Loyete v Kinyanjui (Civil Appeal 47 of 2021)
[2023] KEHC 22736 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 47 OF 2021

HM NYAGA, J

SEPTEMBER 27, 2023

BETWEEN

JACKLINE ARUKUDE LOYETE ..... APPELLANT

AND

PAUL NJOROGE KINYANJUI ..... RESPONDENT

(Being an appeal from the judgment of the Honourable F. K. Munyi, delivered on 3rd January, 2021, in Nakuru CMCC No. 867 of 2018Being an appeal from the judgment of the Honourable F. K. Munyi, delivered on 3rd January, 2021, in Nakuru CMCC No. 867 of 2018)

JUDGMENT

1. The Appellant, had brought a claim against the Respondent seeking general and special damages for injuries he sustained in a road traffic accident on 30th April, 2018 along Kanu street.
2. After hearing the parties, the trial magistrate found that the Appellant had not proven her case on a balance of probabilities and dismissed it with costs.
3. The trial court held that had the claim succeeded it would have awarded the Appellant Ksh160,000/= as general damages, Special Damages of Ksh. 2,650/= plus costs and interest.
4. Aggrieved by the said decision, the Appellant filed a Memorandum of Appeal dated 9th March, 2021 which has six (6) grounds of appeal namely; -
    a. That the Honourable Learned Magistrate erred in law and in fact by not holding the Respondent 100% liable for the accident despite overwhelming evidence to the contrary.
    b. That the Honourable Learned Magistrate erred in law and in fact by not appreciating that the appellant was at the scene of the accident on 30th April,2018 despite overwhelming evidence.

c. That the Honourable Learned Magistrate erred in law and in fact in applying wrong principles while assessing liability.

d. That the Honourable Learned Magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions on liability and quantum.

e. That the Honourable Learned Magistrate erred in law and in fact in failing to consider authorities relied on by the appellant in her submissions.

f. That the Honourable Learned Magistrate erred in law and in fact in dismissing the Appellant's case on account of clerical errors in respect of her names as appearing on her medical reports yet the Appellant was not the maker of the records.

5. The Appellant thus seeks orders; -

1. That the appeal be allowed.

2. That the subordinate court's Judgement be set aside in its entirety.

3. That the costs of this Appeal be awarded to the Appellant.

6. The parties filed Written Submissions, in compliance with the directions given by the court.

Appellant's Submissions

7. On liability, the Appellant submitted that her evidence was that on the material day, she was a pillion passenger aboard Motor Cycle Registration Number KMDJ 281N along Kanu Street heading towards town. An oncoming Motor Vehicle Registration Number KBB 584 H encroached on their lane and knocked them down was uncontroverted. In support of her submissions, the Appellant relied on the Lake Flowers v Cila Francklyn Onyango Ngonga & another [2008] eKLR where the court held interalia that;

> " Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it "

8. Reliance was also placed on the case of Kenya Bus Services Ltd vs Humphrey [2003] KLR 665 for the proposition that where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.

9. The Appellant submitted that the respondent never adduced his evidence since he knew it was adverse to him. She cited the case of Simeon Nyachae vs Eric Ongeri & 2 others [2015] eKLR for the proposition that party who has in his possession evidence which he fails to tender, that evidence is presumed to have been adverse to him.

10. The appellant also cited the case of Billiah Matiangi v Kisii Bottlers Limited & another [2021] eKLR where the court interalia held that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations.

11. The Appellant submitted that having pleaded the doctrine of res ipsa loquitor, the burden of proof shifted to the Respondent to either disapprove or show that she contributed to the accident, but he did not. In support of this proposition the Appellant cited the case of Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR.

12. The Appellant thus urged the court to find the Respondent 100% liable for the accident.

13. On quantum, the appellant urged the court to find that she suffered multiple soft tissue injuries and proposed an award of Ksh. 350,000/= as general damages. To buttress her submissions, the Appellant relied on the case of Francis Ochieng & another vs Alice Kajimba [2015] eKLR.

14. On costs the Appellant submitted that the same follow the event. To bolster this position, the appellant placed reliance on the cases of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR and Rosemary Wairimu Munene Ex-parte Applicant vs Ihururu Party Farmers' Cooperative Society J.R. No. 4/2014

15. The Appellant urged the court to allow the Appeal with costs to her.

Respondent's Submissions

16. The Respondent submitted that it was incumbent upon the Appellant to prove her case against him. To support this position, the respondent cited the provisions of Section 107 of the *Evidence Act* and the case of Kiema Mutuku vs Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258.

17. The respondent submitted that the Appellant's testimony regarding how the accident occurred was not corroborated as she was the sole witness. He submitted that no Occurrence Book (OB) was produced and as such it was unclear how a police abstract and a P3 Form was issued without it. He also contended that the evidence of the Appellant that she had never testified in any traffic offence was an indication that liability was not proved.

18. He argued that in the absence of cogent evidence as to causation, submissions cannot take the place of evidence. To support this proposition reliance was placed on the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another [2014] eKLR quoted in the case of Robert Ngande Kathathi vs Francis Kivuva Kitonde [2020] eKLR.

19. The respondent further submitted that the police abstract produced by the Appellant was of no probative value. He cited the case of Douglas Odhiambo & Another vs Telkom Kenya Ltd CA 115/2006 where the Court of Appeal was presented with a similar case and noted that there was no evidence that the 1st defendant was even faulted by the police for the occurrence of the accident as the police abstract produced did not show that anyone was charged with a traffic offence. It thus follows that even where there is no rebuttal, in a matter that requires proof, Section 107 of the Evidence applies.

20. The respondent also cited on the case of Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR to buttress the proposition that a police abstract is not a proof of occurrence of an accident.

21. The respondent thus urged this court to find that the Appellant failed to prove her case against him on a balance of probability and urged this court to dismiss the appeal with costs.

22. On whether the Appellant proved involvement in the accident, the respondent submitted that the O.B. lays a basis of investigations as it is the first document where the circumstances of the accident are entered. He submitted that in the absence of the O.B., it was unclear how the police abstract and P3 form were issued. As such, he stated that the Appellant failed to prove her involvement in the subject accident.

23. On whether the trial court erred in dismissing the suit for clerical errors, the respondent submitted that the treatment chits produced did not bear the names of the Appellant and were undated. He argued that the Appellant did not take any steps to rectify the error in names if any. He submitted that he who comes to equity must come with clean hands and that equity aids the vigilant and not the indolent.

24. In sum, the respondent urged this court to uphold the judgement of the trial court and to dismiss the appeal with costs to him.

Analysis & Determination

25. The main issue in this appeal is whether the appellant proved her case on the balance of probabilities.

26. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 107(1) of the *Evidence Act* provides that :

> 107.
>
> (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.

27. The evidential burden is the onus cast on any party to prove a particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the *Evidence Act* as follows:

> 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 those proceedings, the burden of proving or disproving that fact is upon him.

28. There is no dispute that the appellant had the evidential duty to prove that the respondent was to blame for the accident. As the Court of Appeal stated in Kiema Mutuku vs Kenya Cargo Hauling Services Ltd. [1991] 2 KAR 258, 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.

29. It is clear from the trial court record, that only the Appellant testified on the issue of liability. Her evidence was that on 30th November,2018 at 8.30 a.m along Kanu Street she was travelling with her daughter as pillion passengers aboard Motor Cycle Registration Number KMDG 281 N heading to town. She further stated that there was an oncoming Motor Vehicle registration no. KBB 584 from Town direction that hit them on their lane. She said the accident occurred in the middle of the road. She told court that she reported the accident at Nakuru Central police station and was issued with an Abstract which she produced in evidence. She blamed the subject Motor Vehicle for the accident.

30. On cross examination, she stated that on the said date she was taking her child to the hospital and she had worn a red helmet and a green reflector. That the rider had a yellow helmet and a reflector while her child did not have a helmet or a reflector but she had covered her with a lesso.

31. The Appellant produced Motor Vehicle Search records confirming that the Respondent as the registered owner of the subject Motor Vehicle. The P3 form produced indicated that the Appellant was involved in an accident. The police abstract indicates that the accident involved the subject motor cycle Registration and motor vehicle. It confirms that the same occurred on 30th April,2018 along Kanu Street and that the matter is pending under investigation. The person injured listed therein is one Jackline Artudu.

32. The burden of proof in civil cases on the balance of probability was defined in the case of Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

33. Lord Nichol of the House of Lords in the case Re H And Others (Minors) (Sexual Abuse: Standard of Proof) (1969) stated the Civil standard of proof to be: -

> " 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 event was more likely than not. When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious 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."

34. In the case Miller vs Minister of Pension (1947) ALL ER 373 the civil standard of proof was also said to be: -

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

35. I note the Respondent did not controvert the Appellant's testimony on the manner in which the accident occurred.

36. The trial court dismissed the Appellant's case on grounds that she did not prove that she was involved in the accident. The court found that the police abstract recorded the person injured as Jackline Artudu, the outpatient card that was produced by the Appellant had the name Jackline Anukipi while the medical reports by Dr. Omuyoma and Dr. Kahuthu indicated the patient's name as Jackline Arukude Loyete.

37. It is true, and as pleaded by the Appellant, that she was not the maker of the Police abstract and the outpatient card. The discrepancy in the names, in my view, is not evidence of non-involvement in the accident or fraud. The names are not so materially different or distinct to lead to the conclusion that they refer to different people and not the appellant. They may look different but not by so much. It is common knowledge that different people may record different a name that they hear differently. It would be a miscarriage of justice if courts were to use spelling errors in names, not attributable to a party, to decide a case against him/her. The court has to look at all the circumstances before determining that the documents do not belong to the claimant. I am well aware of cases of fraud in accident claims but in this case the disparity in the names of the appellant was not so grave as to label her case as such. This was just mistakes by the authors of the documents. Is it possible that three different people namely Jackline Artudu, Jackline Arukude Loyete and Jackline Anukipi were involved in an accident at the same locality and on the same day? This is highly improbable, if not impossible.

38. Also as regards the treatment note, from the Rift Valley Provincial Hospital the trial court noted that the same referred to medical conditions unrelated to the accident. I have looked at the document carefully. It discloses that it was for 11th May 2018, which was the last visit by the patient. Clearly it was not related to the accident. However there is reference to the date of 30th April 2018 on the first column and an entry of 'RTA' which column appears to give history of the patient. It is thus possible that the appellant was in that hospital on 30th April 2018 and again on 11th May 2018.

39. Having looked at the totality of the evidence, it is my view that the Trial magistrate erred in finding that the plaintiff has proven her involvement in the accident. The P3 Form which came from the police confirmed her involvement. The O/B number reflected there is O/B 100 of 30/4/2018. The Police abstract refers to the same O/B number. This is further proof that the 2 are related, despite the disparity in the names.

40. The only witness to the accident was the plaintiff. Her testimony on how the accident occurred was not rebutted by any evidence to the contrary. Consequently, I find that the trial magistrate erred in her finding on liability. The Appellant was involved in the suit accident and she proved her case against the Respondent on a balance of probability.

41. I hereby set aside the judgement of the trial court on liability and substitute it with a finding that the respondent was wholly to blame for the accident.

42. As regards assessment and quantum of damages, the trial magistrate correctly proceeded to assess the damages even though she found that the appellant had not proven liability.

43. Now that the finding on liability has been set aside it is my duty to consider if the damages awarded are reasonable.

44. This court will not interfere with a discretionary order/award of the trial court unless it is satisfied that the trial court proceeded on the wrong principles or that the award was manifestly/ excessively high or low.

45. In Gitobu Imanyara & 2 Others vs Attorney General [supra], the Court of Appeal held that -

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A 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." (Emphasis my own).

46. Similarly, the Court of Appeal in Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 1 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"

47. Lastly, in the case of Savanna Saw Mills Ltd Vs George Mwale Mudomo (2005) eKLR the court stated as follows: -

> "It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ..."

48. In the instant case, the appellant pleaded that she sustained the following injuries: -

    a. Blunt injury to the anterior chest wall leading to soft tissue injuries

    b. Blunt injury to the lower back leading to soft tissue injuries

    c. Blunt injury to the left leg leading to Soft Tissue Injuries

    d. Blunt injury to the left hip joint leading to Soft Tissue Injuries

49. I note that the Respondent has not challenged the award that the trial court would have awarded had the Appellant's case succeeded in this Appeal.

50. I will therefore proceed to consider whether such award was manifestly high or low as to justify my interference with her exercise of discretion.

51. It is not in doubt that the Appellant sustained soft tissue injuries. He has asked this court to award him Ksh.350,000/= as general damages relying on the case of Francis Ochieng & another vs Alice Kajimba (supra) where an award of Ksh.500,000/= as general damages was set aside and substituted with Ksh.350,000/= for a plaintiff who had sustained cerebral contusion with loss of consciousness for 2 hours, massive hematoma on the right parietal head, subconjuctual hematoma of the right eye, peri-orbital hematoma, , peri-orbital ecchymosis, nuckial stiffness, cut wound on the right hand and the right knee. The claimant After the accident lost consciousness and was treated at Awendo Health Centre, Ombo Mission Hospital, Migori and later referred to Kisumu Aga Khan Hospital and was admitted Milimani Maternity Hospital Kisumu.

52. It is clear from the above case that the claimant in the said authority sustained serious injuries compared to the Appellant herein. Unlike the Appellant, she lost consciousness after the accident and was treated at various hospitals. She was also admitted in different hospitals.

53. The trial court therefore rightly found that the award of Ksh. 350,000/= was on the higher side.

54. I have looked at the following cases with similar injuries:Fred Barasa Matayo vs Channan Agricultural Contractors [2013] eKLR: The court reviewed downwards an award of Kshs. 250,000/= to Kshs. 150,000/= for moderate soft tissue injuries that were expected to heal in eight months' timeDickson Ndungu vs Theresia Otieno & 4 Others [2014] eKLR The court reviewed the award of Kshs. 250,000/- to Kshs. 127,500/= for soft tissue injuries which produced no complains.Purity Wambui Muriithi vs Highlands Mineral Water Company Ltd [2015] eKLR: The award of Kshs. 700,000/= was reduced to Kshs. 150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.

55. Taking into account the aforesaid precedents, passage of time and inflation trends, it is my considered view that an award of general damages of Kshs.160,000/= was not manifestly low and it was within the range of similar awards.

56. Special Damages were rightly awarded by the trial court and I allow the same.

57. In summary, the judgment of the lower court is set aside and in its place I find that the appellant had proven her case on a balance of probability. The award of damages by the lower court is reasonable and is upheld.

58. On costs, it is trite law that these follow the event. The Appellant herein has only succeeded on the issue of liability, but failed on quantum. I therefore order that each party will bear its own costs of this appeal but the appellant shall have full costs in the lower court.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

Mr. Maina for appellant

N/A for respondent

Applicant present