Gakunga & another v Mwangi (Civil Appeal E103 of 2022)
[2023] KEHC 24062 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E103 OF 2022

DAS MAJANJA, J

OCTOBER 26, 2023

BETWEEN

STEPHEN GAKUNGA ..... 1ST APPELLANT

MUWAPEKA LIMITED ..... 2ND APPELLANT

AND

PATRICK KINYUA MWANGI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.E. J. Cherop, RM dated 14th December 2022 at the Magistrates Court, Naivasha in Civil Suit No. E330 of 2021)

JUDGMENT

1. The appeal results from a suit filed by the Respondent against the Appellants following a road traffic accident involving the Respondent and the 1st Appellant on 19.04.2021. At the material time, the Respondent was a rider of motor cycle registration no. KMEQ 717A which was allegedly hit by motor vehicle registration no. KBS 576X driven by the 1st Appellant along the Gilgil - Naivasha highway at Kampi Somali area towards Nakuru.

2. The Respondent suffered injuries comprising a fracture to the right tibia, soft tissue injuries of the forehead, soft tissue injuries of the left elbow joint and soft tissue injuries of the left leg. These are outlined in the medical report by Dr. W. K. Kiamba dated 18.05.2021 and the discharge summary from Nakuru Level 5 hospital. The trial court found the Appellant fully liable and awarded the Respondent Kshs 500,000.00 and Kshs 168,770.00 as general and special damages respectively.

3. The Appellants are dissatisfied with the judgment of the trial court and appeals against liability and quantum of damages in accordance with the memorandum of appeal dated 19.12.2022. The grounds of appeal may be condensed into the following issues for determination. First, whether the trial court erred in law and in fact by finding the Appellants fully liable for causing the accident. Second, whether

the Kshs. 500,000.00 awarded by the trial court as general damages for pain and suffering was excessive and not commensurate with comparable injuries.

4. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the Subordinate Court record and the evidence presented before it in order to arrive at its own conclusion. In *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 the Court of Appeal outlined the duties of a first appellate court as follows:

> [An appellate 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...

5. In finding the Appellant fully liable for the accident, the trial court considered the testimony of the Respondent and 1st Appellant. In assessing the evidence, the trial magistrate observed that there was a disparity between 1st Appellant's testimony given at the trial and what was contained in his written statement. In his written statement, the 1st Appellant stated that the Respondent overlapped his motor vehicle, crossed from the left to the right abruptly thus causing the appellant's motor vehicle to hit the motor cycle. In his oral testimony, the 1st Appellant changed his testimony and stated that the Respondent emerged from the left side of the road, took a U-turn on the wrong side of the road causing him to hit the motor cycle. Based on this account, the trial magistrate rejected both versions of the 1st Appellant's testimony as unreliable and concluded that the Respondent's version as to how the accident occurred was uncontroverted.

6. To put the trial court's findings in context, the Respondent's testimony was that he was riding from towards Nakuru in front of the motor vehicle KBS 576X and they were both headed in the same direction. At around Kampi Somali, he looked in the mirror and further looked behind and saw that the motor vehicle was about 200m behind him. He then indicated his intention to turn right, but before he could complete his turn, the vehicle hit him from behind causing him to suffer injuries.

7. The Respondent blamed the 1st Appellant for not keeping a safe distance and for speeding thus failing to keep caution on the road. PW 5, the police officer who produced the police abstract also blamed the Appellant as had been indicated in the police abstract. The trial court however noted that the police officer in question was not the investigating officer and the mere fact that the abstract contained information that the driver of motor vehicle KBS 576X was to blame did not establish liability against the Appellants as the purpose of the abstract was to prove that the accident took place and involved the parties and not provide a basis for apportioning liability.

8. The Appellants fault the trial court for holding them fully liable. That the testimony by the 1st Appellant stating that the Respondent did not overlap from behind was meant to corroborate the evidence of the Respondent that he did not overlap. That the corroborative evidence of the 1st Appellant should not be visited against him to draw a negative inference. He stated further that the Respondent did not adduce evidence to discharge his burden of proof regarding the negligence of the 1st Appellant.

9. I have considered the totality of the evidence contained in the 1st Appellant's written statement and his testimony alongside that of the Respondent. The 1st Appellant disowned his own witness statement hence I am constrained to agree with the trial magistrate that the 1st Appellant changed his version of events contained in the written statement and gave a different version during the hearing hence the

trial court was entitled to come to the conclusion that the Respondent, who was an eye witness, was unreliable.

10. The testimony of the Respondent was that both the motor cycle and the motor vehicle were headed in the same direction and that the 1st Appellant failed to drive carefully and keep distance as required and rammed into the motor cycle from behind. Vehicles when normally driven on the correct side of the road at reasonable speed do not run into each other hence in the absence of any other credible evidence from the Respondent, the trial magistrate was right to hold that if the vehicles were headed in the same direction and if due care had been taken as required, there would not have been an accident. The evidence on a balance of probabilities leads to an inference that the motor cycle was hit from behind.

11. In conclusion, I accept the following observation by the court in *Khambi and Another v Mahithi and Another* [1968] EA 70 where stated that, "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge." Taking this guidance in into account, I do not find any reason to intervene in the apportionment of liability.

12. Turning the issue of quantum of damages, the Respondent suffered injuries comprising of fracture to the right tibia; soft tissue injuries of the forehead; soft tissue injuries of the left elbow joint; and soft tissue injuries of the left leg. A subsequent report prepared by Dr Amos Otara dated 09.03.2022 at the Appellants' behest confirmed the injuries and noted that the Respondent did not suffer any permanent disability. The trial court assessed general damages for pain and suffering at Kshs. 500,000.00.

13. The Appellants had submitted that the injuries suffered by the Respondent would be adequately compensated by an award of Kshs. 250,000.00. They relied on several cases such as *Harun Muyoma Boge v Daniel Otieno Agulo MGR* HCCA No. 86 of 2021 where the court awarded Kshs. 300,000.00 for blunt chest injuries, cut wound on the right wrist, deep cut wound on the right foot, fracture of the right tibia and fibula and soft tissue injuries. They also cited *Hashim Mohamed Said & another v Lawrence Kibor Tuwei* [2018] eKLR where the court awarded Kshs. 200,000.00 to the Respondent who suffered a tender swollen face with bruises and lacerations, tender swollen left leg and knee and a fracture of the left femur. Other authorities quoted by the Appellants on related injuries awarded damages in the range of Kshs. 250,000.00 to Kshs. 300,000.00 in the years 2017 -2018 (see *Rayan Investments Limited v Jeremiah Mwkulegwa Kasha* [2017] eKLR and *Maselus Eric Otieno v Unitel Services Ltd* [2017] eKLR).

14. On his part, the Respondent prayed for an award of Kshs. 2,000,000.00 and urged the court to award Kshs. 100,000.00 as future medical expenses under the limb of general damages. He relied on the cases of *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR and *Joseph Musee Muia v Julius Mbogo Mugi & 3 others* [2013] eKLR. In the former case, the Respondent sustained a fracture right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. The had a permanent partial disability, estimated at 3%, of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain. The court reduced the award of Kshs. 800,000.00 to Kshs. 500,000.00. In the latter the court awarded Kshs. 1,300,000.00 as general damages. The Plaintiff sustained cuts on the head, one tooth fell off and one tooth was broken. He had cuts on the legs, on the left elbow and had a left leg plaster. The left tibia and fibula was broken and infected and had nerve injuries leading to a foot deformity on the same leg.

15. In awarding general damages for pain and suffering, the trial court relied on the case of *Naomi Momanyi v G4S Security Services Kenya Limited & Another* [2018] eKLR. It considered that the

plaintiff in that case suffered injuries having closely related to the injuries suffered by the Respondent. In that case, the court awarded Kshs. 300,000/- for a fracture of the right tibia, blunt injuries on the back and multiple bruises on the left arm. Considering inflation since the award was made in 2018, the trial magistrate awarded Kshs. 500,000.00.

16. The trial magistrate did not err in estimating the similarity of injuries suffered. Considering that the Appellant cited cases that were dated and those cited by the Respondent bore little relationship to the injuries sustained by the Respondent, I would not fault the trial magistrate for coming to the conclusion that taking into account inflation, an award of Kshs. 500,000.00. would be sufficient.

17. For the reasons I have set out above, I dismiss the appeal. The Appellant shall pay costs assessed at Kshs. 30,000.00 only.

DATED AND DELIVERED AT NAIVASHA THIS 26TH DAY OF OCTOBER 2023.

G. K. NZIOKA

JUDGE