Okoth v Oulo (Civil Appeal E3 of 2020)
[2022] KEHC 14462 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14462 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E3 OF 2020

RPV WENDOH, J

OCTOBER 27, 2022

BETWEEN

NICHOLAS WASHINGTON OKOTH ..... APPELLANT

AND

KAROLINE AUMA OULO ..... RESPONDENT

(An Appeal from the Judgement and Decree Senior Resident Magistrate Hon. R. K. Langat, dated and delivered on 8/10/2020 in Rongo PMCC No. 5 of 2020)

JUDGMENT

1. The appellant, Nicholas Washington Okoth preferred the instant appeal dated October 21, 2020 against the judgement of Hon RK Langat (SRM) Rongo, dated and delivered on October 8, 2020. The firm of Omaya & Co Advocates is on record for the appellant while the firm of Khan & Associates is on record for the respondent.

2. By a plaint dated 11/1/2020, the respondent filed a suit against the appellant to recover damages for injuries allegedly sustained in a road accident which occurred on or about 6/10/2019. It was the respondent's case that on or about 6/10/2019, she was standing at the verge of Awendo - Mariwa road when at Marienga area the appellant and/or his authorized driver, so negligently, recklessly and carelessly drove, managed and or controlled motor vehicle registration number KAP 033X that he caused or permitted the same to knock the respondent by reason of which the appellant sustained physical injuries and suffered pain, loss and damage. The respondent averred that the appellant should be held vicariously liable or otherwise liable for the tortious acts and/or omission committed on her.

3. The respondent particularised the negligence of the appellant and/or his assignee, driver servant, agent and/or employee. The respondent further pleaded and particularized the injuries suffered, loss of future earnings, loss of amenities, loss of future earning capacity and special damages. The respondent further claimed general damages together with costs and interest.

4. The appellant filed a statement of defence dated 4/2/2020. The appellant stated that the narration contained is not accurate and the respondent is the one who chose to walk carelessly without paying attention to the traffic rules; that if at all there was an accident involving motor vehicle registration number KAP 033X along the Awendo - Mariwa road as pleaded, the same was caused or substantially contributed to by the negligence of the plaintiff. The appellant particularised the respondent's negligence and averred that the doctrine of res ipsa loquitor does not apply in the present case owing to the circumstances under which the accident occurred.

5. Further, the appellant denied the injuries and the occurrence of the accident an averred that the injuries do not amount to anything serious and such injuries were not in any event sustained in the accident of 6/10/2019. The appellant asked the trial court to dismiss the suit with costs.

6. The suit proceeded to hearing and the respondent presented three witnesses in support of her case. PW1 was Dr Peter Murimi attached to the Kisii teaching Referral Hospital, PW2 the respondent and PW3 the PC Dickens Adumba an officer stationed at Awendo Police Station. The appellant did not call any witnesses in support of its case. Parties recorded a consent on September 15, 2020 in respect of the treatment notes as Pexh 2 and Pexh 3 and the medical report dated May 15, 2020 by Dr James as Dexh4.

7. After the hearing, the trial Magistrate found in favour of the respondent and awarded her a total sum of Kshs 3, 807,430/= as general damages, loss of earning capacity, future medical expenses and special damages. The respondent was also awarded costs and interest.

8. Aggrieved by the outcome, the appellant filed the instant appeal and preferred six (6) grounds of appeal as follows:-

    i. The learned trial Magistrate awarded an amount in damages that are beyond his pecuniary jurisdiction.

    ii. That the decree passed is beyond the permitted limits of the court.

    iii. That the sum of Kshs 3,000,000/= awarded as general damages is excessive and does not reflect the proportionate award amounting to the injuries suffered.

    iv The judgment is against the weight of the evidence.

    v That the learned Magistrate ignored the submissions of the appellant as well as the evidence and did not make use of them in arriving at his judgement.

The appellant prayed:-

i. The judgement of the Senior Resident Magistrate in Rongo SRMCC No 5 of 2020 be and is hereby set aside.

ii. That this court do make its own findings on liability and quantum based on evidence and sound legal principles.

iii. Costs of this appeal be provided for.

Directions were taken that the appeal be canvassed by way of submissions. The appellant filed his submissions dated June 15, 2022 on June 16, 2022. The appellant abandoned ground No one and two and addressed the remaining grounds.

9. On the issue of liability, it was submitted that the court fell into error when it held that the mere fact that the defence did not call evidence, automatically excused the plaintiff from proving her case to the

required standard; that no independent witness was called and the findings on liability at 100% was scanty. The court should have apportioned the blame at 50:50.

10. The appellant further submitted that the Magistrate shifted the burden of proof to the defendant because he failed to testify and this offends the express provisions of Section 107 (1) of the *Evidence Act*. The appellant relied on the findings of the court in Geoffrey Ngatia Njoroge v James Ndungu Mungai ELC Case No 773 of 2017 where the court held that the fact that evidence is not challenged does not mean that the court will not interrogate the evidence of the plaintiff.

11. On the award of general damages, it was submitted that the award of Kshs 3,000,000/= should be reduced to Kshs 2,000,000/= since the authority which the plaintiff relied on had an element of permanent incapacity as opposed to this case where the degree of permanent incapacity was not ascertained and was left to speculation.

12. On the loss of future earning capacity, it was submitted that there was no evidence that the respondent had lost her employment or that the chances of employment were diminished as a result of the injuries. To rebut this position, the appellant relied on the case of *Kenblest Kenya Ltd v Musyoka Kitema* (2020) eKLR. The appellant asked this court to find that the award of Kshs 500,000/= as loss of earning capacity should not have been awarded.

13. On the future medical expenses. The appellant submitted that the court awarded the sum of Kshs 300,000/=, merely because the appellant did not submit on this aspect hence elevating submissions to the level of evidence. it was further submitted that the costs of future medical expenses being special damages must be proved strictly. The appellant relied on the findings of *Hahn v Singh* Civil Appeal No 42 of 1983 (1985) KLR and *Zachariah Waweru Thumbi v Samuel Njoroge Thuku* (2006) eKLR.

14. Further to the foregoing, the appellant submitted that the same way the trial Magistrate rejected the costs of the anticipated medical examination costs of Kshs 3,000/= then he ought to have rejected the cost of future medical expenses.

15. The appellant submitted that the appeal should be allowed and the award under the various heads be set aside or reduced accordingly and the costs of this appeal be awarded to the appellant.

16. The respondent filed submissions dated June 7, 2022 on June 30, 2022. On the issue of liability, it was submitted that the respondent testified that motor vehicle registration number KAP 033X veered off the road which evidence was corroborated by the police who confirmed that the driver was to blame. It was submitted that the appellant did not adduce any evidence to controvert the respondent's evidence and the court was right to find that the appellant was solely to blame. There is no basis of interfering with the trial court's findings.

17. On the award of general damages, it was submitted that the award was commensurate with the injuries suffered. It was submitted that the respondent was admitted for four days and discharged and to date, she has not fully recovered from the injuries; that Dr Morebu's report opined that the respondent sustained severe injuries and permanent disability was expected and the appellant did not avail any medical report to contradict that of the appellant. The respondent placed reliance on the cases of *Regina Mwikali Wilson v Stephen M Gichuhi & Another* (2015) eKLR, *Moi Teaching and Referral Hospital Board & Christopher K Kinyua v Leonard Kibiwott Kosgei* (2020) eKLR to justify the comparable injuries suffered by the respondent and urged this court to uphold the award of Kshs 3,000,000/=.

18. On the future medical expenses, it was submitted that the respondent pleaded the same at paragraph 5 of the plaint and the medical report by Dr Morebu opined that the respondent would need Kshs 300,000/= for hip replacement. The appellant submitted that the rest of the awards were not contested in the memorandum of appeal. The appellant urged the court to find that the appeal lacks merit and dismiss the same with costs.

19. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co Ltd* (1968) EA 123.

20. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

21. I have certainly read, considered and understood the appeal, the proceedings in the trial court and the submissions by both parties. The main issues for consideration are:-

    a. Liability.

    b. Whether the trial court followed the correct principles in assessment of damages.

22. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co Ltd* (1968) EA 123.

> On the issue of liability, the appellant submitted that the trial Magistrate erred in finding that since he had not produced any evidence to the contrary, he is 100% liable for the occurrence of the accident. The respondent agreed with the findings of the trial Magistrate. In reaching his findings on liability, the trial Magistrate observed that the evidence of the respondent was corroborated by PC Akumba (PW2) who testified that the driver of the suit motor vehicle was to blame since he failed to keep a safe distance between himself and a motorcyclist who had made an abrupt "U" turn causing the driver to swerve to avoid hitting the motor cyclist. The trial court also observed that the blame on the driver was uncontroverted as no evidence to the contrary was adduced by the appellant. Being bound by decisions on the consequences of a defendant not adducing evidence in support of its case, the Magistrate found that the appellant is wholly to blame for the occurrence of the accident.

23. The court record, which speaks for itself, confirms that the appellant did not call any witnesses in support of his case. In *North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi* (2019) eKLR it was held: -

> " It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence, which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages."
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> This court's position has always been that when a party fails to call evidence to challenge the other party's position, that evidence remains unchallenged. However, the respondent has to prove its case on a balance of probabilities. Be that as it may, it is not disputed that the respondent was a pedestrian. The evidence of the respondent, PW2, was that she was standing alongside the road when the suit motor vehicle knocked her down. On cross - examination, she reiterated that the suit motor vehicle veered off the road and came to where she was standing, hit her and threw her to the ditch. It was her testimony that another motorist was also knocked down. The investigation officer PW3 testified that the suit motor vehicle was avoiding hitting a motorcycle which made an abrupt U - turn by swerving off the road but it hit the respondent who was a pedestrian. PW3 testified on cross examination that the driver ought to have kept a safe distance from the motor cycle in the event of an emergency.
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> From the evidence of the witnesses, there is no doubt that the driver of the suit motor vehicle was driving at a high speed. If the driver had been driving at a reasonable speed and keeping a safe distance, there would be no need for him to intervene by swerving off the road to avoid hitting the alleged motorcyclist. The Court of Appeal in the Case of Karanja v Malele (1983) KLR 147 addressed the issue of liability as follows: -
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> "there are two elements to be considered when assessing the issue of liability namely causation and blame worthiness; there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence in not seeing it before hand; and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion."
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> The Court of Appeal went on further to state that there can be no excuse for the driver's complete failure to see a pedestrian. I am convinced that the trial Magistrate reached a proper conclusion in attributing liability to the appellant at 100%. If the

appellant attributed blame on the cyclist, he ought to have taken out third party proceedings against the alleged motor cyclist in order to apportion liability. The respondent, being a pedestrian, had no control over the control of the suit motor vehicle and how it was being driven.

From the foregone discussions, it is my view that the respondent's case was not challenged in any way. The appellant did not sufficiently present his evidence before the trial court and the respondent's case stands unchallenged and wasproved on a balance of probability.

24. On the duty of the appellate court to assess and interfere with damages, the principles are well settled. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -

> '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..."

On the general damages awarded to the respondent, the appellant submitted that an award of Kshs 2,000,000/= is appropriate. I have considered the medical reports produced by the respondent being the treatment notes from the Kisii Teaching Referral Hospital (Pexh 2 and Pexh 3) and the medical report from Dr Peter Morebu dated 23/102019. Although the parties on September 15, 2020 by consent indicated that they were producing the medical report of one Dr James dated May 15, 2020 and marked as Dexh4, there is nothing on record to show that such a medical report exists. Even in the pleadings filed by the appellant, there is no list of documents which lists the said medical report dated September 15, 2020 by Dr James as one of the documents. The second medical report would have been used to enhance on reduce the probative value of the first medical report and since it was produced by consent, the Magistrate would have considered it.

That being the case, and in the absence of the second medical report by the appellant, the trial Magistrate correctly relied on the medical reports produced by the respondent. Once again, the appellant seems not to have challenged the evidence adduced by the respondent. In this appeal, the appellant has correctly submitted that submissions are of no evidentially value but they are just flowery language to encourage the court to find in their favour. The appellant cannot now use submissions to attempt to impugn the award on damages.

25. As a result of the road accident, the respondent suffered multiple injuries which are as follows:

i. Segmental fracture of the sacrum

ii. Segmental fracture of the left acetabulum

iii. Linear displaced fractures superior right pubic ramus

iv Linear displaced fractures inferior right pubic ramus

v Left superior pubic ramus with displaced fracture fragments

vi. Left inferior pubic ramus with displaced fracture fragments

vii. Left iliac bone fracture

viii. Left posterior hip dislocation.

26. The medical report by Dr Morebu showed that the respondent was unable to walk and permanent incapacitation was anticipated. The report also showed that the respondent would need a hip replacement for a fractured hip at the cost of Kshs 300,000/=.

27. On the award of general damages, the trial Magistrate relied on the findings of the case *Alex Wachira Njagua v Gathuti Tea Factory* (2010) eKLR which I have considered. The injuries sustained by the plaintiff in that case were fewer multiple fractures compared to the instant case and disability was assessed at 100%. The court awarded Kshs 3,000,000/= as general damages in the year 2010.

28. I have independently considered the case of *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Another* (2015) eKLR where the plaintiff suffered compound communuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 com, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg. A temporary disability was assessed at 10%. Ougo J assessed the general damages of pain and suffering at Kshs 1,500,000/= in the year 2015.

29. In the case of *Peace Kemuma Nyang'era v Michael Thuo & another* (2014) eKLR the injuries sustained were fracture of the sacrum bone – lowest back bone spine, Fracture of the right superior pubic ramus of the pubic bone – right hip bone, Fracture of the right ischium bone part of the pelvis – lower part as one sits down, haematoma on both thighs, haematoma in the lumbar - sacral – lower part of spine between the 2 buttocks. The plaintiff was expected to go through multiple surgeries and risked having difficulties in giving birth and permanent disability assessed at 45%. Aburili J awarded Kshs 2,500,000/= as general damages for pain and suffering in the year 2014.

30. Having considered the nature of the injuries in the aforementioned cases and comparing them with the ones of the respondent herein, I am of the view that the award of Kshs 3,000,000/= was on the higher side. Considering the rate of inflation I am of the view that an award of Kshs 2,500,000/= is commensurate as damages for pain and suffering.

31. On the future medical expenses, the medical report opined that the respondent would need approximately Kshs 300,000/= as medical expenses towards the hip replacement. I find no reason to disturb the same.

32. On the loss of future earning capacity, the Court of Appeal had this to say in *SJ v Francesco Di Nello & Another* (2015) eKLR:-

> " Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved."

33. The Court of Appeal in *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR stated that:-

> "...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed....the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

34. Guided by the above decisions, when making an award for loss of earning capacity, the same is discretionary. The award should be modest or substantial depending on the circumstances. The trial Magistrate relied on the principles set out on the Court of Appeal Case in Mumias Sugar Company Limited (supra) and awarded a global sum of Kshs 500,000/=. The same is reasonable and it is hereby upheld.

35. On the special damages awarded, the same is not in dispute and it is hereby upheld.

36. The upshot thereof is that the appeal partially succeeds. The judgement and decree of the Hon RK Langat dated and delivered on October 8, 2020 is hereby set aside to the extent of the general damages awarded.

    The computation of the final award is as follows: -
    Liability in favour of the respondent 100%General damages onPain and suffering 2,500,000/=Loss of earning capacity 500,000/=Future medical expenses 300,000/=Special Damages 7, 430/=Grand Total 3, 307,430/=

The respondent is awarded half costs of this appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 27TH DAY OF OCTOBER, 2022.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Ms. Nyangano for the Appellant.

Ms. Kusa for the Respondent.

Nyauke Court Assistant.