Kerich v Kemboi (Civil Appeal 12 of 2021)
[2022] KEHC 16809 (KLR) (23 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CIVIL APPEAL 12 OF 2021

RN NYAKUNDI, J

DECEMBER 23, 2022

BETWEEN

DAVID KIPTOO KERICH ..... APPELLANT

AND

MIKE KIPCHOGE KEMBOI ..... RESPONDENT

(Being an Appeal from the judgment and decree of Hon. B.W.Wachira-(RM) delivered on the 21st day of February 2022 in Kapsabet Civil Suit No. 19 of 2018 between Mike Kipchoge Kemboi vs David Kiptoo Kerich)

RULING

1. The present appeal arises from the decision of the trial court delivered on February 21, 2022 in Kapsabet SPMCC No. 19 of 2018. The claim in the trial court was that the Respondent was lawfully being carried on motorcycle Reg. No. KMDR xxxB TVS Star along Wilfred Bungei Road within Kapsabet Township, when the Defendant or his driver drove motor vehicle Reg. No. KCB xxxF Isuzu FHR, so negligently knocked down the Plaintiff and as a result he sustained severe bodily injuries.

   The trial court apportioned liability at 90%:10% in favour of the Respondent and awarded the Respondent Kshs.1,000,000/= and 224,240/= being the general damages and special damages respectively.

   The Appellant being dissatisfied with the findings of the trial court instituted the present appeal vide a Memorandum of appeal dated March 19, 2020 on the following grounds;

   1. The learned trial magistrate erred in fact and in law in awarding Kshs. 1,224,240/- as general and special damages which was not consistent with the injuries sustained, submissions of the counsels for all parties and the legal precedents.

2. The learned trial magistrate erred in fact and in law in arriving at the said general damages and amount not supported by the evidence on record.

3. That the learned trial magistrate erred in fact and in law in considering extraneous issues while arriving at the said general damages, a decision ,contrary to the evidence on record.

4. That the learned trial magistrate erred in fact and in law in awarding quantum of damages that is manifestly excessive in the circumstances.

5. That the learned trial magistrate erred in fact and in law in awarding without having regard to the injuries sustained by the Respondent.

6. That the learned trial magistrate erred in fact and in law in failing to consider the evidence tendered by the Appellant.

7. That the learned trial magistrate erred in fact and in law in failing to consider the submissions tendered by the Appellant.

8. That the learned trial magistrate erred in fact and in law in applying the wrong principles of law on arriving at the said general damages.

9. That the learned trial magistrate erred in fact and in law in finding the Appellant 90 per cent liable.

10. That the learned trial magistrate erred in fact and in law in holding the Respondent 10 percent liable was caused by the Respondent.

Appellant's Case

2. The Appellant filed submissions on July 19, 2022. He submitted that it came out clearly during cross-examination that the Respondent was not wearing a helmet, he was not having a reflector jacket and that the driver of the lorry was not speeding at the time. The Respondent called PW3 P.C Christopher Kosgei, a traffic officer from Kapsabet Police Station who testified that he was the Investigating officer of the alleged accident. He stated that the accident occurred when the driver of the suit Lorry was trying to negotiate a corner when he hit the motorcycle that the Respondent was riding on as a pillion passenger. He produced a police abstract as PEXH.7. He also confirmed to the court that the investigations were still pending. On cross-examination he stated that he was not aware if the motorcycle that the Respondent was on as a passenger had an issue and that he did not have the police file in court. He also admitted that the rider of the motorcycle was not licensed and that the impact of the accident was on the right rear tyre of the suit lorry. He admitted that he was not the investigating officer, that he did not have sketch maps/plans of the scene of the accident, that the motor cycle was uninsured, and that the rider was not in a reflector jacket and helmet. He further stated that his work and duty on that particular day in court was only to produce Police Abstract since the scene of the accident had been interfered with and could not tell who is to be blamed for the accident. He testified that the accident happened on the rightful lane of the lorry. The motor cycle and the lorry were coming from opposite directions and the motor cycle hit itself on right tyre of the lorry.

3. The appellant testified that he was the one driving the suit motor vehicle at the time of the accident. He stated that a motorcycle came from the opposite direction of the road and the rider was at a high speed, he lost control and hit the rear tire of his lorry hence the accident. The motor cycle was descending downhill was the lorry was ascending. He further stated that he went and reported the accident to the police station and his vehicle was inspected and found to have no pre-accident defects but the motorcycle was defective. He blamed the motorcyclist for the accident.

Based on the testimony of the Respondent, the Police Officer and that of the Appellant, it is evident that the Appellant was not to blame for the occurrence of the accident. It was the rider of the motorcycle to blame for the accident as he was not licensed to ride and also had a defective motorcycle while riding at a high speed. Therefore, the learned Magistrate apportioning liability at the ratio of 10%:90% in favour of the Respondent as against the appellant was wrong. based on the testimony of the Respondent, the police officer and that of the Appellant above and the Appellant's and respondent's submissions at the trial court found at pages 45-51 of the Record of Appeal, it is evident that the Appellant was not to blame for the occurrence of the accident. It was the rider of the motorcycle to blame for the accident as he was not licensed to ride and also had a defective motorcycle while riding at a high speed hence lost control and rammed onto the right rear tyre of the suit motor vehicle. Therefore, the learned Magistrate apportioning liability at the ratio of 10%:90% in favour of the Respondent as against the Appellant was wrong. It was the motorcyclist to blame for the accident and the Respondent herein contributed to the accident by not warning the rider to slow down as he was riding on a defective motorcycle at the time of the accident.

4. The Appellant submitted that the Respondent never proved conclusively the particulars of negligence that he pleaded in his Plaint. Section 107 of the *Evidence Act* stipulates 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 these facts exist. Further, Section 108 of the *Evidence Act* further stipulates that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The motor cycle hit itself on the rear side of the lorry. There was nothing the driver of the lorry could have done to avoid the occurrence of the accident.

   PW3 failed to produce a police file in court which could have elaborated the circumstances of alleged accident even by seeing sketch maps of the scene of the accident. Failure to produce the same, left the court in darkness on the circumstances that led to the accident and producing the police abstract as PEXH 7 as proof of the accident for purposes of attaching liability on the Appellant herein was immaterial. The importance of producing sketch maps was greatly emphasized in the case of *Postal Corporation of Kenya & Anor vs Dickens Munayi* [2014] eKLR where it was held that;

   > In my view, it is only a sketch plan of the scene that could clearly map out how the accident occurred and particularly where the point of impact was. Lack of this crucial piece of evidence leads me to doubt the entire evidence."

5. The Appellant disputed the award for damages and submitted that the Respondent called Dr. Sokobe as PW2 who testified that he examined the Respondent and prepared a medical report for him and that he sustained a fracture right femur and fracture -right tibia. He produced the said Medical Report and the receipt of kshs.6,000/= as PEXH9 (a) and 9(b) respectively. He further produced a discharge summary from St. Luke's Hospital as PEXH.3, Physiotherapy PEXH.4. On cross examination PW2 testified that he was not the treating doctor and that no disability was assessed and that the Respondent should have healed by the time he was testifying. As such, the trial magistrate erred in awarding the Respondent Kshs. 1,000,000/= as general damages which was too high as to amount to erroneous estimate.

   He proposed an award of Kshs. 450,000/- as an appropriate award and cited the cases of *Titan Nagra vs Abednego Nyandusi Oigo* (2018) eKLR, *Hassan Farid & Another vs Sataiya Ene Mepukori & 6 others* (2018) eKLR and *Bernard Musuu John vs Jesman Distributors and Another* (2020) eKLR where the courts awarded Kshs, 450,000/- for comparable injuries.

6. On the issue of special damages, the Appellant submitted that the same must be specifically pleaded. He contended that the Appellant should have been awarded only Kshs. 6,000/- as damages as he failed

to prove the special damages as pleaded. The Respondent testified that he was treated at Mediheal Hospital and that he used Kshs. 215,690/— as treatment expenses. He marked a bundle of receipts as PMFI.2. PW2 Dr. Sokobe produced a receipt of Kshs.6,000/= as PEXH.9b and also produced a bundle of receipts totalling Kshs. 215,690/= earlier marked as PMFI.2 as PEXH.2. According to the appellant, t is worth to note that the bundle of documents produced as payment receipts were titled Provisional-in patient bill break up and the said documents totalled Kshs.210,993/=. Further, that it is settled law that invoices cannot be termed as proof of payment. Original receipts of payment are the ones to be produced as proof of payment. In the absence of the same the Respondent cannot be awarded the pleaded special damages.

He cited section 27 of the *Civil Procedure act* and submitted that the appeal is merited and should be allowed with costs to the Appellant.

Respondent's Case

7. The Respondent filed submissions on August 16, 2022. The Respondent's case is that he proved his case on a balance of probability. He proved that he was injured while on his rightful lane through the Appellant's negligence. The Appellant's rebuttal evidence was less than convincing. On the contrary the Appellant was unable to rebut the Respondent's case with credible oral and documentary evidence. The Appellant's evidence was not credible, consistent or coherent and did not suffice to rebut the Respondent's case.

Section 107 of the *Evidence Act* provides that he who alleges must prove. The case of *Anne Wambui Nderitu v Joseph Kiprono Ropkoi & Another* [2005] I EA 334, emphasizes the argument that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. The decision of the Learned Trial magistrate is therefore proper and well-reasoned.

The Appellant has not demonstrated that the award of damages is inordinately high as to be a wholly erroneous estimate of the damages suffered or that the learned magistrate applied wrong principles in assessing damages. It is apparent that the learned magistrate did not misdirect himself in finding that the Respondent had proved his case against the Appellant in the subordinate court.

He prayed that the trial court dismiss the appeal with costs.

Analysis & Determination

8. Having considered the grounds of appeal, the rival submissions and entire evidence adduced before the trial court, it is clear, that the appeal is against both liability and quantum awarded.

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..."

In reaching a determination I shall consider and evaluate the evidence on record.

Whether the trial court erred in its finding on liability

9. In his testimony in examination in chief, the Appellant testified that while on the Kapsabet-Kisumu road he joined the round about to Kapsabet town, a statement he corrected in re examination and said that there was no round about. Further, despite denying knowing that the OB stated that he was turning to enter into the police station, in re-examination he admitted that he read the OB. It was this inconsistency in evidence as to where he was turning when the accident occurred that the magistrate found that the Appellant did not know that there was no round about at the scene of the accident and therefore veered into the rightful lane of the motorcycle. The trial court concluded that the Appellant mistook a T-Junction for a U-turn and in so doing caused the accident.

   The Appellant has raised the issue of the sketch map. There was no sketch map or police file produced begging the question as to how the court was able to understand how the accident occurred and arrive at the conclusion that the Appellant was liable. In the case of *Postal Corporation of Kenya & Another –vs- Dickens Munayi* (2014) eKLR it was held that:-

> In my view, it is only a sketch plan of the scene that could clearly map out how the accident occurred and particularly where the point of impact was. The lack of this crucial piece of evidence leads me to doubt the entire evidence of PW2 and PW3. It also costs benefit to the defence case that probably it could as well be the Respondent who pulled to his lane."

10. In the absence of a sketch map or a site visit, the trial court was able to determine that the Appellant was liable for the accident. Further, the investigating officer testified that the impact on the motor vehicle was on the rear tyre whereas the impact on the motorcycle was on the front. This was established from his investigations. I acknowledge that a sketch map would have been instrumental in determining liability. However, I note that the Respondent was merely a pillion passenger and therefore cannot be held liable for the accident. The Appellant failed to enjoin the motorcycle rider/owner as a third party and therefore the liability cannot be transferred to the Respondent.

    In the premises I find that the trial court did not err in its apportionment of liability.

Whether the damages awarded were excessive

11. The principles to be observed by an appellate court in deciding whether to disturb quantum of damages were set out in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia* (1982-88) 1 KAR 727 and restated by the Court of Appeal in the case of *Arrow Car Ltd v Elijah Shamalla Bimomo & 2 others* (2004) eKLR that:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. ..."

12. Further, Potter JA in *Tayab v Kinany* (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345 stated as follows:

> But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavour to secure some uniformity in the method

of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional." (Emphasis added).

12. The Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR that:

> The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

13. It is not in dispute that the Respondent suffered injuries as a result of an accident between himself as a pillion passenger and the Appellant herein. The injuries sustained by the Respondent were an open fracture distal right femur with bone loss and a comminuted proximal right tibia/fibula fracture.

    In *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR the court upheld an award of Kshs. 800,000 where the plaintiff had suffered femur fractures and fractures of the tibia fibula.

14. In *Reuben Mongare Keba v LPN* (2016) eKLR where the Respondent suffered fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg and was awarded general damages of Kshs. 800,000.

    In the case of *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR, the Respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1, 600, 000.00 had the same reduced on appeal to Kshs. Kshs. 800, 000.00.

    Keeping in mind that not all injuries are similar, that the Respondent was apportioned 10% liability, and considering inflation from the time the precedents quoted were decided, I find that the trial court did not err in its award for damages.

    In the premises the appeal fails in its entirety and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022

.....

R. NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

M/S Z.K Yego & CO. Adv for respondent

M/S Kimaru Kiplagat & CO. Adv for appellant