Cents Holdings Limited & another v Mwita (Civil Case 503 of 2018)
[2022] KEHC 14564 (KLR) (Civ) (23 September 2022) (Judgment)

Neutral citation: [2022] KEHC 14564 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 503 OF 2018

DO CHEPKWONY, J

SEPTEMBER 23, 2022

BETWEEN

CENTS HOLDINGS LIMITED ..... 1ST APPELLANT

FRANCIS NDUNGU ..... 2ND APPELLANT

AND

WAMBURA CHARLES MWITA ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of the Honourable D. O. Mbeja (Mr) Senior Resident Magistrate given in Nairobi CMCC NO.7238 of 2017 of 5th October, 2018)

JUDGMENT

1. Vide a Memorandum of Appeal dated October 15, 2018, the Appellants have appealed against the Judgment of Honorable D.O Mbeja (SRM) in Nairobi CMCC No.7238 of 2017 delivered on October 5, 2018 on grounds that the learned Magistrate erred in law and in fact by;
    a. Giving a narrow interpretation of the facts, leading to an erroneous assessment on the issue of liability;
    b. Failing to take into account the issue of liability which was not proved by the respondent against the appellants;
    c. Failing to consider the law on negligence and thereby erroneously finding the appellants to blame at 100% liability;
    d. Awarding general damages when there was no legal basis for the award;
    e. Awarding general damages that were so excessive as to amount to an abuse of discretion;

f. Applying wrong principals in awarding general damages;

g. Totally ignoring the law and submissions put in by theAappellants thereby arriving at a wrong decision on quantum of damages;

h. Misdirecting himself in the applicable measure of award of general damages in favor of the Respondent;

i. Awarding damages that were so excessive as to represent an erroneous estimate of the loss suffered;

j. That the Judgment of the trial Magistrate is against the law and weight of the evidence on record.

2. In this Appeal, the Appellants are thus praying for orders that;

a. This Appeal be allowed;

b. The Judgment of the lower court passed on October 5, 2018 be quashed and/or set aside;

c. This Honorable Court proceeds to consider the facts and make its own assessment on liability, quantum and costs;

d. The Respondent to pay the costs of this appeal and of the lower court case;

e. Any other relief deemed appropriate in the circumstances.

3. The facts behind the present appeal are that the Respondent vide a Plaint dated September 18, 2017 sued the Appellants for general and special damages plus interests and costs of the suit for injuries sustained in a road traffic accident which occurred on May 22, 2017 along Outer Ring Road. The 1st Appellant was sued in its capacity as the registered owner of Motor Vehicle Registration Number KCD XXXM which allegedly knocked the Respondent on the material day of the accident whereas the 2nd Appellant was sued as the driver of the suit motor vehicle at the time of the accident.

4. The Respondent alleged that he was a pedestrian at the Outer Ring Road near Shell Petrol Station when the 1st Defendant's motor vehicle was negligently driven by the 2nd Appellant causing it to veer off the road, hit and caused him bodily injuries.

5. The Appellants jointly filed a Statement of Defense dated November 14, 2015 wherein they denied the allegations of negligence on their part and alleged that if at all the accident occurred, the same was occasioned by the Respondent's negligence in crossing the road in a dangerous manner while disregarding his own safety.

6. After closure of pleadings, the matter proceeded for hearing and the Respondent testified on his own behalf while the 2nd Appellant

testified on his behalf and on behalf of the 1st Appellant. After considering the evidence on record, the trial magistrate delivered Judgment on October 5, 2018 in favor of the Respondent, wherein he awarded him Kshs.1,000,000/= as general damages for pain and suffering and Kshs.3,550/= as special damages as well as costs of the suit plus interest at court rates.

7. Dissatisfied by that Judgment, the Appellants preferred the present appeal and faulted the trial Magistrate on grounds that have been re-produced at Paragraph 1 of this Judgment.

8. On February 18, 2022, this court directed that the appeal be canvassed by way of written submissions. And in compliance thereof, both parties filed their written submissions which I have read through in consideration of this appeal.

Analysis and Determination

9. As a first appellate court, this Court's duty is to re-evaluate the whole of the evidence and put it to a fresh and exhaustive scrutiny so as to make its own conclusion while bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand as was stated in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

10. Having the above duty in mind, and having considered the record as well as the pleadings filed before this court inclusive of the authorities relied on, it is my considered view that the appeal rotates around two issues, being:-

    1. Whether the Respondent proved 100% negligence against the Appellants; and

    2. Whether the quantum of damages by the trial court is justified in the circumstances.

11. On liability, the trial court held the Appellants 100% liable. It is worth noting that the occurrence of the accident between the Respondent and the 1st Defendant's motor vehicle which was driven by the 2nd Defendant as at the time is not denied. The Respondent testified that he was walking along the pavements of outerring road, when the suit motor vehicle was negligently driven causing it to veer off the road and it hit him. He produced a Police Abstract in support of his case although the same did not squarely cast blame on any one but indicated that the suit was pending under investigations.

12. On the other hand, the 2nd Appellant testified as DW1, and his evidence was that it is the Appellant who was attempting to cross the road while behind a matatu and without being careful of his safety, hence the occurrence of the accident. In this instance, I do find that the evidence on record is merely the word of the Respondent as against that of the Appellants on how the accident happened and who was to blame for the said accident. The Respondent did not call any eye witness or even the Investigating Officer to testify on the true account of what happened, and whose fault the accident may be attributed to.

13. In my view, either the party could have been negligent and responsible for the accident depending on the evidence adduced and it would be difficult to pin liability on any one party without the other establishing the fault lest both parties be deemed to be equally negligent for the accident.

14. In the case of *Hussein Omar Farah –vs- Lento Agencies* [2006]eKLR (Nairobi Civil Appeal No. 34 of 2005), the Court of Appeal, held as follows:

> "In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame... The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame".

15. In normal happenings of events, vehicles well driven are not necessarily involved in accidents except by negligence of either party involved in the accident. In the present case, the deficient evidence adduced reflects a scenario where it is difficult to pinpoint either party as the negligent party for the accident. Whereas it might be true that the 2nd Defendant might have been negligent and indeed carelessly drove the motor vehicle causing it to veer off the road and knock the Plaintiff/Respondent, this court cannot without further evidence wholly agree with that theory and ignore the Appellant's side of story that the Respondent was negligent in crossing the road hence the accident and or vice visa. As such, this court is inclined to hold both the Appellants and Respondent equally to blame for the accident. Consequently, the trial Magistrate's apportionment of liability at 100% against the Appellants is hereby set aside and substituted with 50% liability as against the Appellants and 50% contributory negligence against the Respondent.

16. On quantum, it is trite in law that an appellate court would only interfere with the trial court's discretion on quantum in exceptional circumstances where it is shown that an award for damages is inordinately high or low as to represent an entirely erroneous estimate or where it is shown that the trial Magistrate proceeded on wrong principles, or that it misapprehended the evidence on some material respect, and so arrived at a figure which was either inordinately high or low. (See the cases of *Robert Musyoki Kitavi –vs- Coastal Bottlers Ltd* (1985) 1 KAR 891, *Butt vs Khan* Civil Appeal No.40 of 1977 and *Valley Bakery Ltd and Another –vs- Matthew Musyoki*).

17. From the Judgment, the trial Magistrate awarded the Plaintiff/Respondent Kshs.1,000,000/=as general damages for pain and suffering. The Appellants' submitted that this amount is inordinately high in the circumstances whereas the Respondent maintained that the trial Magistrate made a favorable award in accordance with other decided cases. As regards the injuries sustained, the Respondent produced two Medical Reports, one dated August 5, 2017 by Dr. G.K. Mwaure and another dated June 6, 2018 by Dr. Maina Ruga. Both reports indicate that the Respondent suffered Bimalleolar fractures of the left ankle joint. It is a well laid principle that comparable injuries must attract comparable awards in making a finding on the question of quantum. In assessing the quantum in this case I will seek to establish what other courts have awarded for similar injuries.

18. First, in the case of *Alphonce Muli Nzuki –vs- Brian Charles Ochuodho* [2014]eKLR, the court upheld an award for Kshs.800,000/= for a compound commuted fracture of the tibia and fibula and degloving injury on the medical aspect of the right leg and foot.

19. Secondly, in the case of *Hussein Sambur Hussein –vs- Shariff A. Abdulla Hussein & 2 Others* [2022] eKLR where the Appellant sustained fractures of the right tibia and fibula leg bones (lower 1/3rd

bimalleolar ankle fracture); dislocation of the right ankle and bruise on the right leg and the appellate court awarded Kshs. 600,000/=

20. The injuries sustained by the claimants in the above authorities are comparable to the ones sustained by the Plaintiff/Respondent herein. It is thus my considered view, that the trial court's award of Kshs.1,000,000/=as general damages is well within the range that was awarded by the other courts considering the times and economic inflations. I am therefore not convinced that the award by the trial court is too high or too low or that the trial Magistrate proceeded on a wrong principle to warrant the interference of the same by this court.

21. As for the award made on special damages, since none challenged the same, it appears that parties seem content with the same and I proceed to adopt the same as awarded by the trial court.

22. In the upshot, the Appeal partially succeeds on the question of liability but fails on quantum. Judgment is hence hereby entered to the effect that the trial court's Judgment is substituted as well as the award of Kshs.1,003,550/= awarded by the trial court with Kshs.501,775 as hereunder:

    General damages..... Kshs.1,000,000/=

    Special damages.....Kshs,3,550/=

    Total..... Kshs.1,003,550/=

    Less 50%.....Kshs.501,775/=

23. Since the Appeal has partially succeeded, each party shall bear its own costs. Costs at the trial court be borne by the Appellants.

It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED A NAIROBI THIS ...23RD ... DAY OF ...SEPTEMBER..., 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Muthie counsel holding brief for Mr. Opondo counsel for Appellant

Mr. Kiptanui counsel holding brief for Mr. Waiganjo counsel for Respondent

Court Assistant - Kevin