Global Pest Control & General Limited v Kambi (Civil Appeal 208 of 2022) [2023] KEHC 27540 (KLR) (27 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 208 OF 2022

F WANGARI, J

NOVEMBER 27, 2023

BETWEEN

GLOBAL PEST CONTROL & GENERAL LIMITED ..... APPELLANT

AND

SALIM CHARO KAMBI ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. M.L. Nabibya, Principal Magistrate dated 17/11/2022 arising from Mombasa CMCC No. 1635 of 2019. The Appeal is on both liability and quantum.

2. The Memorandum of Appeal raises only two issues, that is: -

    a. Liability

    b. The Quantum of Damages

3. The Plaint dated 20th September 2019 and amended on 30th October 2020, claimed damages for an accident that occurred on 23/12/2017 involving Motor Vehicle Registration Number KBU 491V owned and driven by the Defendant.

4. It was pleaded that the Respondent was lawfully standing at Gapco Petrol Station in Bamburi waiting for hos motor vehicle to be filled up with fuel when Motor Vehicle Registration Number KBU 491V knocked him hence the accident.

5. The Plaintiff set forth particulars of negligence for the accident motor vehicle. The Plaintiff pleaded Ksh. 81,053/= as Special Damages and injuries as follows:

    a. Fracture of the proximal third of the right femur

    b. Puncture wound on the right thigh

c. Blunt trauma to the chest

6. The Appellants entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint.

7. The Trial Court heard the parties and proceeded to render judgement on 17th November 2022. In the Judgement, the Court found 100% liability against the Defendants and awarded the Respondent Kshs. 1,200,000/- in General Damages for pain and suffering, Kshs. 480,000/- loss of earning capacity, Kshs. 300,000/- for future medical expenses with special damages of Kshs. 78,603/-.

8. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

The Appellants' case

9. The Appellants called one witness, the Dr. Jamleck Muthuuri relied on his medical report dated 13th October 2021and the Plaintiff suffered cut wound on the right arm, trauma to the chest, fracture of the right femur and treatment included fixing long nail like metal plates to unite the two broken segments of the bone.

10. Further, the PW1 stated that the right limb was shortened by 5 cm which was significant and the right thigh had a sinus with pus oozing. Permanent disability was assessed at 10% which would increase if associated sepsis was not treated.

The Respondent's Case.

11. The Respondent called 3 witnesses. PW1 was the Respondent. He testified in Court that he was involved in the accident when the accident motor vehicle knocked him when he was standing at the petrol station awaiting his motor vehicle to be filled with fuel. It was his case that the Defendant was to blame for negligent driving. It was his further case that he was a conductor and his pay was about Kshs. 10,000/- per month. On cross examination, he failed to produce evidence to support earning. The witness also testified that though he was then not taking medication.

12. PW2, Dr. Darius Kiema relied on his Medical Report dated 10th September 2019 produced in evidence. He testified on cross-examination that the Respondent suffered fracture of the proximal third of the right femur and assessed at 40% permanent disability. He further stated that the Plaintiff suffered post traumatic arthritis with stiffness in the right knee and hip joints and shortening of the right lower limb.

13. PW3, the Police Officer testified that the accident occurred around 5.30 a.m when the accident motor vehicle lost control and veered off the road before hitting the Plaintiff. It was his case that he was the investigating officer who visited the scene.

The Appellants' Submissions.

14. The Appellants submitted and reiterated that the court erred in finding that the Respondent had proved his case on liability against the Appellant on a balance of probabilities. It was submitted that the Respondent had not proved his case as required under Section 107 of the *Evidence Act*.

15. Reliance was placed on the case of Karugi & Another v Kabiya & 3 others (1987) KLR 347 to canvass the point that the Respondent had not discharged the burden of proof. On quantum, the Appellants submitted that the award of Kshs. 400,000/= in would be adequate compensation for the injuries suffered. It was thus submitted that the award of general damages was inordinately high.

16. Counsel relied among others on the case of Bhachu Industries Limited v Peter Kariuki Mutura (2015) eKLR and submitted that in this case, fractures of the femur and injury to the chest were awarded at Kshs. 300,000/- in general damages and the sum of Kshs. 400,000/= would have been adequate compensation in this case.

17. On the part of the Respondent, it was submitted that the Respondent proved his case in a balance of probabilities as corroborated by the investigating officer who visited the scene that it was the Appellant to fully blame for the accident. Counsel submitted that the Respondent had discharged the burden of proof.

18. The Respondent relied inter alia on the case of Edward Mariga (Minor suing through Stanley Mobisa v Nathaniel David & another (1997) eKLR. Based on this, it was submitted that the Appellant never called the driver of the accident motor vehicle to testify and so the averments in the defence remained mere allegations. They urged me to dismiss the Appeal.

Analysis

19. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

20. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

21. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this 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..."

Liability

22. The Appellants urge me to find that the trial court erred in finding 100% liability against the Appellants because the Respondent was to wholly blame for the accident. They propose that the Judgement of the trial court be set aside and the Plaintiff's suit therein dismissed with costs. On the other hand, the Respondent's case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed.

23. I have perused the Record of Appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. I am asked to established whether the trial court erred in finding, on a balance of probabilities that the Appellant was wholly liable for the accident.

24. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

25. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. Further, in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

26. I also agree that the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

27. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " 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 even was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the 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....."

29. Furthermore, in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance 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...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

30. It is settled that the standard of proof on civil cases is on a preponderance of probabilities. In reevaluating the evidence, I note that the Respondent, on his own testimony confirmed that he was standing at the petrol station when he was hit by the accident motor vehicle.

31. Further, the police officer who testified on behalf of the Respondent informed the court that the accident motor vehicle was to blame for the accident because it veered off the road and hit the Plaintiff. Whereas, the Respondent submitted that this court ought to find 100% liability in favour of the Appellant as the Appellant failed to call the driver of the accident motor vehicle, I acknowledge that this court has to do so carefully guided by the law because the burden of proof still remains with the Respondent.

32. The Court of Appeal in the case Charterhouse Bank Limited (under Statutory Management Vs. Frank N. Kamau (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-

> " We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

33. In this case on liability, I tend to agree with the trial court's finding that the evidence by the Respondent was highly uncontroverted. Indeed, the Appellant never called the driver of the accident motor vehicle to controvert the evidence of the Respondent. As the person driving the accident motor vehicle, such driver would have been crucial to proffer evidence to controvert the Respondent's case in light of the events leading to the occurrence of the accident.

34. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs. Mahithi and Another [1968] EA 70, it was held 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"

35. In the circumstances of this case, I am inclined to find that the reason the driver of the accident motor vehicle was not called to testify is plausibly that his evidence would have been adverse to his case. I say so because it is a well-known rule of evidence founded on Section 119 of the *Evidence Act*, that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favorable to him, may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case, and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. See *Green Palms Investment Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003*; Bukenya & Others vs. Uganda [1972] EA 549; R. vs. Uberle [1938] 5 EACA 58.

36. I am equally persuaded by the reasoning of Odunga, J as he then was in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR where the learned judge stated as follows:

> " 53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded."

37. Stemming from the stated finding of the Learned Magistrate, I find no reason to interfere with the trial court's finding on liability. The liability at 100% as against the Appellant is upheld.

Quantum

38. The Appellant submitted that an award of Kshs. 400,000/- would be adequate compensation while the Respondent submitted that the trial court correctly assessed general damages for pain and suffering as commensurate compensation in the circumstances of this case at Kshs. 1,200,000/=.

39. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant

one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages."

40. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.

41. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

42. Furthermore, in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

43. There is no dispute that the Respondent suffered a fracture of the right femur with posttraumatic arthritis and had a sinus with pus oozing. This was confirmed by both medical officers called by the respective parties. The trial court did not rely on any comparable authorities in its determination. This was misapprehension.

44. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Maureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

45. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high.

46. I now analyze similar fact cases on quantum. In the case of Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR, the court awarded Kshs. 800,000/- for injuries for fracture of the left femur mid-shaft in 2022. In the case of Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR the court enhanced the award to Kshs. 600,000/= for an Appellant who had suffered fracture of the left femur in 2021.

47. All these authorities show that the Appellant's proposed award of Kshs. 400,000/= is inordinately low and is declined in the circumstances. The award of Kshs. 1,200,000/- by the trial court is also inordinately high. I will interfere with it.

48. I take into consideration inflation and changes in economic times from the time the above decided cases were decided. An award of Kshs. 1,000,000/= in General Damages would in my view be adequate compensation based comparable authorities cited above. The appeal on General Damages is thus merited and is hereby allowed.

49. I do not find reason to interfere with the learned magistrate's award of Kshs. 480,000/= for loss of earning capacity. It was based on plausible reason that the Respondent's evidence that he was a conductor was not controverted and he had indeed suffered a borne infection which would affect his work productivity. The trial court cannot be said to have considered irrelevant factors or failed to consider relevant factors in arriving at this value which I will not disturb.

50. Similarly, I note that the ward of Kshs. 300,000/= in damages for future medical expenses was proposed by the Appellant's medical doctor in his report. The Appellant has not appealed against this figure and it remains as awarded by the trial court.

51. The Appellant similarly did not challenge the special damages awarded by the court and the same will remain undisturbed. The Appellant did not appeal against the award of Special Damages. I will not disturb the award under this head.

Determination

52. In the upshot, I make the following orders: -

a. The Appeal on liability dismissed.

b. The Appeal on damages for loss of earning capacity and future medical expenses is dismissed.

c. The Judgement on general damages for pain and suffering is set aside and substituted with Kshs. 1,000,000/=.

d. As the appeal is partially successful, each party shall bear its own costs in the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 27TH DAY OF NOVEMBER, 2023.

F. WANGARI

JUDGE

In the presence of;

Ms. Atieno Advocate for the Appellant

Mr. Kiragu Advocate for the Respondent

Barile, Court Assistant