Okumu v Rotich (Civil Appeal 28 of 2022)
[2023] KEHC 26398 (KLR) (15 December 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 28 OF 2022

AC MRIMA, J

DECEMBER 15, 2023

BETWEEN

DIANA NJERI OKUMU .... APPELLANT

AND

HELLEN JEBICHII ROTICH .... RESPONDENT

(Being an Appeal arising out of the judgment and decree of Hon. D. K. Mutai (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Civil Case No. E214 of 2021 delivered on 29/09/2022)

JUDGMENT

Introduction:

1. The appeal subject of this judgment arose from the judgment and decree in Kitale CMCC No. E214 of 2021 Hellen Jebichii Rotich v Diana Njeri Okumu & Another (hereinafter referred to as 'the civil suit').

2. In his Plaint dated 8th March, 2021, the Respondent herein, then the Plaintiff, Hellen Jebichii Rotich, averred that on 6th October 2020, while lawfully in a motor vehicle registration number KCQ 619K make Toyota Allion (hereinafter referred to as 'the car'), an accident occurred when one of the car's tyres bursted causing it to veer off the road and overturn.

3. As a result of the accident, the Respondent sustained serious injuries. The Respondent blamed the owner and driver of the car for occasioning the accident. He thus sought damages.

4. After full hearing of the civil suit, the trial Court found the Appellant herein wholly liable in negligence. The Court then awarded general damages of Kshs. 4,000,000/=, Special damages of Kshs. 53,476/= and the cost of removal of metal implant of Kshs. 100,000/=. The Respondent was also awarded costs of the suit and interest at court rates.

5. The Appellant was aggrieved by the decision and preferred an appeal.

The Appeal:

6. A Memorandum of Appeal dated 4th October, 2022 was filed. The Appellant preferred 6 grounds of appeal. She faulted the trial Court for arriving at a wrong finding on liability and in applying wrong principles in assessing damages.

7. The parties canvassed the appeal by way of written submissions.

8. The Appellant's submissions were dated 2nd June, 2023. They were quite extensive and referred to several decisions.

9. On liability, the Appellant submitted that the accident happened outside the control of the driver and that the accident was inevitable after the tyre burst. On the strength of some decisions, the Appellant posited that the driver was never to blame for the accident.

10. To the Appellant, the civil suit was to fail since no negligence could attach to the driver.

11. In the alternative, the Appellant faulted the awards on damages. She submitted that general damages of Kshs. 4,000,000/= were so exaggerated and inordinately high going by the evidence in revealed that the Respondent had fallen down long after the accident where she sustained another fracture. A figure of Kshs. 300,000/= was suggested as adequate compensation for pain, suffering and loss of amenities.

12. The Appellant also faulted the other awards for not having been properly proved in law.

13. In the end, the Appellant prayed that the appeal be allowed and the civil suit be dismissed with costs.

14. The appeal was opposed by the Respondent. Through her written submissions dated 8th June, 2023 she submitted that she did not contribute to the accident in any way and that it was not proved that the accident was inevitable.

15. The Respondent supported the awards made by the trial Court and referred to several decisions.

16. This Court was urged to dismiss the appeal with costs.

Analysis:

17. The role of the first appellate Court was discussed in *Abdul Hammed Saif v Ali Mohamed Sholan* (1955) 22 E.A.C.A. 270. Even though the case was an appeal from the High Court to the Court of Appeal still the applicable legal principles are similar to appeals from the lower Courts to the High Court, hence, its relevance.

18. The Court of Appeal stated as follows: -

> .... An appeal to this court from a trial by the High 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally....

19. See also *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.

20. This Court has carefully considered the Memorandum of Appeal and the parties' rival submissions as well as the authorities relied upon. The Court has also considered the evidence relied on at trial by both parties.

21. In sum, the Respondent testified as PW1. She called 3 witnesses. They were No. 84238 Cpl. Joshua Areman attached at the Kitale Police Station Traffic section who testified as PW2, Dr. Rodger Hannington Kayo who testified as PW3 and Dr. Dan Kipkorir Rono as PW4. The witnesses produced several exhibits.

22. The Appellant testified through DW1 one Emmanuel Kibiwott Kisorio who was the driver of the car. No other witness was called.

23. This Court will not at this point in time reproduce the evidence tendered at trial, but shall deal with such during the discussion on the issue of liability and quantum, which follows shortly.

Liability:

24. Three persons testified on the aspect of the liability. They are PW1, PW2 and DW1.

25. There was consensus on how the accident occurred, the fact that the Respondent was lawfully in the car and that she was injured. The accident occurred as a result of a tyre burst. DW1 contended that the burst was sudden and he tried to manage the vehicle in vain. In other words, the Respondent pleaded the defence of inevitable accident.

26. The defence of inevitable accident was considered by the Court of Appeal for East Africa in *Dewshi v Kuldip's Touring Co.* [1969] E.A 189 where the Court referred to Lord Esher in *The Schwan v The Albano* [1892] P. 419 wherein it was observed thus: -

> .... What is the proper definition of inevitable accident? To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence – that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken between the case of inevitable accident and a mere want of reasonable care and skill.

27. In the above case, the Court of Appeal cited *Barkway v South Wales Transport Co.* [1948] 2 All ER 460, 465 wherein Buckhill LJ., stated: -

> I think that the defendants, in order to avoid liability, must prove to the satisfaction of the Court that they took all reasonable steps to ascertain that the tyre was fit for use ... and I think on the evidence they failed to do so...

28. In *Brenda Nyaboke Michira v German International Co-operation GIZ* [2017] eKLR the High Court summed up the prerequisites of the defence of inevitable accident in road traffic accidents as follows: -

    (i) A driver of any vehicle owes a duty to those in his vehicle to drive carefully and not recklessly or at a high speed under circumstances in which slow speed was required.

    (ii) Where a party pleads inevitable accident, he has an obligation to first give particulars of the alleged inevitable accident and adduce evidence in support of the same.

(iii) Show that something happened over which he had no control or could not have been avoided by the greatest care and skill.

(iv) Has to show that there was probable cause of the accident which does not connote negligence or that the explanation of the accident give rise to the inference of negligence then the defendant, in order to escape liability has to show probable cause of the accident was consistent only with a n absence of negligence.

29. Deriving from the foregoing, for a party to successfully raise the defence of inevitable accident, such is under a duty to plead that defence and to call evidence in support. That is the calling in sections 109 and 112 of the *Evidence Act*.

30. Therefore, in this case, the Appellant was under an obligation to adduce evidence particularly on the roadworthiness of the car. DW1 adopted his statement dated 20th September, 2021 as part of his evidence at trial. Both the DW1's statement and his oral evidence did not any lead evidence on the roadworthiness of the car or the state of the road at the point of the tyre bursted. That was despite stating that the car was inspected and a report released.

31. DW1 only stated that as he drove the car, a tyre suddenly burst and the car veered off the road. Such evidence did not, therefore, discharge the evidential burden of proof on the Appellant. As such, the plea of inevitable accident was rightly disregarded and the Appellant found to be wholly to blame for the accident.

32. In such circumstances, the appeal on liability fails.

Quantum:

33. An appeal on quantum of damages is one relating to the manner in which a trial Court assessed damages. An assessment of damages is generally a difficult task as it hinges on a Court's exercise of discretion.

34. A Court in assessing damages is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler v Butler* (1982) KLR 277.)

35. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, 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 the damage.

36. This position was restated by the Court of Appeal in *Arrow Car Limited v Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* (2013) eKLR.

37. This Court will now reconsider the various heads of damages.

38. On the general damages awarded for pain, suffering and loss of amenities, the Appellant posited that wrong principles were applied and a manifestly high award made.

39. The trial Court awarded the Respondent the sum of Kshs. 4,000,000/= under this head. The injuries sustained by the Respondent were testified upon by PW1, PW3 and PW4. There was also a Medical Report that was prepared by one Dr. Gaya on 10th November, 2021. That report was produced by the consent of the parties in support of the Appellant's case. Apart from the three medical reports, the Respondent's also produced a P3 Form, as well as a Discharge Summary and treatment notes from the Moi teaching and Referral Hospital in Eldoret.

40. According to PW1, PW3 and PW4, the Respondent sustained the following injuries: -T6/T7 unstable fractureLeft clavicle fractureRight-sided haemothoraxFracture of the 6th and 7th ribsT6 and T7 Cord compressionAbsent lower limb motor functionBlood lossSoft tissue injuriesPhysical and psychological pains.

41. Dr. Gaya was instructed to re-examine the Respondent by the Appellant and/or the car's insurer. The examination was on 10th November, 2021. According to Dr. Gaya, the Respondent sustained the following injuries: -Unstable fracture of the thoracic spine at T6/T7 with disc prolapse.Fracture left clavicleFracture ribs with haemothorax.

42. This Court has carefully considered the testimonies of PW1, PW3 and PW4 on the injuries sustained by the Respondent and the resultant effects. All the exhibits have also been reviewed. The Report by Dr. Gaya stated in part as follows: -

> …. She walks with the aid of a tripod walking stick. This is due to bi-malleolus fracture sustained on 13th October 2020 following a fall. The incident has no relationship to the accident that occurred on the 6th October 2020…

43. The Court will, therefore, look into the possibility of the Respondent having sustained further injuries elsewhere after the accident. The accident occurred on 6th October 2020 within Trans Nzoia County. According to the Respondent's Discharge summary from the Moi Teaching and Referral Hospital dated 29th October 2020, the Respondent was admitted into the institution on 7th October 2020 and discharged on 29th October 2020 inclusive.

44. Going by the allegation by Dr. Gaya on the Respondent's fall on 13th October 2020, it, therefore, means that the Respondent fell when he was still admitted at the Moi Teaching and Referral Hospital and sustained a bi-malleolus fracture. Several observations arise from Dr. Gaya's testament. One, the source of the information on the fall was not disclosed. Two, neither the Respondent nor PW4 who was a Doctor from the Moi Teaching and Referral Hospital were cross-examined on the alleged fall. Three, Dr. Gaya did not disclose how he confirmed that there was a bi-malleolus fracture, that is whether it was as a result of an X-Ray examination, any medical notes or otherwise.

45. By placing the evidence by Dr. Gaya, which was not tested in cross-examination, and the evidence by the Respondent and PW4 (which had nothing to do with the alleged fall) on a balanced weighing scale, the evidence by Dr. Gaya is outweighed and thereby amounts to heresay. That evidence is, hence, disregarded.

46. It is now this Court's position that all the injuries captured in the Medical Reports and other medical documents were sustained by the Respondent out of the accident in issue.

47. The P3 Form classified the injuries sustained by the Respondent as 'grievous harm'. The Form defines 'grievous harm' to mean

> '... any harm which amounts to maim, or endanger life or seriously or permanently injures health or which is likely to so injure health, or which extends to permanent disfigurement, or any permanent or serious injury to any external or internal organ....'

48. PW3 assessed the Respondent's disability at 100% when he examined her on 8th April, 2021. PW4 testified before the trial Court on 19th May, 2022. He assessed the Respondent's disability at 80%. Dr. Gaya examined the Respondent on 10th November, 2021. He, however, deferred his 'final and accurate' assessment of the disability to March 2023 terming that '...the right leg fracture that occurred this year has complicated final assessment.'

49. The Appellant seems not to have taken steps to carry out the 'final and accurate' assessment of the disability. As such, this Court will be guided by the evidence of the Respondent, PW3, PW4 and the P3 Form on the resultant disability.

50. The Respondent narrated her condition before the trial Court as follows: -

> .... I still have pain on my back. I am unable to walk without support and I have to use support stick. I am unable to do anything...

51. When the Respondent was examined by PW3 on 8th April 2021, she was not able to walk and was on a wheel chair. When she testified before Court on 9th December 2021 she was able to walk, but with a support stick. That was in a span of around 8 months. The improvement was noted by PW4 when he assessed the disability at 80% when he testified before the trial Court on 19th May, 2022. PW4 was, hence, the latest medical officer to testify on the Respondent.

52. It, therefore, appears that the Respondent's condition improved over time. As a result, it will be unfair to the Appellant to still find the disability at 100%. This Court will find guidance on the Respondent's disability from the testimony of PW4 which was tested in cross-examination. As such, the Court finds and hold that the Respondent suffered permanent disability at 80% as a result of the injuries she sustained.

53. Having settled the aspects of the injuries suffered by the Respondent and the resultant disability, the Court will now look at whether the award of Kshs. 4,000,000/= made to the Respondent was fair and reasonable.

54. Parties tendered their proposals both before the trail Court and this Court on the possible awards. They also relied on various decisions. This Court has considered the submissions and decisions with a keen eye.

55. There is no doubt that the injuries sustained by the Respondent were serious and resulted into a permanent disability. On being examined-in-chief, PW4 stated that '.... the patient [Respondent herein] will not be able to walk as before and would need support to walk....' On cross-examination, PW4 elaborated the Respondent's position in reference to the medical reports and other documents and stated that '... The patient will never walk. He lost 80% of the body functions...'

56. This Court has looked at several decisions with comparable injuries as those sustained by the Respondent. The decisions in *Brenda Nyaboke Michiracase* (*supra*), *A.A. M.V. Justus Gisairo Ndarera & Another* (2010) eKLR, *Brian Muchiri Waihenya v Jubilee Haulers Ltd & 2 Others*, Nakuru HCCC No. 34 of 2014, *William Wagura Maigua v Elbur Flora Limited* (2012) eKLR and *Rosemary*

Wanjiru Kungu v Elijah Macharia Githinji & Another (2014) eKLR seem to be more on point. In those decisions the Courts made awards ranging from Kshs. 3,000,000/= to Kshs. 8,000,000/=. Therefore, this Court finds that the award of Kshs. 4,000,000/= was a reasonable exercise of discretion on the part of the trial Court and that ought not to be disturbed.

57. Turning to the issue of special damages, the Appellant raised two objections. First, that the receipts produced as exhibits by the Respondent did not bear evidence of payment of stamp duty, and, second, that the special damages were not proved.

58. On the first objection, the Court of Appeal in *Paul N. Njoroge v Abdul Sabuni Sabanyo* (2015) eKLR long settled the matter. The decision was captured at length in the Respondent's written submissions. The prevailing position is that

> '.... before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the Court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ......'

59. There is no evidence that the Respondent was given such opportunity in the civil suit. As such, the objection fails.

60. The second objection is on proof of special damages. Agreed, the position in law is that such damages must be pleaded and specifically proved.

61. The Respondent produced a bundle of receipts as Exhibit 5. They amounted to Kshs. 50,476/=. The cost of the medical report of Kshs. 3,000/= was also pleaded as well as the cost of Police Abstract of Kshs. 100/= and Motor vehicle search at Kshs. 550/=. The sum pleaded amounted to Kshs. 54,126/ =. However, the Respondent did not prove the entire costs and the Court finally awarded the sum of Kshs. 53,476/=.

62. The Respondent pleaded the sum of Kshs. 54,126/= in the Plaint dated 8th March 2021. The amount allowed as special damages was, hence, pleaded and proved. The second objection also fails.

63. Lastly, there was the issue of the sum of Kshs. 100,000/= being the cost of removing the metal implant. The amount was captured in the Medical Report prepared by PW3 on 8th April, 2021. The Plaint was filed on 8th June 2021. Therefore, the Respondent was aware of the cost of removal of the implant way before filing of the Plaint. She then ought to have specifically pleaded the amount. Having failed to do so, the sum is, hence, not recoverable.

64. Having dealt with the aspect of quantum in detail, this Court now finds that save for the sum of Kshs. 100,000/= on the removal of the metal implant, the rest of the awards are sustainable. The appeal on quantum, hence, succeeds partly.

Disposition:

65. With the foregoing analysis, this Court hereby makes the following final orders: -

    a. The appeal on liability is hereby dismissed.

    b. The appeal on quantum only succeeds on the limb of the cost of removal of the metal implant at Kshs. 100,000/=. The said amount is hereby disallowed.

    c. The rest of the findings and awards by the trial Court are upheld.

    d. Given that the appeal has partly succeeded, each party shall bear its own costs on appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF DECEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Miss Wambani, Counsel for the Appellant.

Mr. Mberere, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.