Mwangi v Wachira & another (Civil Appeal 171 of 2021)
[2023] KEHC 3003 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 3003 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 171 OF 2021

LN MUGAMBI, J

MARCH 31, 2023

BETWEEN

MOSES KINYANJUI MWANGI ..... APPELLANT

AND

PETER KINYUA WACHIRA ..... 1ST RESPONDENT

MIRIAM NJERI KINYUA ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of D.N. Musyoka (SPM) delivered on 14th February 2021 in Kikuyu SPMC No. 265 of 2017)

JUDGMENT

1. This appeal arises from a suit filed in the lower court on September 20, 2017 by the appellant who sued the respondents due to an accident on August 12, 2017 along Thogoto-Gikambura road.

2. The plaintiff, then a minor, pleaded that he was travelling as a lawful pillion passenger on motor cycle registration number KMDL 811D when the first defendant who was in the employment of the second defendant negligently drove, managed and/or controlled motor vehicle registration number KCJ 961V and caused or permitted it to lose control and veer off the road onto the lawful path of the motor cycle thereby colliding with it.

3. Consequently, the plaintiff sustained severe bodily injuries, endured and continues to endure pain and suffering hence suffered loss and damages.

4. The respondents filed their defence dated February 15, 2018 in which they denied the allegations in the plaint and outlined the particulars of negligence of the appellant in paragraph 8.

5. On April 13, 2021, the matter came up for a hearing and both parties were heard. In its judgment, the trial court apportioned liability as 60% to 40% in favour of the appellant as against the respondents. On

quantum, the trial court awarded the appellant Kshs 600,000/= general damages for pain and suffering and loss of amenities to be subjected to the 40% contributory negligence.

6. Aggrieved by the judgement by the lower court, the appellant filed this appeal and cited three main grounds of appeal as follows:

    a. That the learned trial magistrate erred in law and in fact in apportioning liability at the ratio of 60% :40% in favour of the plaintiff based on no evidence at all.

    b. That the learned trial magistrate erred in law and in fact in disbelieving the plaintiff's evidence in total on the issue of liability and without giving reasons for so doing.

    c. That the learned trial magistrate erred in law and in fact in failing to award special damages though pleaded and proved at the trial and made no mention on the issue of witness expenses for the doctor and the police officer.

7. The appellant prayed that the judgment delivered on September 14, 2021 be varied and/or set aside on the issue of apportionment of liability and the same be substituted with an order on liability at 100% and an award of special damages and witness expenses in favour of the appellant. He also prayed that the costs of this appeal be awarded to the appellant.

8. The respondents filed a memorandum of cross-appeal on October 15, 2021 and outlined the following grounds of appeal;

    i. The learned trial magistrate misdirected himself in both law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous vis-a-viz the injuries sustained by the respondent.

    ii. The learned trial magistrate misdirected himself and erred in law and in fact in failing to consider the medical report on record and hence arrived at an award that was not supported by the doctor's findings and hence arrived at an erroneous award that is so manifestly excessive as to be erroneous.

    iii. The learned trial magistrate misdirected himself and erred both in law and in fact by not properly considering the severity of the respondent's injuries and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous.

    iv. That the learned trial magistrate misdirected himself and erred in law and in fact by totally failing to consider the defendant's submissions on record and thus arrived at an erroneous finding on quantum.

9. They prayed that the whole judgment on delivered on September 14, 2021 on quantum be set aside and this court does assess the proper damages payables to the appellant.

10. Directions were issued that the hearing of the appeal be dispensed with by way of written submission.

Appellant's Submissions

11. The appellant filed his submissions on June 23, 2022 and submitted that the trial magistrate went into grave error in apportioning liability in the ratio of 60:40 in favour of the appellant and as against the 1st respondent in that it was against the weight of evidence adduced before him. He submitted that in his evidence it was clearly stated that they both wore the reflector jackets and helmets respectively at the time of the accident and it is apparent from the judgment that there was no mention of the evidence of

the plaintiff and that of PW3 who stated that the 1st defendant was charged with the offence of causing death by dangerous driving in Kikuyu Law Courts Traffic case No 406 of 2017.

12. He continued that insurance of the motorcycle or otherwise was irrelevant to the issue of negligence and making reliance on such material to determine the issue of negligence was erroneous on the part of the trial magistrate. He submitted that liability should be 100% against the respondents.

Respondents' Submissions

13. The respondents filed their submissions on December 20, 2022 and submitted on both the appeal on liability and the cross-appeal on quantum. On liability, they submitted that award on liability at 60:40 in favour of the appellant was justified for two reasons;

    -the trial court arrived at the finding after being presented with two sets of possible causes of the accident without an attempt by the appellant to call any independent witness to prop his case.

    -the appellant testified that the impact on the motor cycle he was riding at the time of the accident was from behind. Being the passenger, had he been wearing a reflector jacket the headlights of the suit motor vehicle could have reflected light from the reflector jacket that way the accident might have been avoided.

14. On quantum, the respondents implored this court to note that the appellant did not suffer any permanent incapacity. They prayed that this court interferes with the award of Kshs 600,000/= for being excessive and instead award Kshs 400,000/=. The respondents placed reliance on the following authorities; *Hussein Sambur Hussein v Chariff A. Abdulla Hussein & 2 others* (2022) eKLR, *DG (minor suing through her next friend MOR) v Richard Otieno Onyisi* (2021) eKLR.

Analysis and Determination

15. After a thorough review of the submissions together with the memorandum and record of appeal as well applicable law, I do consider the following to be the issues in this appeal:

    a. Whether the trial court erred in apportioning the liability at 60% to 40% in favour of the appellant; as against the respondent.

    b. Whether the trial court erred in failing to award special damages and witness expenses;

    c. Whether the quantum awarded by the trial court was excessive;

    d. Who should pay costs of this appeal?

16. As the first appellate court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).

17. In *Coghlan v Cumberland* (1898) 1 Ch 704, the Court of Appeal (of England) stated as follows -

    " ...Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials

before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen..."

Issue no 1 liability

18. The appellant filed a suit against the respondents and pleaded that the 1st respondent who was the driver of motor vehicle registration number KCJ 961V was to blame for hitting the motor cycle registration number KMDL 811B on which he was a pillion passenger and as a result he sustained injuries. The burden of proof thus lay on the appellant to show that the respondents caused the accident.

Section 107 (1) of the *Evidence Act*, cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

19. The Court of Appeal in *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR:

> " ...The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) AC 663 at p 681 as follows:
>
> 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."

20. In this instant case, the appellant outlined the particulars of negligence on the paragraph 4 of the amended plaint. The appellant stated that the 1st respondent was driving too fast in the circumstances and was on the wrong side of the road. The respondents in their defence testified that the appellant failed to put on a reflective jacket and as such was partly to blame for the accident. The trial court in its analysis stated that the 1st respondent confirmed that the appellant and the rider were not wearing any helmets nor reflective jackets and the motor cycle was not insured. It noted that the appellant and respondents were to some extent to blame for the accident and therefore apportioned liability at 60:40 in favour of the appellant.

21. The appellant in cross-examination reiterated that he had a helmet and reflector on. PW3 who was a police officer testified that the 1st respondent was charged with causing death by dangerous driving.

On cross examination, PW3 stated he could not confirm whether the scene was visited or the point of impact of the accident. He testified that he was not the investigating officer and was just in court to produce the abstract.

22. The 1st respondent was the only defence witness. He testified that he did not see the motor cycle entering from the right-hand side and the rider did not have a reflector jacket and helmet, therefore he did not see them.

23. The case of *Khambi and another v Mahithi and another* [1968] EA 70, provides a useful guide on when an appellate court may interfere with the trial court's finding on liability. It held as follows:

> " ...It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge..."

24. In this case, there was no other eye-witness account as to how the accident occurred apart from that of the appellant and the 1st respondent. The 1st respondent does not deny the occurrence of the accident but he insisted that the rider and the passenger neither wore helmets nor reflective jackets. Despite the respondent also pleading that in his statement of defence against the appellant, the appellant did not bother to testify about it in his evidence in-chief. instead, he waited and responded to it when asked about it in cross-examination. The casual manner that the appellant treated this matter demonstrates that that he never considered that the protective clothing was critical to his safety to the point that he ignored talking about it in his entire evidence in chief. He only unconvincingly reacted when he was prompted by the defence through questioning. This attitude makes me believe that he was not wearing the reflector jacket or the helmet at the time of the accident as attested to by the respondent in his evidence in-chief.

25. Wearing a reflective jacket was particularly important considering the accident happened at night, to wit 1.30 a.m. as reflected in the police abstract. The appellant and the rider would have been more visible to other drivers at a distance and this could have possibly alerted the respondent about their presence in good time so as to try and avoid them. Further, wearing a helmet would have lessened the severity of the injuries resulting from the accident considering that there were several injuries on the face and the head.

26. In view of the above, I find no basis for interfering with the trial court's finding on liability since the role played by failing to wear the reflective jacket and the helmet cannot be underrated. I maintain the percentage of liability for the accident at 60:40 as against the respondent vis-vis the appellant as found by the trial court.

Issue no 2 Special damages & witness expenses

27. Special damages must be both pleaded and proved. In *Hahn v Singh*, civil appeal No 42 of 1983 [1985] KLR 716, at P 717, and 721 the Court of Appeal held:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

28. The appellant pleaded special damages of Kshs 20,095/= and produced a medical receipt from Kinoo Medical Clinic, receipt of record of ownership from Kenya Revenue Authority, and medical expenses receipts. The exhibits were marked as they appeared on the appellant's list of documents dated September 19, 2017.

29. It is my finding that the appellant pleaded and proved the special damages of Kshs 20,095/=. The trial court erred in not awarding the same.

30. In relation to witness expenses, Dr Grace Mwangi testified as PW2 and stated that the appellant paid Kshs 15,000/= for her attendance. The police officer testified as PW3 and informed that Kshs 5,000/= charges for his attendance was catered for.

31. Witness attendance fees are part of costs which should be awarded during taxation as witness expenses. I therefore decline to award the same at this stage.

Issue no 3 – whether the quantum of damages was proper

32. The respondents in their cross-appeal stated that the award of general damages by the trial court was excessive. In their submissions, they proposed an award of Kshs 400,000/= for the injuries sustained.

33. There are two medical reports which were produced by the parties before the trial court. The appellant produced a medical report dated September 11, 2017 which was done a month after the accident occurred. The prognosis was fair though the healing was incomplete.

34. The respondents produced a medical report dated July 15, 2020 and the opinion was that the even if the appellant suffered a fractured left big toe, he has since fully recovered and no further complications are envisaged. There was no total permanent incapacitation.

35. The second report was done at a later date and showed that though the appellant experienced occasional pains on the left foot on exertion, he was fully recovered. The appellant did not seek to cross examine the maker of the 2nd medical report.

36. It is evident that the trial court placed reliance on the first medical report which was produced by PW2 in awarding the general damages.

37. I have examined other relevant decisions with similar injuries. In the case of *Daneva Heavy Trucks & another v Chrispine Otieno* [2022] eKLR where the respondent suffered a fracture of the pelvis and fracture of the left tibia and fibula, the trial court awarded him Kshs 1,000,000/= and the appellate court reduced it to Kshs 800,000/=. In *Wakim Sodas Limited v Sammy Aritos* [2017] eKLR, the respondent sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs 400, 000.00, which was upheld on appeal. In *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR, the appellate court declined to disturb an award of Kshs 500, 000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

38. Guided by the above decisions, it is my view that the award by the trial court on general damages was in sync with comparable awards.

39. In the end, I find that this appeal partly succeeds on the issue of special damages only. The appellant is awarded Kshs 20,095/= as special damages. Special damages shall earn interest from date of filing suit in the lower court until payment in full.

40. The appellant shall have costs of the suit in the lower court.

41. Each party shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 31ST DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE.

In presence of:

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent- absent

Court Assistant- Etyang

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N. MUGAMBI

JUDGE.