Daniel v Kamene (Civil Appeal 24B of 2019)
[2022] KEHC 11179 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 11179 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL 24B OF 2019

RK LIMO, J

JUNE 23, 2022

BETWEEN

CHRISTINE DANIEL ..... APPELLANT

AND

SAMMY KAMENE ..... RESPONDENT

(An Appeal from the Judgement and Decree of the Principal Magistrate court of Kenya at Kitui (Hon. J. Munguti-P.M delivered on the 20th day of March, 2019)

JUDGMENT

1. This appeal arose from the decision of Hon. J. Munguti-PM in Kitui CM's Court Civil Case No. 156 of 2017. In that suit the appellant was sued for tort of negligence as a result of a Road Traffic involving appellant's motor vehicle Registration No. KBZ 961Q and Respondent's motorcycle Registration No. KMDS 435T.

   The respondent was a rider of the said motorcycle and the accident occurred on August 29, 2016 along Kitui-Kabati Road at a Kaayoi Bridge.

2. It was the respondent's case that the appellant, whose husband was the driver of the motor vehicle KBZ 961Q, was in the process of overtaking another vehicle when it hit the respondent's motorcycle and caused the accident. He sought general damages, as well as special damages suffered. He pleaded that he suffered a broken leg injury to the hand and lost 5 teeth as a result of the accident.

3. The appellant denied liability and blamed the respondent for causing the accident. He claimed that the respondent was intoxicated at the time and was over speeding. He further faulted him for not wearing a helmet and carrying more than one pillion passenger.

4. The trial court in its judgement dated March 20, 2019 found the appellant 100% liable and awarded the Respondent as follows: -

i. General damages Kshs. 700,000

ii. Future Medical Expenses Kshs. 50,000

iii. Special damages Kshs. 14,550

Kshs. 764,550

5. The appellant felt aggrieved the trial court and lodged this appeal where he has raised the following grounds namely: -

a. The honourable trial court erred in law and facts in failing to consider material evidence clearly demonstrating that the Respondent had not proved his claim on a balance of probabilities

b. The Honourable Learned Trial Magistrate erred in law and fact and misdirected himself by finding the Appellant 100% liable and disregarding evidence on record demonstrating that the Respondent largely demonstrating that the Respondent largely contributed to the said accident

c. The honourable trial court erred in law and fact in failing to find that the Respondent contributed to the accident given the facts and circumstances surrounding the accident in question

d. The honourable learned trial Magistrate erred in law and fact in failing to appreciate the relevant principles and case law in assessing general damages on pain, suffering and loss of amenities and future medical expenses and thereby giving an inordinately high and manifestly excessive award unsupported by law so as to amount to an erroneous award in the circumstances of the case.

e. The honourable learned Magistrate erred in law and fact in failing to appreciate and properly evaluate the evidence on record in particular the evidence on the Plaintiff's injuries and thereby erroneously awarded an inordinately high and manifestly excessive award on general damages

f. The honourable learned Magistrate erred in law and in fact in awarding general damages of Kshs 700,000/- which was inordinately excessive given the circumstances of the case

g. The honourable learned Magistrate erred in law and in fact in proceeding on the wrong principles vis-avis the evidence before him and laid down principles of law thus arriving at a judgment that was erroneous in the circumstances.

h. The learned trial Magistrate erred in law and fact by taking into account irrelevant consideration/ factors while awarding general damages

i. The honourable learned trial Magistrate further erred in law and fact by failing to appreciate, consider and take into account the Appellant's submissions on the quantum of damages awardable in the circumstances.

j. The honourable learned trial Magistrate erred by making a decision on quantum that was erroneous without proper basis and against the weight of evidence.

6. In her written submissions through Counsel, the appellant has urged this court to relook at the question of liability and quantum.

7. On liability, appellant submits that the respondent was required prove all allegations of negligence on the part of the appellant. She submits that the respondent contributed to the accident and injuries

sustained because of over speeding and failing to wear a helmet while carrying excessive passengers and riding motorcycle while intoxicated. He also faulted the Respondent for riding an uninsured motorcycle. He had relied on the case of *Dun Onyango Odera v Aineah Mbuyia* (2015) eKLR. The appellant alleges that the court in that appeal apportioned liability at 50%-50% because the respondent was riding under the influence which is not entirely correct. The court in that matter apportioned liability at 50-50 after it found that it was not possible to determine who was at fault between the plaintiff and defendant as there were no eye witnesses. The trial court in the matter had found that the point of impact was not clear. The cited decision is not very relevant in this instance as I will show shortly.

8. On the damages awarded, the appellant submits that general damages at Kshs 300,000/- would have sufficed have been fair as the respondent did not suffer any deformity. He has relied on the case of *Timsales Limited v Robert Mutuku Kyengo & 3 others* (2016) where the court awarded general damages at Kshs 400,000. The Respondent in that case sustained loss of two lower incisors teeth and two upper incisors teeth and two canines, deep cut wound on forehead and nasal septum and sub-conjunctival hemorrhage on the right eye. Liability in that matter was apportioned at 80-20.

9. The appellant has also relied on the case of *Francis Ochieng & anor v Alice Kajimba* (2015) eKLR. Although the appellant has cited that the respondent in that case lost 7 teeth and suffered multiple injuries that led to her hospitalization, the appellate court in fact found that the allegation that she lost 7 teeth as a result of the accident was not proven and on that basis, the appellate court revised the general damages awarded from Kshs 500,000/- to Kshs 350,000/- liability was also apportioned at 80-20.

10. The respondent did not file any submissions in this appeal despite clear directions issued on October 19, 2021. The provisions of Order 42 Rule 16 gives latitude for parties in an appeal to canvass the appeal through written submissions. The Respondent failed to present his arguments to this court on time or at all but that notwithstanding, I am inclined to determine this appeal on merit.

11. I have considered this appeal and the grounds put forward. I have gone through the pleadings and the evidence tendered at the lower court. This is a first appeal and the duty of this court is to review and re-evaluate the evidence tendered at the trial court in order to make own conclusion regarding issues raised in this appeal. As the appellant noted above, the issues I raised in this appeal touches on liability and quantum.

12. On liability, the appellant faults the trial court for finding her 100% liable. According to her the appellant was over speeding, not wearing a helmet and carrying excess pillion passengers.

13. I have looked at the respondent's case at the trial. He testified that he was riding a motorbike when the accident occurred. He stated;

> "I was riding a motorbike Registration No. KMDS 435T. The driver of the motor vehicle was overtaking when I collided with him."

14. The appellant on her part testified through her husband and driver as follows: -

> "On the 29th August 2016, I was driving on a hill along Kitui-Kabati road...I deviated a little from the left side of the road in order to have a clear view of the same. A speeding motorcycle registration number KMDS 435T came out of nowhere and hit the right front side of the said motor vehicle....."

15. The proceedings also show that evidence of a police officer who testified in a related case (No. 158/2017) was adopted. I have looked at the evidence of the police officer in that file and save for the

police abstract, his other evidence was not useful to either party because it was hearsay. He stated that one PC Gitahi investigated the case but did not state where the said investigating officer was and why he did not turn up in court to assist the court arrive at an informed decision with the results of the investigations carried out. The provisions of section 33 of the *Evidence Act* is clear on admissibility of statements of persons who cannot be found to testify.

The Section states;

> "Statements written or Oral .....of admissible facts made by .....person who cannot be found.....incapable of giving evidence or whose attendance cannot be procured.....without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible in the following cases .....statements made in the course of business....."

16. This court finds that the tendency by the advocates to just rush to a police station and pick any police officer in uniform to come and tender police abstracts in evidence is irregular and improper in light of the clear provisions of the law cited above.

    An officer in a traffic matter should be well seized with the investigation file and any other relevant information relating to the occurrence of the accident before he/she can testify. He or she should also lay basis under section 33 of the *Evidence Act* as to why he is coming to testify on behalf of the police Officer who carried out the investigation otherwise coming to testify just because one has been paid Kshs. 5,000 or any other consideration runs the risk of having the evidence rendered as hearsay.

17. In this instance, CPL Charles Kiprotich just testified without laying basis and apart from saying he was paid Kshs. 5,000 to come to testify and tell the court that the driver of the motor vehicle was to blame, there was not much he added to the respondent's case. His evidence apart from the Police Abstract admitted by consent breached the hearsay rule.

18. I have keenly evaluated the evidence tendered by the respondent as well as the appellant at the trial and find that the respondent's driver was trying to overtake another motor vehicle when the respondent's motorcycle appeared from the opposite direction and a collision occurred. It is also apparent that the respondent was carrying two pillion passengers as clearly captured in the Police Abstract. There is also no denying that he was not wearing a helmet. However, the appellant's claim that he was intoxicated and riding at 100 kilometres per hour was not proved because there was no evidence tendered to that effect. The evidential burden is always on the one alleging. The respondent claimed that the respondent was overtaking another vehicle and the same was conceded by the respondent who stated that he had veered off his lane to get a clear view of the road ahead. By that concession the burden shifted to him to show that the respondent was to blame. He stated that the respondent appeared from nowhere and at the same, stated that he was doing around 100 kilometres per hour and the question is how can someone ride from nowhere at 100 kilometres per hour?

19. The only legitimate point raised by the appellant is the fact that the respondent was not wearing his protective helmet at the time. The issue of carrying excess passengers in my view is not relevant in this appeal in so far as liability is concerned. The appellant ought to have shown how the issue of extra pillion passengers contributed to the occurrence of the accident and/or aggravated the accident but he did not.

    As I have noted above, the lack of helmet in my view may only have aggravated the nature of injuries suffered hence quantum. As a matter of fact, had the respondent been wearing a protective helmet, the loss of 5 teeth and disfigurement of the nose and cuts suffered may not have occurred. To that extent one can see that genuinely even though the lack the lack of helmet per se never caused the accident, the

same only aggravated the injuries suffered by the respondent and it is only to that extent that he should have at least been found liable to some extent. The trial court in my view fell into error when it failed to consider that fact. It is on that premise that I find that the appellant appeal on liability is merited to some extent. Taking everything into consideration, the respondent should be held 30% liable for aggravating the injuries suffered. He was under a duty to ensure that he wore a helmet for protection in an event of an eventuality such as the one that occurred in this instance.

20. On quantum, it is now well settled that quantum is a discretionary matter in *Francis K Rigba v Mary Njeri* [2021] eKLR, the court of appeal in reference to *Butler v Butler* (1984) eKLR 225 stated;

> "...that assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge's findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision..."

21. The Court of Appeal also observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that –"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

22. The trial court awarded the Respondent Kshs 700,000/- as general damages for injuries sustained following the accident. This award was grounded on a medical report dated January 30, 2017which indicated that the Respondent sustained injuries as follows;

    i. Multiple cuts involving the bridge of nose, upper lip, tongue and lower lip

    ii. Missing teeth

    iii. Avulsed 3 teeth, 12,13,32

    iv. Generalized chest pain

    v. Bruises on both hands.

23. The report also indicated that the respondent was taken to the theatre and suturing of cuts wounds was done. There was also wiring of teeth and his tongue was stitched. The doctor also reported that therespondent suffered a lot of scarring and slight disfigurement of facial features. He also needed replacement of five missing teeth at a cost of Kshs 50,000. The doctor assessed his degree of injury as grievous harm.

24. The appellant submitted that general damages at Kshs 300,000/- would suffice as the Respondent did not suffer any deformity. This assertion is contrary to the doctor's assessment. The doctor actually found that the respondent suffered facial disfigurement. The appellant also produced a medical report dated March 15, 2018as part of his evidence in the trial court. That report confirmed that the respondent required replacement of five teeth at an estimated cost of Kshs 40,000/- The doctor was also of the opinion that the Respondent suffered severe harm.

25. The appellant cited authorities with awards ranging from Kshs 350,000/= to Kshs 400,000/=. In *Timsales Limited v Robert Mutuku Kyengo & 3 others* (2016) however, liability was apportioned at 80:20. The respondent in that case lost six teeth and sustained deep cut wounds on the right side of the forehead and nasal septum. The respondent did not sustain any disfigurement as is it happened in the present case. In *Francis Ochieng & anor v Alice Kajimba* (2015) eKLR, liability was also apportioned

at 80: 20 and although the appellant had submitted that the respondent lost seven teeth in this case, the appellate court actually found that this was not proven. This authority is therefore not a good comparison in terms of injuries sustained by the respondent herein.

26. The trial court compared the authorities cited by parties and the fact that the respondent sustained permanent injuries and on that basis awarded him Kshs 700,000/- The appellant submitted that the respondent had completely healed and did not suffer any deformity which is contrary to the medical report as the doctor found that he suffered slight disfigurement. The appellant has not demonstrated that the trial court acted wrong on principle in awarding the general damages.

27. There is no basis for this court as an appellate court to interfere with the award given by the trial court which exercised its discretion well in arriving at the award. It is also noteworthy that the authorities cited by the appellant were assessment done more than a decade ago. A lot in terms of inflation has changed.

28. According to the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR: -

> "An appellate court will not disturb an award for general 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..."

29. On the question of special damages, I find that the same were specifically pleaded by the respondent and proved. The appellant in fact estimated the cost of future medical costs at Kshs. 40,000. The trial court awarded Kshs. 50,000 which I find commensurate. The only amount I find to have been an exaggeration and unnecessary was Kshs. 5,000 claimed to have been paid to a Police Officer to come and testify in court. That amount was excessive and unjustified. The same should not have been awarded and this court will intervene on quantum only to that extent.

In summary this appeal partly succeeds and is allowed on the following terms;

i. The trial court's finding on liability is set aside and in its liability apportion as follows: -

   a. The appellant 70 %

   b. The Respondent to shoulder 30% liability

   c. The quantum awarded Kshs. 764,550 is subtracted by Kshs. 5,000 which means that the quantum award is

      Kshs. 759,550

      Less 30% liability - 227,865

      Total Kshs. 531,685

The appellant shall therefore pay the respondent Kshs. 531,685 plus cost and interests with apportionment of liability being factored in. The appellant shall have 30% cost in this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 23RD DAY OF JUNE, 2022.

HON. JUSTICE R. K. LIMO

JUDGE