Ababa v Odhiambo (Civil Appeal 236 of 2019)
[2022] KEHC 13065 (KLR) (Civ) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 236 OF 2019

JK SERGON, J

SEPTEMBER 22, 2022

BETWEEN

JANET ALUOCH ABABA ..... APPELLANT

AND

JOSEPHINE ACHIENG ODHIAMBO ..... RESPONDENT

(Being an appeal against the judgment and decree delivered by Hon. G. A. Mmasi (Mrs.) (Senior Principal Magistrate) on 25th March, 2019 in Milimani CMCC NO. 4014 OF 2015)

JUDGMENT

1. The respondent in this instance filed a suit against the appellant and sought for both general and special damages plus costs of the suit and interest thereon.

2. The respondent pleaded in her plaint filed on July 13, 2015 that sometime on or about the October 6, 2013 she was lawfully crossing the road along Waiyaki Way at about 11.30 am. when the appellant carelessly and negligently drove the motor vehicle registration number KAN 428M ("the subject motor vehicle") and knocked her down, causing her to sustain serious injuries.

3. The particulars of negligence and the injuries sustained are laid out under paragraph 5 of the plaint.

4. Upon service of summons and entering appearance, the appellant filed her statement of defence on November 3, 2015 to deny the allegations set out in the plaint.

5. At the hearing of the suit, both the respondent and the appellant testified and called one (1) witness each.

6. Upon close of submissions, the trial court delivered judgment in favour of the respondent and against the appellant in the manner hereunder:

Liability 80%:20% in favour of the respondent

a. General damages for pain,

Suffering and loss of amenities Kshs 850,000/=

Less 20% contribution Kshs 170,000/=

Net Total Kshs 680,000/=

b. Future medical expenses Kshs 200,000/=

Grand Total Kshs 880,000/=

7. The aforementioned judgment is now the subject of the appeal before this court. To challenge the judgment, the appellant has put forward the following grounds of appeal vide her memorandum of appeal dated April 25, 2019:

i. That the learned trial magistrate erred in law and in fact in apportioning liability at 80:20% in favour of the respondent and against the appellant, 20% being too low an apportionment as against the respondent.

ii. That the learned trial magistrate erred in law and in fact in failing to make a finding on whether or not there was a zebra crossing where the subject accident occurred.

iii. That the learned trial magistrate erred in law and in fact in failing to find the respondent's evidence contradictory and unreliable and thereat being guided by the appellant's evidence which was consistent and credible.

iv. That the learned trial magistrate erred in law and in fact in assessing general damages at Kshs 850,000/ for pain, suffering and loss of amenities which amount was/is manifestly excessive in the circumstances.

v. That the learned trial magistrate erred in law and in fact in assessing and awarding future medical costs at Kshs 200,000/ which being a special damage had not been specifically pleaded.

vi. That the learned trial magistrate erred in law and in fact in failing to take cognizance of the fact that the Kenyan economy cannot sustain such a huge award.

8. At the directions of this court, the parties filed and exchanged written submissions on the appeal.

9. On liability, the appellant submits that the apportionment of liability made by the trial court is low and urges that the same be revised upwards to indicate equal apportionment of liability (50:50), if at all this court is satisfied that the respondent proved her case. Otherwise, the appellant submits that the impugned judgment ought be set aside and substituted with an order dismissing the suit with costs.

10. Still on liability, it is the submission by the appellant that in the absence of an indication that there was a zebra crossing at the scene of the accident, it would only be proper for this court to find the respondent 100% liable and hence dismiss the suit, on appeal.

11. It is also the submission by the appellant that the account of events given by the respondent was filled with contradictions and that the trial court ought to have taken this into account.

12. On quantum, the respondent argues that the award in the sum of Kshs 850,000/= made on general damages is on the higher side and suggests that the same be revised downwards to an award in the sum of Kshs 500,000/= being a more reasonable award.

13. Concerning the award made under the head of future medical costs, the appellant is of the view that the same ought not to have been awarded since the respondent did not specifically plead it in her plaint.

14. For all the foregoing reasons, the appellant urges this court to allow the appeal.

15. On her part, the respondent contends that the trial court considered all the evidence which was placed before her and therefore arrived at a proper finding on both liability and quantum.

16. The respondent further contends that the prayer for future medical costs was pleaded and therefore correctly awarded.

17. In view of the foregoing, the respondent is of the view that the appeal is deserving of dismissal, with costs.

18. I have considered the written submissions on record in respect to the appeal. I have also re-evaluated the evidence tendered before the trial court for consideration.

19. It is clear that the appeal is challenging the findings on both liability and quantum. I will therefore tackle the appeal under the two (2) limbs.

20. On liability, the respondent adopted her signed witness statement as evidence and produced her list and bundle of documents as exhibits.

21. The respondent stated that on the material date, she was walking with a client and crossing a zebra crossing when the accident occurred, thereby resulting in her injuries and admission in hospital.

22. In cross-examination, the respondent testified that she does not know whether criminal charges had been preferred in relation to the accident and that the said accident occurred on a straight road which happens to be a highway and that prior to crossing, she had stopped to confirm that the road was clear.

23. The respondent further testified that the person she was crossing with was not hit.

24. In re-examination, it was the evidence of the respondent that the vehicles using the road were coming from one direction.

25. Shamima Apiyo who was PW2 also adopted her executed witness statement as evidence and testified that she had accompanied the respondent on the material date and that it is at the point of crossing the zebra crossing that she realized that the respondent had been knocked down.

26. The witness testified that the subject motor vehicle had passed behind her swiftly and that prior to the accident, they had seen it from a distance.

27. In cross-examination, it was the evidence of PW2 that the respondent collapsed on the road and not on the pavement upon being hit and that just before the accident, she and the respondent had been walking side by side but on noticing the motor vehicle, she ran across the road, leaving the respondent behind.

28. The appellant in her evidence as DW1 stated that she was involved in the material accident while on her way to church and that at the time, she was driving at a reasonable speed.

29. The appellant stated that before the accident, she had noticed the respondent and PW2 checking to see whether the road was clear and that the respondent suddenly jumped onto the road, resulting in the accident.

30. It was the testimony of the appellant that the road is straight in nature but that there was no zebra crossing, and hence the respondent contributed to the accident by not ensuring the road was clear before attempting to cross.

31. In cross-examination, it was the testimony of the appellant that she attempted to apply emergency brakes upon seeing the respondent but that she was unsuccessful in preventing the accident.

32. William Maina Gitau who was DW2 stated that he is an Insurance Investigator by profession and that he received instructions to investigate the material accident, following which he compiled a report, which he produced as an exhibit.

33. In cross-examination, the witness gave evidence that the road in question is two-laned but that he did not personally visit the scene but that the report was done by his colleague.

34. In her judgment, the learned trial magistrate reasoned that while there is evidence to show that the appellant is liable for the accident, it is also her view that the respondent contributed to the accident by not exercising extra caution before attempting to cross the road.

35. Upon my re-examination of the evidence tendered before the trial court, I observed that the same confirms the occurrence of the accident on the date earlier referenced.

36. It is not controverted that the accident involved the respondent and the subject motor vehicle being driven by the appellant.

37. On the question of negligence, upon my study of the police abstracts tendered, I note that the matter was still pending under investigation and there is nothing to indicate whether such investigations were concluded.

38. However, I note from the evidence tendered that the appellant was served with a notice of intended prosecution by the police on October 7, 2013 followed by a cash bail receipt to indicate an intention to charge her with the traffic offence of careless driving.

39. Upon my re-examination of the pleadings and totality of the evidence, I concur with the finding of the learned trial magistrate that the same points to negligence on the part of the appellant, irrespective of whether or not there was a zebra crossing at the scene of the accident.

40. It is apparent that the respondent was at all material times within the view of the appellant and given the evidence that the road in question is quite busy in nature, the appellant like all other road users ought to have exercised extra caution.

41. I am therefore satisfied that in the circumstances, the appellant was liable for the accident.

42. This leads me to the second crucial facet of the appeal which has to do with whether there is proof of contributory negligence on the part of the respondent.

43. I note from the evidence which I have re-examined that the road in question is known to be quite busy with both road and human traffic. In that respect, I am of the view that the respondent equally ought to have exercised caution in ensuring her safety while using and crossing such a busy road, but did not. In this way, I am satisfied that she contributed to the accident and was therefore rightly held partially liable by the learned trial magistrate.

44. Upon considering the rival positions and the view that the appellant substantially caused the accident, I am satisfied that the learned trial magistrate correctly apportioned liability between the parties in the

manner she did, and I see no need to interfere with her finding on liability. To this extent, the appeal fails.

45. The second limb of the appeal touches on quantum, specifically the awards made under the heads of general damages for pain, suffering and loss of amenities, and future medical costs.

46. On the general damages, the respondent on the one part proposed the sum of Kshs 1,500,000/= and cited *inter alia*, the case of *George Mathenge Mbiyo v MD Patel*-HCCC 2216/93 where a fracture was sustained and an award of Kshs 600,000/= was given. The appellant on her part suggested the sum of Kshs 400,000/= with reference inter alia, to the case of *John Kimani Kamau v Stephen Warui Kiarie*-HCCC No 4503 of 1993 where the plaintiff who had suffered a fracture of the tibia and fibula with pain and swelling at the fracture site was awarded the sum of Kshs 200,000/= under this head.

47. In her judgment, the learned trial magistrate awarded the respondent a sum of Kshs 850,000/=.

48. Upon my re-examination of the authorities cited by the parties, I note that they were decided many years ago and would therefore not offer comparable awards. I also note that the learned trial magistrate did not cite any guiding authorities in arriving at her award.

49. Upon my study of the record, I observed that the injuries pleaded and supported by the medical evidence on record are as follows:

    a) Head injuries resulting in loss of consciousness

    b) Fracture of the left leg (fracture of the tibia)

50. In seeking comparable awards made, I considered the case of *Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N* [2018] eKLR where the injuries sustained included head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. The court awarded the sum of Kshs 500,000/= under this head. I also considered the case of *Tirus Mburu Chege & another v J K N (minor suing through the next friend and mother D W N & another* [2018] eKLR where an award of Kshs 800,000/= was on appeal substituted with one of Kshs 500,000/= in the instance of a plaintiff who had sustained fractures of the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness.

51. In view of the foregoing, I am satisfied that the award made by the learned trial magistrate is on the higher side. In my view, given the passage of time, nature of injuries and inflation rates, the sum of Kshs 600,000/= would constitute a more reasonable award.

52. On future medical costs, the respondent sought for the sum of Kshs 250,000/= in her submissions, while the appellant submitted that in the absence of a prayer for this award, the respondent was not entitled to the same.

53. The learned trial magistrate on her part awarded the sum of Kshs 200,000/= under that head.

54. I considered the reasoning by the Court of Appeal in the case of *Tracom Limited & Another v Hassan Mohamed Adan* [2009] eKLR where it held thus:

> " ...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma (2004) 1 EA 91*, this court, stated: -
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> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general

damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."

55. Upon my study of the pleadings, I observed that the respondent did not include the prayer for future medical costs therein and hence there was no basis for the learned trial magistrate granting the same. I will therefore interfere with the award made under that head.

56. The upshot therefore is that the appeal partially succeeds, on quantum. Consequently, the award in the sum of Kshs 850,000/= made under the head of general damages for pain, suffering and loss of amenities is hereby set aside and is substituted with an award of Kshs 600,000/=, whereas the award made under the head of future medical costs is set aside.

57. Accordingly, the judgment shall now read as follows:

i. General damages for pain, suffering

and loss of amenities Kshs 600,000/=

Gross Total Kshs 600,000/=

Less 20% contribution Kshs 120,000/=

Net total Kshs 480,000/=

ii. Costs of the suit are awarded to the respondent together with interest on general damages at court rates from the date of judgment until payment in full.

iii. In the circumstances, a fair order on costs is to order which I hereby do that each party to meet their own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent