Otange Group Limited v Nyaura (Civil Appeal E079 of 2022)
[2023] KEHC 24065 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E079 OF 2022

DAS MAJANJA, J

OCTOBER 26, 2023

BETWEEN

OTANGE GROUP LIMITED ..... APPELLANT

AND

JOHN ODHIAMBO NYAURA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon Y M Barasa, SPM dated 6th October 2022 at the Magistrates Court, Naivasha in Civil Suit No. E087 of 2020)

JUDGMENT

1. The appellant contests the judgment of the subordinate court where it was found fully liable for the accident and the Respondent awarded damages. The respondent was a passenger in motor vehicle registration No KCR 508A which collided with another vehicle registration No KCV 984Y on 01.10.2023 along the Mai-Mahiu Naivasha road. As a result of the injuries, the Subordinate Court awarded the Respondent Kes 500,000.00 and Kes 10,805.00 as general and special damages respectively this precipitating this appeal.

2. The appeal, encapsulated in the memorandum of appeal dated October 24, 2023, is both on liability and quantum of damages awarded. Although it raises 11 grounds, the issues in the appeal are three. First, whether the trial court erred in finding the appellant fully liable. Second, whether the award of Kes 500,000.00 as general damages is excessive in relation to the injuries sustained by the respondent and last, whether the respondent pleaded and proved special damages.

3. Whether and to what extent the appellant is liable is a question of fact. In dealing with this issue, it is important to recall the general principle governing the exercise of this court's appellate jurisdiction. It is that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, 126).

4. The appellant has faulted the trial court for finding it fully liable for the occurrence of the accident. Its contention is that the respondent did not discharge his duty of proving his case on a balance of probabilities. The appellant submits that the mere fact that the accident occurred does not mean that it was caused by the negligence of the appellant or its agents. It questions the trial court's reliance on the police abstract which does not contain information regarding the extent of the investigations undertaken, and does not state who was to blame for the accident.

5. It is not in dispute that the accident subject to the suit occurred. Indeed, the purpose of the police abstract produced by PC Latenya Sirere in evidence is to confirm the particulars of the accident; where and when it occurred, the vehicles involved and the person injured (see *Peter Kanuthi Kimunya v Aden Guyo Haro* [2014] eKLR and *Catherine Mbithe Ngina v Silker Agencies Ltd* [2021] eKLR). The accident involved motor vehicle no. KCR 508A and KCV 984Y. The respondent was a passenger in motor vehicle no. KCR 508A. The respondent's testimony of at the trial was that he was injured when motor vehicle No. KCR 508A rammed into motor vehicle no KCV 984Y from behind. The Respondent testified that the driver of motor vehicle KCR 508A was driving recklessly and was under the influence of alcohol. That he tried to overtake motor vehicle KCV 984Y but realized albeit late that there was not enough space to overtake because of an oncoming vehicle. He thus swerved back into his lane causing motor vehicle KCR 508A to hit motor vehicle KCV 984Y from behind. The appellant did not call any witnesses or adduce any evidence to controvert the Respondent's evidence.

6. The allegations on recklessness and drunkenness of the driver of motor vehicle KCR 508A notwithstanding, the accident occurred as a result of collision between two motor vehicles. The Respondent was only a passenger in motor vehicle KCR 508A and was not in control of any of the vehicles that were involved in the accident hence he could not be held liable for the accident or indeed his own injuries (see *West Kenya Sugar Co Limited v Lilian Auma Saya* [2020] eKLR). Although the appellant, in its statement of defence, blamed the driver of motor vehicle registration number KCV 984Y, it did not seek to join him either as a co-defendant or a third party to the suit. The court's hands were therefore tied in finding any liability or contribution against a party not joined to the suit (see *Kenya Commercial Bank Ltd v Suntra Investment Bank Ltd* [2015] eKLR). Further by failing to call any witness to support the allegations of negligence against the plaintiff, there was no basis upon which the court could apportion any liability against the plaintiff. On the whole therefore, I find that the respondent's evidence was uncontroverted. I therefore affirm the trial court's finding on liability.

7. Turning to the issue of quantum of damages, it is beyond argument that the general principle upon which an appellate court can interfere with an award of damages was that stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 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 inordinately high or low.

8. The appellant decries the award of Kes 500,000.00 as general damages and submits that it is too high for the type of injuries suffered by the respondent. A look at the medical report by Dr. Obed Omuyoma dated October 19, 2020 shows that the injuries suffered by the Respondent comprised a fracture of the middle phalanx of the left big toe; severe soft tissue injuries of the left foot; soft tissue injuries of the face; blunt injuries to the anterior chest wall leading to soft tissue injury. The trial court accepted these injuries and relied on the case of *Kenya Power & Lighting Company Ltd v Margaret Wanjiku Njunge* [2019]eKLR to award the Kes 500,000.00. In that case, the respondent lost the distal phalanx of the right thumb and left little finger, sustained soft tissue injuries to the right index finger, injuries

to the left ring finger that caused deformity even after healing; soft tissue injuries to the face and to the anterior chest wall. The respondent's level of permanent disability was assessed at between 15-20%.

9. A comparison of the respondent's case and that of the claimant in *Kenya Power & Lighting Company Ltd* (*supra*), which was the only case cited by the respondent, and which the trial magistrate relied on to make the award, reveals that the two cases are a distant apart as comparators. The respondent in that case suffered more severe injuries leading to loss of two toes and deformity of the ring finger which resulted in an assessment of permanent disability. Although Dr Omuyoma characterized the injuries sustained by the Respondent as grievous harm, there is no evidence that the Respondent sustained permanent disability.

10. The appellant urged the court to award Kes 150,000.00 and cited *Peter Kioko & Jamila E Achieng v Hellen Muthee Muema* [2018] eKLR where the court awarded Kes 200,000.00 to the plaintiff who sustained a crush injury on the left toe which was later amputated and *John Kipkemboi and another v Bramwel Vikinu* [2020] eKLR where the court considered Kes 200,000.00 for an amputated toe as sufficient compensation.

11. In assessing damages at large, the court is guided by awards made by the court in similar cases. This principle was summarized by the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR which stated that, "comparable injuries should attract comparable awards". Of course, the court must also factor in such awards inflation over a period to time (see *Charles Oriwo Odeyo v Appollo Justus Andabwa & another* [2017] eKLR). I think the cases cited by the respondent are more relevant to the matter at hand. However, the injuries therein refer to the loss of the toe which is unlike this case. I therefore hold that the sum of Kes 500,000.00 is excessive and does not reflect the nature and extent of the injuries sustained by the respondent in line with the authorities cited. I would consider a sum of Kes 300,000.00 as sufficient recompense for the respondent as general damages for pain and suffering

12. The general principle regarding special damages is that special damages must be pleaded and proved with particularity (see *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR). In this case, the plaintiff pleaded particulars of special damages at paragraph 5 of the Plaint. These comprised Kes 7,000.00 for the medical report, Kes 100.00 for the police abstract, Kes 1000.00 for the P3 medical form, Kes 575.00 for search certificate and Kes 2,130.00 for medical expenses all totaling Kes 10,805.00. Although the respondent did not state in the reliefs that it was seeking Kes 10,805.00 as special damages, the amount was properly particularized in the body of the plaint and the plea for special damages could only refer to what was particularized. The purpose of pleading special damages is to alert the other party on what it seeks to prove. In this case, the appellant was not prejudiced as all the particulars of special damages were provided and in fact proved by producing the supporting documents. I do not find any merit in the complaint regarding special damages.

13. In conclusion, I allow the appeal only to the extent that the award of general damages of Kes 500,000.00 is set aside and substituted with an award of Kes 300,000.00 only.

14. The appellant shall have costs of the appeal assessed at Kes 25,000.00

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

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

G. K. NZIOKA

JUDGE