Nyakundi v Okonya (Civil Appeal E68 of 2021)
[2023] KEHC 17989 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E68 OF 2021

REA OUGO, J

MAY 26, 2023

BETWEEN

ROBERT NYAKUNDI ..... APPELLANT

AND

PETER OLOO OKONYA ..... RESPONDENT

(Being an appeal from the judgment and decree of the subordinate court (Hon. N.S Lutta, CM) dated and delivered on 31st May 2021, in Kisii CMCC No 346 of 2019)

JUDGMENT

1. The appeal before the court is challenging the finding of the subordinate court on quantum and liability. The suit before the trial court was filed following a road traffic accident that occurred on February 20, 2019. The respondent at the time was walking at the verge of Kisii –Kisumu road at Daraja Mbili Market when the appellant's driver negligently drove motor vehicle registration No KCS 117R knocking down the respondent. As a result of the accident the respondent sustained the following injuries: laceration to the right shoulder, contusion to the chest and right knew, fracture of the right humerus, right femur, right tibia/fibula bones and fracture of the pelvis. Once the hearing was concluded, the trial magistrate entered a judgment in favour of the respondent in the following terms:

    a. Liability 100%

    b. General damages Kshs 1,000,000.00

    c. Special damages Kshs 162,900/-

2. The appellant dissatisfied with the finding of the trial magistrate has filed this instant appeal. The grounds set out on the face of the memorandum of appeal are as follows:

    1. The learned trial magistrate erred in fact and law in holding that the appellant was wholly liable, in negligence, for the injuries which the respondent suffered in the accident in issue.

    2. The learned trial magistrate erred in fact and law in failing to find and hold that the respondent contributed to the accident the subject of that suit, in spite of evidence tendered.

    3. The learned trial magistrate erred in fact and law in awarding the respondent the sum of Kshs 1,000,000/- as general damages, on 100% basis, which sum was inordinately and manifestly excessive in the circumstances of the suit, as to amount to an erroneous estimate.

    4. The learned trial magistrate erred in law and fact in applying wrong principles and ignoring the proper principles in assessing damages, hence awarded the respondent the sum of Kshs 1,000,000/- as general damages, which amount was inordinately and manifestly excessive.

    5. The learned trial magistrate erred in law and fact in awarding the respondent the sum of Kshs 162,900/-, as special damages, which amount was not proven, at all, by the evidence which the respondent led during the hearing of the respondent's suit before the lower court.

    6. The learned trial magistrate erred in law and fact in deciding the case, on the whole, against the evidence that was before him, and thus arriving at a decision which was wholly erroneous.

3. The appeal was canvassed by way of written submissions. The appellant submits that the accident took place at night and the respondent never saw the appellant's vehicle hit him. He further submits that there was no evidence of the exact position the respondent had taken while walking the road. The respondent in his submissions argue that it was his testimony that he was knocked from behind by the appellant's motor vehicle.

4. This being the first appeal I am required to consider the evidence adduced before the trial court, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123).

5. Peter Oloo Okonya (Pw1) adopted his witness statement as his evidence in chief. He testified that he was at the verge of the road when the appellant's vehicle which was being negligently driven in high speed veered off the road and knocked him. On cross examination, he testified that he was on the side of the road and was not crossing the road when the accident occurred. He was knocked from behind and rushed to hospital. The testimony of Pw1 who was the only person that witnessed the accident was that the vehicle was being driven at high speed causing it to lose control and veer of the road therefore knocking the respondent. This evidence was not shaken in cross examination and the trial magistrate was correct to make a finding that the appellant was 100% liable for the accident. There is no justification for apportioning the liability in the ratio of 50:50 as proposed by the appellant considering that he did not adduce any evidence to tilt the scales in his favour. Therefore the appeal on this ground fails.

6. I now turn to consider the damages awarded by the trial court. In dealing with an appeal on quantum I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

> "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low"

7. The respondent tendered a medical report prepared by Dr Daniel Nyameino dated February 20, 2019 confirming that he had sustained the injuries listed in his plaint. Dr Nyameino was of the opinion that the respondent sustained multiple fractures and soft tissue injuries. He would require prolonged orthopaedic follow up and physical therapy. The appellant also produced into evidence a medical report by Dr Kumenda, Dexh1. The report also comes to the same conclusion as that of Dr Nyameino, that is, the respondent suffered multiple fractures which have healed well but possible osteomyelitis of the right femur following internal reduction. That the respondent will need reassessment after complete resolution of the infection. The injuries sustained by the respondent are thus not in dispute.

8. The appellant submits that an award of Kshs 450,000/- would be a reasonable award for general damages. They placed reliance of the cases of *Mwavita Jonathan v Silvia Onunga* (2017) eKLR, *Maqsooda Begum Sroya v Sunmatt Limited* [2017], and *Christopher Njoroge Ngugi & Stella Kathure v Cosmas Kithusi Nzioka* [2018] eKLR. In *George Karanja Mukundi v Mariera Francis & another* [2022] eKLR the appellant sustained a fracture of the right tibia and right humerus as well as soft tissue injuries and was awarded Kshs 750,000/-. In general, the cases cited by the appellant are far much less severe than those sustained by the respondent.

9. The respondent supported the finding of the trial court arguing that it was not excessive and that the appeal lacked any merit on the issue of quantum. Although the respondent supported the finding of the trial magistrate, in*Kimathi Muturi Donald v Kevin Ochieng Aseso* [2021] eKLR the court awarded Kshs 1,200,000/- where the respondent sustained afracture of the upper right tibia and fracture of the floor of the socket of the hip (acetabulum). The injuries in the *Kimathi Muturi Donald v Kevin Ochieng Aseso* (supra) case were less severe than those sustained by the respondent herein. In my view, had the respondent filed a cross appeal in this case, I would have considered reviewing the award on the general damages upwards.

10. The special damages was pleaded and proved. The medical bill at RAM hospital was Kshs 156,400/- and Kshs 6,500 was paid towards preparation of the medical report. There is no justification for interfering with the award of special damages tabulated as Kshs 162,900/-.

11. Having compared injuries sustained by appellant, I do not find that an award of Kshs 1,000,000/- awarded by the trial magistrate as excessive warranting interference by this court. The appellant has failed to show that the trial court proceeded on wrong principles, or misapprehended the evidence in some material respect.

12. The upshot is that the appeal is devoid of merit and is hereby dismissed. The respondent shall have the cost of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MAY 2023

R.E. OUGO

JUDGE

In the presence of:

Mr. Odero For the Appellant

Respondent Absent

Aphline C/A