Muia v Mugendi & another (Civil Appeal E057 of 2022) [2023] KEHC 25595 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25595 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E057 OF 2022

LM NJUGUNA, J

NOVEMBER 22, 2023

BETWEEN

DANIEL NUINDI MUIA .... APPELLANT

AND

HUMPHERY GITONGA MUGENDI .... 1ST RESPONDENT

BURTON WACHIRA MURIITHI .... 2ND RESPONDENT

(An appeal from the Judgment of Hon. E.N. Wasike PM in Siakago PMCC No. 63 of 2018 delivered on 27 th October 2022)

JUDGMENT

1. Vide Memorandum of appeal dated 31st October 2022, the appellant seeks orders that:
    a. the appeal be allowed and the judgment of the learned trial magistrate on liability be substituted with a finding that the appellant is not 100% liable for the accident;
    b. the court finds that the damages awarded by the trial magistrate were excessive and reduce the same; and
    c. costs of the appeal be granted to the appellant.
2. The appeal is premised on the following grounds that:
    a. The learned Magistrate erred in law and fact in the manner in which she assessed evidence on liability and concluding that the appellant was 100% to blame for the accident;
    b. The learned magistrate erred in law and fact by awarding manifestly excessive general damages in the circumstances considering the injuries that had been sustained by the respondent according to the evidence;

c. The learned Magistrate misdirected himself in law and in fact in not taking cognizance and applying the established principles in the award of general damages; and

d. The learned Magistrate erred in law and fact in failing to consider adequately, or at all, the submissions on liability and quantum that had been tendered by the appellant and the authorities, thereby arriving at an erroneous decision.

3. The 1st respondent filed a plaint dated 04th July 2018, seeking judgment against the appellant for special damages of Kshs. 5,100/= general damages and costs with interest. The particulars of his claim were that on 02nd April 2017, the 1st respondent was a lawful pedestrian walking along Kiritiri-Embu Road when the driver of motor vehicle registration number KBK 417G unlawfully, negligently and/ or carelessly drove the motor vehicle as a result of which the 1st respondent was hit thereby occasioning him grievous harm. The particulars of injuries were; swollen periorbital area with cut on right eyelid which was sutured, compound fracture on the right anterior mid shaft femur, bruised anterior right mid shaft tibia fibula and surgical toilet right leg wound.

4. The 1st respondent filed an amended plaint amended on 05th September 2018, adding the 2nd respondent as a defendant on the basis of vicarious liability and he also added a claim for future medical expenses. The appellant filed a statement of defense dated 21st September 2018 and an amended statement of defense amended on 19th September 2019, denying the allegations made in the plaint and blamed the 1st respondent for the accident. The 1st respondent filed a reply to the appellant's amended statement of defense dated 08th October 2019, putting the appellant to strict proof of his allegations.

5. PW1 the 1st respondent, stated that on the day of the accident, he was walking along Kiritiri-Embu Road when he was knocked down by the aforesaid motor vehicle. He rehashed the particulars of injuries as stated in the plaint. On cross-examination, he stated that he was admitted at Embu Level 5 Hospital for three months and transferred to Chogoria Hospital where he was admitted for one month.

6. DW1, the appellant, stated that on the material day, he was coming from Matuu heading to Embu and when he reached Kiritiri area, he saw a motor cycle coming from the opposite direction and it had a total of 4 occupants. That the rider of the motor cycle lost control and veered into his lane. That he applied emergency breaks to avert the accident and, in the process, the car rolled off the road. That the motor vehicle was towed to Kiritiri Police Station. On cross-examination, he stated that he was driving at about 75KPH and there was a slight bend on the road at the point where the accident occurred. That the 1st respondent was a pedestrian along that road. That he was charged with a traffic offence but was acquitted.

7. DW2, PC. Peter Auka of Kiritiri Police Station produced police abstract dated 07th April 2017 and an OB extract which stated that the driver of the motor vehicle lost control of his vehicle and knocked down a motor cycle which had 3 pillion passengers. He stated that there was a flaw in their investigations of the accident and the original investigating officer is since deceased. That the 1st respondent was a pedestrian at the time of the accident.

8. The trial court found the appellant 100% liable for the accident and awarded Kshs. 4,900/= as special damages, Kshs. 120,000/= for future medical expenses and Kshs. 3,000,000/= as general damages for pain and suffering and loss of amenities.

9. This appeal was canvassed by way of written submissions. Both parties filed their submissions.

10. The appellant urged the court to re-evaluate the evidence adduced at trial as guided by the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* (1968) EA 123. He argued that under sections 107 and 108 of the *Evidence Act*, the burden of proof lay on the party alleging. That the police abstract

dated 27th January 2018 was never produced during the plaintiff's case and any evidence in support of the plaintiff's case was never produced in court. For this argument, he relied on the cases of *Benter Otieno Obonyo v. Anne Nganga & Another* (2021) eKLR and *Kennedy Nyangoya v. Bash Hauliers* (2016) eKLR and added that liability cannot be established in the absence of the police records on the accident investigation.

11. It was his argument that the fact that the appellant was charged and acquitted of a traffic offence does not mean that he is automatically to blame wholly for this tortuous claim. He relied on the case of *Caroline Endovelia Mugayilwa v. Lucas Mbae Muthara* (2016) eKLR. He argued that according to the investigating officer, the motor cycle was found lying on the opposite lane while the motor vehicle was on its lawful lane, proving that the motor cycle rider was to blame for the accident. That the investigating officer had visited the scene where he found the 1st respondent and two others who were travelling as pillion passengers on the motor cycle, even though the appellant insisted that he was a pedestrian. Reliance was placed on the cases of *Karanja v. Malele* (1983) KLR 147 and *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others* (2014) eKLR for the argument that the 1st respondent should be put to strict proof of this allegation that he was a pedestrian and not a pillion passenger on the motor cycle in order to aid the court in apportioning liability for the accident.

12. Further reliance was placed on Sections 109 and 112 of the *Evidence Act* and the cases of *Victor Muriuki Karobia v. Martin Ingecha Wamburu* (2016) eKLR, *Daniel Muthini Maweu v. Gideon Misheck* (2020) eKLR and *William Kabogo Gitau v. George Thuo & 2 Others* (2010) 1 KLR 526. He stated that the trial magistrate failed to critically analyze the evidence adduced and that the discrepancies in the pleadings should not have been overlooked in assessing liability. He further argued that the medical examination report by Dr. Kane did not mention any permanent incapacity and that the 1st respondent only suffered skeletal and soft tissue injuries. That the trial court misdirected itself on the evidence and therefore awarded general damages based on inapplicable caselaw. He suggested that an award of Kshs. 800,000/= would suffice in the circumstances, citing the decision in the case of *Pestony Limited & Another v. Samuel Itonye Kagoko* (2022) eKLR.

13. On the other hand, the 1st respondent submitted that from the evidence adduced, no negligence was attributed to him in the accident. He cited the case of *Kenya Horticultural Exports Ltd v. Julius Munguti Maweu* (2010) eKLR and urged the court to re-evaluate the evidence adduced and draw its own conclusions but where it finds no need to interfere with the trial court's finding on liability, the same should be upheld. He urged the court not to unsettle the award of general damages as it was based on comparative caselaw in the case of *Christine Mwingina Akonya v. Kairu Chege* (2017) eKLR where the court awarded Kshs. 4,000,000/= as general damages. He also relied on the case of *Jitan Nagra v. Abednego Nyandusi Oigo* (2018) eKLR. It was his argument that two police abstracts emanated from Kiritiri police station and that this happened because the appellant was attempting to control the outcome of the case. He urged the court to uphold the findings of the trial court both on liability and quantum.

14. I have considered the memorandum of appeal and the competing arguments made by the parties herein both at the trial court and on appeal and in my view, the issues for determination are:

    a. Whether the finding of the trial court on liability is sound; and

    b. Whether the trial court's award of general and special damages is justified.

15. While sitting as an appellate court, I am expected to re-evaluate the evidence and make a finding vis-a-vis the finding of the trial court. In the case of D*avid Njuguna Wairimu v. Republic* (2010) eKLR the Court of Appeal held thus:-

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

16. On the first issue for determination, liability is to be established based on the evidence adduced at the trial because liability is a matter of fact. From the available evidence, the court must establish on a balance of probabilities how much blame should be apportioned to the parties. In the case of *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another* (2015) eKLR:

> "Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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."

17. The answer to this question lies in establishing whether the 1st respondent was a pedestrian or a pillion passenger on the motor cycle. PW1 who is the appellant herein stated that he was a pedestrian at the time of the accident and the same was recorded as such in the police abstract issued to him, dated 27th January 2018. PW1 and DW1 both stated in their testimonies that the appellant was a pedestrian. DW1 narrated that he was driving on his side of the road at about 75KPH when the motor cycle rider lost control and hit his car from the side, thereby causing the accident. If the appellant was a pedestrian, he was injured as a result of actions of the driver of the motor vehicle and the rider of the motor cycle, and not himself. In my view, as relates to the injuries sustained by the 1st respondent, the appellant is solely liable for the accident as no third party proceedings were taken out against the driver and/or the owner of the motorcycle.

18. On the second issue of quantum, the trial court was guided by the case of *Hellen Otieno Oduor v. S.S. Mehta & Sons & Another* (2015) eKLR where the court awarded general damages Kshs. 1,500,000/= and Kshs. 200,000/= as future medical expenses. I have considered the injuries sustained by the 1st respondent and the medical reports produced in support thereof. I have also considered decisions by other courts on the same subject of general damages for similar injuries. In the case of *Daneva Heavy Trucks & another v Chrispine Otieno* [2022] eKLR, the court awarded Kshs. 800,000/= and stated thus:

> "I have examined other relevant decisions. In the case of *Godfrey Wamalwa Wamba & another v. Kyalo Wambua* [2018] eKLR, where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the

lower lip, he was in hospital for three weeks, he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court awarded him general damages at Kshs. 700, 000.00, which the appellate court upheld. I note though that the injuries sustained by the appellant in that case were more grave that in the case before me. In *Wakim Sodas Limited v. Sammy Aritos* [2017] eKLR, the respondent sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400, 000.00, which was upheld on appeal. In *Vincent Mbogholi v. Harrison Tunje Chilyalya* [2017] eKLR, the appellate court declined to disturb an award of Kshs. 500, 000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe. In the case of *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1,600,000.00 had the same reduced on appeal to Kshs. Kshs. 800, 000.00"

19. In the case of *Geoffrey Kamuki & another v. RKN (Minor suing through her late father and next friend ZKN* (2020) eKLR, the appellate court upheld an award of Kshs. 450,000/= by the trial court for similar injuries being; 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, the right forehead was swollen and tender, she sustained a dislocation of the wrist joint, she sustained fractures of the right radius and ulna and blunt trauma to the right leg, which was tender.

20. The medical report shows that following the injuries, the 1st respondent will not suffer any permanent disability but will need further treatment to remove the metal plates and screws that were inserted in his leg. The 1st respondent testified at trial that he has not been able to work because of the injuries sustained. That after the accident, he was admitted in hospital for a cumulative period of 4 months, which position was not disputed by the appellant. In my view, and in comparison to awards of other courts, the award for general damages for pain and suffering and loss of amenities is excessive. An award of Kshs.1,000,000/= will suffice.

21. As regards special damages, the trial court awarded Ksh. 4,900/= as proved special damages. I have examined the receipts produced for medical report and hospital bill expenses and the amount of Kshs. 4,900/= has been proved. An award of Kshs. 120,000/= was made for future medical expenses. On this, the trial magistrate noted that the opinion by the doctor regarding future medical expenses did not specify the medical facility where the procedure will be undertaken. The future medical expenses had been estimated at Kshs. 327,000/= but the trial court awarded Kshs. 120,000/=. I agree with the trial court on this award because it may not be possible to know exactly how much money will be needed for future treatment before the treatment becomes due. Such was the position in the case of *Forwarding Company Limited & Another v. Kisilu; Gladwell (third Party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR), where the court stated as follows;

> "..... To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

22. Therefore, I find that the appeal partially succeeds with respect to quantum. The trial court's finding on liability is hereby upheld. For the avoidance of doubt, the court finds as follows:

a. Liability 100% against the appellant

b. General damages for pain and suffering and loss of amenities Kshs. 1,000,000/=

c. Proven special damages Kshs. 4,900/=

d. Future medical expenses Kshs. 120,000/=

Grand Total Kshs. 1,124,900/=

e. Each party to bear their own costs of this appeal;

f. Interest on (a), (b) and (d) above shall accrue from the date of the trial court's judgment until payment in full.

g. All interest shall be at court's rates.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

....for the Appellant

....for the Respondents