Muigai & another v Kiiru (Civil Appeal E080 of 2021) [2023] KEHC 26223 (KLR) (27 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26223 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E080 OF 2021

GL NZIOKA, J

NOVEMBER 27, 2023

BETWEEN

EDWARD MBUGUA MUIGAI .... 1ST APPELLANT

FRANCIS NDUNGU MWANGI .... 2ND APPELLANT

AND

SIMON MBURU KIIRU .... RESPONDENT

(Being an appeal against the judgment delivered by Hon. E. W. Mburu Senior Resident Magistrate (SRM) dated 30th November 2021, vide Civil Case No. 188 of 2019 at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. By a plaint dated 11th March 2019 the plaintiff (herein "the respondent") sued the defendantS (herein "the appellants") seeking for judgment for:

    a. General damages

    b. Special damages (Kshs 5,550)

    c. Cost of the suit

    d. Interest

    e. Any other relief deemed fit to grant by this honorable court

2. The respondent's case is that on the 22nd November, 2018, he was travelling as a lawful passenger on motor vehicle registration No. KCS 320 D Toyota along Gilgil-Naivasha road. That, the motor vehicle was being driven by the 1st appellant. That, he drove it negligently that, he caused the vehicle to lose control and hit another motor vehicle registration No. KCN 986F and caused him the said injuries.

3. The respondent further averred that, the 1st defendant was negligently driving in a careless manner, failing to slow down, swerve or brake to avoid the accident failed to keep proper look out for other road users or notice the other motor vehicle involved in the accident, driving on the wrong side of the road and in a zig zag manner.

4. That as a result he sustained the following bodily injuries:

   a. Deep cut wound on the right supra orbital region leading to soft tissue injuries

   b. Soft tissue injures of the upper lip

   c. Soft tissue injuries of the face

   d. Cracked one upper incisor tooth

   e. Further particulars of injuries to be furnished at the hearing hereof by way of medical report.

5. The 2nd appellant was sued as the owner of the vehicle driven by the 1st appellant therefore vicariously liable for his negligent act.

6. However, the appellants vide a statement of defence dated 28th May 2019 refuted the claim. It is the appellants defence that, the accident did not occur that, the respondent was not injured as alleged and neither was the 1st appellant careless, negligent or reckless as alleged.

7. However, on a without prejudice basis, the appellants pleaded that, if the accident ever occurred, then the respondent caused it solely or substantially contributed to the same. That, he failed to take adequate precaution to protect himself, or heed to the safety precautions, or traffic rules. That in the alternative, it was contributed to by the negligence of the driver of the motor vehicle registration No. KCN 986F, as he failed to keep proper look out for other road users, disregarded traffic rules, failed to stop, slow down, swerve or in any other manner avoid the accident. The appellants relied on the doctrines of res ipsa loquitor and volenti non fit injuria.

8. The case proceeded to full hearing and by a judgment dated 30th November 2021, the trial held the appellants 100% liable and awarded damages as follows:

   General damages - Kshs 250,000

   Special damages -Kshs 5,500

   Total award -Kshs 255,500

   The respondent was also awarded costs and interest from date of judgment until payment in full.

9. However, the appellants are aggrieved by the decision of the trial court on both liability and quantum and appeal against it on the following grounds:

   a. That the learned magistrate erred in law in making a finding of damages against the defendants.

   b. That the learned magistrate erred in law and fact in holding that the defendants were 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

   c. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to general damages of Kshs 250,000/= without any tangible proof of the same.

d. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs 5,500/= allegedly spent in what the plaintiff turned to be a merry celebration without concrete documentary evidence.

e. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to excess quantum and special damages without concrete documentary evidence.

f. The learned magistrate erred in law and face in failing to appreciate the long established principles of stare decision precedent law thus bringing law into confusion and thereby deriving on erroneous finding/conclusion, in particular relating to damages.

g. The learned magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.

h. That the learned magistrate erred in law and fact in entering judgment in favour of the plaintiff as against the defendants in spite of the plaintiff's miserable failure to establish her case more especially on quantum.

i. That the learned trial magistrate decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

j. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellant

k. That the learned trial magistrate proceeded on wrong principles when assessing damages to the respondent if any and failed to apply precedents and tenets of the law applicable

10. The appeal was disposed of through filing of submission. The appellant in submissions dated 13th January 2023, relied on the case of; Power Lighting Company Limited & Another vs Zakayo Saitoti Naingola & Another (2008) eKLR as cited in Jennifer Mathenge vs Patrick Muriuki Maina [2020] eKLR where the court set out the principles that guide an appellate court in considering whether to interfere with an award of damages. That, the court should consider whether the damages were inordinately too high or too low. That damages are meant to compensate a party for the loss suffered and should be commensurate with the injuries suffered, and where past decisions are considered they act as a guide and inflation should be taken into account.

11. The appellants argued that, the respondent only sustained soft tissue injuries that were less severe than indicated in the plaint as evidenced by the letter dated 12th February 2019, from AIC Kijabe Hospital that indicated he sustained bruising over the anterior aspect of the leg and laceration over lateral aspect of the right. In the circumstances, the award of Kshs. 250,000 as general damages by the trial court was inordinately high.

12. That an award of Kshs. 100,000 would be reasonable and sufficient compensation and relied on the case of Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018] eKLR where the court held that the actual injuries sustained by the respondent were soft tissue injuries to the lower leg and back and therefore the sum of Kshs. 300,000 awarded the trial court was manifestly excessive and substituted it with a sum of Kshs. 100,000.

13. Further, in the case of Eva Karemi & 5 others vs Koskei Kieng & another [2020] eKLR the court awarded Kshs. 70,000 to the 1st appellant who sustained injuries to her right thigh and bruises on her lower and upper limbs, while the 2nd appellant was awarded the sum of Kshs. 40,000 where he sustained right shoulder pain and a cut wound on her mouth. That, the 3rd appellant suffered pain on her right shoulder and back and was awarded Kshs. 45,000 while the 4th appellant who sustained cuts on the chin and right shoulder tenderness was awarded Kshs. 40,000. Further, the 5th appellant was awarded Kshs. 60,000 for a 2cm cut on the forehead, a cut wound on the right elbow and right leg and ankle joint. Lastly, the 6th appellant was awarded Kshs. 65,000 for a bruising on the forehead, hip and left ankle.

14. The appellant urged the court to allow the appeal and award them the costs of the appeal on the ground that costs follow the event and relied on section 27 of the *Civil Procedure Act*.

15. However, the respondent in submissions dated 26th January 2023, argued that, he proved the 2nd appellant was the registered and beneficial owner of motor vehicle registration number KCS 320D at the time of the accident, which evidence was not rebutted by the appellant. Further, he proved the occurrence of the accident on a balance of probabilities that the driver of the said motor vehicle was blamed for the accident and was fined in a traffic case.

16. Furthermore, he was a fare paying passenger and relied on the case of Robert Gichuchu Maina vs John Kamau (2004) eKLR where it was held that a lawful passenger has no control in the manner a vehicle is being driven and cannot be held liable for an accident unless it is shown that there is something expressly the passenger failed to do.

17. On quantum, the respondent cited the case of Bhutt vs Khan [1977] eKLR 1 KAR where the Court of Appeal laid down the principles upon which the appellant court will interfere with an award of damages where the damages are inordinately too high or too low as to represent an erroneous estimate, or that the judge proceeded on wrong principles, or misapprehended the evidence in some material aspect arriving at an inordinately high or low figure.

18. The respondent submitted that, the injuries he sustained were not in dispute and was corroborated by the treatment notes, the medical report by Dr. Obed Omuyoma and the P3 Form that classified the injuries as maim. That, the trial Magistrate took into account the severity of the injuries, the written submissions and authorities relied on by both parties and justifiably awarded him general damages of Kshs. 250,000 as general damages.

19. He relied on the case of Nganga John & another vs David Ogot Agola [2021] eKLR where the plaintiff suffered two cracked/loose upper molars and blunt injury to the left side of the chest, and the High Court reduced the trial court award of general damages from Kshs. 603,170 to Kshs. 353,170.

20. Further, in the case of Daniel Njagi Mwai & another vs Jennifer Wanjiku John [2014] eKLR the High Court upheld the trial court award of Kshs. 200,000 for general damages where the plaintiff sustained multiple soft tissue injuries to the forehead, left arm and leg, back and neck, a deep cut wound above the nose, left cheek, and a broken tooth.

21. Similarly, in the case of Isaac Muriungi Mbataru vs Silas Kalumani [2017] eKLR the plaintiff sustained swelling/lacerations and bruises on the right side of the face, loss of two upper incisors and tenderness and swelling of the lower back and was awarded Kshs. 350,000 in 2010.

22. On special damages, the respondent submitted that, he pleaded and proved special damages and asked the court to uphold the same. He cited the case of Hahn vs Singh Civil Appeal No. 42 of 1983 [185] KLR 716 where the Court of Appeal held that special damages must not only be specifically pleaded but strictly proved.

23. I have considered the appeal in the light of the materials placed before the court on the issue of liability. I find that, the respondent was a lawful passenger on the appellant's motor vehicle. He was not the driver of any of the two motor vehicles involved in the accident. He was not in control of any one of them. Therefore he cannot have caused and/or contributed to the cause of the accident.

24. Furthermore, the evidence of (PW3) No. 94895 PC Caroline Kilonzo was that, the 1st appellant was charged for carelessly and/or negligently causing the accident. That, he pleaded guilty and was fined. That evidence has not been rebutted. Further, the appellants did not adduce any evidence on how the accident occurred therefore they cannot turn submission into defence. That is not tenable. I therefore uphold the trial court's finding on liability and hold the appellant's 100% liable. If the appellants held the view that the driver of the other motor vehicle contributed to the accident, they should have brought him in as a third party and sought for contribution or indemnity from him.

25. As regard quantum I find that the plaint outlined the injuries the respondent sustained. They were generally speaking soft tissue injuries, and it is not clear why Dr. Obed classified them as grievous harm. Further, during cross-examination, the doctor conceded that, there was no permanent injury and did not ascertain any disability.

26. However, the medical report of Dr. Jenipher Kahua, must be handled with a lot of caution. She was given the brief by the insurance company that insured the appellant's motor vehicle. As can evidently be seen from the conclusion of the report she only makes reference to a laceration to the right eye and soft tissue injuries to the leg and nose. Yet, even the treatment notes she referred to indicates the respondent suffered a cracked tooth. The treatment notes were admitted as part of the respondent's documents.

27. Be that as it were, the respondent was treated and released to go home and for that matter, the injuries were not serious to warrant an admission. Both medical reports indicated that, he has healed with no permanent disability.

28. I have considered the authorities relied on in submissions proposing various sums as general damages. However I noted that, the respondent's submission in the trial court are not part of the record of appeal, though in the trial court's file. Be that as it may, I find that, the amount of Kshs 550,000 sought for is not reasonable in the given circumstances herein.

29. Similarly, the figure of Kshs. 60,000 proposed by the appellants was based on decisions delivered between the year 2013 to 2021 and range between awards of Kshs 60,000 to Kshs 90,000. Obviously with inflation, the sum of Kshs 60,000 is not reasonable. In the given circumstances a reasonable figure over the subject awards would have been sufficent. The figure of Kshs 250,000 awarded doubled the award in these comparable cases and went beyond. I am inclined to interfere with the same. I therefore set aside the figure of Kshs 250,000 and substitute it with a figure of Kshs 180,000 as general damages. The rest of the judgment is upheld. Interest on the awarded sum will be paid from the date of judgment in the trial court to payment in full. The respondent will have costs of the suit in the trial court, the costs of the appeal is assessed at Kshs 20,000.

30. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 27TH DAY OF NOVEMBER 2023.

GRACE L. NZIOKA

JUDGE

<u>In the presence of:</u>

N/A for the appellant

Ms. Adan for the respondent

Ms. Ogutu court assistant