Kenya Breweries Limited v Miruka (Civil Appeal 59 (E005) of 2020)
[2023] KEHC 1376 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1376 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 59 (E005) OF 2020

CW GITHUA, J

FEBRUARY 23, 2023

BETWEEN

KENYA BREWERIES LIMITED ..... APPELLANT

AND

ERICK MOREMA MIRUKA ..... RESPONDENT

(An appeal against the judgment of Hon. N. Shiundu Lutta (C.M.) in Kisii CMCC NO.717 of 2018 dated 31.8.2020)

JUDGMENT

1. This appeal arises from the judgment and decree of the lower court in Kisii CMCC No 717 of 2018 in which the respondent was the plaintiff while the appellant was the defendant.

2. According to the plaint filed on December 3, 2018, the respondent sued the appellant seeking general and special damages as a result of personal injuries sustained in a road traffic accident on or about October 17, 2018. It is alleged that the accident involved him and the appellant's motor vehicle Registration No KCR 785 Z - Ford pick Up (the subject vehicle).

3. The Respondent further alleged that the accident was caused by the appellant or its driver or servants negligence and that therefore the appellant was vicariously liable to compensate him for the pain and suffering he endured following the injuries sustained in the accident and the resultant financial loss which he claimed as special damages.

4. Upon being served with the plaint, the appellant filed a statement in defence dated January 17, 2019 denying all allegations contained in the plaint and put the respondent to strict proof thereof. In addition, the appellant blamed the respondent for the accident claiming that it was caused by his negligence as particularized in paragraph 4 of the statement in defence.

5. After a full trial, the learned trial magistrate entered judgment on liability in the ratio of 20:80 in favour of the respondent against the appellant and awarded the respondent general damages in the sum of Ksh 1,200,000 and special damages amounting to Ksh 108,600.

6. The appellant was aggrieved by the trial court's finding on both liability and quantum hence this appeal. In the grounds encapsulated in the memorandum of appeal filed on April 25, 2022, the appellant complained that the learned trial magistrate erred in law and fact by disregarding the appellant's evidence on the issue of liability and failing to judiciously analyse all the evidence on record thereby rendering a decision on liability which was not well reasoned. The appellant also faulted the trial court for ignoring the medical evidence adduced by the appellant thereby arriving at an award which was manifestly excessive and which represented an erroneous estimate of the damage suffered by the respondent.

7. In compliance with directions of the court issued on June 2, 2022, the appeal was prosecuted by way of written submissions. The firm of Morara Apiemi & Nyangito Advocates filed submissions on behalf of the appellant on September 29, 2022 while those of the respondent were filed by MS TO Nyangosi & Company Advocates.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am cognizant of my duty as a first appellate court which is to revisit and thoroughly scrutinize the evidence presented before the trial court to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses as they testified and give due allowance to that disadvantage; See: *Selle & Another V Associated Motor Boat Company Ltd & Others* [1968] EA 123; *Sumaria & Another V Allied Industrial limited* [2007] 2 KLR I.

9. Briefly, the evidence on record reveals that four witnesses testified in support of the respondent's case while the appellant called one witness. The respondent testified as PW4 and adopted his written statement as his evidence in chief. In his written statement, he stated that on October 17, 2018, he was walking on the verge of the Kisii-Migori Road when the driver of the subject who was driving at a very high speed lost control of the vehicle which proceeded to knock him down. He sustained several injuries for which he was first treated at Nyangena Hospital and later at Tenwek Mission Hospital.

10. PW4 also recalled that he reported the accident to Kisii Traffic Base where he was issued with a P3 form and a police abstract. PW1 Mr Jackson Morani was the clinical officer who examined PW4 at Kisii Teaching and Referral Hospital on November 18, 2018. He filled the P3 form which he produced as Pexhibit I.

    The police abstract was produced as Pexhibit 5 by PW3, a police officer attached to Kisii police Station.

11. Dr Ombati Timothy Mokua testified as PW2. He stated that on examining PW4, he noted that he had a head injury with loss of consciousness, abdominal bruises, dislocation of the right shoulder, fracture of the right femur and a pelvic fracture. He assessed permanent disability at 15%. He produced his medical report as Pexhibit 3 and receipt issued to PW4 for payment of his medical fees as Pexhibit 4.

12. In support of the applicant's case, DW1 Mr Billy Rodgers Millah adopted his written statement as his evidence in chief in which he admitted having been the driver of the subject vehicle as well as the occurrence of the accident in question. He however denied liability for the accident claiming that it was caused by the respondent who abruptly staggered into the road and although he swerved to avoid hitting him, he was hit by the vehicle's rear view mirror.

13. I have carefully considered the evidence on record, the parties rival written submissions and all the authorities cited. I have also read the judgment of the trial court. Having done so, I find that the only

issue for my determination in this appeal is whether the learned trial magistrate erred in his finding on liability and quantum.

14. On liability, the appellant submitted that the trial court erred in disregarding the evidence adduced by the appellant's witness and relying entirely on the Respondent's evidence without giving any reason for so doing. Reliance was placed on the persuasive authorities of *Auron Odipo T/A Baraka Bookshop V Boitellin Supply Trading Co Ltd & Another* [2016] eKLR and *Mufrank Builders Ltd V Kiriti Women Transport and Housing Co-operative Society* [2015] eKLR which I wholly associate with as they emphasized on the need for courts to give reasons for arriving at a particular decision or finding.

15. Further, relying on two other persuasive authorities, namely, *Evans Mogire Omwansa V Benter Otieno Omolo & Another* [2016] eKLR and *Beriter Atieno Obonyo V Anne Nganga & Another* [2021] eKLR, the appellant urged the court to find that the respondent had failed to discharge his burden of proving negligence on the appellant's driver since the investigating officer was not called to produce a sketch map of the scene indicating how the accident occurred.

16. The respondent on his part supported the trial court's finding on liability arguing that an apportionment of 80:20 was fair since the respondent's evidence was not challenged in cross-examination and DW1 did not have medical evidence to support his claim that the respondent was drunk at the time.

17. In making his finding on liability, the learned trial magistrate stated as follows;

> "……The next issue for determination is whether there was an accident as pleaded and if so whether the accident was caused by the negligence of the defendant. The evidence before court is that of the plaintiff and with the support of the abstract from the police on the road accident, the court finds that the accident took place due to the negligent acts of the defendant in driving at a high speed, driving recklessly and without due care and attention. In light of this the forth issue for determination is answered in the affirmative."

18. Given the above extract of the trial court's judgment, I agree with the appellant's submissions that the learned trial magistrate based his finding on liability on the evidence adduced by the respondent only completely disregarding the evidence presented by the appellant.

    This was a fundamental error on the trial court's part because due process requires that the case presented by each party to a dispute is thoroughly examined and considered before a court makes a determination on the issues raised.

19. Since the learned trial magistrate failed to execute his duty of objectively interrogating all the evidence presented before him in its entirety, it now behooves this court, being the first appellate court, to step into the shoes of the trial court, evaluate the evidence and arrive at its own conclusions.

20. I have duly analyzed the evidence on record and the submissions made by the parties. I find that it was not disputed that an accident involving the respondent and the appellant's motor vehicle occurred at the time alleged. What was disputed was the appellant's liability for its occurrence.

21. My independent appraisal of the evidence reveals that both the respondent and the appellant blamed each other for the accident. The respondent testified that DW1 was driving at a high speed as a result of which he lost control of the vehicle which found him on the verge of the road and knocked him down. DW1 on the other hand denied this claim and insisted that he was driving at a reasonable speed of 60 KMPH and that the respondent caused the accident by abruptly staggering into the road and that despite his best effort to avoid him, he was hit by the vehicle's rear view mirror.

22. In my considered view, the evidence adduced by DW1 lacked credibility because if it true that he was driving at 60 KMPH, had he been diligent and attentive, he would have seen the respondent getting into the road and immediately brake and stop the vehicle before hitting the respondent. Secondly, the nature of injuries sustained by the respondent which were supported by the medical evidence on record leaves no doubt that the impact of the collision was high and it is more probable than not that the injuries were caused by a vehicle which was being driven at a high speed as opposed to a vehicle which was moving at a speed of 60 KMPH or thereabouts as alleged by the appellant. Besides, it is not feasible that such injuries could have been caused by a collision with the rear view mirror of a vehicle which was being driven at an average speed.

23. In view of the foregoing, even if I did not have an opportunity of seeing the witnesses as they testified, from the evidence on record, I find that the respondent gave a more credible and plausible account of how the accident happened than the appellant and the trial court did not err in accepting his evidence.

24. That said, it is pertinent to note that the respondent admitted that he was walking on the surface of the road not off the road when the accident occurred. As a pedestrian, he had a duty of taking care of his own safety and that of other road users which be breached by walking on the road when the appellant's vehicle was approaching instead of walking off the road. PW3's claim that the respondent was hit when walking on the side of the road does not help the respondent's case since he did not witness the accident and his evidence thus amounted to hearsay.

    In view of the foregoing, I find that to the extent explained above, the respondent contributed to the occurrence of the accident. Given the trial court's finding on liability, it is apparent that the learned trial magistrate made a similar finding and that is why he apportioned liability at 20:80 in favour of the respondent.

25. In my opinion, the 20 % contributory negligence apportioned to the respondent was on the lower side given the circumstances of this case. The respondent ought to have shouldered a higher percentage of contribution given his admission that he was walking on the verge of the road at the material time when it was unsafe for him to do so.

    In the premises, I hereby set aside the trial court's finding on liability and substitute it with a finding apportioning liability at the ratio 30:70 in favour of the respondent against the appellant.

26. Turning to the appeal against quantum, the appellant relied on the submissions presented before the lower court in which it set out the principles that guide courts in the assessment of damages for personal injuries and proposed an award of Ksh 50,000 arguing that the amount was sufficient to compensate the respondent as he suffered only soft tissue injuries.

27. The respondent on his part supported the trial court's award on quantum arguing that it was fair considering that he had proposed an award of Ksh 2,000,000 and the severity of the injuries he sustained as a result of the accident.

    In support of his proposal, the respondent relied on the authorities cited before the trial court, namely, *Millicent Atieno Ochongo V Katila Richard* [2015] eKLR where the plaintiff was awarded Kshs. 2,000,000 for similar injuries and *Daniel Muchemi & Another V Rosemary Kawira Kiambi* [2018] eKLR where the plaintiff was awarded Ksh 1,200,000 for fewer injuries.

    In his submissions in the appeal, the respondent in addition relied on the persuasive authority of *Irene Chebotuya V Shadrack Kiplangat Ngeno* Bomet HCCA No 25 of 2019 where the court awarded the Respondent Ksh 1,500,000 for fewer injuries than those sustained by the respondent.

28. As a general rule, an appellate court should be slow to interfere with an award of damages essentially because the award of damages is at the sole discretion of the trial court.

The principles that should guide an appellate court in deciding whether or not to interfere with such an award were well articulated by the Court of Appeal in *Mariga V Musila* [1984] KLR 251 as follows;

> " The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principle".

See also: *Kemfo Africa Limited T/A Meru Express Services [1976] & Another V Lubia & Another* [1987] KLR 30.

29. To determine whether or not the trial court erred in arriving at the impugned award, it is important to examine the injuries sustained by the respondent.

In paragraph 5 of the plaint, the respondent pleaded his injuries as follows;

1. Head injury of the right shoulder
2. Abdominal bruises
3. Dislocation of the right shoulder
4. Fracture of the right femur
5. Pelvic fracture

30. The above injuries were confirmed by the medical evidence in the P3 form and discharge summary from Tenwek Hospital produced in evidence by PW3 and the medical report presented by Dr Ombati Timothy Mokua (PW2). According to the discharge summary, the respondent was admitted at Tenwek Hospital for 12 days where he underwent a surgical procedure to fix the fractures with metal plates. According to the medical report, the respondent was expected to undergo a further operation in future to remove the metal implants. Permanent disability was assessed at 15 %.

31. The trial court's record shows that the respondent underwent a second medical examination at the appellant's request. He was examined by a Dr DO Olima on September 18, 2019. According to Dr Olima's report

(D Exhibit 1), the respondent sustained multiple soft tissue injuries which had healed. In my view, this report had little or no probative value for two reasons. First, the report was prepared after examination of the respondent a year after the accident.

Secondly, it is unbelievable that the doctor came to a conclusion that the respondent had sustained only soft tissue injuries after making reference to, inter alia, the discharge summary from Tenwek Hospital which clearly showed that the respondent had sustained multiple fractures. Moreover, the respondent's examination by PW1 on November 18, 2018 about a month after the accident confirmed the multiple fractures.

In the circumstances, it is my finding that the respondent suffered soft tissue injuries in addition to multiple fractures as shown in PW2's Medical report and the P3 form.

32. Having found as I have above, I find that the persuasive authority of *PF V Victor O Kamadi & Another* HCCA No 19 of 2017 which was relied on by the appellant was not applicable in this case.

33. It is now settled law that in so far as is practically possible, comparable injuries should be compensated by comparable or similar awards in order to ensure some measure of uniformity in the making of awards. It should be appreciated however, that no two cases are exactly alike as noted by the Court of Appeal in *Stanley Maore V (Geoffrey Mwenda* [2004] eKLR.

    Each case must therefore be decided on its own merits. It is also noteworthy that an award of damages for personal injuries is meant to give the injured party a just and fair compensation for the pain, suffering and loss of amenities suffered as a result of the injuries sustained but it is not aimed at enriching a party.

34. In this case, the learned trial magistrate in awarding the respondent Ksh 1,200,000 as general damages made reference to the authorities cited by the respondent namely; *Millicent Atieno Ochuonyo V Katula Richard* [2015] eKLR where the plaintiff was awarded Ksh 2,000,000 for injuries which were more severe than the injuries sustained by the respondent and *Daniel Muchemi & Another V Rosemary Kawira Kiambi* (supra) where an award of Ksh 1,200,000 was affirmed by this court for injuries which were more or less comparable to the injuries sustained by the respondent in this case.

35. Looking at the learned trial magistrate's judgment, I find no indication that in making the award, he applied any wrong legal principle or considered irrelevant factors or failed to consider relevant ones.

    Considering that the respondent underwent a surgical procedure to fix the fractures and was admitted in hospital for two weeks and is likely to undergo another surgery to remove the metal implants, I am unable to say that the award was either excessive or inordinately high. In the circumstances, i find no basis to interfere with the trial court's award and the same is hereby upheld.

36. The amount awarded in special damages was not disputed on appeal and the same is accordingly sustained.

37. For the reasons and findings made hereinabove, this appeal partially succeeds on the issue of liability only. I consequently set aside the trial court's finding on liability and substitute it with an order of this court apportioning liability at the ratio of 30:70 in favor of the respondent against the appellant. The total amount payable to the respondent is Ksh. 1,308,600 less 30% contribution by the respondent.

38. The award of general damages will attract interest at court rates from date of judgement of the trial court while the award of special damages will accrue interest at the same rate from date of filing suit.

39. Costs follow the event and are at the discretion of the court. As the appeal has partially succeeded, the appellant will bear costs of the respondent in the lower court but each party will bear his/its own costs of the appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF FEBRUARY 2023.

C. W. GITHUA

JUDGE

In the presence of:

No Appearance for the Appellant

No Appearance for the Respondent

Ms. Aphline Court Assistant