Odero v Nicholas & another (Civil Appeal 477 of 2019)
[2023] KEHC 2808 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2808 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 477 OF 2019

PM MULWA, J

MARCH 31, 2023

BETWEEN

BONIFACE OPIYO ODERO ..... APPELLANT

AND

CHITTA MWAJOTO NICHOLAS ..... 1ST RESPONDENT

DICKSON MUSYOKI MUSAU ..... 2ND RESPONDENT

JUDGMENT

1. Boniface Opiyo Odero; the appellant in this instance; lodged a suit against the 1st and 2nd respondents vide the plaint dated November 30, 2017 and amended on June 20, 2018 and sought for general and special damages, future medical expenses and costs of the suit and interest on the same arising out of a road traffic accident.

2. The 1st respondent was sued in his capacity as the registered owner of the motor vehicle registration number KBU 590A ("the subject motor vehicle") at all material times, whereas the 2nd respondent was sued as the beneficial owner/driver of the subject motor vehicle at all material times.

3. The appellant pleaded in the amended plaint that sometime on or about the 19th day of June, 2017 he was lawfully walking along Jogoo Road in Nairobi when the 2nd respondent negligently drove the subject motor vehicle, causing it to knock him down. As a result, the appellant sustained serious bodily injuries which are particularized in the amended plaint.

4. The appellant further attributed his injuries to negligence on the part of the respondents jointly and severally, by setting out the particulars thereof in the amended plaint.

5. The 1st and 2nd respondents entered appearance on being served with summons and filed their joint statement of defence dated February 19, 2018 and amended on July 2, 2018 to deny the appellant's claim.

6. At the hearing of the suit, the appellant testified and called two (2) additional witnesses, while the 2nd respondent testified for the defence case.

7. Upon close of written submissions, the trial court entered judgment in favour of the appellant and against the 2nd respondent in the following manner:

    Liability 50%:50%

    a. General damages Kshs 1,200,000/

    b. Special damages Kshs 352,550/

    c. Future medical expenses Kshs 150,000/

    Total Kshs 1,702,550/

    Less 50% contribution Kshs 851,275/

    Gross Total Kshs 851,275/

8. The case against the 1st respondent was dismissed with costs, upon the finding by the trial court that the 2nd respondent admittedly purchased the subject motor vehicle from the 1st respondent.

9. Being dissatisfied with the judgment by the trial court, the appellant lodged this appeal against the respondent vide the memorandum of appeal dated August 16, 2019 and put forward six (6) grounds of appeal to challenge the trial court's findings on both liability and quantum.

10. The court gave directions for the parties to file written submissions on the appeal. On liability, the appellant faulted the trial court for apportioning liability and yet the evidence tendered shows that the accident took place at Gulf Petrol Station where the appellant was standing and not on the road.

11. The appellant is of the view that his evidence was clear as to the manner of occurrence of the accident and hence the 2nd respondent ought to have been found fully liable.

12. On quantum, it is the submission by the appellant that the award made on general damages is manifestly low in view of the injuries sustained. The appellant therefore urges this court to enhance the award to the more reasonable sum of Kshs 2,500,000/.

13. In reply, the respondents argue that the trial court acted correctly by apportioning liability equally between the appellant and the 2nd respondent since evidence was tendered to show that the appellant was attempting to cross the road prior to the accident and that the point of impact did not constitute a stage.

14. In respect to quantum, the respondents make reference to the authority of *Leonard Njenga Ng'ang'a & another v Lawrence Maingi Ndeti* [2018] eKLR in which the court set out the principles to guide an appellant court in determining whether to interfere with the award made by a trial court, namely:

> " As properly appreciated by the parties herein, this appeal revolves around the award of quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:
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> > "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a

different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.""

15. The respondents are of the view that the award made by the trial court is reasonable and there is no need for it to be disturbed.

16. Consequently, the respondents are of the view that the trial court considered all the evidence and material placed before it and arrived at a fair finding, and therefore urge that the appeal must fail.

17. I have considered the submissions and authorities on record in respect to the appeal. This being a first appeal, I am enjoined to re-evaluate the evidence placed before the trial court. It is apparent that the appeal lies essentially against the findings on liability, specifically the apportionment of liability; and on quantum, specifically the award made under the head of general damages. I will therefore address the six (6) grounds of appeal under the two (2) limbs.

18. On liability, the appellant while testifying at the trial adopted his signed witness statements as evidence and testified that the accident occurred near Gulf Petrol Station at about 8.00 pm while he was waiting to cross.

19. The appellant testified that the subject motor vehicle was being driven at a high speed.

20. During cross-examination, the appellant stated that he had alighted from a matatu and was waiting near the Petrol Station for the traffic to clear so that he could cross the road, but that the subject motor vehicle swerved and hit him.

21. In re-examination, it was the testimony by the appellant that the subject motor vehicle had a wide frontage.

22. Police Constable Hesbon Lugalia who was PW2 produced the police abstract as an exhibit and stated that the accident took place at Gulf Petrol Station and that there is no stage at that point.

23. In cross-examination, the police officer testified that he is not the Investigating Officer and therefore has no knowledge as to how the accident occurred.

24. For the defence, the 2nd respondent adopted his signed witness statement as evidence and stated that as he was passing a matatu, a pedestrian appeared on the road and was knocked by the subject motor vehicle, following which the accident was reported at Makongeni Police Station.

25. The 2nd respondent stated that the appellant was to blame for the accident since he moved onto the road suddenly and without a proper lookout.

26. During cross-examination, it was the evidence by the 2nd respondent that the pedestrian emerged from the front of the matatu and upon being knocked, fell on the windscreen of the subject motor vehicle, following which the 2nd respondent parked the subject motor vehicle at the Petrol Station.

27. The 2nd respondent stated that he was not speeding prior to the accident and in re-examination, further stated that the appellant was hit while crossing the road.

28. In his judgment, the learned trial magistrate reasoned that none of the parties had called an independent witness to corroborate their respective testimonies and the police abstract did not disclose the result of the investigations.

29. It is for the above reasons that the learned trial magistrate decided to apportion blame equally between the appellant and the 2nd respondent.

30. The law on negligence sets out the elements which ought to be proved for a claim of negligence to stand. For this purpose, I make reference to *Halsbury's Laws of England*, 4th Edition at paragraph 662 on page 476 which reads as follows:

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

31. Upon my re-examination of the material and evidence tendered before the trial court, it is not in issue that the 2nd respondent was driving the subject motor vehicle on the material date and that he knocked the appellant, thereby causing him to sustain bodily injuries.

32. I am therefore satisfied that the appellant had proved the particulars of negligence against the 2nd respondent.

33. On the subject of apportionment of liability arising out of the contributory negligence defence raised by the 2nd respondent, upon my study of the record, I concur with the reasoning by the learned trial magistrate that none of the parties herein brought any evidence to corroborate their testimonies as to the events surrounding the accident.

34. As the learned trial magistrate rightly pointed out, the police abstract which was tendered in evidence did not disclose who was to blame or mention the results of the investigations. Furthermore, the police officer who testified admitted that he was not the investigating officer and that he was not present at the scene of the accident on the material date and could therefore not shed light as to the circumstances under which the accident occurred.

35. From my re-examination of the evidence, it is apparent that the appellant and the 2nd respondent gave varying accounts as to how the accident occurred and in the absence of any credible evidence, the trial court was only left to consider the appellant's word against that of the 2nd respondent.

36. Suffice it to say that, it is apparent from the record that the point at which the appellant was standing; though adjacent to a Petrol Station; did not constitute a stage and that the appellant stated in his evidence that he had alighted from a matatu and was preparing to cross the road when the accident occurred. In my view, the appellant equally owed himself and other road users a duty of care, especially given that the road being used is known to be quite busy.

37. In the premises, I am of the view that the learned trial magistrate acted correctly in apportioning liability in the manner he did. I see no reason to interfere with the finding on liability.

38. On quantum, it is trite law that this court can only interfere with the award of a trial court in instances where an irrelevant factor was taken into account, a relevant factor was disregarded or the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were laid out by the court in the case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another* [1976] *v Lubia & Another* (No 2) [1985] eKLR and are reaffirmed in the case of *Leonard Njenga Ng'ang'a & another v Lawrence Maingi Ndeti* [2018] eKLR cited in the submissions by the respondents and which I have quoted hereinabove.

39. As earlier noted, the appellant is challenging the award on general damages for pain, suffering and loss of amenities for being inordinately low.

40. On his part, the appellant suggested an award in the sum of Kshs 2,000,000/ and cited the case of *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR in which the court awarded the sum of Kshs 1,500,000/ under that head to a plaintiff who had sustained a fracture on the left leg and three other fractures on the right leg. The respondents by way of their submissions urged the trial court to award the sum of Kshs 160,000/ as a suitable award, with reference *inter alia*, to the case of *Munza Investment Company Limited v Makau Mwonewa* [2012] eKLR where the court entered a similar award for soft tissue injuries.

41. The learned trial magistrate awarded the sum of Kshs 1,200,000/ upon reasoning that the authorities cited by the respondents constituted soft tissue injuries which were less severe than the injuries sustained by the appellant herein.

42. Upon my consideration of the pleadings and medical evidence tendered, I note that the appellant sustained fractures of the right tibia and right humerus, plus a blunt soft injury to the head causing swelling resulting in surgery and the insertion of metal plates. In the medical report dated April 26, 2018 and prepared by Doctor W.M. Wokabi assessed permanent disability at 30%.

43. Upon considering the authorities cited by the parties before the trial court, I find that the one cited by the appellant to involve relatable injuries though it was decided a few years ago, while those cited by the respondents involved injuries of a less severe nature in comparison to those sustained here.

44. Upon also considering the case of *Hussein Sambur Hussein v Shariff A Abdulla Hussein & 2 others* [2022] eKLR in which the court awarded the sum of Kshs 600,000/ under the same head at the instance of fractures of the right tibia and fibula leg bones (lower 1/3rd bimalleolar ankle), dislocation of the right ankle and a bruise on the right leg, with treatment including X-ray; tibia (screws) and Fibula (plate) metal implants, crutches, leg brace and bandage, wound and pain care with permanent disability being assessed at 18%; and the case of Barnabas v Ombati (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) (28 July 2022) where the High Court sitting on appeal upheld an award made in the sum of Kshs 800,000/ at the instance of a head and chest contusion, bruises on his right hand and waist and fracture of the right femur, fracture of right humerus and fracture of the pelvic, I am satisfied that the award made by the learned trial magistrate is reasonable in the circumstances and well within the range of comparable awards made. I therefore see no reason to interfere with the award made under the head of general damages.

45. On the issue of consideration of the submissions and authorities cited by the appellant before him, upon my perusal of the record and the impugned judgment, I did not come across anything to indicate that the learned trial magistrate overlooked or otherwise ignored the submissions and/or authorities relied upon by the appellant.

Determination

46. The upshot therefore is that the appeal is hereby dismissed for lack of merit. The judgment delivered by the trial court on July 19, 2019 is hereby upheld. Costs will be to the 2nd Respondent.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT MILIMANI THIS 31ST DAY OF MARCH, 2023

…….

P.M. MULWA

JUDGE

In the presence of:

Aden – Court Assistant

No appearance for Appellant

No appearance for Respondent