Onyango v Simbi (Civil Appeal E005 of 2022)
[2023] KEHC 22878 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22878 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL E005 OF 2022

JN KAMAU, J

SEPTEMBER 27, 2023

BETWEEN

JOSHUA JAMSUMBA ONYANGO ..... APPELLANT

AND

COLLINS ODUOR SIMBI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M. M. Gatuma (RM) delivered at Vihiga in Senior Principal Magistrate's Court Case No 194 of 2020 on 16th March 2022)

JUDGMENT

Introduction

1. In her decision of 16th March 2022, the Learned Trial Magistrate, Hon M.M. Gatuma, Resident Magistrate, found the Appellant to have been fully liable for the injuries that the Respondent sustained and entered Judgment in favour of the Respondent as against the Appellant as follows:-

    General damages Kshs 800,000/=

    Special damages Kshs 21,085/=

    Future medical expenses Kshs 410,000/=

    Kshs 1,231,085/=

    Plus costs and interest at court rates.

2. Being aggrieved by the said decision, on 12th April 2022, the Appellant filed a Memorandum of Appeal dated 8th April 2022. He relied on nine (9) grounds of appeal.

3. His Written Submissions were dated 8th February 2023 and filed on 14th March 2023 while those of the Respondent were dated 20th March 2023 and filed on 31st March 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. The Appellant also relied on the case of Selle & Another vs. Associated Motor Boat Co Ltd & Others (Supra) and the case of David Kahuruka Gitau vs George Kuria vs Nancy Ann Wathithi Gitau & Another (eKLR citation not given) where the common thread was that an appellate court will re-evaluate the evidence given trial and come up with its own conclusion.

7. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination were:

    a. Whether or not the Appellant herein was liable for the accident herein;

    b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.

8. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Liability

9. Grounds of Appeal Nos (1), (2) and (6) were dealt with under this head as they were all related.

10. The Appellant submitted that the Respondent who was a pillion rider in a motorcycle did not call eye witnesses or a police officer to corroborate his assertions that his driver was driving Motor Vehicle Registration Number KCL 649 Q (hereinafter referred to as "the subject Motor Vehicle") too fast in the circumstances or that he drove carelessly and recklessly at a high speed while attempting to overtake other motor vehicles.

11. In this regard, he placed reliance on the case of Sally Kibii vs Dr Francis Ogaro [2012] eKLR where Mohamed Ibrahim J (as he then was) held that in an adversarial system like ours, a party undermined his case drastically by not calling or failing to call witnesses.

12. He asserted that the Respondent failed to produce the sketch maps to show how the accident occurred. It was his further contention that the Respondent produced the Police Abstract Report yet he was not the maker of the same. He added but that in any event, the said Police Abstract Report did not disclose the results of any investigations or findings.

13. He referred this court to the case of Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR where it was held that a police abstract report was not proof of an occurrence of an accident but that it was proof that the occurrence was reported at a particular police station.

14. He also submitted that the Respondent was not wearing any helmet or reflective jacket that would have mitigated the injuries that he sustained and that at no one time did he try to avoid the accident. He submitted that the Respondent was the author of his own misfortune and was thus estopped by the doctrine of non fit injuria from claiming damages from him.

15. On the other hand, the Respondent submitted that the Appellant drove the subject Motor Vehicle into the path of the motorcycle in which he was a pillion rider at the material time of the accident. He asserted that the accident could only have been avoided if the Appellant did not overtake other motor vehicles when it was not safe to do so.

16. He cited Rule 73 of the Traffic Rules under the *Traffic Act* Cap 403 (Laws of Kenya) where it is provided that no vehicle shall overtake other traffic unless the driver of the vehicle had a clear and unobstructed view of the road ahead.

17. He added that any person who drove or rode a motor vehicle or motor cycle respectively on the road was expected to keep a proper look out as was held in the cases of Alfred Chivatsi Chai & Another vs Cecilia Tabu (eKLR citation not given) and Devon Higgins & Another vs Uriah Campbell & Another 2011 HCV 04465 2011. It was his averment that it was not necessary for him to have called another witness as he gave an accurate account of what transpired on that material date.

18. On 13th September 2020, he was a pillion rider on Motor Cycle Registration Number KMEY 862Y TVS make (hereinafter referred to as "the subject Motor Cycle") along Kisumu- Busia Road when the Appellant carelessly and recklessly while driving the subject motor vehicle at an excessive speed tried to overtake a trailer and collided with the said subject Motor Cycle as a result of which he sustained serious injuries.

19. On his part, the Appellant testified that as he was passing Luanda Junction that goes to Vihiga, he saw a matatu parked on the side of the road. He then saw the subject Motorcycle that was being driven at a high speed come to his path. He hooted and swerved to his right. The Motor Cycle rider also swerved to his right where he ought not to have been. He applied emergency brakes, skidded until he hit the said Motor Cycle. He blamed the rider of the said Motor Cycle for having caused the accident.

20. A perusal of the Police Abstract Report shows that neither the Appellant herein nor the rider of the subject Motor Cycle were charged in court for the accident that occurred on 13th September 2020. The matter was shown to have been pending under investigations. As at the time of trial, there was no indication that any of them have been charged with any offence. The court was thus left with the duty to ascertain who between the Appellant and the Respondent herein was to blame for the said accident and/or whether the Respondent could be said to have contributed to the causation of the said accident.

21. The Appellant's assertions that the Respondent tendered in evidence the Police Abstract Report yet he was not the author of the same was rendered moot as the proceedings of 30th June 2021 clearly showed that the said Police Abstract Report was produced by consent of both parties.

22. Right at the outset, this court noted that the Respondent was a pillion rider on the subject Motor Cycle. He could not have taken any evasive action to have avoided the accident herein. The burden was on the Appellant to provide proof to show what actions the Respondent ought to have taken to evade the accident as provided in Section 107 of the *Evidence Act* Cap 80 (Laws of Kenya). The said Section 107 of the *Evidence Act* stipulates as follows:-

> " 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."

23. Section 108 of the *Evidence Act* states that:-

> " 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."

24. Further, Section 109 of the *Evidence Act* provides as follows:-

> " 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."

25. As the Appellant did not demonstrate what action the Respondent ought to have taken to have avoided the said accident and thus failed to discharge his burden of proof, the Respondent could not be said to have contributed to the causation of the accident between the Appellant and the rider of the subject Motor Cycle or to blame for the misfortune that befell him. The doctrine of non fit injuria was thus inapplicable in the circumstances of the case herein.

26. Going further, the court looked at the facts of how the accident occurred and found the version that was given by the Appellant herein not to have been plausible. He did not explain why he was not able to swerve to the left but instead swerved to the right on the path of the subject Motor Cycle. As the Learned Trial Magistrate correctly observed, the Appellant ought to have swerved to his left and not to the right. If at all he was not able to swerve to the left because of the Matatu that was parked on the road, he could not then have blamed the rider of the subject Motor Cycle for having swerved to the right. It was the matatu that could have been blamed for obstructing him.

27. The Respondent did not fault the rider of the subject Motor Cycle for having caused the accident and hence did not sue him in the lower court proceedings. However, he faulted the Appellant fully. In the event the Appellant felt that the rider of the subject Motor Cycle was the one who caused the accident, nothing stopped him from enjoining him as a co-defendant and /or enjoined him as a third party in the proceedings therein, a fact that the Respondent raised in his Written Submissions at the lower court and accepted by the Learned Trial Magistrate.

28. Indeed, Order 1 Rule 3 of the Civil Procedure Rules, 2010 states as follows:-

> " All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

29. Further, Order 1 Rule 10 of the Civil Procedure Rules envisages the addition of a defendant after a suit is filed. It states as follows:-

> " Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.""

30. In addition, Order 1 Rule 15 of the Civil Procedure Rules provides that:-

> " Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

a. that he is entitled to contribution or indemnity; or

b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,

he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit."

31. As there was no obligation on the part of the Respondent to have enjoined a party he did not view to have caused him the injuries that he sustained, the legal and evidentiary burden lay squarely on the Appellant to attribute and prove negligence on the rider of the subject Motor Cycle.

32. Accordingly, having failed to enjoin the rider of the subject Motor Cycle, the Appellant failed to prove that any liability ought to attach against the Respondent herein for the actions and/or omissions of the rider of the subject Motor Cycle.

33. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (6) were not merited and the same be and are hereby dismissed.

II. Quantum

34. Grounds of Appeal Nos (3), (4), (5), (7), (8) and (9) were dealt with together under this head as they were all related but under the following separate and distinct heads.

A. Future Medical Expenses

35. The Appellant pointed out that the claim for future medical expenses was not specifically pleaded and proved contrary to the provisions of Order 4 Rule 6 of the Civil Procedure Rules and was held in the case of Daniel Otieno Migore vs South Nyanza Sugar Company Limited [2008] eKLR and in the case of Tracom Limited & Another vs Hassan Mohamed Adan [2009] eKLR where it was also held that future medical care was a special damage that had to be specifically pleaded and strictly proven and that if the sum could not be ascertained, then an approximate figure ought to be set out.

36. He asserted that the Respondent did not call Prof L.W. Okombo who had prepared the Medical Report to explain the nature of treatment and anticipated costs. It was therefore his submission that the learned Trial Magistrate ought not to have awarded the sum of Kshs 410,000/= under this head and urged this court to set it aside.

37. On his part, the Respondent submitted that he pleaded for future medical expenses the sum of Kshs 410,000/= in his Amended Plaint as per the aforesaid Medical Report. He relied on the case of CK vs Kenya Power & Lighting Limited [2021] eKLR without setting out the exact reasoning that he was advancing. Suffice it to state that one of the conclusions that the court therein arrived at was that one could not predict what future medical costs and/or expenses could be as they would continue incurring.

38. He also referred to the case of Tracom Limited & Another vs Hassan Mohamed Adan (Supra) where he emphasised that although the plaintiff may not specifically state the amount, he or she must plead the same. He thus urged this court not to dismiss his claim under this head.

39. In his Amended Plaint dated 20th December 2020 and filed on 21st December 2020, the Respondent pleaded cost of future medical expenses. The Medical Report dated 3rd November 2020 by Prof L.W. Okombe indicated that the Respondent would require further treatment (orthopedics, analgesics and physiotherapy). The Appellant did not object to the said Medical Report being tendered in evidence by the Respondent herein.

40. Further, the Appellant did not submit on the issue of future medical expenses. He had only argued that the Respondent was entitled to the sum of Kshs 21,035/= which was specifically pleaded and strictly proved.

41. This court agreed with the Respondent that he specifically pleaded for future medical expenses when he amended his Plaint. However, he did not indicate the amount that the doctor had already approximated at Kshs 410,000/=. It was not clear why he failed to indicate the amount for future medical expenses when he amended his Plaint on 21st December 2020 as he was examined almost a month earlier, on 3rd November 2020.

42. Further, there was no explanation why he did not amend his Plaint further or provide evidence of the future medical expenses he had incurred from the time of the medical examination to 1st December 2012 when he testified in court. This was almost a year after the medical examination when it was reasonable to expect that he ought to have incurred part of the future medical expenses which included analgesics, orthopedic and physiotherapy. Notably, a perusal of the receipts showed that they were for the period between 13th September 2020 and 3rd November 2020. There were no receipts after 3rd November 2020.

43. While the Learned Trial Magistrate also noted in her decision that the Appellant was silent on the issue of future medical expenses, this court took the considered view that it was not sufficient for the doctor to have approximated a figure for future medical expenses. The onus was on the Respondent to prove that he was entitled to the future medical costs. The Appellant was under no obligation to assist his case.

44. It was necessary for the Respondent to have demonstrated the expenses he incurred from the time he was examined and/or to explain why he had not incurred a single coin yet he would be expected to have been in pain. A second medical report could have assisted this court in establishing whether or not the Respondent had healed considering that the first medical examination was conducted close to the date of the accident.

45. In the premises foregoing, this court found and held that the Respondent was not entitled to the sum for future medical expenses necessitating the same to be set aside. As the Grounds of Appeal Nos (3), (4), (5), (7), (8) and (9) were intertwined, the same were partly merited on the question of the claim for future medical expenses.

B. General Damages

46. The Appellant submitted that the Respondent had not indicated that he had not healed and/or that he was still attending a medical facility and that during cross-examination he had admitted that he had no documents to show that he was still undergoing treatment.

47. He further submitted that the Learned Trial Magistrate awarded a sum of Kshs 800,000/= for general damages which was not comparative to the decisions she relied upon. He placed reliance on the case of Millicent Atieno Ochuonyo vs Katola Richard [2015] eKLR where the court therein held that it was desirable that so far as possible, comparable injuries be compensated by comparable damages.

48. He relied on the cases of T A M (Minor suing through her father and next friend JOM) vs Richard Kirimi Kinoti & Another [2015] eKLR, Ibrahim Kalema Lewa vs Esteel Company Limited [2016] eKLR and Erick Ratemo vs Joash Nyakweba Ratemo [2018] eKLR where the courts awarded general damages between Kshs 250,000/= and Kshs 300,000/= for fractures of femurs and other soft tissue injuries. He therefore urged this court to set aside the award of Kshs 800,000/= and replace the same with an award of Kshs 250,000/= general damages.

49. On the other hand, the Respondent referred this court to the cases of Patriotic Guards Limited vs James Kipchirchir Sambu [2018] eKLR and Patel vs EA Cargo Handling Services Limited [1983] eKLR where the common thread was that when exercising its discretion, the main concern for the court is to do justice to the parties.

50. He submitted that the cases that the Appellant had relied upon were for 2015, 2016 and 2018 and for less serious injuries. He urged this court to consider the case of Petony Limited & Another vs Samuel Itonye Kagoko [2022] eKLR where the court awarded general damages in the sum of Kshs 800,000/= for a fracture of the left femur (mid-shaft) and swollen left thigh.

51. According to the Medical Report of Prof L.W. Okombe, the Respondent herein sustained fracture of the right thigh and injuries to the chest, abdomen, right hip joint, right ankle joint, right first toe and right knee which was bruised and swollen. At the time of his medical examination, he had not healed and complained of pains on the parts that he had sustained injuries. An X-ray that was done showed the implant in the middle shat femur was intact, protruding proximally. The bone fragments were well reduced and hip joint space was normal.

52. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of Margaret T. Nyaga vs Victoria Wambua Kioko[2004] eKLR.

53. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

54. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

55. Indeed, in the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated as follows:-"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."

56. Remaining faithful to the doctrine of stare decisis, this court had due regard to the case of Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR with a view to coming to a fair and reasonable assessment of the general damages that ought to be awarded herein.

57. Sitting on appeal in that case, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screwsor.

58. In the case of Jackson Mbaluka Mwangangi v Onesmus Nzioka & Another [2021] eKLR, the respondent therein a blunt injury to the right shoulder and fracture of the right femur. At the time of the examination, he was still complaining of the healing right femur. In the opinion of the doctor, the respondent suffered severe skeletal injuries and though complete healing was anticipated, he would suffer from degenerative osteoarthritis at a later stage. It was the doctor's opinion that further surgery was necessary to remove the nail at an estimated cost of Kshs 100,000/=. In 2021, Odunga J (as he then was) enhanced the general damages from Kshs 350,000/= to Kshs 600,000/=.

59. In the case of Akamba Public Road Services vs Abdikadir Adan Galgalo [2016] eKLR this very court reduced the lower court award of Kshs 800,000/= to Kshs 500,000/= where the respondent therein had sustained a fracture on the right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. In his prognosis the doctor observed that the respondent therein had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain and estimated the permanent partial disability at three (3%) per cent. It was his opinion that the soft tissue injuries would leave no residual disability.

60. It appeared to this court that the main injury that the Respondent herein sustained was the fracture of the femur. A fracture is not a minor injury. Bearing in mind the injuries he sustained, comparable general damages that have been awarded in similar cases and the inflationary trends, the sum of Kshs 250,000/= that the Appellant had proposed was so inordinately low as not to adequately compensate the Respondent for the injuries that he sustained. Indeed, the cases that the Appellant relied upon were old and could not assist the court in coming up with a comparable award for general damages. It would actually be a travesty of justice to the Respondent herein to rely on the cases the Appellant referred this court to. On the other hand, the case of Petony Limited & Another vs Samuel Itonye Kagoko (Supra) that the Respondent relied upon was more realistic as it was recent.

61. This court thus came to the firm conclusion that the sum of Kshs 800,000/= that was awarded by the Learned Trial Magistrate was not inordinately high so as to warrant the interference by this court. It thus left the award for general damages undisturbed.

Disposition

62. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 8th April 2022 and lodged on 12th April 2022 was partially merited. The effect of this decision is that the Judgment of Kshs 1,231,085/=that was entered by the Learned Trial Magistrate in Vihiga in PMCC No 194 of 2020 on 16th March 2022 be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondents herein against the Appellant for the sum of Kshs 821,085/= made up as follows:-

General damages Kshs 800,000/=

Special damages Kshs 21,085/=

Kshs 821,085/=

Plus costs and interest at court rates.

63. For the avoidance of doubt, interest on special damages will accrue at court rates from the date of filing suit until payment in full while interest on general damages will accrue at court rates from the date of judgment of the Trial Court until payment in full.

64. As the Appellant was only partly successful in his Appeal, each party will bear its own costs of this appeal.

65. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF SEPTEMBER 2023

J. KAMAU

JUDGE