Ouma & another v Chirchir (Civil Appeal 67 of 2019)
[2022] KEHC 12595 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12595 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 67 OF 2019

JN KAMAU, J

JULY 26, 2022

BETWEEN

GEORGE OUMA ..... 1ST APPELLANT

PAMELA AKINYI OSEWE ..... 2ND APPELLANT

AND

FRANCIS KIMUTAI CHIRCHIR ..... RESPONDENT

(Being an Appeal from the Judgment of Hon P. Olengo (PM) delivered at Nyando in Principal Magistrate Court Case No 376 of 2013 on 8th May 2019)

JUDGMENT

Introduction

1. In his decision of 8th May 2019, the Learned Trial Magistrate, Hon P. Olengo (PM), entered Judgment in favour of the Respondent herein against the Appellants as follows:-
    a. General Damages Kshs 1,500,000/=
    b. Special damages Kshs 56,015/=
    c. Costs of the suit
    d. Interest at court rate
2. Being aggrieved by the said decision, on 28th June 2021, the Appellants filed a Memorandum of Appeal dated 4th June 2019. They relied on six (6) grounds of appeal.
3. Their Written Submissions were dated and filed on 14th March 2022 while those of the Respondent were dated 11th March 2022 and filed on 15th March 2022.

4. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for consideration were:-

    a. Whether or not the Learned Trial Magistrate erred in having found the Appellants wholly liable for the accident herein;

    b. Whether or not the quantum that was awarded was excessive in the circumstances warranting its interference by this court.

8. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Liability

9. Grounds of Appeal Nos (3), (4) and (6) were dealt with under this head.

10. The Appellants submitted that the Respondent failed to establish the casual link between his injuries and negligence on their part. In this regard, they placed reliance on the case of *Stratpack Industries vs James Mbithi Munyao* Nairobi HCCA No 152 of 2013 (eKLR citation not given) where the court held that it was trite law that the burden of proof of any fact or allegation was on the plaintiff and that he must prove a casual link between someone's negligence and his injuries and that an injury per se was not sufficient to hold someone liable for the same.

11. They pointed out the meaning of burden of proof as provided in Phipson on the Law of Evidence was that the obligation was on a party to convince the court on a fact and an obligation to adduce sufficient evidence of a particular fact. They argued that it was unfair for them to have been held fully liable for the accident. They relied on the case of *Kiema Mutuku vs Kenya Cargo Hauling Services Ltd* 1991(eKLR citation not given) where the court held that there was as yet no liability without fault in the legal system in Kenya, and that where the claim was based on negligence, a plaintiff had to prove some negligence against the defendant.

12. They submitted that liability ought to be apportioned equally. They added that the 2nd Appellant was not an Administrator of the estate of the registered owner of the subject Motor Vehicle and hence he was not vicariously liable for the actions and omissions of the driver of the subject Motor Vehicle. In this respect, they referred to the case of *Paul Muthui Mwavu vs Whitestone (K) Ltd* [2015] eKLR where the court held that in order to find the owner of a car liable for the negligence of a driver, it was necessary to show either that the driver was owner's servant or that he was acting on the owner's behalf as his agent at the material time. They did not however, come out clearly on the question of

whether or not the 2nd Appellant was vicariously liable for the actions or omissions of the driver of the suit Motor Vehicle.

13. On his part, the Respondent argued that the 2nd Appellant's tractor had been parked on the road without any warning signs as a result of which it caused the accident by obstruction. He pointed out that the driver of the tractor was convicted of the offence of causing death by obstruction. He was emphatic that the finding of Trial Court on liability ought not be faulted as it was sound in law and supported by evidence on record as the 2nd Appellant pleaded guilty and admitted being the owner of the said tractor. He added that the 2nd Appellant was shown as the driver of the tractor in the Police Abstract Report. He submitted that the appeal on the issue of liability was not merited and urged the court to dismiss the same.

14. Notably, the Respondent herein testified that on 16th November 2012, he was traveling from Awasi to Kisumu aboard motor vehicle registration KBA 115 F (hereinafter referred to as "the 1st subject Motor Vehicle") when on reaching Ngere Kagoro area, the 1st subject Motor Vehicle hit a Tractor Registration No KAH 976 U (hereinafter referred to as the 2nd subject Motor Vehicle) which had been parked on the road without any road signs such as reflectors or leaves. He blamed the driver of the 2nd subject Motor Vehicle for the said accident.

15. No 72014 PC Caleb Omuse (hereinafter referred to as "PW 2) corroborated Respondent's evidence. He blamed the driver of the 2nd subject Motor Vehicle for the said accident and added that the said driver was charged with eight (8) charges namely, causing death by obstruction, driving a motor vehicle without a driving licence, driving an uninsured motor vehicle on a public road, handling unregistered trailer and driving without a valid inspection sticker. He added although the 2nd subject Motor Vehicle was not registered, they establish that the insured was one Vitalis Okeyo Oweya. He stated that the 2nd Appellant was charged in Traffic Case No 495 of 2012 where she admitted that she was the owner. He adduced in evidence the Police Abstract Report showing that she was the owner of the 2nd Subject Motor Vehicle.

16. In her evidence, the 2nd Appellant testified that she was a wife to Joshua Osewe Muga who was the registered owner of the 2nd subject Motor Vehicle. She stated that he died in 2009. She denied having been the registered owner of the said 2nd subject Motor Vehicle. She stated that the deceased had three (3) wives and she did not know why she was the one who was the only one who was sued. She did not witness the accident.

17. Notably, the 2nd Appellant was estopped from claiming that she was not the owner of the 2nd subject Motor Vehicle on appeal as she had admitted before the Trial Court that she was the owner in Nyando Traffic Case No 495 of 2012 *Republic vs Pamella Akinyi Osewe*. The Respondent could not therefore be faulted for having sued her as the owner of the 2nd subject Motor Vehicle and not her two (2) co-wives.

18. The burden lay upon the Appellants to adduce evidence to rebut the Respondent's evidence that the 2nd subject Motor Vehicle was parked half way on the road. Be that as it may, both drivers owed a duty of care to the Respondent.

19. Bearing in mind PW 2's evidence that the accident occurred at 1900hrs, that it was not raining and that several vehicles had passed the 2nd subject Motor Vehicle without any other accident occurring and taking into consideration that the driver of the 2nd subject Motor Vehicle was charged with and convicted of eight (8) counts and fined Kshs 35,000/=, it was this court's considered view that the driver of the 1st subject Motor Vehicle who the Respondent ought to have sued but did not sue, could not escape liability. Indeed, the said driver ought to have exercised more care and diligence as he owed

a duty of care to his passengers. In this regard, this court found and held apportionment of liability at 90%-10% as against the Appellant was fair apportionment of liability with 10% liability being attributed to the driver of the 1st subject Motor Vehicle.

20. In the premises, Grounds of Appeal Nos (3), (4) and (6) of the Memorandum of Appeal were merited and the same be and are hereby allowed.

II. Quantum

21. Grounds of Appeal Nos (1), (2) and (5) were dealt with under this head.

22. The Appellants urged the court to use the appropriate principle in interfering with the award of the trial court which is that it should only interfere if it was satisfied that in assessing damages, the said court applied a wrong principle of law by taking into consideration some irrelevant factors or leaving out of account some relevant factors and/or the amount was so inordinately low or so high that it must have been a wholly erroneous estimate of the damage as was held in the case of Henry Hidaya Ilanga vs Manyema Manyoka (eKLR citation not given), a position that the Respondent agreed with.

23. He was emphatic that comparable injuries ought to be compensated by an award of comparable damages and that the passage of time and inflationary trends ought to be considered. In this regard, he placed reliance on the case *Florence Hare Mkaha vs Pwani Tawakal Mini Coach and Another* [2012] eKLR where the plaintiff therein with similar injuries was awarded Kshs 2, 040,000/= in 2012 and the case of *Michael Maina Gitonga vs Serah Njuguna* [2012] eKLR where the plaintiff therein was awarded general damages of Kshs 1, 500,000/= for nearly similar injuries in 2012.

24. He argued that the Trial Court was live to the fact that comparable injuries ought to be compensated by comparable awards before it proceeded to award him Kshs 1,500,000/= general damages. He contended that that sum could not be said to have been so inordinately high as to amount to an erroneous estimate and warrant interference by this court. He added that the special damages were pleaded and proved by production of relevant receipts and therefore the award ought not be disturbed.

25. Notably, of greater significance is the acknowledgment that an appellate court does not have the jurisdiction to interfere with the assessment of damages merely by substituting a figure of its own to that awarded by the trial court, even though it could have awarded a higher or lesser sum itself.

26. The rationale is both constitutional and statutory. Where a judgment has been made by a competent court, an appellate court is estopped from asserting the contrary position unless on the well settled principles as propounded in *Butt vs Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470 that an appellate court will not disturb an award of damages unless it was so inordinately high or low as to represent an entirely erroneous estimate that the trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low as was correctly pointed out by both the Appellants and the Respondent herein.

27. Notably, the Respondent sustained bruises on the face and the right wrist, ruptured spleen, a contusion of the pancreas, blunt trauma to the chest, abdomen, right hip and right knee, dislocation of the right wrist, dislocation of the right hip joint and right knee joint, fracture of the right acetabulum and the right fibula near the knee joint.

28. He was rushed to Ahero District Hospital where he received emergency treatment. He was subsequently transferred to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) for further medical attention from where he was also referred to Moi Teaching and Referral Hospital

(MTRH). He adduced in evidence discharge summaries from the two (2) hospitals. He also adduced in evidence P3 Form. He was also treated at St Lukes Orthopeadic and Trauma Hospital.

29. He was examined by Dr S. I. Aluda on 30th September 2013, about ten (10) months after the accident. In his Medical Report, Dr S. I. Aluda observed that the Respondent sustained very severe injuries but that he had healed save for occasional pains in the face, chest, abdomen, right wrist, right hip and right knee. The said Medical Report also showed that although the fractures had healed, the Respondent lost his spleen which would remain a permanent feature of ailment as a result of which he would thus require frequent visits to hospital.

30. There was no indication if the Appellants referred the Respondent for a second medical examination, or that they referred him for a second medical examination and he declined to go. This court therefore limited itself to Dr S. I. Aluda's Medical Report for purposes of assessing the quantum that was reasonable in the circumstances of the case herein.

31. Notably, an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained. As correctly submitted by the Respondent similar, injuries should attract comparable awards. However, in the quest for consistency, courts must also recognise that no case is exactly the same as another and therefore each case must be decided with its own peculiar circumstances in mind but keeping in mind that any monies awarded must be sustainable.

32. In determining if the sum of Kshs 1,500,000 general damages that was awarded by the Trial Court was reasonable compensation, this court had due regard to the following cases:-

    1. Cold Car Hire Tours Limited vs Elizabeth Wambui Matheri [2025] eKLR wherein the Respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total his replacement, and was awarded a sum of Kshs 1,400,000/= as general damages by the lower court which award was upheld by the High Court.

    2. Kennedy Ouma Dachi vs Joseph Maina Kamau & Another [2018] eKLR where an award of Kshs 1,000,000/= was made by the lower court for a comminuted fracture acetabulum and was enhanced to Kshs 1,400,000/= on appeal.

33. Taking into account the serious injuries that the Respondent herein sustained vis- a- vis the damages in comparable cases and the inflationary trends this court came to the firm conclusion that a sum of Kshs 1,500,000/= general damages was adequate to compensate the Respondent for the injuries that he sustained. As it was not inordinately high, this court was not persuaded that it should interfere with the same.

34. In the premises, Grounds of Appeal Nos (1), (2) and (5) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.

Disposition

35. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on 28th June 2021 was partly merited. The effect of this is that the Judgment in the sum of Kshs 1,556,015/= that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgment be and is hereby entered against the Appellants herein in favour of the Respondent for the sum of Kshs 1,399,423.50 made up as follows:-

    General Damages Kshs 1,500,000.00

    Special Damages Kshs 56, 015.00

Kshs 1, 556,015.00

Less 10% contribution Kshs 156,601.50

Kshs 1,399,413.75

Plus costs and interest thereon at court rates. Interest on special damages will accrue from date of filing suit while interest on general damages will accrue from the date of judgment of the lower court.

36. Since the Appellants were partly successful in their Appeal, each party will bear its own costs of the Appeal.

37. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JULY 2022

J. KAMAU

JUDGE