Oyaro v Mong'are (Civil Appeal E075 of 2021)
[2023] KEHC 20411 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E075 OF 2021

WA OKWANY, J

JUNE 29, 2023

BETWEEN

NICHOLAS OYARO ..... APPELLANT

AND

GEORGE ONDHARI MONG'ARE ..... RESPONDENT

(Being an appeal Against the Judgment/Decree of the Hon. M. O. Wambani – CM Nyamira dated and delivered on the 21st day of September 2021 in the original Nyamira CMCC No. 68 of 2016.)

JUDGMENT

1. The Respondent herein was the Plaintiff in Nyamira CMCC No. 68 of 2016 where he sued the Appellant seeking damages in respect to injuries arising out of a road traffic accident that took occurred on 9th January 2016. The Respondent's case was that he was on the material day lawfully traveling aboard motor vehicle registration number KBJ 867N along Kisii-Nyamira Road when an accident occurred in which he sustained serious injuries. The Respondent attributed the accident to the negligence of the Appellant's driver /agent who, he alleged, drove, managed and/or controlled the said vehicle negligently thereby causing it to violently collide with Motor Vehicle Registration No. KAS 964N.

2. The trial court heard the case and rendered its judgment dated 21st September 2021 wherein it found the Appellant/Defendant 100% liable for the accident and awarded the Respondent/Plaintiff Kshs. 500,000/= for general damages, Kshs. 6500/= for special damages and the costs and interests of the suit at court rates.

3. Aggrieved by the said decision of the trial court, the Appellant filed the present appeal and listed the following grounds in the Memorandum of Appeal: -

    1. The learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendant without considering the circumstances of the case.

    2. The learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendant whereas the Police Abstract produced as Plaintiff's exhibit indicated that the matter was still pending under investigation.

    3. The learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendant whereas PW2 and DW1 gave evidence that the third-party motor vehicle was to blame for causing the accident.

    4. That the learned Trial Magistrate erred in fact and in law in the assessment of quantum thereby giving an award or quantum of general damages of Kshs. 500,000/= that was overly excess in the circumstances of the case.

    5. That learned Trial Magistrate erred in fact and in law by failing to pay regard to decisions filed alongside the defence's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.

    6. That learned Trial Magistrate's exercise of discretion in the assessment of quantum was injudicious.

4. The Appellant sought orders for the reassessment of the trial court's findings on liability and quantum. The appeal was canvassed by way of written submissions which I have considered.

5. I have carefully examined the trial Record of Appeal and the parties' rival submissions. The main issue for determination is whether this court should re-assess the trial court's findings on quantum and liability.

6. The duty of the first appellate court, as was restated by the Court of Appeal in Kenya Ports Authority vs. Kusthon (Kenya) Limited (2009) 2EA 212 as follows: -

    " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

    (See also Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123).

7. In Stratpack Industries vs. James Mbithi Munyao; Nairobi HCCA No. 152 of 2013, the court held that:-

    " It is trite law that the burden of proof of any fact or allegation is on the Plaintiff and he must prove causal link between someone's negligence and his injuries; he must adduce evidence from which, on a balance of probabilities a connection between the two be drawn as not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

8. Sections 107 and 108 of the *Evidence Act* provide for the burden of proof and incidence of burden as follows: -

> 107. Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden.
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

9. Phipson in 'The Law of Evidence', explained the term 'burden of proof' as follows:-

> i. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
>
> ii. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

10. It is also trite that the standard of proof in a civil suit is based on a balance of probabilities. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 explained this standard and held that: -

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

11. The Appellant testified that he was a passenger in the Appellant's motor vehicle Reg. No. KBJ 867N when it hit the other vehicle on the driver's side. PW1 produced his treatment notes from Nyamira District Hospital (P.Exh1), P3 Form (P.Exh 2) and the Medical Report by Dr. Ogando (P.Exh 4a).

12. PW2 No. 65548 Corporal Mecha confirmed the Respondent's claim and produced the Police Abstract (P. Exh3). It is therefore not in question that an accident occurred and that he suffered injuries as a result.

13. On liability PW1 testified that even though he did not witness the said accident as he was sitting at the back of the vehicle, the driver of KBJ 867N knocked the KAS 964N on the driver's side. DW1, on the other hand, testified that the accident was caused by the negligence of the driver of motor vehicle registration number KAS 964N because the driver did not check to see if the road was clear before joining the main road.

14. My finding, from the analysis of the evidence on record, is that the driver of motor vehicle Reg. No. KAS 964N may have caused or largely contributed to the accident in question. It was therefore incumbent upon the Appellant to institute third party proceedings against the owner of the said vehicle so as to enable the trial court determine/apportion liability as between the owners of both vehicles.

15. A perusal of the trial court record reveals that the Appellant's application to enjoin a third party to the suit was allowed after which the third Party Notice was filed on 20th April 2017. It is however noteworthy that despite numerous concessions by the trial court, the Appellant did not provide proof of service of the third-party notice and that the matter proceeded for trial with only the parties herein.

16. The question that begs an answer therefore, is whether the trial court properly apportioned liability where the Appellant failed to enjoin the owner of KAS 964N as a third party to the proceedings.

17. It is trite that third-party proceedings are only applicable between a defendant and the intended third party. This means that a plaintiff seeking compensation is not obligated, under the law, to enjoin all possible defendants in the suit for compensation of damages. Such an action would rightfully be undertaken by a defendant who claims that another party was to blame for accident. A court of law in cannot also apportion liability to a party who is not enjoined to the suit. In Kenya Commercial Bank vs. Suntra Investment Bank Ltd (2015) eKLR the High Court in Nairobi held that:-

> " in law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 Rule 15-22 of the Civil Procedure Rules..... The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the Defendant and cannot be a bona fide issue triable between the Defendant and the Plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the Plaintiff and the Defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out."

18. In the present case, it is clear that the Appellant did not protect his interests by serving the third-party notice. I find that the non-joinder of the owner of KAS 964N to the suit does not invalidate the decision of the trial court. I am persuaded by the decision by Gikonyo J. in Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR, where he held that: -

> " A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually

and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties."

19. The Appellant submitted that since the Respondent was seated at the back of the vehicle, he could not see who caused the accident. PW2, who also testified as DW1 testified that the driver of KAS 964N was to blame for accident. My finding is that failure, by the Appellant, to serve the third party notice on the owner of the other vehicle left him as the sole defendant to whom liability could be attributed. I am guided by the decision by the Court of Appeal in Margaret Waithera Maina vs. Michael K. Kimaru [2017] eKLR where the doctrine of Res ipsa loquitur was discussed as follows:

> " This is a case where the doctrine of Res Ipsa Loquitor applies. In Mukusa vs. Singa & Others (1969) E. A 442, it was held that:

'for the doctrine to apply there must be reasonable evidence of negligence but where the thing is shown to be under the management of defendant or his servants and the accident in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care'.

> It is worth noting that the driver of motor vehicle registration number KBA 917Q was not a party in this suit and therefore the enumeration of the particulars of negligence by the defendant was in vain. If the defendant's driver was not negligent as suggested then the defendant ought to have instituted 3rd party proceedings against the driver of motor vehicle registration No. KBA 917Q (See Esther Michele vs. Merahia Nduta) H.C.C.C No. 303 of 1991 in Nairobi.
>
> A perusal of the court file shows that the defendant filed some documents to initiate 3rd party proceedings but apparently abandoned the same. In the absence of such proceedings, I find the defendant 100% liable."

20. Similarly, in EWO (suing as the next friend of a minor COW) vs. Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR the high court overturned the trial court's decision and found the Respondent 100% liable where they failed to take out third-party proceedings. He held thus: -

> " During cross-examination of the defence witness Walter Obonyo, he stated in evidence that there was a possibility that the motor cycle knocked the child. Accordingly, it is my humble view that the police abstract having held the driver of the School Bus as having caused the accident, if the said driver truly believed that the motor cyclist caused the accident, then he should have taken out a Third Party Notice to controvert the evidence by stating that the accident was caused by the motorcyclist and not him. There was no Third Party Notice on record.....
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> In my humble view, therefore, the appellant had discharged the burden of proof and proved on a balance of probabilities, that the Respondent's driver was negligent. I find that there is no material to apportion liability between the plaintiff minor and the Respondent's driver.....This appeal is thus allowed. The decision of the trial magistrate dismissing the plaintiff's suit on liability is hereby set aside and substituted with judgment finding and holding the defendant/ Respondents is liable for the accident at 100 percent." (Emphasis added)

21. I find, as the trial court did, that the Appellant in this case was 100% liable for the accident in question owing to his failure to enjoin the third party in the suit at the trial court. I further find that the

Respondent could not have contributed to the accident in any manner as he was merely a passenger in the Appellant's motor vehicle and not the one driving.

22. Turning to the appeal on quantum, I take cognizance of the principles governing decisions on award of damages as stated in the case of Kigaraari vs. Aya (1982-88) 1 KAR 768 where it was held that:-

> " Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

23. I am also cognizant of the fact that an award of damages must not be such that the Plaintiff will be overly compensated and placed in a better position than he originally was before the accident. In other words, damages are not meant to enrich parties. In Woodruff vs. Dupont [1964] EA 404, the East African court of appeal held that: -

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

24. I have considered similar cases with and comparable injuries as follows:

    i. Michael Okello vs. Priscilla Atieno [2021] eKLR where the court substituted an award of Kshs 500,000/= with Kshs 225,000/= where the respondent had sustained injuries on the right shoulder, the chest, the back and the left leg with haematoma.

    ii. Blue Horizon Travel Co Ltd vs. Kenneth Njoroge [2020] eKLR where the court substituted an award of Kshs. 400,000/= for Kshs. 650, 000/= where the respondent had sustained bruises on the scalp, neck, abdomen, lower back, cut wound on the left thumb, left palm and left foot near the ankle joint, sublaxation of the left shoulder joint and fractures 3rd and 9th ribs.

    iii. Michael Owuor Obonyo vs. Felix Onyango Owino [2021] eKLR, Kamau J set aside an award of Kshs. 500,000/= and substituted it for Kshs. 200,000/= where the Respondent suffered multiple bruises on the right leg, right thigh and right hip, chest pain and injuries on the lower and upper limbs.

    iv. Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna [2022] eKLR, Aburili J set aside the award of Kshs. 850,000/= for Kshs. 500,000/= where the Respondent suffered head injury with loss of consciousness, fracture of the right zygoma (facial bone), multiple facial lacerations, blunt injury to the shoulders and Blunt injury and bruises to both lower limbs.

25. From the above cited cases, it is clear that where the injuries are serious such as those involving fractures, the award will be relatively higher than where the claimant sustained soft tissue injuries.

26. In the instant case, the Respondent did not sustain any fracture but pleaded that he suffered contusion on the back, contusion on both upper limbs, and bruises on both legs.

27. The Appellant proposed an award of Kshs. 60,000/= which I consider to be inordinately low. At the same time, it is my view that the award of Kshs. 500,000/= was too much on the higher side since the Respondent did not have any fractures but suffered injuries which could be categorized as harm. In the premises, I set aside the trial court's award of Kshs. 500,000 general damages and substitute it with an award of Kshs. 250,000/=.

28. Turning to the award for special damages, the law is that the same must be specifically pleaded and proved as was determined by the Court of Appeal in Hahn vs. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717 and 721 where it was 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."

29. In the present case, the respondent pleaded Kshs. 6,500/= under special damages and tendered proof of the same. I am satisfied that the same was properly pleaded and proved.

30. In the end, I find that the instant appeal is merited and I therefore allow it, albeit partly only to the extent of quantum. I uphold the trial court's findings on liability but set aside the award of Kshs. 500,000/= general damages and substitute it with Kshs. 250,000/=.

31. The award of general damages will also have interest at court rates, from the date of judgment in the lower court until payment in full.

32. Each party shall bear his own costs of the appeal.

33. It is so ordered.

Judgment dated, signed and delivered at Nyamira via Microsoft Teams this 29th day of June 2023.

W. A. OKWANY

JUDGE