Mwanthi & another v Njoka (Civil Appeal 48 of 2022)
[2023] KEHC 18125 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18125 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 48 OF 2022

FROO OLEL, J

MAY 31, 2023

BETWEEN

MATHEW MULI MWANTHI ..... 1ST APPELLANT

PRISCA MUNYOTI MOYODI ..... 2ND APPELLANT

AND

GABRIEL NYAGA NJOKA ..... RESPONDENT

(Being an Appeal from the judgment of Honourable Senior Resident Magistrate Martha Opanga, delivered in Kangundo CMCC 249 of 2019 on 22nd March, 2022)

JUDGMENT

1. This appeal arises from the judgement of Honorable Martha Opanga, Senior Resident Magistrate, delivered on 22nd March 2022, where she awarded the Respondent a sum of Kshs.175,000/= as General damages and Kshs 4,500/= as special damages arising from a road traffic accident where the appellant's motor vehicle been involved in an accident, and the respondent, who was a passenger therein sustained bodily injury. The respondent was also award interest on this sum plus costs of the suit.

2. The Appellant's, who were the Defendant in the primary suit being dissatisfied by the said judgment did file their Memorandum of Appeal dated 21st April 2022. The grounds of appeal were that;-

    a. That the learned trial Magistrate erred in law and in fact in finding the Defendants/Appellants 100% liable for the accident.

    b. The learned trial Magistrate erred in law and in fact by failing to exonerate the Appellants from any wrong doing in view of the actions of the Respondent.

    c. That the learned trial Magistrate erred in law and in fact in finding that the Respondent was entitled to General Damages of Kshs 175,000/=

d. That the learned trial Magistrate grossly misdirected herself in treating the evidence presented before her both on liability and quantum and consequently coming to a wrong conclusion on the same;

e. That the learned trial Magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstance's and was excessive in the circumstance's occasioning miscarriage of justice; and

f. That the learned trial Magistrate failed to adequately evaluate the evidence provided both on liability and quantum thereby arrived at a decision, unsustainable in law.

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 5th December 2019 claiming damages arising from a tort of negligence. The respondent alleged that on 14th October 2019, he was a fare paying passenger in the appellant's motor vehicle registration number KCE 336Z TOYOTA VAN {hereinafter referred to as the suit Motor vehicle}. The said motor vehicle was being driven along Kangundo- Nairobi Road, when at Mobina area, it failed to give way and/or slow down to allow Motor cyclist KMCD 252T make Tiger to pass. The suit motor vehicle rammed into the said motor cyclist and as a result of the accident, the respondent who was travelling as a fair paying passenger in the suit motor vehicle, sustained bodily injuries and prayed for damages.

5. The Appellant's who was the defendant's in the primary suit, did file their statement of defense on 13th January 2020 denying any wrong doing on their part. They did plead in the alternative that the respondent substantially contributed to his injuries due to his own negligence. They also blamed the drive/rider of the Motor cycle registration Number KMCD 252 T for being negligent. The suit came up for hearing on 19th January 2021 when the Respondent testified and adopted his witness statement. He further produced as exhibits all the documents listed in the list of documents as Exhibit 1-9.

6. The respondent testified that on 14th October 2019, he was a passenger in the suit motor vehicle and sat in front with the driver. At Mobina area an accident occurred. The suit motor vehicle failed to give way to a motor cyclist who had indicated that he was turning right to enter the petrol station. According to the respondent, the motor cyclist was from the opposite direction and gave indication that he was turning while they were about 45 meters away. The respondent blamed the suit motor vehicle driver because he did not slow down or keep safe distance and ended up knocked down the motor cyclist. The respondent further testified that he sustained injury to his right hand and still had to undergo therapy. He was also unable to go back to work at the U.S embassy where he was previously employed.

7. In cross examination he testified that he was a driver by profession. He saw the accident occur as he was seated in front and also saw the rider indicate that he intended to turn. The suit motor vehicle was doing a speed of about 80 Kmph. After the accident, the driver of the suit motor vehicle ran away and later the police came to the scene. He confirmed that the suit motor vehicle was in its rightful lane, when the accident occurred, and he still had to undergo physiotherapy at Kenyatta National Hospital or at Meru county referral Hospital, where the therapy doctor was situated. In reexamination he stated that, the motor cyclist gave good notice, while they were about 40 meters away and the suit motor vehicle driver ought in the circumstances to have exercised proper judgment and give way for the rider to get into the petrol station. The suit motor vehicle driver was speeding at over 100kmph, and he got confused after the accident.

8. DW1 P.C Simon Kasimba testified that he was a police officer stationed at KBC police station, assigned traffic duties. On 14.10.2019 at about 11.30am he was in the station and got a call from members of the public that an accident had occurred along Kangundo – Nairobi road at Mobina area. Together with the base commander, the deputy OCS and other traffic officers, they rushed to the scene and confirmed that indeed an accident occurred. It involved the suit motor vehicle and one motor cycle registration No KMCD 252T, which was being ridden by on John Muthawa, who died on the spot as a result of injuries sustained in the said accident. The motor cycle was from Tala direction heading toward Nairobi, it was moving in the opposite direction to the suit motor vehicle when the accident occurred.

   DW1 further testified that he drew a sketch plan which showed the possible point of impact. The impact was on the right side as one faces Tala from Nairobi that meant that the rider had left his side of the lane to get into Mobina petrol station, without checking the road. The respondent was amongst the passengers who were injured. The injured were advised to go to the hospital for check-up and the deceased body was removed from the scene. The suit motor vehicle and the Motor cycle were towed to the police station to await inspection. The witness also stated that he recorded statement from witnesses and was of the opinion that the motor cyclist was to blame for the accident

9. In cross examination, the witness confirmed that he was the one who drew the accident sketch plan at the scene. The motor cyclist had left his lane to enter a petrol station and thus he was to blame for the accident. The accident debris were on the right side and the rider died on the spot due to impact of the accident. There was also an inquest on going in court, being inquest No 4 of 2021.

10. DW2 Amos Mutua t adopted his witness statement filed in court and dated 22.11.2019. He testified that he was driving the suit motor vehicle at Mutalia area, near Mobina. A canter was from Nairobi driving towards Tala, while him he was driving the suit motor vehicle in the opposite direction. Suddenly a motor bike emerged from behind the canter and crossed to get into Mobina petrol station, they collided head on and the motor cyclist died on the spot. The point of impact was on the suit motor vehicle rightful lane. In cross examination DW2 blamed the motor cyclist as he did not indicate nor did he check to see if it was safe to cross over. He stated that the dead tell no tales, but it was the rider to blame. He fled the scene as he feared for his life.

Appellants Submissions

11. The Appellant's submitted that the respondent was a passenger in the suit motor vehicle, and did not call an independent witness to support his evidence as to how the accident. The appellants on the other hand called the investigating officer, who visited the scene of the accident and drew a sketch Map showing the point of impact and blamed the motor cyclist for the accident as he left his lane to enter a petrol station without exercising a proper lookout. The driver of the suit motor vehicle also corroborated the evidence of the investigating officer as to how the accident occurred. They submitted that the respondent did not discharge the burden of proof especially on the issue of liability and thus it was wrong for the trial court to apportion 100% liability on the appellants. The appellants relied on East Produce (k) Limited Vs Christopher Astiado Osiro in Civil Appeal No 43 of 2001, where it was held that there is no liability without fault. The motor cyclist ought to have shoulder the liability and the suit against the appellants be dismissed.

12. The appellants further submitted that it was also not shown or proved that the proximate cause of the accident was due to the driver's negligence. The rider had abruptly crossed the road without care and attention, leaving little room to swerve and avoid the said accident. DW2 thus did not contribute to the said accident. Reliance was placed on Edward mzamili Katana Vs CMC Motors Group Ltd & Another {2006} Eklr, Frida Kimotho Vs Earnest Maina {2002} Eklr & Woods Vs Duncan 1946 AC 419.

13. The Appellants prayed that the appeal be dismissed with costs.

Respondents Submissions.

14. The Respondent filed his submissions on 16th February 2023 and submitted that there was no error on the part of the trial magistrate in finding that the appellants were 100% liable for the occurrence of the accident and it was their driver DW1 who was to blame wholly for the accident. Further the respondent was a fair paying passenger and never contributed in any manner to the said accident.

15. The Respondent further submitted that the award of damages given was reasonable and commensurate with current court awards for similar injuries and there was no basis for the appellate court to interfere with the same. Reliance was placed on HCCA NO 5 OF 2020 Siaya Equity Bank (k) Ltd & 2 others Vs David Githuu Kuria & HCCA no 36 of 2017 naivasha -Lake Naivasha Growers Vs Muigai Thuku amongst others.

16. The Respondent prayed that this appeal be dismissed with costs.

Analysis and Determination.

17. In determining this appeal, I have considered the details/evidence presented, 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 scrutiny and arrive at its own conclusion.

18. As held in Selle and another versus Associated Moto boat Co. Ltd and 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...".

19. In Coghlan versus 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 demeanor, 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 demeanor, 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."

20. The appellants raised six grounds of appeal. Grounds 1, 2, and 4 basically challenge the trial courts finding on liability. Ground 3, 4 & 5 challenges the courts finding on the issue of quantum awarded which the submit was unreasonably high.

21. The Respondent did testify and provided documents to prove that indeed the on 14.10.2019 he was a passenger in the suit motor vehicle, which got involved in a road traffic accident and as a result he suffered soft tissue injury all over the body. The said accident occurred along Kangundo-Nairobi Road at Mobina Area, involving the suit motor vehicle and a motor cycle KMCD 252T. The appellant blamed the driver of the suit motor vehicle for driving at a speed which was high and not having a proper look out of other road users.

22. The appellants called two witnesses to testify on their behalf. One was the police officer who investigated the accident, and the other was the driver of the suit motor vehicle. They both confirmed that indeed an accident did occur as pleaded but the negligent party was the rider of motor cycle registration Number KMCD 252T Tiger (One John Muthuwa-deceased). The deceased from Tala direction, while heading to Nairobi, while the suit motor vehicle was heading in the opposite direction. At Mobina petrol station the rider left his proper lane and turned right to enter the petrol station without having a proper look out for oncoming traffic as a result of which he was knocked down by the suit motor vehicle and he sustained fatal injuries. DW1 confirmed that he is the one who drew the accident sketch plan which showed that the rider left his proper lane and was knocked on the right side as one faces Tala. He blamed the rider for the accident.

23. DW2 Amos Mutua, also testified and confirmed that he was the driver of the suit motor vehicle. He was driving from Tala to Nairobi. There was a canter being driven from the opposite direction an as they were about to pass each other, a motor cyclist emerged from behind the canter and crossed to get into Mobina petrol station. A head on collusion occurred and the motor cyclist died on the spot.

24. The trial magistrate in her determination did find that the plaintiff was a passenger, seated on the front seat of the suit motor vehicle and believed his evidence that he saw the motor cyclist from about 40meter away, therefor the driver of the suit motor vehicle should have also been able to see the cyclist, but ignored to exercise caution by slowing down or giving way to the said rider to enable him cross into Mobina petrol station.

25. The trial court also blamed the rider for being impatient and failing to wait and confirm that it was safe on his part before crossing over to the petrol station. She did find that in the circumstance's the rider also contributed to the occurrence of the accident, but since the deceased was not enjoined in the suit and the plaintiff was an innocent passenger, who got injured. The trial magistrate shifted blame to the driver of the suit motor vehicle and assigned liability at 100%. The owner of the suit motor vehicle too was held to be vicariously liable.

26. Provision of Section 107(1) of the Evidence At Cap 80 Laws of Kenya "Whoever desires a court to give judgment as to any legal right or liability dependent on the existence of fats which he assists must prove that these facts exists"

27. 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.

28. 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"

29. 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."

30. The respondent indeed proved that an accident did occur involving the suit motor vehicle and the Motor cycle registration Number KMCD 252T make Tiger. He confirmed that the accident occurred, when the motor cyclist attempted to cross over the road and enter into the Mobina petrol station. Also indeed he did prove that he was injured as a result of the said accident. The evidential burden shifted on the appellants and they too presented concrete evidence that, they were not to blame for the accident and the same was caused by the negligence of the rider, who left his lane and attempted to cross into Mobina petrol station without considering other road users and having a proper look out for on coming traffic. Indeed, the trial magistrate did find as much in her judgment too.

31. The question that then arises is whether the magistrate was right to hold the appellants 100% liable for this accident. Based on the analysis of the evidence presented, it is clear that the trial magistrate fell in error in her analysis of the evidence to find that the appellant was 100% liable for the accident. In her own judgment she had made a correct observation that "the rider was also impatient and failed to wait and confirm safety on his part before he made an attempt to cross over to the petrol station. In the circumstances, the rider in my view contributed to the occurrence of the accident."

32. Having found that the motor cyclist contributed to the accident, the second question that then arose is whether the motor cyclist was 100% liable or some contributory negligence could be attributed to the appellants? Even on this question the trial magistrate erred in law by only believing the respondents testimony that he was seated in front of the suit motor and saw the motor cycle 40 meter away, and thus the suit motor vehicle driver had ample time to swerve and avoid the said accident.

33. The trial magistrate failed to consider the evidence of DW2 Amos Mutua, who was the driver of the suit motor vehicle. He did testify that he was on his lawful lane driving from Tala to Nairobi, when at Mutalia area near Mobina, a motor bike suddenly emerged from behind a canter being driven in the opposite direction. The rider suddenly without looking out for other road users, unilaterally crossed the road to enter Mobina petrol station and he had no time to avoid the accident. There was a head on collusion and the rider died on the spot.

34. Faced with two conflicting evidence as to how the accident occurred, the trial magistrate fell in error, by believing the plaintiff and not DW2 Amos Mutua. The trial magistrate did not analysis the evidence of DW2 nor did she give any reason as to why she disbelieved him and believed the plaintiff. Having

sufficiently proved that the motor rider was on the wrong especially with support of the evidence of DW1 P.C Simon Kasimba and also looking at the accident sketch plan which was produced as part of the appellant's case, the evidential burden had been sufficiently discharged and the party who would fail if no further evidence was produced was the respondent.

35. As held in Eastern Produce {k} Limited Vs Chrisopher Atiado Osiro {2006} eKLR

> " it is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku Vs Kenya Cargo Hauling services Ltd (1991) 2KAR 258, Where it was held that " there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence".
>
> I have in mind the description of negligence as is to be found in salmond and Houston on the law of torts 19th Edition. Where it is described as "conduct, not a a state of mind-conduct which involves an unreasonably great risk of causing damages..... negligence is the omission to do something much as a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do. The position is laid more clearly as "in strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owing."(lord wright in lochgelly iron and coal co Vs MC'Mullan {1934} A.C. 25)

36. Also as held by Justice Hayanga in Frida Kimotho Vs Ernest Maina {2002} eKLR , where he quoted with approval Simmons L.J in Woods Vs Duncan 1946 AC 419, where he held that ;

> " I accept Mr Fraser Murray's proposition that the respondents (defendants) can avoid liability if they can show either that there was no negligence on their part which contributed to the accident, or that the accident was due to circumstance's not within their control."

37. In the circumstance of this appeal, I do find that the appellants fully discharged the evidential burden and proved that they were not to blame for the accident nor was there any negligence established to show that they contributed to the same. The finding by the trial magistrate that they were 100% liable has no basis and the same is therefore wholly set aside.

Ground 4 & 5 of the Grounds of Appeal

The trial magistrate awarded exorbitant damages

38. The appellant was awarded of Kshs 175,000/= as general damages for pain and suffering and Kshs 4,500/= for special damages. The appellants in the above grounds of appeal stated that the award was inordinately high and excessive in the circumstance's, thereby occasioning miscarriage of justice. In their written submissions the appellants did not make any submissions on this ground of appeal, while the respondent justified the same and stated that the award was reasonable and commensurate with the current awards for similar injuries, thus should not be disturbed.

39. In Catholic Diocese of Kisumu versus Sophia Achieng Civil appeal no.284 of 202 (2004) 2KLR 55 the court set 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"

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

> " The appellant court is only entitled to increase and award of damages by the high court if it is so inordinately low that it represents and entirely erroneous estimate or the party asking for an increase must show that I 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 says 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..."

41. From the pleadings and medical documents produced in evidence, the respondent suffered pain and tenderness on the occipital scalp, neck, left groin, right shoulder, right leg and nose bleeding. Analgesics and physiotherapy were recommended. The degree of injury was classified as harm.

42. Before the trial court, the appellants did propose that an award of Ksh.70,000/= would have been adequate compensation for the injuries suffered. The respondent on the other hand submitted that an award of Kshs.250,000/= would have been adequate compensation for the injuries suffered.

43. 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.

44. Accordingly, having considered the entire evidence before the trial court, submissions made herein and the medical evidence presented, and similar awards for similar injuries, it is the courts considered view that the award of Ksh 175,000/= for the injuries sustained is excessive and the trial courts discretion was not properly exercised. Having considered similar awards and inflationary trends, an award of Ksh 150,000/= would have been more appropriate as the quantum appropriate for the injuries sustained.

Disposition

45. Having found that the respondent did not discharge the burden of proof, especially to prove that the appellants were liable for the accident that occurred, I do find that this appeal as merit. The judgment of Hon Martha Opanga, Senior Resident Magistrate in Kangundo CMCC 249/2019 dated and delivered on 22nd March 2022 is hereby set aside and the said suit is dismissed with costs.

46. The costs of this appeal too are awarded to the appellants and it is hereby assessed at Kshs 100,000/= all inclusive.

47. It is so ordered

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF MAY 2023.

RAYOLA FRANCIS OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of May 2023

In the presence of;

.....For Applicant

.....For Respondent

.....Court Assistant