



REPUBLIC OF KENYA



KENYA LAW
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Sacco v Koleli (Civil Appeal E175 of 2021) [2023] KEHC 3658 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E175 OF 2021

FR OLEL, J

APRIL 27, 2023

BETWEEN

MANATWA SACCO APPELLANT

AND

BOAZ CHAGWA KOLELI RESPONDENT

*(Being an Appeal from the judgment of Honourable B. Kasavuli PM,
delivered on 30th September 2021 in Mavoko PMCC 438 of 2019)*

JUDGMENT

1. This appeal arise from the judgement of Honorable B Kasavuli, P.M. delivered on September 30, 2021, where he awarded the Respondent a sum of Kshs. 1,010,945/-as damages arising from a road traffic accident where the appellant’s motor vehicle had knocked down the respondent and caused him bodily injury. The respondent was also award interest on this sum plus costs of the suit.
2. The appellant, who was the defendant in the primary suit being dissatisfied by the said judgment did file their Memorandum of Appeal dated 26th Ocotber 2021. The grounds of appeal were that;-
 - a. That the learned trial Magistrate erred in law and in fact in holding the appellant 100% liable when the respondent greatly contributed to the accident as a pedestrian and failing to apportion liability.
 - b. The learned trial Magistrate erred in law and in fact by failing to consider the appellant’s evidence on liability as to how the accident occurred.
 - c. That the learned trial Magistrate erred in law and in fact on failing to hold that the plaintiff had not proved his case on a balance of probabilities and dismiss the same.



- d. That the learned Magistrate erred in law in awarding general damages of one million (1,000,000/=) which were inordinately very high for a fracture of the tibia/fibula which ought to have attracted a lesser amount hence erroneous and a miscarriage of justice.
 - e. That the learned trial Magistrate erred in law and in fact in failing to consider the appellants submissions on liability and quantum and judicial authorities cited by the appellant on the comparable awards in similar circumstances.
 - f. That the learned Magistrate erred in law and in fact and misdirected himself as to the exact extent of the respondents injuries and erred in his assessment of general damages awardable to the respondent which were manifestly excessive.
3. The appellant prayed that this appeal be allowed, and the judgment of the trial court be set aside and damages be re- assessed. They also prayed for costs of the appeal.

Brief Facts

4. The respondent did file a plaint on June 26, 2019 claiming damages arising from a tort of negligence. The respondent alleged that on October 1, 2017, he was knockdown by the appellant's motor vehicle while lawfully walking along Mombasa road as a result of which he suffered serious bodily injuries and prayed for damages.
5. The appellant who was the defendant in the primary suit, did file their statement of defence on December 10, 2019 denying any wrong doing on their part. The suit came up for hearing on June 28, 2021 when the respondent testified and adopted his witness statement. He further produced as exhibits all the documents listed in the list of documents apart from the police abstract and medical report. In cross examination he testified that he was walking off the road when the suit motor vehicle knocked him from behind fracturing his leg. He stated that he was not crossing the road He prayed for compensation.
6. PW2 P.c Paul Muthengi testified that the accident occurred on October 1, 2017 at about 7.00p.m at Devki along Nairobi – Mombasa road. The respondent was cross the road at a zebra crossing, when he was knocked down by the appellants Motor vehicle KCG 057M a Mitsubishi Minibus driven by unknown driver. After the accident the said driver did not stop. The respondent was rushed to Shalom Community Hospital and reported the incident on 02/10/2017 at Athi River Police station. The witness blamed the appellant's driver as he was to give way and/or slow down at a zebra crossing. He produced the police Abstract as an Exhibit. In cross examination the witness stated that he did not know when the pedestrian cross was placed by the road and it was the victim who reported that he was crossing the road. He confirmed that the accident occurred on the zebra crossing.
7. PW3 Dr George Mwaura testified that he had 25 years' experience and had authored the medical report. The plaintiff suffered a future of the right tibia and fabula. POP was applied and he was put on pain killers. He was expected to have healed.
8. DW1 Kioko Nzioka testified that on 1/10/2017 he was at work driving the appellant's motor vehicle and delivering passengers. On a Monday he was told by the police that he had caused an accident and went to the station. He denied knocking down the plaintiff and was not charged before any court. He prayed that the suit be dismissed. In cross examination he stated that on the said date he was driving motor vehicle KCY 037Y and did not cause any accident nor could he tell which motor vehicle knocked the plaintiff.



9. The trial magistrate after considering the parties submission delivered judgment on September 30, 2021 whereby he found the appellant to be 100% liable and awarded the Respondents a total of Ksh.1,010,945/- plus costs and interest. It is this judgement/award that has given rise to this appeal.

Appellants Submissions

10. The appellant faulted the trial magistrate on finding them 100% liable yet the respondent had not fully discharged their burden of proof in line with section 107 and 109 of the *Evidence Act*. They submitted that the evidence of the respondent and the police officer (PW2) was contradictory. The respondent alleged that he was knocked down while walking off the road, while it was the police officer's evidence that the respondent was knocked down while crossing the road at a zebra crossing. They faulted the court for believing the police officer yet his evidence contradicted that of the plaintiff.
11. The appellant also submitted that parties were bound by their pleadings and should tender evidence to prove the averments. Owing to the contradiction in the evidence, the respondent had not proved their case on a balance of probability and his suit ought to have been dismissed.
12. The appellants also submitted that the award of Ksh.1,000,000/= for the injuries sustained was excessive and not comparable for similar awards. An amount of Ksh.350,000/= to Ksh.400,000/= would have been appropriate in the circumstances. They relied on the citation of *Tabro Transports Ltd vs Absalom Dova Lumbasi*. Bugoma HCCA No 31 of 2012.

Respondents Submissions

13. The Respondent did not file any submissions.

Analysis and Determination

14. In determining this appeal I have considered in detail, the entire record of appeal, submissions filed by the parties both before the trial court and in this appeal and will consider the whole appeal and fresh subject it to scrutiny to enable me arrive at my own conclusion
15. As held in *Selle and another v Associated Moto boat Co Ltd & another* [1968] EA 123 that,
“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”.
16. In *Cogblan 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."

17. The appellants raised six grounds of appeal. Grounds 1, 2, 4 and 5 basically challenge the trial courts finding on liability. Ground 3 challenges the courts finding on burden of proof and the final ground deals with the issue of quantum awarded which the submit was unreasonable high.
18. The respondent did testify and provided documents to prove that indeed the on 01/10/2017 he was involved in a road traffic accident when he was knocked down by motor vehicle registration Number KCG 057M at Devki area along Nairobi – Mombasa Road. As a result of the said accident he suffer serious injury being a fracture of the right tibia-fibular. This accident was reported to the Athi river police station and PW3 confirmed that indeed the accident did occur when the suit motor vehicle knocked down the respondent as he was crossing the road at a zebra cross. The driver of the suit motor vehicle was blamed as he did not give way to let the respondent use the Zebra crossing.
19. The appellants witness denied driving the suit motor vehicle on the said accident date and was categorical that he was driving motor vehicle KCY 037M, which was owned by the appellant company and the said motor vehicle was not involved in any accident on 01/10/2017. The trial magistrate in his analysis concluded that indeed an accident did occur and did not believe DW1. It was improbable that the plaintiff and the police would just guess the details of the motor vehicle and record it in the OB and police abstract. On the evidence presented he was satisfied that indeed the plaintiff was knocked down the by suit motor vehicle while cross a zebra crossing and therefore found the appellant 100% liable.
20. Provision of section 107(1) of the Evidence Act cap 80 Laws of Kenya "Whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he assists must prove that these facts exists"
21. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Section 109 and 112 of the same Act and which provides that;
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 112. In civil proceedings, when any fact is especially within the knowledge of any party to these proceedings, the burden of proving or disapproving that fact is upon him.
22. These two propositions were dealt with in *Ann Wambui Nderitu versus Joseph Kiprono Ropkor and Another* (2015) 1 EA 334 in which the court of appeal held that;

"As a general proposition under section 107(1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires that court to believe in its existence which is captured in section 109 and 112 of the Act"
23. In *Mbuthia Macharia versus Anna Mutua and another* 2017 eKLR the court stated that;

"the legal burden in discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes the evidential burden therefore while both the legal and evidential burden initially rest upon the appellant the



evidential burden may shift in the course of trial depending on the evidence adduced. As the weight of evidence given by either sides during trial varies so will the evidential burden shift to the party who would fail without further evidence being adduced. In this case, the incident of both the legal and evidential burden was with the appellant.”

24. The appellant’s witness denied knowledge of the accident and even denied driving the suit motor vehicle KCG 057M on the said date. According to him he was driving motor vehicle KCY 037M which was not involved in any accident. The appellant did not tender any evidence to show that indeed no accident occurred. Their witness did not help their cause and gave irrelevant evidence by denying knowledge of the accident and further denied even driving the suit motor vehicle. Why the appellants chose to bring this irrelevant witness is a question, they can only answer. The evidential burden shifted on the appellant’s to prove that the plaintiff was to blame or substantially contributed to the accident. Unfortunately they did not and it is obvious their case would fail if no further evidence was adduced.
25. In this instance there was no evidence adduced to rebut the respondent evidence that he was knocked down by the appellant’s motor vehicle while crossing a zebra crossing and fractured his right leg. The trial magistrate therefor cannot be faulted for holding that the defendant’s driver was 100% liable for the accident and by extension that the appellant are vicariously liable for the same.

A. The trial magistrate awarded exorbitant damages

26. The appellant submitted that the award of Ksh.1,000,000/- from pain and suffering was exorbitant and not comparable to awards of similar injuries. The court therefor acted on the wrong principles of law by taking into account irrelevant factors in assessing damages. They proposed that the award be reduced to a range between Ksh 350,000 to Ksh 500,000/=
27. *Catholic Diocese of Kisumu v Sophia Achieng* Civil Appeal No 284 of 202 (2004) 2 KLR 55 sets out circumstances under which an appellate court can interfere with an award of damages in the following terms.

“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 different figure. If it had tried the case first instance, the appellate court can justifiably interfere with”

28. The same court in *Shiekh Mustag Hassan v Nathan Mwangi Kamau Transporters and 5 others* (1986) KLR 457 held that;

“The appellate court is only entitled to increase and award of damages by the high court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge proceeded on a wrong principle of misapprehended the evidence in some material respect.....A member of an appellate court would naturally and reasonably say to himself” what figure would I have made? And reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

29. From the medical evidence presented from Shalom community Hospital Ltd and the evidence Dr G.K. Mwaura, the plaintiff suffered a fracture of the right tibia and fibular lower 1/3 and plaster of paris was applied. The degree of injury was classified as permanent and the incapacity assessed at 5%. The doctor also anticipated that the respondent would suffer ankle joint osteo-arthritis in the future.



30. In the submissions before the trial court, the respondent relied on the citation of *Francis Ndungu Wambui & 2 others v VK (A minor suing thro next friend and mother MCWK)*(2019) eKLR, where an award of Ksh 1,000,000/= was awarded for a fractured Tibia/Fibula and soft tissue injury. The respondent on the other hand relied on the citation of *Samuel Mungai Njau v Wanainchi Sanitary & Hardware Ltd* (2004) eKLR, where the plaintiff was awarded Ksh 150,000/=. They also relied on the citation of *Tabro Transports Ltd v Absalom Dova Lumbashi* Bugoma HCCA NO 31 of 2012, & *Amritlal S Shab Wholesalers Limited & ano v Joshua Ekeno*; Eldoret HCCA NO 99 of 2010, where for similar injuries the courts awarded between Ksh.350,000/= to Ksh.500,000/=.
31. The general principle is that an appellate court should be slow to interfere with the discretion of the trial court in awarding damages except where it is shown that the court acted on a wrong principle, took into consideration irrelevant factors, or made an award that is inordinately low or high that it must be wholly erroneous. The award must also reflect the trend of pervious, recent and comparable awards, keeping in mind inflationary trends and that the award ought to be a fair compensation.
32. The awards the appellant referred the court to are not recent and do not represent recent awards for similar injuries. In *Mwaura Muiruri v Suera Flowers limited & another* (2014) eKLR, *James Gathirwa Ngunji v Multiple Hauliers (EA) Limited & another* (2015)eKLR & *Francis Ndungu Wambui & 2 others v VK (A minor suing thro next friend and mother MCWK)*(2019) eKLR, In all these recent decisions, the courts awarded between Ksh.1,000,000/= to Ksh.1,750,000/= for similar injuries.
33. Accordingly having considered the entire evidence before the trial court, submissions made herein and the medical evidence presented, it is the courts considered view that the award of Ksh.1,000,000/= for the injuries sustained is not excessive and the trial courts discretion was properly exercised as the quantum awarded is not manifestly high and/or excessive.

Conclusion

34. This appeal therefore has no merit and the same is dismissed.
35. The costs are awarded to the respondent and it is hereby assessed at Ksh.100,000/= all inclusive
36. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 27TH DAY OF APRIL, 2023.

In the presence of;

.....for the Applicant
for Respondent
Court Assistant

