Ihuthia v Gatura (Civil Appeal 67 of 2019)
[2022] KEHC 14342 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14342 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 67 OF 2019

JN NJAGI, J

OCTOBER 26, 2022

BETWEEN

JULIA WAIRIMU IHUTHIA ..... APPELLANT

AND

AGNES NYAWIRA GATURA ..... RESPONDENT

JUDGMENT

1. The appellant instituted a suit against the respondent in the lower court claiming general and special damages after the respondent`s driver reversed her vehicle on the appellant thereby knocking her down while she was walking on a pedestrian path as a result of which she sustained injuries. The appellant blamed the driver for reversing the motor vehicle negligently thus causing the accident. After a full trial the trial court blamed both the motorist and the pedestrian to have equally contributed to the accident and apportioned liability at the ratio of 50:50. The court awarded the appellant a sum of Ksh 400,000/- in general damages and Ksh 454,000/= in special damages. The appellant was dissatisfied with the finding on liability and quantum and filed the instant appeal.

2. The grounds of appeal are that:

    a. The learned magistrate erred in law and in fact in apportioning liability when there was no evidence to support the said finding.

    b. The learned magistrate erred in law and in fact in awarding damages that were inordinately low as to represent a fair award in the circumstances.

    c. The learned magistrate erred in law and in fact in failing to award the total sum of the special damages claimed.

3. The appeal is both on liability and quantum. I will first deal with the issue of liability and later consider the issue of quantum.

4. The appeal was canvassed by way of written submissions. The firm of Nderi & Kiingati & Co Advocates appeared for the appellant while the firm of Munene Wambugu & Kiplagat Advocates represented the respondent.

Liability

5. The advocates for the appellant submitted that each party was blaming the other for causing the accident and were thus enjoined by the law to discharge their respective burdens of proof. They submitted that the trial court misapprehended the import of judicial notice on matters that ought to have been proved by way of evidence. That in doing so the court ended up drawing inferences that were unsupported by evidence on record. That it was the duty of the respondent to discharge her burden by way of leading evidence. That the court seems to have tilted the dearth of evidence in favour of the respondent instead of the respondent proving her case.

6. It was submitted that the respondent owed the appellant a duty of care to ensure her safety before embarking on reversing and more so in an area that was busy with traffic and pedestrians. That she failed in this duty and ought to have been found wholly to blame.

7. The respondent on the other hand submitted that the appellant did not tender enough evidence proving fault on the part of the respondent. That no blame has been laid against the respondent as the appellant admitted that she was walking behind the parked motor vehicle and not on the pedestrian path. That negligence was not proved.

8. The respondent urged the court to take judicial notice that a pedestrian path can only be off the main road street. She submitted that the accident was caused by the plaintiff`s failure to pay regard to her own safety and to walk along the road when it was not safe to do so. That it was risky for a pedestrian to walk behind a vehicle. That the doctrine of *volenti non fit injuria* applies as she assumed the risk which a reasonable person would not have undertaken.

9. It was submitted that both the appellant and the respondent owed each other duty of care but that the respondent`s driver was diligent as she ensured that it was safe to reverse before she did so. The appellant relied on the case of *Leonard Kamenwa Njenga v David Mauna Mbugua* (2019) eKLR where it was held that a pedestrian has a duty to take care of his own safety while crossing or walking on a road and to have due regard for other road users. The respondent urged the court to find that she was not liable.

10. It was submitted in the alternative that the court upholds the trial court`s holding on liability at 50:50 basis between the appellant and the respondent.

Analysis and Determination

11. This being a first appeal this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See *Selle & another Vs Associated Motor Boat Co Ltd & others* (1968) EA 123 and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

12. It was the evidence of the appellant that at the material time she was walking on a pedestrian path along the busy Gakere Road in Nyeri town when the respondent`s motor vehicle reversed from a parking bay and rammed into her whereupon she sustained injuries. That she was among others who were walking on the pedestrian path but the others scampered for safety but she was unable to move away quickly due to her advance age of 86 years.

13. The respondent`s driver DW1, on the other hand stated that she was parked on a parking bay in a busy road. That before she embarked on reversing she ascertained from the side and rear view mirrors that the road was clear. That as she reversed she heard a bang from the rear and members of the public alerted her that she had ran into someone. She came out of the vehicle and noted that she had knocked down an old lady. She blamed the lady for walking on the road instead on the space that was in front of the vehicle.

14. The trial court faulted the appellant for walking behind a parked motor vehicle instead of walking at the front of it. The magistrate took judicial notice that a pedestrian path can only run parallel to a street of a main road. That the motor vehicle could not possibly have been parked on a pedestrian path. It also found that as the respondent had parked in a busy area she was liable for not being more alert to the presence of pedestrians and was found equally to blame for the accident.

15. The issue for determination on liability is as to who between the appellant and the driver of the respondent was to blame for occasioning the accident and whether, as held by the trial court, both parties were equally to blame.

16. The trial court dismissed the appellant`s evidence that she was walking on a pedestrian path behind the vehicle when she was knocked down. The court took judicial notice that a pedestrian path can only run parallel to a street off a main road and that a vehicle could not possibly be parked on such a path.

17. Section 60(1)(a) of the *Evidence Act* provides that the facts of which the Court shall take judicial notice of include all written laws, and all laws, rules and principles, written and unwritten, having the force of law including the rule of the road on land or at sea or in the air. The court may take judicial notice of matters that are of general or local notoriety. Section 59 of the *Evidence Act* (cap 80) provides that no fact of which the Court shall take judicial notice need be proved.

18. The issue as to where the footpath in this case was located is not one which the court could take judicial notice of as a matter of general application as this is an issue that ought to have been proved through evidence. The appellant insisted that she was walking on a pedestrian path that was behind where the respondent`s motor vehicle was parked. That she was among many other people who were walking along the said place. The respondent on the other hand stated that there was space at the front of the vehicle where pedestrians could pass. Therefore, that the appellant was at fault in walking behind the vehicle instead of doing so at the front.

19. I have considered the evidence that was adduced before the lower court. I have noted that no question was put to the appellant that there was a footpath off the road at the front of the vehicle. Neither did the respondent`s driver say that there was a pedestrian path off the road. She only described it as space where people could pass. She was not categorical that there was a designated pedestrian path off the road. She also did not mention any foot path in her written statement. I therefore find no evidence that there was a pedestrian path off the road.

20. Similarly, there was nothing to prove that there was a designated pedestrian path behind where motor vehicles were parked. It would appear from the evidence that pedestrians were walking behind the parked motor vehicles, possibly due to lack of a designated walking area along the road. However, there is no reason for the place to be described as a pedestrian path simply because many people were walking alongside that area. There is nothing though to prevent a pedestrian path being located between parked vehicles and the road. It was for the appellant to show that she was walking on a designated footpath. It would appear to me that both motor vehicles and pedestrians were sharing the road, possibly because the road was narrow. It was the duty of any driver reversing from the parking bay to be extra careful not to hit the pedestrians who were walking behind the parked vehicles.

21. In the premises, the respondent`s driver owed a duty of care to pedestrians who were using the street not to drive her vehicle in a manner that could cause injury to the other users of the street. It would appear to me that the driver pulled out of the parking without due care and attention as a result of which she knocked down the appellant. The driver was partly to blame for causing the accident.

22. A pedestrian owes a duty of care to be on the look-out when using a road. In this case the appellant was taking a risk in walking behind parked motor vehicles in what seemed to be part the road. There was danger of being hit by a motor vehicle. I find that the appellant contributed to the occurrence of the accident. Knowing that she was of advanced age it was a risk for her to walk behind parked motor vehicles as she could not move away fast in case of a reversing vehicle. She cannot however be entirely to blame as there was no evidence that there was any other walking area along that road. It was for both the pedestrians and motorists to be mindful of other road users.

23. In *Kennedy Macharia Njeru v Packson Githongo Njau & another* (2019) eKLR, Gitari J held as follows on the issue of contributory negligence:

    In determining liability the court must consider the facts of the case and come to a conclusion as to what mostly contributed to the cause of the accident. The court will consider the manner of driving, identify the person who was at fault and place the blame on him. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

24. As it was not clear as to who between the driver of the motor vehicle and the appellant was to blame for the accident, I am of the view that the trial court was correct in apportioning liability equally between the parties.

Quantum

25. As this is an appeal against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages see *Butt v Khan* [1982-88]1KAR 1 and *Mariga v Musila* [1982-88] 1 KAR 507). In *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal restated this principle as follows:

    > " 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."

26. The medical report prepared by Dr Muchai Mbugua dated March 28, 2018 noted that the respondent had suffered the fracture of the neck of the left femur that necessitated the replacement of the left hip joint. That at the time of examination she could only walk short distances using a walking stick and could not squat in the toilet. He also noted that due to her advanced age of around 86years complete rehabilitation would be difficult.

27. The respondent submitted that an award of Ksh 400,000/= would be sufficient for general damages. He relied on the case of *Florence Njoki Mwangi v Peter Chege Mbituru* (2014)eKLR where the respondent had sustained fracture of the right mid shift femur, fracture of the left mid shaft femur, degloving wound on the right fibia fibula necessitating skin grafting, amputation of the right foot behind the ankle join and multiple cuts on the forehead. The court affirmed an award of Ksh 700,000/ =.

28. The respondent also relied on the case of *Catherine Gatwiri v Peter Mwenda Karaai* (2018)eKLR where the respondent had sustained cut wound on the forehead, fracture of the left scapular, fracture of the left clavicle, fracture of 3 ribs and compound fracture of the tibia and fibula. The court reduced the award from Ksh 1,800,000/ to Ksh 500,000/=.

29. On his part the appellant submitted that an award of Ksh 1,800,000/= would suffice in general damages. He relied on the case of *P W v Peter Muriithi Ngari* (2017)eKLR where the appellant had sustained the following injuries:-

    a. A fracture left femur which was operated on and fixed with a metallic plate.

    b. Fractures of the left fibula and tibia malleolli which were operated on and fixed with K-wires and plates.

    c. Blunt injuries to the pelvis causing fractures of the pelvis.

    According to his medical report the respondent could not walk fast, or far or even squat and was unable to control urine and had to wear diapers. She suffered 20% permanent incapacity.

30. The trial court considered the authority relied on by the appellant and said that the injuries sustained therein were more serious than those sustained by the appellant in this matter. The trial court then considered the award in the case of *Al Samah Enterprises Ltd & Abubakar Omar v DM (Minor suing through mother and next friend CGK)*(2016) eKLR where Ksh 400,000/= was awarded in a case where the respondent had sustained degloving injuries measuring 25 x 5 centimetres and extending between the right knee and the leg.

31. The appellant herein had sustained a fracture of the neck of the left femur. The injuries in the case relied on by the trial magistrate consisted of degloving injuries on the leg. There was thereby no comparison in the injuries sustained in that case with those sustained by the appellant in the instant case. On the other hand, the authorities cited by the respondent did not involve the fractures of the hip which is what was suffered by the appellant. The authorities therefore did not compare well with the injuries sustained by the appellant.

32. I have examined the injuries in the authority cited by the advocates for the appellant and find them to have been more serious wherein the victim was even unable to control urine. I have considered other cases where comparative awards were made for general damages. In *Cold Car Hire Tours Limited vs Elizabeth Wambui Matheri* (2015) eKLR High Court upheld an award of Ksh 1,400,000/= where the respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement.

33. In *Kennedy Ouma Dachi vs Joseph Maina Kamau & Another* [2018] eKLR an award of Kshs 1,000,000/= was made by the lower court for a comminuted fractured acetabulum. On appeal, the award was enhanced to Ksh.1,400,000/= on the grounds that:

    " A fracture of the tibia or femur for instance, is very different from a hip fracture, especially in terms of long term consequences to the victim's health, and especially mobility... the trial

magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis."

34. In *Kuria Samuel Chege & another v John Ikua Mwangi* (2019) eKLR the respondent sustained fracture of acetabulum, fracture of the head and neck of the right femur and right hip joint dislocation. The doctor indicated that the head of right femur was excised and hemiarthroplasty was done on the right hip. Further that at the time of examination the respondent could not walk without crutches. That function of his lower limb was reduced and that he would undergo hip replacement in future. The doctor assessed temporary disability at 40%. The High Court upheld an award of Ksh 1,200,000/=.

35. In the case of *Geoffrey Maraka Kimchong v Frechiah Hugiru* (2020) eKLR, the respondent suffered a cut wound on the cheek which was tender, blunt trauma to the pelvis which was tender and a fracture of the right acetabulum. The High Court found an award of Ksh 1,000,000 to be fair and reasonable considering that there was no specific indication in the medical reports that the appellant would require hip replacement.

36. In *Kimathi Muturi Donald v Kevin Ochieng Aseso* (2021) eKLR

the respondent suffered a fracture of the upper right tibia and a fracture of the floor of the socket of the left hip joint (acetabulum). The fracture of the tibia was surgically fixed with a metal implant and the fracture of the socket of the left hip was treated conservatively (non-surgically). He was mobilized and discharged with crutches. As a result of these 2 major injuries and the surgery, he suffered a lot of pain. At optimal rehabilitation, the disability will be 20% for both legs. His prospects of developing arthritis were higher due to the fracture of the acetabulum which the process has already started as confirmed by the X-ray. The court reduced an award of Ksh 1,500,000/= to Ksh 1,200,000/= on general damages upon considering that an award on future medical expenses had been made in the case.

37. In the instant case it would appear that the trial court misapprehended the injuries suffered by the respondent. The appellant suffered serious injuries that made her to undergo replacement of the left hip joint (hemiarthroplasty). As a result of the accident she can only walk with the aid of a walking stick and cannot squat in the toilet. Considering the residual effects of the injuries, I am of the view that the award of Ksh 400,000/= was low. Having regard to the authorities cited above in respect to hip injuries, I consider an award of Ksh 1,200, 000/= to be sufficient compensation for the injuries sustained.

38. On the issue of special damages, the court notes that the appellant had filed a further list of documents dated March 20, 2019. During the trial the learned magistrate on the March 26, 2019 allowed the production of the appellant`s documents out of time. The trial court however did not take into consideration the added sum of Ksh 37,487/= bringing the total sum to Ksh 491,487/=. The trial court erred in failing to consider the additional sum.

39. Accordingly, the finding of the trial court on liability is upheld. The appeal on quantum of damages succeeds to the extent that the award of general damages in the sum of Ksh 400,000/= is set aside and substituted with one of Ksh 1,200,000/=, subject to apportionment on liability. The appeal on special damages also succeeds and the award of Ksh 454,000/= is set aside and substituted with an award of Ksh 491,487/=.

40. Orders accordingly. The appellant to have the costs of the appeal.

Signed this 14th day of September 2022.

J. N. NJAGI

JUDGE

Delivered, Dated and Signed at NYERI this 26th day of October, 2022.

By:

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

Nderi:for Appellant

Mrs Mwangi for Kiplagat: Respondent

Court Assistant: Kinyua.

30 days R/A.