P.N. Mashru Limited v Mulama & another (Civil Appeal E072 of 2021) [2022] KEHC 654 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 654 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E072 OF 2021

SN RIECHI, J

MAY 31, 2022

BETWEEN

P.N. MASHRU LIMITED ..... APPELLANT

AND

MARY KHAUMBI MULAMA ..... 1ST RESPONDENT

WINSLUS WAMALWA BUCHUNJU ..... 2ND RESPONDENT

(An appeal from the Judgement and Decree of Hon. S. Mogute P.M in Bungoma CMCC No. 145/2019 delivered on 24/11/2021)

JUDGMENT

1. The 1st respondent sued the appellant in the subordinate court claiming general and special damages, costs and interest following a road traffic accident which occurred on December 10, 2018 when a container being ferried by truck registration number KBU 164K/ZE 2000 fell and landed on a motor vehicle registration number KCE 484H occasioning bodily injury to the 1st respondent.

2. The appellant filed its defence denying negligence on the part of its driver and attributed negligence to the driver carrying the 1st respondent, Mary Khaumbi Mulama.

3. The 1st respondent testified as PW-1 adopting her written statement dated 23/4/2019 where she narrates that while travelling in motor vehicle registration number KCE 484H as a fare paying passenger, the truck was trailing them and when their vehicle stopped at the bus stop to allow a passenger alight, a container carried by the truck fell off the trailer and fell on their vehicle thus occasioning her bodily harm. She was rushed to Bungoma West Hospital for treatment. She later reported the accident at Bungoma Police station and was examined by Dr. Sokobe seven days later.

4. The appellant subsequently closed its case without calling any witness. The parties later filed their written submissions and by a judgement of that court, it awarded Kshs 150,000/= in general damages

and Kshs 6,000/= in special damages. The appellant was aggrieved thus the instant appeal where the appellant raises the following grounds;

1. The learned trial magistrate erred in law and fact in awarding Kshs 156,000/= as general and special damages which was not consistent with the injuries sustained, counsel's submission and legal precedents.
2. The learned magistrate erred in law and fact in arriving at the said general damages and amount not supported by evidence on record.
3. That the learned trial magistrate erred in law and fact in considering extraneous issues while arriving at the said general damages, a decision contrary to the evidence on record.
4. That the learned trial magistrate erred in law and fact in awarding quantum of damages that is manifestly excessive in the circumstances.
5. That the learned trial magistrate erred in law and fact in awarding quantum of damages without having regard to the injuries sustained by the respondent.
6. That the learned trial magistrate erred in law and fact in finding the appellant 100% liable a decision contrary to the evidence and the pleadings on record.
7. That the learned magistrate erred in law and fact in failing to consider the evidence tendered by the appellant.
8. That the learned trial magistrate erred in law and fact n failing to consider the submissions tendered by the appellant.
9. That the learned trial magistrate erred in law and in fact in applying wrong principles of law on arriving at the said general damages.

5. The court directed the appeal to be disposed of by way of written submissions. The appellant raised the following issues as germane to the appeal;

    1. Whether the learned trial magistrate erred in law and fact by awarding the 1st respondent a sum of Kshs 156,000/= as general and special damages that was so excessive as to amount to an erroneous estimate compared to the injuries sustained by the respondent.
    2. Who is liable for the accident and to what accident.
    3. Who should bear the costs of the appeal.

6. Mr. Wanyama, learned counsel for the appellant submits on the first issue and citing the authority in *Tayab v Kananu* [1983] eKLR that the damages awarded ought to correspond with the injuries sustained even though money cannot renew the physical frame of a body. That from the evidence on record, the 1st respondent produced medical reports showing that she sustained both soft tissue and bony injuries. That the award of Kshs 150,000/= is excessive in the circumstances considering that the doctor who treated her at Bungoma County Referral Hospital and Dr. Sokobe who authored the medical report were not called to testify. On this issue, counsel cites the case of *Grace Wangari Mwangi v Woodventure (K) Ltd & 3 others* [2006] eKLR for the proposition that it is vital to call the doctor who authored the medical report.

7. Counsel submits that in as much as the respondent pleaded cracked ribs, the author of the medical report examined the 1st respondent after 7 days of the occurrence of the accident. That the treatment notes from Bungoma West Hospital and the P3 form do not show that the 1st respondent had cracked

ribs nor a bone specialist called to testify on the veracity of this fact. The case of *Hassan Noor Mohamoud v Tae Youn Ann* [2001] eKLR has been cited in support.

8. Counsel also submits that the medical report by Dr. Sokobe was exaggerated thus the court made an award that was too high in the circumstances. For this proposition, counsel relies on *Richard Andanje Abwalaba v Farm Industries Ltd* [2006] eKLR.

9. As such the appellant beseeches the court to award the sum of Kshs 60,000/= based on the authorities in *Eastern Produce (K) Ltd (Chemomi Tea Estate) v Inea Avutu Shitakwa* [2019] eKLR where and *Jotham Murugi v Dancan Mwenda & another* [2016] eKLR where in both cases Kshs 60,000/= was awarded for soft tissue injuries.

10. On liability, it is submitted that from the evidence from the evidence on record, it is not clear whether the 1st respondent was travelling in motor vehicle registration number KCE 484H or KCE 484W. The case of *Dare v Fulham* [1982] 1 C.L.R 658 is cited in support. That similarly, the trial court did not pronounce itself on the apportionment of liability.

11. On the costs of the appeal, counsel submits that under Section 27 of the *Civil Procedure Act*, the appeal is meritorious and ought to awarded costs.

12. On the other hand, the respondent submits on the issue of liability that the accident occurred when a container fell of trailer No. ZE 2000 hauled by truck registration number KBU 164K and the trial court properly directed itself by holding the appellant 100% liable and the appellant did not tender any evidence to controvert the fact.

13. On the quantum awarded under general damages, counsel submits that the sum of Kshs 150,000/= is commensurate with the injuries sustained by the 1st respondent.

14. This being a first appeal, the court is duty bound to re-evaluate the evidence afresh as was held in *Peters v Sunday Post Ltd* [1958] EA 424 , where it was stated;

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

15. The instant appeal revolves around the two issue of liability and the quantum of damages awarded by the trial court.

On the issue of liability, it has been stated not once that there cannot be liability without fault. See *Kiema Mutuku v Kenya Cargo Hauling Services Ltd*. [1991] 2 KAR 258, where it was held;

> there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

16. In a similar vein, the 1st respondent in his pleadings stated that he would be relying on the principle of res ipsa liquitor which was held in *Emmanuel Wawole Mochawa v Harun Kariuki Kamande* [2020] eKLR as;

> This doctrine, translated directly, means the thing speaks for itself. Under the common law of negligence, the res ipsa loquitur doctrine indicates that a breach of a party's duty of care may be inferred or presumed from the events that occurred. In other words, the negligence is so obvious that you can tell that someone had a negligent hand in what happened...

17. In the trial court, PW-1 stated the appellant's truck was sitting in motor vehicle registration number KCE 484H before the container that was being hauled by the truck fell thus injuring the 1st respondent. No explanation was ever tendered by the appellant as the matter proceeded ex-parte. A prudent defendant would have put forth evidence to demonstrate how the plaintiff or rather the respondent contributed to the occurrence of the accident or the steps such plaintiff ought to have taken in the circumstances to mitigate the loss and or injury sustained.

18. In their statement of defence, the appellant had pleaded negligence on the part of the driver carrying the 1st respondent. However, the said appellant did not tender any evidence in proof of the negligence so pleaded. It was duty-bound to adduce evidence to dispel the 1st respondent's allegations as required by Section 107, 108 and 109 of the *Evidence Act* which provides;

> 107.
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> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

19. As such, I find the learned trial magistrate's finding on liability to have been sound and in accordance with the evidence tendered therein.

20. On quantum, the principles governing such awards are now well settled as stated in numerous decisions of this court and the Court of Appeal. In *Charles Oriwo Odeyo v Appollo Justus Andabwa & another* [2017] eKLR it was held;-

> On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision.

21. In *Boniface Waiti & another v Michael Kariuki Kamau* [2007] eKLR the court stated that assessment of damages in personal injury case is guided by the following principles: -

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.

22. In the circumstances of this appeal, the 1st respondent sustained the following injuries; head injury with loss of consciousness for 2 hours, blunt injury to the head, blunt injury to both shoulders, chest injury with cracked ribs. The medical report produced into evidence confirmed this fact. This piece of evidence was not controverted by the appellant by way of cross-examination or evidence in rebuttal and the contention that the injuries were exaggerated has no basis.

23. In the submissions filed at the subordinate court as well as in this court, the appellant had proposed the sum of Kshs 60,000/= as adequate compensation. The 1st respondent on her part had proposed the sum of Kshs 1,000,000/= while the court finally awarded Kshs 150,000/=.

24. The court having reviewed the authorities cited in support of their proposed sums and other awards with similar injuries; particularly the case of *Daniel Ndung'u & another v Harrison Angare Katana* [2020] eKLR where Nyakundi J. after reviewing similar awards reviewed downwards to Kshs 140,000/= a suit where the respondent had been awarded Kshs 350,000/= by the trial court. This authority bears more semblance to this case since the injuries in both instances were soft-tissue in nature. As such, I find no reason to disturb the trial court's award on this limb.

25. The appeal is hereby dismissed with costs to the 1st respondent both in this appeal and the subordinate court.

DATED AT BUNGOMA THIS 31ST DAY OF MAY, 2022

S.N. RIECHI

JUDGE