Kanyango & 2 others v Napeyok (Civil Appeal 53 of 2018)
[2022] KEHC 11747 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEHC 11747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 53 OF 2018

GWN MACHARIA, J

APRIL 28, 2022

BETWEEN

PETER KANYANGO ..... 1ST APPELLANT

JOHN MWANGI SIMON ..... 2ND APPELLANT

BENSON MBURU KIMANI ..... 3RD APPELLANT

AND

SUSAN NAPEYOK ..... RESPONDENT

(Being an appeal from the judgment and decree in the Senior Principle Magistrate's Court at Naivasha Civil Case No. 588 of 2008 delivered by Hon. N. Njagi (Mr), SRM on the 20th April, 2020)

JUDGMENT

The Appeal

1. The instant appeal is with respect to the judgment by Hon. N. Njagi, SRM delivered on the 20th day of April, 2020 in Naivasha CMCC 588 of 2008 Susan Napeyok vs Peter Kanyango and 2 Others where the trial court awarded Kshs. 130,000.00 as general damages and Kshs. 5,600.00 as special damages as well as costs and interests having found the Appellants 100% liable for the accident.

2. The Appellants were aggrieved by the foregoing awards and filed their Memorandum of Appeal on the 19th day of May, 2010. The appeal is on the Trial Court's finding on both quantum and liability and is based on 10 grounds, that:

    1. The Learned trial Magistrate erred in law and in fact in that having denied the Appellants' an opportunity to amend their Defence via their application date 5th October, 2009 to plead inevitable accident caused by a tyre burst and thereafter proceeding to allow them adduce

evidence on the issue he held that there was no evidence to support the defense of tyre burse so that the Defendant had not pleaded a tyre burst.

2. The Learned trial magistrate erred in law and in fact in finding that the Defendant's motor vehicle was driven at a high speed in absence of any evidence or proof of the same.

3. The Learned trial Magistrate erred in law and in fact in finding that the Defendant's driver was negligent in absence of any evidence to support that allegation.

4. That the Learned trial Magistrate erred in law and in fact in finding that the Plaintiff had proved her case against the Defendants in view of the evidence before court and more particularly in view of the evidence that the accident had been caused by a tyre burst.

5. That the Learned trial magistrate erred in law and in fact in failing to find that the cause of the accident was a tyre burst.

6. That the Learned trial magistrate erred in law and in fact in failing to dismiss the Plaintiff's suit against the Defendant as the accident was inevitable.

7. That the learned trial magistrate erred in law and in fact in basing his judgment on the averments on the plaint yet there was no evidence on record to support these averments.

8. The Learned trial magistrate erred in law and in fact in awarding the Plaintiff Kshs. 130,000/= as general damages which amount is excessive and manifestly high in the circumstances and the amount is an erroneous estimate of the loss/damage suffered by the Respondent.

9. The learned magistrate erred in law and in fact in failing to take into account the medical report by Dr. Omuyoma into consideration finding the nature of injuries sustained were soft tissue in nature and had healed well and went ahead and awarded Kshs. 130,000/= as general damages.

10. The decision of the Learned trial magistrate is against the weight of evidence.

3. The Appellant prayed for Orders:

   i. The appeal be allowed

   ii. The judgment/decree of the Honourable Court be set aside and Plaintiff's suit be dismissed with costs to the Defendant with costs.

4. At the hearing of the appeal, directions were taken that the parties canvass the appeal by way of written submissions.

5. This Court being the first appellate court is required to reconsider the evidence adduced, reevaluate it and draw its own conclusions, bearing in mind that it did not hear and see the witnesses who testified. See: *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.

Background

6. The Respondent commenced the suit vide a Plaint dated the 31st day of October, 2008 alleging that on or about the 17th day of September, 2008, she was travelling as a passenger aboard motor vehicle registration number KYK 391 along Naivasha- Nakuru road at around Marura when the Appellants or their agent and/or employee and/or servant negligently drove, controlled and/or managed motor vehicle registration number KYK 391 it was involved in an accident and subsequently caused the Respondent serious injuries.

7. The Appellant sustained the following injuries:

i. Head injury

ii. Soft tissue injuries to the neck, back, both knee joints and shoulders.

iii. Cut wound on the left middle finger.

8. As a result of the accident the Respondent blamed the Appellants fully for negligence and breach of duty of care as particularized in paragraph 6 of the plaint.

9. The Appellants filed a joint statement of defence dated the 18th December, 2008 in which they denied the occurrence of the accident, negligence on their part and suffering of any injuries by the Respondent as a result of the aforementioned accident.

Evidence

10. The Respondent who was PW1 she testified that she was employed a harvester. On the 17th September, 2008 at around 1400hours she left Naivasha Town for Shalima and was on aboard the subject motor vehicle which lost control and overturned. She reiterated the injuries as per her documents and made reference to treatment notes from Naivasha District Hospital PMFI-1, P3 Form PMFI-2, the Police Abstract PMFI-3, Medical Report PMFI4a and Receipt PMFI-4b. She further testified that she had not fully recovered from the injuries sustained.

11. On cross examination, the PW1 indicated that she was a fare paying passenger and there was a traffic case against the driver which she did not know the particulars.

12. PW2 was Dr. Obed Omuyoma who testified that he examined PW1 and noted she had sustained the injuries as listed. As at the time of examination on 27th October, 2008 PW1 she had pains on the neck and a 2 cm long scar on the left middle finger. He prepared the medical report, receipt for the medical report and for court attendance of Kshs. 6,000.00 produced as P. Exhibit-4, 5 and 6 respectively.

13. PW3, Benson Karera was the health records officer Naivasha District Hospital. He testified that the card belonged to PW1 who was issued with OP No. 54511/08. He produced the treatment notes as P. Exhibit-1.

14. PW4,PC Patrick Mbila was a police officer from Naivasha Police Station. He produced the Abstract as P. Exehibit-3 and testified that PW1 was amongst the injured persons and the matter was still pending under investigations. On cross examination, he responded that he was not the investigating officer.

15. PW5, Milka Wanja Nyathuma was aboard the motor vehicle as a passenger. She testified that the driver of the subject motor vehicle lost control when he tried to negotiate a bend at a high speed. She conducted a search and it revealed the 1st Appellant to be the registered owner of the subject motor vehicle. The motor vehicle copy of records was produced as P.Exhibit-7 and a receipt of 500/- exhibits P.E-8. She blamed the driver of the subject motor vehicle for the accident. On cross examination she responded that the subject motor vehicle was not fitted with seat belts and she did not check the speedometer but could reasonably tell the same was at high speed. She reported the matter to the police station and was not aware of the progress of the investigations.

16. The Appellants called three witnesses in their defence. DW1, PC Patrick Mbila was a police officer who also testified as PW4. He brought the police file and testified that the accident was as a result of a tyre burst. He further testified that the witness statements in the file stated that the accident was consequent to a tyre burst. The scene of the accident was straight and clear and the driver of the subject motor vehicle had never been charged for the same as it was caused by a tyre burst and that the matter was still pending under investigations. He produced the police file and the contents as D. Exhibit-1 and

Abstract as D. Exhibit-2. He confirmed he was not the investigating office, that he did not visit the scene of the accident and that the investigations were yet to be completed.

17. DW2, John Gathara Kuria was a motor vehicle examiner based in Nyahururu. He testified that he had inspected the subject motor vehicle after the accident. It had minor pre-accident defects which would not have contributed to the accident. The report did not account for the control of the motor vehicle. The tyres were in good working condition.

18. DW3, Benson Mburu Kimani was the 3rd Appellant and the driver on the day of the accident. He testified that it was raining and the subject motor vehicle had a tyre burst leading to the accident. It was his testimony that he was driving at about 40km/hr. He confirmed that he lost control of the motor vehicle and it fell and the passengers on board were injured. He denied the motor vehicle ever rolling as a result of the accident and it was him who reported to the police. He had never been charged for any traffic offence with respect to the said incident. He was surprised DW2 indicated there was no tyre burst.

Submissions

19. The Appellants filed their submissions on the 5th day of October, 2021 in which it urged the Court to dismiss and set aside the judgment of the learned trial court and proceed to dismiss the Respondent's claim with costs. In the alternative, if the court is inclined to find the Appellants liable, the Appellants propose that an award in the region of Kshs. 50,000.00 to Kshs. 80,000 would be commensurate to the injuries sustained by the Respondent.

20. The Respondent in opposition to the said appeal urged the Court to dismiss the appeal with costs as the Learned Trial Magistrate had correctly come to a conclusion on the issues of liability and quantum.

21. It further submitted that the Respondent being a fare paying passenger, it was impossible that they can be faulted for the accident which it entirely caused by the Appellants.

22. The Respondent relied on the authority of *Naftaly Muiruri Macharia v Samuel Maina & another* [2018] eKLR where the court held:

> " Having considered the evidence on record and submissions of both parties, I am satisfied that the defence remains mere unsubstantiated allegations. PW2 was a fare paying passenger who expected to be driven to his destination safely. He had no part or role in managing the vehicle nor is there evidence that he was not belted or was standing in the vehicle. Contributory negligence cannot be attributable to him. I find that the 1st defendant was wholly to blame for the occurrence of the accident, and he will bear full liability of 100% and the 2nd defendant is therefore vicariously liable for the negligence of the 1st defendant."

23. The Respondent in submissions filed by learned counsel, M/S Gekonga & Co. urged the court to dismiss the instant appeal with costs.

Analysis and Determination

24. Once again, I reiterate that this being the first appellate court, this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. This position was emphasized in

the case *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999) in the following manner:-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

25. The appeal presents three issues for determination being liability, quantum and costs.

26. On the issue of liability, the Court having re-evaluated the evidence upholds the decision of the Learned Trial Magistrate to find that the Appellants were entirely to blame as the Respondent was a passenger.

27. The Court concurs with the position *Naftaly Muiruri Macharia v Samuel Maina & another* [2018] eKLR cited by the Respondent where it was held that:

> "..., I am satisfied that the defence mere unsubstantiated allegations. PW2 was a fare paying passenger who expected to be driven to his destination safely. He had no part or role in managing the vehicle nor is there evidence that he was not belted or was standing in the vehicle. Contributory negligence cannot be attributed to him. I find that the 1st Defendant was wholly to blame for the occurrence of the accident, and he will bear full liability of 100% and the 2nd Defendant is therefore vicariously liable for the negligence of the 1st defendant."

28. I cannot add more as similar scenario obtains in this case. The driver of the motor vehicle was expected to drive the Respondent to his destination safely and the failure to do so cannot warrant the shifting of blame to the Respondent. The Respondent cannot shoulder any contributory `negligence in the circumstances.

29. Further, DW2 testified that on assessment of the motor vehicle following the accident he noted that there were no tyre bursts as alleged by the Defence. He further noted some minor pre-accident defects which he indicated would not have led to the accident. It remains that the Appellants did not establish the existence of tyre burst as alleged.

30. This Court in affirming the findings of the Learned Trial Magistrate echoes the position in *David Kabesa & another v Harriet Kemunto Mokua* [2020] eKLR where it was held:

> "The case of *Joash Musikhu Vuranje v Wanjiru Mwangi & Another* [2016]eKLR which was referred to by the appellants can be contrasted from the present case since in that case, there was evidence that the vehicle had passed a vehicle inspection test a month prior to the accident. The vehicle inspection report was also produced as evidence in the court. In this case DW 1 only conducted the inspection after the accident.
>
> I agree with the trial court's finding that as a passenger, the respondent could not contribute to the accident. The appellants did prove that the accident had been caused by a tyre burst but could not absolve themselves from liability since they were not able to prove that the tyre that had burst was the one that had been purchased from and vouched for by DW 3. I therefore uphold the trial court's finding on liability".

31. On the issue of whether the award of Kshs. 130,000.00 as general damages was inordinately high to warrant the interference by this Court, I bear in mind that comparable injuries should attract comparable interests as was the position in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR.

32. I am further alive to the doctrine that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the Learned Trial Magistrate which advantage an appeal court by its mode of delivery lacks. See: *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR.

33. It is crucial to note that in order for the appellate court to interfere with the award of the trial court, there has to be sufficient grounds and principles as was held in *Butt v Khan* {1981} KLR 470 and *Kitavi v Coastal Bottlers Ltd* {1985} KLR 470) that:

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."

34. This Honourable Court is guided by the principles on interfering with judicial discretion as laid down in the case of *Price and Another v Hilder* {1996} KLR 95 which laid down the following guidelines that:

> " In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

35. Further, in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, where the Court of Appeal held that –

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:
>
> 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

36. I have considered the medical documents relied on by the Respondent. It is undisputed that she sustained multiple soft tissue injuries.

37. I note that the authorities cited by the Appellants before the trial court were not recent and/or the injuries less severe than those suffered by the respondent. The injuries in the authority cited by the Respondent were more severe than those she suffered. In my view, the award made by the trial court was fair compensation for the injuries suffered by the Respondent and I uphold it.

Disposition

38. The upshot of the foregoing is that this appeal is found to be lacking merit and is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 28TH DAY OF APRIL, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:_

No appearance for the Appellants.

Miss Kiberenge for the Respondent.