



REPUBLIC OF KENYA



Titus v Ikonze (Civil Appeal 53 of 2019)
[2021] KEHC 345 (KLR) (16 December 2021) (Judgment)

Neutral citation: [2021] KEHC 345 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 53 OF 2019
MW MUIGAI, J
DECEMBER 16, 2021

BETWEEN

KIMUYU WAMUYU TITUS APPELLANT

AND

ILUKU SHADRACK IKONZE RESPONDENT

(Being An Appeal Against The Decree And Judgement Delivered on 28th of March 2019 By Hon. J. Bartoo Senior Resident Magistrate at the Machakos Law Courts CMCC 508 of 2017)

JUDGMENT

TRIAL COURT RECORD

1. The suit was filed vide the Complaint of 16th August 2017 amended on 25th July 2018. The proceedings arose out of an accident that occurred on the 2nd day of April 2017 when the Respondent was travelling as a passenger on board motor vehicle registration number KBR 919E along the Kitui- Machakos road when the motor vehicle lost control, veered off the road and overturned causing the Plaintiff to sustain the following injuries;
 - a. An epistaxis
 - b. Blunt injury on the right eye
 - c. Fracture of the right orbit
 - d. Fracture of the right distal radius
 - e. Dislocation of the right ankle
 - f. Bruises on the back
 - g. Bruises on the left arm



- h. Recurrent headaches
 - i. Wrist joint movements are tender
 - j. Pain on the left wrist
2. The Plaintiff blamed the Defendant for the accident. He particularized negligence to include excessive speed, driving recklessly, without due care and attention and/or failed to slow down, stop, brake, swerve or take any other reasonable step thus causing the accident that occasioned injuries on the Plaintiff. The Plaintiff and sought general damages, special damages, interest and costs.
 3. The Defendant vide amended statement of defense of 15th November 2017, sought dismissal of the suit. He denied that the particular of negligence that the motor vehicle belonged to him, the injuries the Plaintiff sustained as a result of the accident and the application of res ipsa loquitur.
 4. The matter came up for hearing on 17th of January 2019, the Plaintiff called two (2) witnesses.
 5. PW1 was the Plaintiff who testified that the motor vehicle was speeding when it lost control. He was injured and after he got 1st Aid from Machakos hospital, he went to Forces Memorial Hospital. He told the court that he could not work as an employee of KDF because of the fracture he had sustained. He confirmed that he was a passenger in motor vehicle Reg. KBR 919E that occurred at a steep place. He said the driver was speeding. He produced the following as evidence;-
 - a. The Police Abstract dated 18th of May 201 as PE-2
 - b. Treatment notes from Forces Memorial Hospital dated 2nd April 2017 as PE-3 a and b
 - c. Motor vehicle search and receipt dated 26th May 2017 as PE-4 a and b
 - d. Demand letter dated 4th of July 2017 as PE-5
 - e. Statutory notice to insurance dated 6th of July 2017 as PE-6
 - f. Medical report and receipt by Dr. Okere dated 25th May 2017 as PE-7 a and b
 - g. 2nd medical report by Dr. Wambugu dated 14th May 2018 as PE-8
 6. Upon cross examination he said that he had not healed well. That during the accident he had not tied his belt as there was no seat belt in the vehicle and that those who had tied the belt did not get injured.
 7. In re-examination he stated that the Defendant was the one who was to ensure that the belts were properly fixed.
 8. PW2 was officer number [Particulars Withheld] Jane Ewaton. It was her testimony that PC Kimaiyo, the Investigating Officer had been transferred to an unknown station. She did not know the nature of the accident but confirmed that the name of the Plaintiff was on the Police Abstract dated 12th April 2017 which she produced as PE-1.

The accident was on 2nd April 2017 and it involved motor vehicle Reg KBR 919 E Nissan X -trail.
 9. In cross examination, she stated that she did not know the defendant was chased
 10. The Plaintiff then closed its case.
 11. The Defendant did not call any witness and closed its case.



12. The parties filed submissions and the Trial Court and the Court delivered judgment.

JUDGMENT

13. The Trial Court delivered judgment on 25th of March 2019 and awarded as follows;
- a. Liability at 100%
 - b. General damages of Kshs 900,000
 - c. Special damages of Kshs 8550
 - d. Costs and interest at court rate from the date of the judgement.
14. The Trial Court referred to Section 107,108 and 109 of the *Evidence Act* with regards to burden of proof. On the issue of Res Ipsa Loquitur, reliance was placed on the cases of *Barkway Vs South Wales Transport Company Limited* [1956] 1 ALL E 392, 393 B and *Dorcas Wangithi Nderi Vs Samuel Kibiru Mwaura & Another* [2015] e KLR.
15. The Trial Court awarded liability on the premise that the Plaintiff was a fare paying passenger and did not contribute to the occurrence of the accident.
16. On quantum, the Trial Magistrate upon perusal of the respective parties' submissions relied on the case of *Michael Njagi Karimi Vs Gideon Ndungu Nguribi And Another* [2013] eKLR where Kshs. 2,000,000 was awarded to the Plaintiff who suffered serious injuries and found that the cases cited by the Defendant were not relevant to this particular suit.
17. The Trial Magistrate also observed that damages should not enrich a party but reinstate him/her to the status he or she was in before the accident.

APPEAL

18. Being dissatisfied by the judgment, the Appellant filed a Memorandum of Appeal on 11th of February 2021 seeking the following orders;
- a. The Appeal be allowed
 - b. The award of general damages be set aside and be substituted with such finding as the court may deem appropriate.
 - c. The award on special damages be set aside and substituted with an award of Kshs. 3550.
 - d. Costs be borne by the respondent
 - e. Any other relief as justice may require.
19. The Appellant raised issues with the quantum awarded on the grounds that the Learned Trial Magistrate erred;
- a. in law and on fact in making an award on general damages which was inordinately high considering the Respondent's injuries
 - b. in law and on fact in making an award on special damages in excess of the amount pleaded



- c. in law and on fact in failing to appreciate the discrepancies in the injuries suffered by the Plaintiff and the degree of permanent incapacitation as presented by two competent medical doctors.
 - d. in law and on fact in failing to consider and/ or appreciate the Appellant's submissions as well as authorities thereto
20. Parties agreed to dispose of the Appeal by way of written submissions when the matter came up for directions. The Appellant filed his submissions on 4th of November 2021 while the Respondent filed on 23rd of July 2021.

APPELLANT SUBMISSIONS

21. The Appellant submitted with regards to General damages that the Learned Trial Magistrate failed to consider the discrepancies on the degree of incapacitation as presented by the two doctors. Dr. Wambugu said it was 4% while Dr. Cyprianus Okere said 15%. He submitted that the Learned Trial Magistrate only relied on the report of Dr. Okere.
22. He relied on the case of *Patrisia Adhiambo Omolo Vs Emily Mandala* [2020] eKLR where the award was Kshs 180,000. He submitted that Kshs. 200,000 was sufficient as general damages.
23. He referred the court to the authorities he relied upon at the lower court on quantum being *Benard Mutiso Mutisya –vs- Joseph Wamburu Tumbu* [2018] eKLR where the Respondent suffered bruises on the left side of the body, fracture on the right arm and clavicle with 4% incapacitation and was awarded Kshs 600,000 in General damages.
24. He also relied on the case of *Joseph Wanburu Tumbu & Another Vs Michael Mutiso Mulwa* [2017] eKLR also got 4% incapacitation after suffering blunt trauma to the lower back, blunt trauma to the right lip and blunt trauma to the forehead.
25. On special damages, he submitted that they must be specifically pleaded and proved and relied on the case of *Hahn Vs Singh*, Civil Appeal No 42 [1985] KLR 17. He submitted that the award of Kshs. 8550 was in excess of what was pleaded.

RESPONDENT SUBMISSIONS

26. The Respondent submitted that in as much as the Respondent visited Dr. Wambugu, the said Doctor did not testify and neither was his medical report produced. Reliance was placed in the case of *Kitale Hauliers Limited Vs Emmanuel Soita Simiyu* [2013] eKLR and *Kenneth Nyaga Mwigie Vs Austin Kiguta & 2others* [2015] eKLR on the introduction of new documents at the Appeal stage and production of documents in court.
27. He opined that the authorities cited by the Appellant at the trial were not commensurate to the injuries sustained in the instant suit. That further, the Appellant should not be allowed to introduce new authorities that were not placed before the trial court. He referred to the case of *Gabriel Maina Mungai Vs Jane Wanjiku Mwaura* [2019] eKLR
28. In addition, he submitted that the Trial Court has discretion to consider cases it wants in arriving at a decision. He relied on the case of *Peter Namu Njeri Vs Philomene Mwagoti* [2016] eKLR.
29. On special damages he submitted that the Appellant did not object nor challenge the testimony of PW2 when she informed the court that she was paid Kshs 5,000 as travel allowance. He reiterated that they had proven their case and asked the court to dismiss the Appeal with costs.



DETERMINATION

30. The Court considered the Memorandum and Record of Appeal, the Trial Court file and the submissions of the parties and I find the following as the issues for determination;

- a. Whether the award of General damages was appropriate
- b. Whether the award of special damages was appropriate.

31. The Court notes that an appellate court that did not have the opportunity to see, listen to nor interrogate any of the witnesses and therefore its determination will be pegged on the facts and the law that is before it as espoused in Section 78 of the *Civil Procedure Act*. This was also observed in the case of *Selle –vs- Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 particular the court is not bound necessarily to follow the Trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

32. This was also observed in the case of *Peters –vs- Sunday Post Limited* [1958] EA 424 where it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.

33. It is not in dispute that an accident occurred on 2nd of April 2017 causing the Respondent to sustain injuries. It is also not in dispute that the Appellant is 100% liable for this accident. What remains to be determined is the issue of quantum.

34. The Court considered the award of damages and the relevant authorities. In *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 the Court held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete



assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought.

35. The Appellant raised the issue of the contradiction in the degree of incapacitation in the medical reports. I have looked at the medical report by the doctors. Dr. Wambugu's report dated 14th of May 2018 and in his opinion the incapacitation was 4% while that of Dr. Okere of 25th of May 2018 pegged it at 15%. Both reports were produced by the Respondent and as such this evidence remains uncontroverted.
36. I also noted that the nature of injuries in the amended plaint and the medical report by Dr. Okere referred to the same injuries being;
- a. Fracture left distal radius
 - b. Blow out fracture medial wall of the right orbit
 - c. Multiple lacerations on the back
 - d. Bruises on the left arm
 - e. Blunt trauma right ankle joint
37. Dr. Okere does not in his opinion talks about a blunt injury to the left orbit while the pleadings refer to the right orbit, he talks about the left ankle while the pleadings refer to the right ankle as that which was dislocated. Dr. Wambugu gives a general opinion but makes reference to stiffness of the left joint as being stiff.
38. None of the doctors came to court to testify. In the case of *Sentongo and Another vs. Uganda Railways Corp.* Kampala HCCS No. 263 of 1987 in which the Court held, citing *Sarkar on Evidence 12th ED* pp 506.R. that:
- “Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion.”
39. Section 77 of the *Evidence Act* prescribes;
- Reports by Government Analysts and geologists
1. In criminal proceedings, any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
40. The fact that the Medical Reports produced in Court during trial were not produced by the respective doctors does not prevent reliance on expert evidence on the injuries sustained by the plaintiff.
41. It is not disputed that a road traffic accident occurred on 2nd April 2017 by motor vehicle Reg KBR 919 E where the plaintiff as a passenger sustained injuries. The Police Abstract P Exh 1-contains details of the accident.



42. The Plaintiff obtained medical treatment as evidenced by Defense Forces Memorial Hospital's Interdepartmental Consultation/Referral Request Form & Radiological Examination report of 3rd April 2017 produced as P. Exhibit 3b and contains results of the x-ray as;
- a) Blowout fracture of the medial wall of the right orbit.
 - b) Right orbital emphysema
 - c) Normal brain examination.
43. The Medical Examination Report P. Exhibit 2 filed on 12th April 2017 by the Government Medical Officer confirms the injuries the Plaintiff sustained.
44. The totality of these documents confirm that the Plaintiff sustained injuries arising from the road traffic accident. Traffic matters have both criminal or civil processes and hence Section 77 of the *Evidence Act* is applicable. The mere fact that doctors did not testify does not by and of itself vitiate the impact of evidence based on the medical records presented. Secondly, no evidence was adduced to controvert the medical evidence on record. Thirdly, these medical documents/reports have not been impeached as invalid and not genuine as no fraud or forgery has been alleged as to authenticity of these documents.
45. Fourthly, the discrepancy in the contents of medical documents are reasonable and legitimate considering that the early reports indicate more serious injuries but later reports minimized and reduced the number and/or impact of injuries sustained due to the healing process overtime. The Court considers the evidence produced in medical reports is corroborated by evidence of injuries by the Plaintiff.
46. The degree of incapacitation is only one of the factors that guide the Court in in assessment of appropriate damages but not the only factor as there other factors for example the permanent impact of injuries to the Plaintiff's social, economic and other spheres in arriving at the appropriate damages.
47. Bearing this in mind and all factors considered, I find that the award of Kshs 900,000 was excessive in the circumstances. The Court has considered the injuries sustained in 2017 and also in 2018 when the Plaintiff had healed. The Plaintiff sustained the following injuries;
- a. An epistaxis
 - b. Blunt injury on the right eye
 - c. Fracture of the right orbit
 - d. Fracture of the right distal radius
 - e. Dislocation of the right ankle
 - f. Bruises on the back
 - g. Bruises on the left arm
 - h. Recurrent headaches
 - i. Wrist joint movements are tender
 - j. Pain on the left wrist
48. The Appellant relied on an additional authority that was not part of submissions before the Trial Court. Patrisia Adhiambo Omolo vs Emily Mandala [2020] eKLR where the Appellate Court upheld



general damages of Ksh 180,000 where the plaintiff sustained among other injuries fracture of the radia-ulna. Also, in the case of *Wakim Sodas Limited vs. Sammy Aritos* [2017] eKLR, the Respondent had sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The Trial court awarded Kshs. 400, 000.00, which was upheld on appeal. In *Naomi Momanyi v G4S Security Services Kenya Limited* Meru HCCA No. 145 of 2014 [2018] eKLR, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. He was awarded Kshs. 300,000/-

49. The Respondent submitted before the Trial Court an award of Ksh 1,500,000/- and relied on the cases of *Mwaura Muiruri vs Suera Flowers Ltd & Anor* [2014] eKLR where the Plaintiff was awarded Ksh 1,450,000/-. Also, *Kenya Wildlife Service vs Godfrey Kirimi Mwiti* [2018] C.A.12 of 2017, the Plaintiff was awarded Ksh 2,000,000/- & *Charles Mwanja & Anor vs Batty Hassan* [2008] eKLR, the Court awarded Ksh 800,000/-.

The Court considering the circumstances, the injuries sustained, healing process and rate of incapacity; an average of 4% and 15% which comes to 10% and considering inflation, I find that the award of Kshs 800,000/- appropriate in the circumstances and uphold the award of general damages at Ksh 800,000/-

50. With regard to special damages, the Trial Court awarded Kshs 8550 yet according to the court record, the only receipts produced were that of the motor vehicle search and for Dr. Okere's medical report amounting to Kshs 3550. PW2 only said "I was paid Kshs. 5000" this does not amount to proof of payment. Secondly, the plaint special damages were /are pleaded at Ksh 3550/-. In any case, this is an issue of costs that can be assessed by the Trial court.
50. I therefore award the Respondent Kshs. 3550 as special damages.

DISPOSITION

50. Accordingly, for the reasons set out above, the Court grants the following orders:
- a. The Appeal succeeds partially. I substitute the general damages award at Kshs. 800,000 which shall attract interest from the date of judgment before the Trial Court.
 - b. I also set aside the award for special damages which substitute it with an award of Kshs. 3550 which shall accrue interest from the date of filing suit in the subordinate court.
 - c. Each party shall bear the costs of the appeal.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH DECEMBER 2021. (VIRTUALLY).

M.W. MUIGAI

JUDGE

