Kinuthia & another v Thuo (Civil Appeal 28 of 2017)
[2022] KEHC 14225 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KEHC 14225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL 28 OF 2017

OA SEWE, J

SEPTEMBER 23, 2022

BETWEEN

JOSEPH MAINA KINUTHIA ..... 1ST APPELLANT

CHANIA SHUTTLE ..... 2ND APPELLANT

AND

HANNAH WANJIKU THUO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Nderitu, Senior Principal Magistrate, delivered on 15th May 2017 in Voi CMCC No. 8 of 2012)

JUDGMENT

1. This is an appeal that was lodged herein on December 11, 2017 by the two appellants, Joseph Maina Kinuthia and Chania Shuttle, from the judgment and decree passed by the Senior Principal Magistrate, Hon Nderitu, in Voi CMCC No 8 of 2012: Hannah Wanjiku Thuo v Joseph Maina Kinuthia & another. Through the law firm of M/s Wambui Ndung'u & Co Advocates, the respondent had sued the appellants in respect of injuries sustained by her in a road traffic accident that occurred on November 8, 2009 at Maji Ya Chumvi area along Nairobi-Mombasa Road. The respondent had contended that she was travelling as a fare-paying passenger aboard the 2nd appellant's motor vehicle registration No KBJ 631J, Nissan bus when the accident occurred. She further alleged that the accident was attributable to the negligence of the 1st appellant.

2. At paragraph 4 of the plaint dated December 7, 2011, the respondent had supplied the particulars of negligence alleged against the appellants as well as particulars of her injuries and special damages. She also averred that the 1st appellant was charged with the offence of careless driving *vide* Voi Senior Resident Magistrate's Traffic Case No 2770 of 2009 in which he was found guilty, convicted and sentenced to pay a fine of Kshs 5,000/= or 3 months' imprisonment in default. Consequently, the respondent prayed for an award in general and special damages together with the costs of the suit.

3. In response to the claim, the appellants filed their memorandum of appearance and defence through the law firm of M/s Kairu & McCourt. They denied the respondent's allegations as to the occurrence of the accident and the particulars of negligence, injuries and special damage as enumerated in paragraph 4 of the plaint. In the alternative, the appellants averred that, if any such occurrence as alleged by the respondent occurred, then it was caused solely and/or substantially contributed to either by the negligence of the respondent or the driver of motor vehicle KBE 568U/ZC9058. They consequently prayed for the dismissal of the respondent's suit with costs.

4. Upon hearing the parties and taking into consideration the written submissions filed by counsel, the lower court found in favour of the respondent in a judgment delivered on May 15, 2017. Accordingly, the respondent was awarded general and special damages in the total sum of Kshs 702,954/= plus costs and interest at court rates from the date of judgment till payment in full.

5. Being dissatisfied with the lower court's decision and decree, the appellants filed this appeal on the following grounds:

   (a) The learned magistrate erred in fact and in law in finding that the appellants were liable for causing the accident at the ratio of 100% despite the fact that the evidence on record proved otherwise.

   (b) The learned magistrate erred in fact and in law in failing to consider the evidence tendered in court during the trial in respect of the issue of liability.

   (c) The learned magistrate erred in fact and in law in finding that the respondent was entitled to general and special damages of Kshs 702,954/=, an amount that was excessive in view of the injuries suffered by the respondent;

   (d) The learned magistrate erred in fact and in law in failing to consider the appellants' evidence tendered in court during trial in respect to the injuries that were allegedly sustained by the respondent;

   (e) The learned magistrate erred in fact and in law in failing to consider the appellants' submissions on liability as well as quantum;

   (f) The learned magistrate erred in both fact and in law in failing to consider the previous precedents of similar cases in respect to the issue of liability as the one herein.

6. Accordingly, the appellants prayed that their appeal be allowed with costs; that the judgment in Voi CMCC No 8 of 2011 be set aside, and that the costs of the lower court suit be borne by the respondent.

7. Directions were then given herein on June 9, 2022 that the appeal be canvassed by way of written submissions; and while no submissions appear to have been filed on behalf of the appellants, counsel for the respondents, Ms Odhiambo, complied and filed her submissions on July 6, 2022. She thereby proposed the following issues for consideration:

   (a) Whether the appellant's appeal has merit;

   (b) Whether the trial court's award was excessive;

   (c) Who should bear the costs of the appeal.

8. Counsel urged the court to find that the respondent proved her case on a balance of probabilities and is therefore entitled to the fruits of her judgment. She pointed out that the respondent is yet to fully recover from the injuries sustained in the accident and therefore an award of Kshs 702,954/= cannot

be said to be excessive in the circumstances. Ms Odhiambo further argued that, since the appellants did not demonstrate that the lower court erred in principle, the appeal is devoid of merits and ought to be dismissed with costs. She relied on the following authorities:

(a) *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR, and *Martha Waithera Kinyanjui v Tete* [2004] eKLR for the proposition that where the lower court has committed no error of principle in analyzing the facts and the law, an appeal cannot be sustained;

(b) *Justine Nyamweya Ochoki & another v Francis Ndurya & another* [2020] eKLR, in which Kshs 500,000/= was awarded for pain, suffering and loss of amenities in comparable circumstances;

9. In the premises, Ms Odhiambo submitted that the instant appeal is an afterthought and is only calculated at denying the respondent an opportunity to enjoy the fruits of her judgment. She consequently urged the court to dismiss the appeal with costs to pave way for the execution process to enable the respondent receive the needed funds to take care of her deteriorating health.

10. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

11. Before the lower court, the appellant testified on June 6, 2016 as PW1. She narrated the circumstances in which the accident occurred on the November 8, 2009. It was her evidence that she was travelling to Mombasa in motor vehicle KBJ 613J belonging to the 2nd appellant; and that the said motor vehicle was driven so carelessly by the 1st appellant that he caused it to collide head-on with an oncoming tanker by dangerously overtaking another motor vehicle when it was not safe to do so. The respondent further enumerated the injuries suffered by her to include head injuries with loss of consciousness as well as fractures, cuts and bruises on the hands and legs. The respondent also produced documents to prove that she was admitted at Mombasa Hospital for 3 days after which she continued with treatment at Makuyu Hospital. She added that she was still on analgesic drugs as at the time she testified, owing to the residual post-accident pain.

12. The appellant called Dr Mohamed Hanif, a general practitioner based in Voi, as PW2. He confirmed having examined the respondent for the purpose of preparing a medical report in respect of the injuries sustained by her in a road traffic accident. He told the lower court that the respondent sustained multiple cuts on both hands and forearms, right temporal head and lower limbs. PW2 also testified that the respondent sustained a dislocation of the right small finger and had, as a result, suffered diminished grip of the right hand. In his prognosis, the respondent would require orthopedic intervention to restore the function of the affected finger. PW2 produced his medical report before the lower court as the plaintiff's exhibit No 11(a). PW3 also produced other documents in support of the respondent's case, including a P3 form (exhibit 9), treatment notes, x-ray reports and a receipt for his fees.

13. The respondent's last witness was Corporal Hassan Ali (PW3) who was then stationed at Taru Police Station. He confirmed that an accident was reported at the police station on November 8, 2009 involving motor vehicle registration No KBJ 613E, Nissan UD bus and motor vehicle KBE 568U/ZC 9580 Mercedes Benz. PW3 further testified that the driver of the motor vehicle registration No KBJ

613J was found to be at fault and was charged with careless driving. He added that the said driver was charged and fined Kshs 5,000/= on February 2, 2010.

14. Although accorded sufficient time to avail their witnesses, the appellants ultimately called none; and instead relied on the medical report prepared by Dr Jennifer Kahuthu, which was produced by consent of the parties as defence exhibit 1. With that the appellants closed their case.

15. From the foregoing, there can be no dispute that the respondent was, on the November 8, 2009, travelling to Mombasa as a fare paying passenger in motor vehicle registration No KBJ 631J. There was credible evidence presented before the lower court to prove that the said motor vehicle was involved in a road traffic accident about 4.30 pm on reaching Maji Ya Chumvi area on Nairobi-Mombasa Road; and that the respondent was one of the individuals who sustained injuries in that accident. She gave uncontroverted evidence before the lower court to prove that she was admitted at Mombasa Hospital for 3 days between November 8, 2009 and November 11, 2009 as per the discharge summary at page 14 of the record of appeal. Indeed, in Dr Kahuthu's medical report, produced by consent on behalf of the appellants, it was not in dispute that the respondent was injured in the subject accident on November 8, 2009 or that she was thereafter admitted for treatment for three days at Mombasa Hospital.

16. In the light of the foregoing, the issues for determination are whether, in the circumstances, the respondent proved negligence on the part of the appellants; and if so, whether the quantum of damages arrived at by the lower court is defensible. Needless to say that the legal burden of proof was on the respondent, for, section 107(1) of the *Evidence Act*, chapter 80 of the laws of Kenya, is explicit that:

> "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."

17. The evidence of the respondent was that she was seated behind the driver, although she was not in a position to read the speedometer. She stated that the 1st appellant was driving at a high speed and attempted to overtake other motor vehicles in a reckless manner even before the accident occurred. She added that it was while overtaking other vehicles that the 1st appellant caused motor vehicle KBJ 631J to collide head on with a tanker. Her evidence was corroborated by the evidence of PW3 who testified that, upon investigations, the 1st appellant was found to be at fault and was charged with careless driving contrary to section 49 of the *Traffic Act*, and for which he was fined Kshs 5,000/=.

18. While it is settled that conviction for the traffic offence of careless driving does not, *per se,* impute 100% liability on the part of that driver, it is significant that in this case, the evidence of the respondent was entirely uncontroverted. Hence in *Robinson vs Oluoch* [1971] EA 376, it was held that:

> "Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent, but that is a very different matter from saying that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."

19. It must have been in this regard that the appellants alleged contributory negligence on the part of not only the respondent, but also the driver of motor vehicle registration No KBE 568U. The particulars

of their negligence were set out at paragraphs 6 and 7 of the defence. As against the respondent, the appellants had alleged the following:

(a) Failing to take any or any adequate precaution for her own safety;

(b) Failing to heed the instructions on safety precautions when travelling; and,

(c) Failing to heed the traffic rules and regulations when travelling.

20. In respect of the driver of motor vehicle registration No KBF 568U, the appellants alleged the following particulars of negligence:

(a) Failing to have any or any sufficient regard for the safety of the users of the said road by driving without due care or attention;

(b) Failing to keep any or any proper look-out for other vehicles that might reasonably have been on the said road;

(c) Driving at an excessive speed in the circumstances;

(d) Colliding onto motor vehicle registration No KBJ 631J;

(e) Endangering the lives of other road users in his manner of driving;

(f) Having total disregard for the traffic rules;

(g) Failing to stop, slow down, swerve or in any way so manage the said motor vehicle so as to avoid the collision.

21. Having pleaded the foregoing particulars, the evidential burden shifted to the appellants to demonstrate their assertions on a balance of probabilities. In this regard, sections 109 and 112 of the *Evidence Act* provides that:

> "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."
>
> ...
>
> "112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

22. It is instructive therefore that, in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, the Court of Appeal held that:

> "As a general proposition under section 107(1) of the Evidence Act, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act."

23. The appellants having failed to prove their allegations of negligence against the respondent, the lower court cannot be faulted for finding them 100% liable for the accident as well as the loss, pain and suffering suffered by the respondent as a result. I therefore find no basis for interfering with that finding.

24. On quantum, I note that at paragraph 5 of her plaint, the respondent pleaded the following injuries:

    (a) Multiple cut wounds on the left hand;

    (b) Multiple cut wounds on the right hand;

    (c) Deep wound on the right small finger;

    (d) Dislocation of the right small finger at the proximal interphalangeal joint;

    (e) Deep cut wound on the right supra-orbital region;

    (f) Deep cut wound on the left thigh;

    (g) Cut wound on the left knee;

    (h) Multiple cut wounds on the left leg.

25. Dr Mohamed Hanif, (PW2), confirmed that the respondent sustained multiple cuts on both hands and forearms, right temporal head and lower limbs, in addition to a dislocation of the right small finger with resultant diminished grip of the right hand. He expressed the opinion that the respondent would require orthopedic intervention to restore the function of the affected finger. In addition to his medical report, PW2 produced other documents in support of the respondent's case, including a P3 form (exhibit 9), treatment notes and x-ray reports.

26. It is noteworthy therefore that the medical report exhibited by the appellants before the lower court is largely in tandem with the evidence of both PW1 and PW2 as to the nature and extent of the respondent's injuries, including the dislocation of the proximal interphalangeal joint of the 5th finger. The only point of departure appears to be whether any physical disability resulted from that injury. Thus, according to Dr Kahuthu, the respondent required no future treatment.

27. It was on the basis of the aforestated injuries that the learned magistrate made an award of Kshs 500,000/= in general damages and Kshs 102,954 in special damages. He took into account the submissions made by learned counsel, and in particular the authorities of *Athuman Simuyu v Ludococa Mwandoe & 2 others* [1999] eKLR, *James Gathirwa Ngungi v Multiple Hauliers (EA) Ltd & another* [2009] eKLR which were cited by counsel for the respondent in support of their proposal for an award of Kshs. 2.5 million in general damages. He likewise considered the cases of *Francis Kinyu Wagikunju v Mukira Gathekie*, Nairobi HCCC No 2935 of 1996 and *Philip Munyao Musyoki v Kenya P & Co Ltd*, Nairobi HCCC No 1783 of 1989 which the appellants relied on to justify their proposal of Kshs 200,000/=.

28. I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in *H West & Son Ltd vs Shephard* [1964] AC 326, it was acknowledged that:

> "...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

29. In this regard, counsel for the respondent drew the court's attention to the cases of *Martha Waithera Kinyanjui v Anesta Secondary School* [2020] eKLR and *Catholic Diocese of Kisumu v Tete* (*supra*) to support her argument that, for the court to disturb the lower court's award, the appellants needed to demonstrate that the learned magistrate disregarded any of the applicable principles in awarding damages; which in her view was not the case herein. Indeed, in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal held thus:

> "As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see *Butt vs Khan* [1981] KLR 349)

30. Accordingly, the approach taken by Hon Wambilyanga, J in HCCC No 752 of 1993: *Mutinda Matheka vs Gulam Yusuf*, which I find useful, was thus:

> The court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

31. Additionally, in *Stanley Maore vs Geoffrey Mwenda* [2004] eKLR, the Court of Appeal suggested thus:

> ...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

32. In the light of the foregoing, to determine whether or not the lower court's assessment was reasonable I have given due consideration to the authorities that were drawn to the attention of the lower court by learned counsel for the parties and note that:

    (a) In *Athuman Simiyu v Ludovoca Mwandoe & 2 others* (*supra*) in which the plaintiff sustained soft tissue injuries as well as fractures of the tibia and fibula of the right leg as well as dislocation of the right ankle joint he was awarded Kshs 600,000/= in 1999 as general damages for pain, suffering and loss of amenities.

    (b) In *James Gathirwa Ngugi v Multiple Hauliers (EA) Ltd & another* (*supra*), Kshs. 2.5 million was awarded as general damages for compound fracture of right tibia and fibula, fracture of the left proximal radius and ulna as well as soft tissue injuries on head, both hands and legs. The plaintiff had significant residual complications, including restriction in squatting, walking and mobility of the forearm.

(c) In *Catholic Diocese of Kisumu v Tete* (*supra*), a matter in which the plaintiff sustained head injury, fractures of both superior and inferior rami with associated dislocation of the left hip joint; comminuted fracture of the mid-shaft of the left femur, contusion to the left knee, deep cut wound to the left foot, cut wound on the scalp and soft tissue injuries to the chest, an award of Kshs 1,300,000/= was upheld by the Court of Appeal.

33. Considering the injuries suffered by the respondent and the prognosis that she will require surgical intervention to manage the effects of the injuries sustained by her in the subject accident, I find no reason to interfere with the award. The appeal is accordingly dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022

OLGA SEWE

JUDGE