



REPUBLIC OF KENYA



KENYA LAW
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**James v Mwangi (Civil Appeal 54 of 2019)
[2022] KEHC 15701 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 54 OF 2019
RB NGETICH, J
NOVEMBER 17, 2022**

BETWEEN

NJUHO JAMES APPELLANT

AND

PETER KAMAU MWANGI RESPONDENT

(Being an appeal from the judgment delivered on 28th March, 2019 at the Chief Magistrate's Court at Thika by Hon MW Wanjala, Senior Resident Magistrate)

JUDGMENT

1. This appeal arises from suit filed by respondent Peter Kamau Mwangi against the appellant Njuho James through plaint on September 9, 2014 seeking for special and general damages, costs and interests of the suit for the injuries he sustained on April 15, 2012 along Thika – Road at GSU drift while travelling as a passenger in the respondent's motor vehicle KBA 531H which collided with motor vehicle registration number KBH718V belonging to a 3rd party.
2. On December 9, 2014, the appellant/defendant filed defence denying the claim and attributing the occurrence of the accident to the negligence of the respondent and the driver of motor vehicle KBH 718V.
3. Further, the appellant filed a third-party notice dated January 30, 2017 on February 3, 2017 citing the registered owner of the motor vehicle registration number KBH718V whose application was allowed by consent of the parties on May 26, 2017.
4. After hearing of the case, the trial court in its judgment delivered on March 28, 2019 found the driver of KBA 531H 100% liable for the occurrence of the accident and assessed general damages at Kshs 3,500,000/= and special damages of Kshs 2,427,112/=, costs and interest from the date of filing the suit.



5. The appellant being aggrieved by the decision of the trial court filed the memorandum of appeal dated March 28, 2019 citing five grounds set out hereunder: -
 - i. The learned magistrate erred in law and in fact in finding the appellant 100% liable which finding was against the weight of the evidence on record.
 - ii. The learned magistrate erred in law and in fact in awarding the respondent damages when they had to prove the particulars of negligence against the appellant.
 - iii. The learned magistrate erred in law and in fact in finding that the respondent was entitled to special damages that were too high in view of the fact that they were not proven by the plaintiff.
 - iv. The learned magistrate erred in law and in fact in holding that the respondent had proved his case on a balance of probability which finding was against the weight of the evidence on record.
 - v. The learned magistrate erred in fact and law in finding that the respondent was entitled to general damages that were too high in view of the injuries suffered by plaintiff.
6. The appellant prayed for the following orders:
 - a. The appeal be allowed with costs.
 - b. The judgment of the trial court delivered on March 28, 2019 be set aside.
 - c. The honorable court be pleased to dismiss the suit based on the facts of the case and evidence on the record as submitted by the appellant.
 - d. The costs of the appeal be borne by the respondent.
7. The applicant thereafter filed two applications seeking a stay of execution which were withdrawn on May 16, 2022 by the consent of the parties on condition that the appellant pays the auctioneers fees and the proceeds of the motor vehicle are deposited in a joint interest-earning account in the names of both advocates.
8. On May 16, 2022, directions were taken to have the appeal proceed by way of written submissions.

Appellant's Submissions

9. Counsel for the appellant filed submissions on July 20, 2022 and submitted that the trial court erred in finding the appellant 100% liable in the presence of a third-party notice; that the trial court failed to apportion liability to the third party as per order 1 rule 19 of the *Civil Procedure Rules, 2010* and cited the case of *Clearwater Industries vs First Community Bank Limited; Rural Power Solutions Limited (Third Party)* (2019) which stated that: -

“The provisions mandate the court to consider the pleadings and to give directions on whether there is a triable issue between the defendant and the third party as to the liability of the third party and to establish the manner in which the dispute between the defendant and the 3rd party is to be tried.
10. Counsel further submitted that the trial magistrate failed to consider other cases filed with respect to the same accident being Nairobi High Court Case No 336 of 2014 *James Wambua Kimila vs Sinohydro Corporation Ltd & James Njuho*, where the court apportioned liability of 60% to the third party (Sinohydro) and 40 % to the appellant.



11. Counsel submitted that there was no evidence that was tendered to reasonably lead the trial magistrate to believe the appellant was liable for the accident and the award of special damages is inordinately too high and the same was not proved by the respondent.
12. That the respondent failed to prove the case on a balance of probability as the respondent failed to controvert the allegation by the appellant that the accident was caused by the actions of a third party. In conclusion, the appellant urged this court to find merit in the appeal and allow it.

Respondent's Submissions

13. Counsel filed submissions on August 18, 2022 and submitted that the police abstract blamed the appellant for the accident and the appellant failed to tender any evidence to the contrary; thus the trial court's finding that the appellant was wholly liable was properly founded in the law.
14. Counsel submitted that despite the application for leave to issue third-party proceedings being allowed by consent, the appellant failed to serve the third-party notice as per order 1 rule 15 of the *Civil Procedure Rules* and the court may not proceed to grant orders against a third party for whom the appellant/defendant has not shown evidence of service; that the trial court could not pronounce itself on an issue that was defective and irregular.
15. Counsel further submitted that the respondent proved negligence on the part of the appellant's driver and the appellant being the registered owner, is vicariously liable for the actions of the driver who is liable to compensate the respondent who was a fare-paying passenger; that the evidence of the respondent was not controverted at trial.
16. In respect to damages awarded, counsel submitted that the award of general damages of Kshs 3,500,000/= was proper considering the injuries sustained by the respondent and urged the court not to disturb the award by the trial court as the appellant has failed to demonstrate to the court that the trial magistrate took into account irrelevant factors.
17. On the issue of special damages, counsel for the respondent submitted that the same was pleaded and proved as required by the law; that the trial court did not err in awarding special damages of Kshs 2,427,112/= as pleaded and proved by way of receipts.

Analysis and Determination

18. I have considered grounds of this appeal and the submissions filed by the parties herein. This being the first appellate court, I am required to re-evaluate the evidence adduced before the trial court and arrive at an independent determination as held in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the Court of Appeal stated as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
19. In view of the above, I have perused and considered the trial court record. I wish to consider the following: -
 - a. Whether the trial magistrate erred in finding the appellant 100% liable for the accident.
 - b. Whether award of damages should be interfered with.



Whether the Trial Magistrate Erred in Finding the Appellant 100% Liable for the Accident

20. It is not disputed that the respondent was a passenger in the appellant's vehicle. The appellant faults the trial court for finding the appellant's driver 100% liable for the accident. There is no participation of the third party. The appellant submitted that the 3rd party was served but did not enter appearance and the trial court failed to give directions in respect of 3rd party proceedings; the issue of liability between appellant and 3rd party. The appellant submitted that in matters arising from the same accident were filed in Milimani High Court and 60% liability was apportioned to the third party.
21. The judgment delivered on November 4, 2021 in the High Court at Nairobi Civil Case number 336 of 2014 was attached to submissions by the appellant. I note that the parties are *James Wambua Kimila vs Sinohydro Corporation Ltd and James Njuno*. The 2nd defendant is the appellant herein and 1st defendant is the 3rd party. It relates to accident herein which occurred on April 15, 2014. Justice Chitembwe apportioned liability at 60:40. The appellant herein to shoulder 40% liability and the 3rd party 60% liability.
22. It is not disputed that the respondent was a fair paying passenger and could not shoulder any liability.
23. The respondent argues that the 3rd party was not served while the appellant's argument is that the 3rd party was served but failed to enter appearance.
24. However, in view of the fact that the third party participated fully in Nairobi HCT Civil Case No 336 of 2014 a matter arising from the same accident, it would be unfair for the court to shut its eyes on the determination of liability in a matter arising from the same accident which has not been appealed against. It is fair and just to apply the finding of liability in that matter to this case as it arises from the same accident and the court had an opportunity to hear and determine liability between the defendant/appellant and third party. There is no evidence of appeal against the said judgment. I take note of the fact that the respondent was a fare-paying passenger and thus was not in control of the motor vehicle, he could not have contributed to or controlled the occurrence of the accident.

Whether Award of Damages Should be Interfered With the Assessment of Damages

25. In respect to assessment of damages, the appellant contends the award of special damages was excessively high and the same were not proved and should be interfered with. On the other hand, the respondent contends that the award is fair as special damages were properly pleaded and proved.
26. In *Butt v Khan* [1981] KLR 349, Law JA observed that:

“An appellate court will not disturb an award of damages unless it is as 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.”
27. The respondent in the plaint dated September 9, 2014, pleaded for special damages of Kshs 2,901,847/= . The bill dated August 10, 2012 was for Kshs 2, 857,112/= there is thus no justification for the amount in excess of Kshs 2,857,112/=.
28. I have perused and analyzed the bundle of receipts attached herein by the respondent and I am satisfied that the award of special damages of Kshs 2,427,112/= was proper and I have no reason to interfere with the trial court's award under this heading.



29. The appellant did not submit on the issue of general damages and as such despite raising the same as a ground in the memorandum of appeal. In the trial court, the appellant urged the court to award general damages of Kshs 400,000/= for the injuries sustained.
30. The respondent on the other hand sought general damages of Kshs 10,000,000/= as adequate compensation. The trial court awarded general damages of Kshs 3,500,000/= citing the case of *Terry Kanyua Marangu vs Wells Fargo Limited* (2014) eKLR where the plaintiff sustained injuries to the forehead, nose and eyes. The plaintiff lost two teeth and sustained injuries to the left arm and the right leg. The plaintiff was awarded general damages of Kshs 3,500,000/= on October 16, 2014.
31. The trial court in awarding damages considered the authorities submitted by the parties as well as the medical report by Dr Karanja.
32. According to the plaint, the respondent sustained injuries to the head with loss of consciousness for about two (2) days, multiple fractures of the head involving the forehead, supraorbital region right maxillary, right zygomatic and para symphyseal bones, laceration of the lips, right chest haemothorax and soft tissue injury of both legs. The injuries were confirmed by the medical report dated August 22, 2013. The report pointed out that facial disfigurement is permanent and needs future surgery at Kshs 200,000/=. It also indicates that the respondent has a high chance of developing epileptic attacks and arthritis in view of the intensity trauma.
33. The appellant has not demonstrated that the trial magistrate in arriving at an award of Kshs 3,500,000/= as general damages applied the wrong principles. An award of general damages is a discretionary remedy of the trial court which the appellate court will interfere with if convinced the award was erroneously arrived at or the magistrate applied the wrong principles.
34. I am not persuaded by the appellant that i should interfere with the award of the trial court on the issue of general damages factoring in the injuries sustained by the respondent.
35. From the foregoing, I do allow appeal on liability and apportionment at 40:60. Appellant to shoulder 40% and 3rd party 60%.
36. Final orders:-
 1. Appeal on liability is allowed.
 2. Liability is apportioned at the ratio of 40:60 between the appellant and 3rd party; appellant to shoulder 40% liability and 3rd party 60%.
 3. Quantum to remain as assessed by the trial court; to be apportioned between the appellant and 3rd party as per order (2) above.
 4. Costs of the appeal to appellant.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 17TH DAY OF NOVEMBER, 2022.

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RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua/Martin – Court Assistant



Ms. Ndungu for Appellant
No appearance by Respondent

