Mugo v Nyaguthii (Civil Appeal 81 of 2019)
[2023] KEHC 24186 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24186 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 81 OF 2019

FN MUCHEMI, J

OCTOBER 25, 2023

BETWEEN

PAUL MUNENE MUGO ..... APPELLANT

AND

FLORENCE NYAGUTHII ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Y. M. Barasa (RM) delivered on 14th June 2018 in Kerugoya CMCC No. 162A of 2018)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Kerugoya Resident Magistrate in CMCC No. 162A of 2018 arising from a road traffic accident whereby judgment was delivered in favour of the respondent as against the appellant in the following terms:-
    a. Liability 100%
    b. General damages Kshs. 800,000/-
    c. Future medical expenses Kshs. 116,000/-
    d. Special damages Kshs. 21,980/-
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
    a. The learned trial magistrate erred in fact and in law in finding the appellant 100% liable for the accident;

b. The learned trial magistrate erred in fact and in law in awarding Kshs. 800,000/- as general damages for pain suffering and loss of amenities which amount is manifestly excessive;

c. The learned trial magistrate erred in fact and in law in awarding future medical expenses of Kshs. 116,000/- which amount was not sufficiently proven;

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that he is the registered owner of motor vehicle registration number KBX 553W. He further submits that on the material day, he lent his car to one Robert Waithanji Njeri who borrowed his vehicle to take his friend, the respondent, to Sagana town. As such, the appellant relies on the case of Khayigila vs Gigi & Co. Ltd & Another Court of Appeal Number 119 of 1986 and argues that the driver, one Robert Waithanji ought to have been sued jointly with him.

5. The appellant states that the police abstract produced by the respondent did not show that he was to blame for the accident and that there was no independent eye witness called to testify that indeed the driver of the said motor vehicle was negligent as alleged by the respondent.

6. The appellant further submits that from the respondent sustained multiple soft tissue injuries and a mid-shaft fracture. He argues that no permanent incapacitation was suffered. The appellant submits that the respondent ought to be awarded Kshs. 400,000/- as reasonable compensation for the injuries she suffered. He relies on the case of Lynn Kambua Enterprises vs Edith Vaati Simon Kasika [2021] eKLR where an award of Kshs. 350,000/- was given to a claimant who suffered a fracture of the left clavicle and blunt soft tissue injuries. He further relies on the case of Board of Governors, Narok High School & Another vs Polycarp Kamau Irori [2020] eKLR where the High Court upheld an award of Kshs. 400,000/- for the respondent who sustained a fracture of the mid clavicle, multiple bruises on the right knee, cut wounds on the right hulux toe pain and psychological trauma. In Geoffrey Kamuki & Another vs RKN (Minor suing through her late father and next friend ZKN) [2020] eKLR where the High Court substituted the trial court's award of Kshs. 600,000/- with an award of Kshs. 450,000/- for the following injuries:- blunt trauma to the scalp, which was tender with bruises, blunt trauma to the periorbital region, which was tender, blunt trauma to the right eye which was tender and could not see clearly, blunt trauma to the chest which was tender, dislocation of the wrist joint and fractures of the right radius and ulna.

7. In respect of future medical expenses, the appellant argues that the respondent ought to produce receipts to prove the same, which she did not do. Further, he states that the trail court erred by awarding future medical expenses without evaluating the medical report by Dr. Kane Maina.

The Respondent's Submissions

8. The respondent submits that she was a passenger in motor vehicle registration number KBX 553 which was involved in a road traffic accident on 8th February 2015 along Kagio Sagana road. She states that on reaching Kahero area, the subject motor vehicle suddenly lost control, swerved and left the tarmac road. She states that the said motor vehicle was being driven at a high speed. The respondent further submitted that the motor vehicle belonged to the appellant and that Robert Waithanji was the appellant's agent and the driver of the said motor vehicle. She submits that the appellant called Robert as a witness and he testified that on the material day he was on his way to Sagana town when he saw a moving vehicle on his lane and alerted the driver by flashing his lights. He further testified that just before he moved, his motor vehicle hit a pot hole and his vehicle swerved and rolled severally. He

further stated that he lost consciousness and was admitted at Kerugoya General Hospital for 2 weeks. The respondent submits that although the driver of the subject motor vehicle seemed to blame the driver of the vehicle that was moving from Sagana to Kutus, he did not file any third party proceedings. She further states that her evidence was not controverted and consequently the appellant was found 100% liable for the acts of his driver. To support her contentions, the respondent relies on the case of Stella Muthoni vs Japhet Mutegi (2016) eKLR.

9. The respondent submits that she sustained the following injuries which are confirmed by the case summary from Central Provincial General Hospital, P3 Form and the medical report by Dr. Kane Maina :-

    a. Upper facial bruise wound;

    b. Swollen tender right thigh;

    c. Right sub troncheric and mid shaft femur fracture;

    d. Upper thoracis spine spondylasis;

    e. Lumber spine spondylasis;

    f. Right hip joint osteoarthritis;

    g. Soft and skeletal tissue injuries

10. The respondent relies on the case of Pestony Limited & Another vs Samuel Itonye Kagoko (2022) eKLR and submits that the trial court did not err in awarding a sum of Kshs. 800,000/-.

11. The respondent submits that she prayed for future medical expenses for Kshs. 116,000/- as captured in her amended plaint dated 30th August 2017 and the same was provided for by Dr. Kane Maina in his report dated 9th November 2015. She further submits that the appellant did not lead any evidence to show why she should not be awarded the same.

12. The respondent further states that in her amended plaint in paragraph 6, she pleaded Kshs. 28,450/- as special damages under the heading treatment Kshs. 27,950/- and medical report Kshs. 500/-. From the receipts she exhibited, Kshs. 21,980/- was awarded by the trial court and she thus urges the court to uphold the same.

Issues for determination

13. The main issues for determination are:-

    a. Whether the trial magistrate erred by attributing 100% negligence against the appellant;

    b. Whether the award on general damages was inordinately high;

    c. Whether special damages were specifically pleaded and proven;

    d. Whether the award of future medical expenses was justified.

The Law

14. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....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. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

15. It was also held in Mwangi vs Wambugu [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

16. Dealing with the same point, the Court of Appeal in Kiruga vs Kiruga & Another [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

17. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the trial magistrate erred by attributing 100% negligence against the appellant.

18. The appellant argues that he was not to blame for the accident as he had given his car to one Robert Waithanji and as the driver of the motor vehicle on the material day, he was not enjoined as a party to the suit which the respondent should have.

19. On perusal of the trial court record, the respondent testified that on the material day, she boarded motor vehicle registration number KBX 553W heading to Sagana and on reaching Kahero area, the driver, one Robert suddenly swerved to the left side of the road while being driven at a high speed and lost control of the said vehicle. On cross examination she stated that the driver of the said motor vehicle tried to overtake another motor vehicle and that the oncoming vehicle was on its lane.

20. The appellant testified and stated that he was the owner of motor vehicle registration number KBX 553W and on 8/2/2015, he had given the said motor vehicle to his driver, one Robert Waithanji to take his friend to Sagana town. He later learnt that his car was involved in a road accident. The appellant called the driver, Robert Waithanji as a witness who confirmed that the appellant had employed him as a driver. He further testified that on the material day he borrowed the car from the appellant to take the respondent to Sagana town. He testified that as they were approaching Sagana Technical School, he saw a motor vehicle moving to his side and his motor vehicle hit a pot hole and rolled severally. On cross examination, the driver stated that he was not employed by the appellant. He further stated that there was an oncoming vehicle which was trying to dodge a pothole and it moved to his lane in the process and they collided.

21. Both the appellant and DW2 testified that DW2 was employed by the appellant as a driver. Thus to determine the liability of the appellant as the owner of the motor vehicle, one has to establish the employer employee relationship between him and the driver and secondly whether the driver was

driving the suit motor vehicle at the owner's authority. This was stipulated in the Court of Appeal in the case of Paul Muthui Mwavu vs Whitestone (K) Ltd [2015] eKLR which held:-

> Moreover, even assuming that the issue of vicarious liability was an issue for determination in the Nuthu case, this Court applied Morgans vs Launchbury & Others [1972] 2 ALL ER 607 in which it was stated:-
>
> In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request or express or implied on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner....
>
> In the same Nuthu case the court restated the law on vicarious liability adopting the statement of Newbold P in Muwonge vs A.G. of Uganda [1967] EA 17 as follows:-
>
> The law, is so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable.

22. In view of the foregoing it was not in dispute that there was an express employee employer relationship between the appellant and DW2, the driver. Evidence was adduced that the appellant was aware that his driver was going to Sagana to drop the respondent. He admitted that he had allowed DW2 to drop the respondent at Sagana. Moreover, from the evidence, the driver of the said motor vehicle did not give evidence of the precautionary measures he took to avoid the accident as he owed a duty of care to the passengers in his vehicle

23. The appellant argued that his driver ought to have been joined as a party to this case. The law provides that a driver employed by the owner of a vehicle is vicariously liable in case of injury to a 3rd party in an accident. Whether the driver was joined as a party or not does not affect liability of the appellant. The appellant is liable for the negligent acts of his driver.

24. It is my considered view that the appellant was 100% liable for the accident just as the court below rightly found. In the event, the appellant felt that the oncoming motor vehicle was liable he ought to have instituted third party proceedings against the said motor vehicle.

Whether the award on general damages was inordinately high.

25. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

26. Similarly in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

27. According to the amended plaint, the respondent suffered the following injuries:-

a. Upper facial bruise wound;

b. Swollen tender right thigh;

c. Right sub-troneheric and mid shaft fermur fracture;

d. Upper thoracic spine spodylasis;

e. Lumber spine spondylasis;

f. Right hip joint osteothitis;

g. Soft and skeletal tissue injuries.

28. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr. Kane Maina in his medical report dated 9th November 2015. Furthermore, the respondent was admitted at Kerugoya General Hospital and then referred to Nyeri Provincial General Hospital.

29. On perusal of the court record, the trial magistrate awarded a sum of Kshs. 800,000/- for general damages for pain and suffering. The appellant contends that the said award is inordinately high and submits that an award of Kshs. 400,000/- would suffice. He has relied on the cases of Lynn Kambura Enterprises vs Edith Vaati Simon Kasika [2021] eKLR, Board of Governors, Narok High School & Another vs Polycarp Kamau Irori [2020] eKLR and Geoffrey Kamuki & Another vs RKN (Minor suing through her late father and next friend ZKN) [2020] eKLR. The respondent submits that the sum of Kshs. 800,000/- is reasonable as awarded by the trial court and she relies on the case of Pestony Limited & Another vs Samuel Itonye Kagoko (2022) eKLR. I have perused the authorities cited by the parties and noted that the injuries sustained by the plaintiff in the case cited by the respondent are more severe than those she suffered. The injuries sustained by the claimants cited in the cases by the appellant are more comparable to those sustained by the respondent herein. Therefore taking into consideration that an award of general damages is an exercise of judicial discretion for which the appellate court ought to freely and lightly interfere with and that comparable injuries ought to attract comparable damages, it is my considered view that Kshs. 800,000/- is on the higher side.

30. The learned trial magistrate in her judgment indicated that she took into account the nature of the injuries and the authorities cited by the parties whereby those cited by the respondent had severe injuries than those sustained by the respondent and settled on the award of Kshs. 800,000/-. The magistrate did not make any reference to decisions that she relied on to justify the award of Kshs. 800,000/-. It was only stated that the respondent did not suffer any permanent incapacitation. As such,

this court is of the view that this is a suitable case for the exercise of discretion to interfere with the trial court's finding on general damages for the reason that the quantum that was awarded was so manifestly excessive so as to warrant this court to interfere with the same. All considered, I find that a reasonable and adequate award of Kshs. 550,000/- would suffice for general damages for pain and suffering.

Whether the special damages awarded were specifically pleaded and proved.

31. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

> Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not 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.

32. The respondent pleaded for special damages of Kshs.27,950/-. He produced receipts amounting to Kshs.21,980/-which the court awarded. As such, the amount awarded was pleaded and proved as required by the law.

33. Under the heading of special damages, the respondent pleaded Kshs. 27,950/- for treatment expenses and Kshs. 500/- for the medical report. I have perused the receipts and noted that they add up to Kshs. 21,980/-. Thus it is my considered view that the sum of Kshs. 21,980/- was proved by way of receipts.

Whether the award of future medical expenses was justified.

34. Future medical expenses are in the nature of special damages and hence the same should be strictly pleaded and proven by the claimant. The Court of Appeal in Tracom Limited & Another vs Hassan Mohammed Adan [2009] eKLR stated:-

> We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs Gituma (2004) 1 EA 91, this court had this to say:-
>
> And as regards future medication (physiotherapy) the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does not contemplate as arising naturally from the infringement of a person's legal right should be pleaded.

35. The respondent in her amended plaint pleaded for future medical expenses at the sum of Kshs. 116,000/-. The medical report by Dr. Kane Maina dated 9th November 2015 indicated that the respondent will require to undergo surgery which will cost Kshs. 116,000/-. As such, it is my considered view that future medical expenses was pleaded and proved and that the court below did not err in awarding the said future expenses.

36. Consequently, the award of general damages awarded to the respondent is hereby set aside and substituted with Kshs.550,0000/-. The total mages amounts to Kshs.687,980/- payable to the respondent by the appellant.

37. This appeal is partly successful.

38. Each party will meet their own costs of this appeal.

39. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October 2023