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Danros Kenya Ltd & another v Mabuka (Civil Appeal 89 of 2019) [2022] KEHC 11711 (KLR) (20 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11711 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 89 OF 2019

RN NYAKUNDI, J

MAY 20, 2022

BETWEEN

DANROS KENYA LTD .... 1ST APPELLANT

MWANGOMBE MWALUGHA .... 2ND APPELLANT

AND

GODFREY KULUBI MABUKA .... RESPONDENT

(Appeal from the Judgment and Decree of the Chief Magistrate's Court at Eldoret in Eldoret CMCC No 110 of 2018 delivered on June 21, 2019 by the learned Honourable Magistrate C Obulutsa)

JUDGMENT

1. The appeal before me has been instituted by the 1st and 2nd appellants against the award of damages by the trial court in the sum of Kshs 3,054,735/= for general and special damages after they were found to be 100% liable for the accident.

2. Aggrieved by the judgment, the Appellants filed a memorandum of appeal dated July 1, 2019. The grounds of appeal are that: -

   1 The finding on liability was erroneous vis-a- vis the issues entailed and the evidence tendered by the Appellants.

   2 The Learned Trial Magistrate's award on damages was inordinately high, improper, unrealistic and inappropriate under all circumstances of the case.

   3 The Learned Trial Magistrate erred both in law and fact in basing his finding on irrelevant matters without taking taking into consideration the evidence of the appellants.

4 The Learned Trial Magistrate erred both in law and in fact in failing to appreciate or take into account the Appellants submissions or at all.

5 The Learned Trial Magistrate erred on all points of fact and law in as far as award of damages is concerned.

3. The appellants' prayed for judgment as follows;-

   a. That the decision of the Chief Magistrate on both quantum and liability in Eldoret CMCC No 110 of 2018 be set aside and a proper finding be made by this honourable court.

   b. That this honourable court do make such further orders as may be just and expedient

   c. Costs of this appeal.

4. At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. The appellants filed their written submissions on August 25, 2021 whereas the respondent filed his submissions on February 7, 2022.

5. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.

6. Being guided by the above principles of law, I shall proceed to evaluate the facts and evidence as presented in the Trial Court.

Brief Facts

7. Vide a further further amended plaint dated June 7, 2018, the Respondent filed suit against the Appellants for general damages, special damages and costs of the suit as a result of a road traffic accident which was alleged to have occurred on or about December 21, 2017, where the plaintiff was lawfully driving motor vehicle registration number KBP 178L along Nakuru- Eldoret Road when at Mlango Nne area, the 2nd defendant while negligently driving trailer registration no KCG 578N/ZF 3975 occasioned an accident for which the plaintiff's motor vehicle KBO 178L was extensively damaged.(sic) The Respondent blamed the Appellants for the alleged accident and set out particulars of negligence. He sought general damages, special damages to a rune of Kshs 54,735 and costs of the suit and interest thereof.

8. The Appellants/defendants filed an amended defence dated June 28, 2018 denying any liability arising from the said accident.

9. The suit was then set down for hearing.

The Evidence adduced

10. At trial the plaintiff called three witnesses in furtherance of his case. PW1, Dr Rono confirmed the occurance of the accident and the subsequently injuries that were sustained by the plaintiff. PW2, Dr Imbezi a medico-legal expert stated that he examined the plaintiff and established that the plaintiff had suffered a fracture right 3 ribs (9th, 10th and 11th), haemothorax with lung contusion and dislocation of the right wrist joint. At the time of examination, the plaintiff was still expieriencing pain on deep chest palpation. He formed the opinion that the plaintiff sustained bony and soft tissue injuries from which he was recovering well. He said that he charged Kshs 6,000/= to prepare the medical report .

11. Peter Barmao , the investigating officer testified as PW3 and stated that on the material day, three motor vehicles registration number KCC 963N, KCG 578N ZF Trailer and KBP 178L were heading the same direction. It was his testimony that the trailer hit the motor vehicle registration no KBP 178L from behind which was being driven by the plaintiff. He stated that the driver of the said trailer was at fault and was even charged with careless driving and fined.

12. On cross examination, the witness said that he visited the scene and confirmed that the vehicle registration no KBP 178L was hit on the left side.

13. The plaintiff testified as PW4. He stated that on December 21, 2017, he was driving his motor vehicle along Nairobi – Eldoret Road when on reaching Mlango Nne, the defendants motor vehicle which was being driven negligently knocked his vehicle from behind as a result of which he sustained injuries and was treated as an inpatient. He stated that he made areport at the police station where he was issued with a P3 form and a police abstract.The plaintiff, blamed the 2nd defendant who was the driver of the trailer. With that evidence the plaintiff closed his case.

14. The defence called Mr Mwangombe Mwalugha the 2nd defendant herein who testified as DW1. DW1 stated that he was driving the trailer to Nairobi and on reaching the scene his vehicle knocked the plaintiff's vehicle from behind. On cross examination, he confirmed that the plaintiff's motor vehicle was damaged at the front. However, he denied being charged with a traffic offence.

15. After the close of the defence case, the trial court directed parties to file submissions and thereafter judgment was delivered by the trial court on 21. 06.2019. The Learned trial Magistrate awarded general damages of Kshs 3,000,000 and special damages of Kshs 54,735. The plaintiff was also awarded costs of the suit and interest.

The appeal

16. On July 6, 2021,the appeal was admitted for hearing and parties agreed to canvass the appeal by way of written submissions.

The Appelant's Submissions

17. Counsel for the Appellant, Mr Kibichy in his submissions dated August 11, 2021, submitted that on the issue of liability, the respondents case was not supported by any evidence and neither was it proved on a balance of probability. It was his position that the respondent in his testimony failed to narrate to the trial court how the alleged accident occurred considering he was the driver in one of the motor vehicles. Counsel submitted that the respondent's testimony was insufficient to hold the appellants liable and the trial court only misdirected itself. It was averred that there can never be liability without fault and that the respondent ought to have showed the trial court how the appellants were at fault. Reliance was placed in the case of *Kiema Mutuku vs Kenya Cargo hauling services Ltd* 1991 cited in *Morris Njagi & Another vs Beatrice Wanjiku Kiura* (2019) eKLR.

18. Counsel submitted that the respondent did not call any eye witness to testify in support of his case and narrate to the trial court how the accident did occur and nevertheless, the trial court went ahead to hold the appellants liable without any cogent evidence by the respondent.

19. It was further submitted that the learned trial magistrate failed to take into consideration the fact that PW3 the investigating officer did not produce before the trial court any sketch map that could have assisted the trial court have some picture of the scene of the accident. Counsel relied on the case of *Evans Mogire Omwansa vs Benard Otieno Omolo & Another* (2016) eKLR.

20. The appellant urged the court to find and hold that the trial court erred in holding the appellants liable without any proper evidence by the respondent.

21. On the issue of quantum, it was submitted that the trial magistrate erred in awarding the respondent damages given the circumstances of the case and that the case to have been dismissed with costs for lack of sufficient evidence. In the alternative, counsel contended that the award by the trail magistrate was inordinately high and manifestly excessive for the injuries allegedly suffered by the respondent.

22. According to the appellants' counsel, the respondent did not prove his case on a balance of probability to warrant being compensated. The case of *Kemfro Africa Limited & Another Vs Lubia & Another* (No. 2)(1987) KLR 30 quoted in *Sokoro Saw Mills Limited V Grace Nduta Ndungu* (2006)eKLR.

23. Counsel urged the court to re evaluate the quantum of damages awarded by the trial court and opined for an award of Kshs 400,000. The following cases were relied upon;

    i. *Morris Miriti V Nahashon Muriuki & Another* (2018)eKLR

    ii. *George Kinyanjui t/a Climax Coaches & another V Hassan Musa Agoi* (2016)eKLR

    iii. *Miriam Njeri Murimi vs Kenya Broadcasting Corporation* (2009)eKLR

24. Lastly on the issue of special damages, it was submitted the trial erred in awarding Kshs 54,735 as the respondent did not produce any receipts in his name to prove that he incurred the amounts alleged. Reliance was placed in the case of *KPLC Ltd vs Clement Likobele Shikondi(personal representative of the estate of Desmond Tutu Likobele)* 2018 eKLR.

25. In the end, the court was urged to set aside the decision of the trial magistrate on both liability and quantum and a proper finding be made that the trial matter be dismissed with costs and the appeal be allowed in its entirety.

The Respondents' Submissions

26. Counsel for the Respondents, Mr Alwanga, in his submissions dated February 7, 2022, submitted that though the appellate court is mandated to review and reverse or otherwise the findings or verdict of the lower court, it must exercise its discretion with caution.

27. On the issue of liability, it was submitted that the police officer who testified as PW3 and confirmed the circumstances of the accident and that the 2nd appellant was blamed for the accident for careless driving. It was further submitted that the 2nd appellant was issued with Notice of intention to prosecute and released on police cash bail of Kshs 10,000.

28. As regards the quantum that was awarded by the trial court, counsel submitted that one of the principles that ought to be considered is whether the plaintiff has so far healed from the injuries sustained and the level of injuries sustained. It was contended that the respondent called PW1 and PW2 who confirmed the injuries the respondent sustained. It was submitted that according to PW2, the respondent was still recovering from the injuries he sustained.

29. It was further submitted that from the medical reports and the testimony of the two doctors, the respondent had sustained a total of four fractures which critically interred with how he carries out his daily duties. According to counsel, the award of Kshs 3,000,000 as general damages is adequate and not inordinately high considering the injuries the respondent sustained.

30. On special damages, it was submitted that the respondent in his amended plaint, pleaded Kshs 54,735 and that the same were produced during the hearing of the case before the trial court. As regards the

payment of the hospital expenses by the National Hospital Insurance Fund, counsel submitted that from the document tendered before court, the insurance paid Kshs 5,200 and the respondent paid Kshs 47,795.

31. It was submitted that the respondent pleaded and strictly proved the special damages awarded by the trial court and as such this court has no business interfering with the said finding.

32. Consequently, the court was urged to dismiss the appeal with costs

Determination

33. The appeal by the appellant challenges liability and the assessment of general and special damages by the trial court as a result of the road traffic accident. The principles upon which this Court acts in such an appeal were stated in the cases of *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 to the effect that the duty of of the 1st appellate court is to re-evaluate the evidence, analyse it to its conclusion but in doing so the court must give allowance to the fact that it has neither seen nor heard the witnesses an advantage only accorded to the trial court.

34. In the case of *Ephantus Mwangi v Duncan Mwangi* (1984)eKLR, it was held that,

> " The hallmark of this case is that an appeal's court will not normally interfere with a finding of facts by the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown the demonstrably to have acted on wrong principles in reaching the finding he/she did."

35. This court has re evaluated the evidence as presented before the trial court.

37. One of the issues that fall for determination in the instant appeal is who was liable for the accident that resulted in the injuries sustained by the respondent and to what extend? Was it the appellants, the respondent or both of them somewhat contributed?

The principles which governs total negligence are not always precise and any evaluation on what constitute the breach of duty of care is expounded in the persuasive cases of "*Adele Shtern v Villa Mora Cottages Ltd and Monica Cummings* [2012] JMCA Civ 20, *Caparo Industries plc v Dickman* [1990] 1 All ER 568 Ng *Chun Pui v Lee Chuen Tat* [1988] RTR 298 said as follows:

> " The requirements of the tort of negligence are, as Mr Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused (see *Clerk & Lindsell on Torts*, 19th edn, para 8-04). The test of whether a duty of care exists in a particular case is, as it is formulated by Lord Bridge of Harwich, after a full review of the authorities, in the leading modern case of *Caparo Industries plc v Dickman* [1990] 1 All ER 568, 573- 574:
>
> 'What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.'
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> As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see *Clerk & Lindsell*, op cit, para. 8- 149; see

also, *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, per Lord Griffiths at page 300). But the actual proof of carelessness may often be problematic and the question in every case must be 'what is a reasonable inference from the known facts?' (*Clerk & Lindsell*, op cit, para 8-150)"

38. The Court of Appeal when determining the issue of liability in the case of *Stapley vs Gypsum Mines Limited* (2) (1953) A C 663 at P 681 stated as follows;

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...
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> "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

39. In the instant appeal, the police officer who testified as PW3 gave evidence and blamed the 2nd appellant for the accident. DW1 in his evidence admitted to hitting the respondent's car from behind. The answer to who was to blame for the accident lies on the question, is there any act that the respondent would have done to prevent the accident considering he was driving on his lane? I do not think we need a rocket scientist to tell us who was to blame. In the premises, I am satisfied that, based on the overwhelming evidence adduced that the 2nd defendant was wholly to blame for the accident. That ground of appeal should therefore fail.

40. The next issue for my determination is with regards to quantum of damages. In *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 , the court of appeal set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

41. From the medico-legal report tendered before the court, the respondent had suffered a fracture right 3 ribs (9th, 10th and 11th), haemothorax with lung contusion and dislocation of the right wrist joint.

42. In the case cited by the appellant of *Njeri Murimi vs Kenya Broadcasting Corporation* (2009) eKLR, the plaintiff was awarded Kshs 450,000/= for the following injuries;a) Cut wounds on the head b) Cut wounds on right forearm, c) Bruising on both head and right forearm d) Fractured ribs L1-6

and R11-12 e) Right haemothorax, Fracture dislocation of the right hip, Fracture dislocations of right shoulder joints.

> In addition the case of Mediana (1900)AC 113 the court had this to say on this issue of grievances on damages by the appellant "Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless, it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such thing. What manly mind cares about pain and suffering that is past? But, nevertheless, the law recognizes that as a topic upon which damages may be given."
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> Thus in law applying the above principles broadly speaking assessment of damages falls squarely under the realm of discretion fashioned with the settled principles more so on past awards and comparable injuries.

43. In my view, the injuries sustained in the cited case were almost similar if not severe than those of the Respondent herein. It would then appear that the amount awarded in the instant appeal was inordinately high. Taking into consideration the inflation rate and the fact that the above cited case was delivered over 13 years ago, I think an award of Kshs 1,500,000 would suffice.

44. As regards special damages, the respondent in his amended plaint pleaded for Kshs 54,735. From the record of appeal at page 40, I note that the amount that was specifically proved via receipts by the respondent was Kshs 47,795 for the medical expenses and Kshs 6,000 for the medical report which totals up to Kshs 53,795.

45. In the end, the upshot is that the appeal succeeds to the extent of the General and Special damages awarded only in the following terms;

    a. Liability apportioned at 100%.

    b. General damages Kshs 1,500,000

    c. Special damages Kshs. 53,795/=

    d. The award of the trial court is substituted with an award of Kshs 1,553,795/= plus costs below and interest at court rates from the date of the Judgment below.

    e. Parties to share the costs of this appeal.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 20th DAY OF MAY, 2022.

....

R NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

M/S Alwanga & Co. Adv for respondent

M/S Kibichy & CO. Adv