Njiru & another v Kang'ethe (Civil Appeal E493 of 2023)
[2025] KEHC 357 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 357 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E493 OF 2023

JM OMIDO, J

JANUARY 23, 2025

BETWEEN

BRIDGET IRERI NJIRU ..... 1ST APPELLANT

ELIAS IRERI ..... 2ND APPELLANT

AND

WILSON KANG'ETHE ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Selina N. Muchungi, Principal Magistrate delivered on 19th May, 2023 in Nairobi Milimani CMCC No. E2679 of 2021)

JUDGMENT

1. This appeal was preferred by Bridget Ireri Njiru and Elias Ireri (hereinafter referred to as "the Appellants"), against the judgement and decree of Hon. Selina N. Muchungi, Principal Magistrate delivered on 19th May, 2023 in Nairobi Milimani CMCC No. E2679 of 2021, which was a tortious liability claim.

2. In the matter before the lower court, the 1st and 2nd Appellants herein were the 1st and 2nd Defendants respectively while the Respondent herein was the Plaintiff.

3. Judgement on liability in the lower court was entered in favour of the Respondent at 100% against the Appellants. The trial court proceeded to assess and award the Respondent special damages at Ksh.3,050/-; general damages for pain, suffering and loss of amenities at Ksh.650,000/-. Costs and interest were also awarded to the Respondent.

4. Being aggrieved with the judgement of the trial court, the Appellants presented seven grounds of appeal vide a Memorandum of Appeal dated 13th June, 2023 which I summarize as follows:

i. That the learned trial Magistrate fell into error in finding the Appellants 100% liable for the accident.

ii. That the learned trial Magistrate reached an award in general damages that was inordinately high and acted upon some wrong principles of law in reaching the award.

5. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Sielle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

6. In Sielle, Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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."

7. Going back to the record of the trial court, the Respondent (the Plaintiff in the lower court matter), presented the suit vide a plaint dated 20th April, 2021, seeking for special damages of Ksh.15,550/-; general damages, costs of the suit and interest. The claim arose out of injuries that the Respondent sustained in a road traffic accident that is said to have occurred on 28th January, 2020.

8. The Appellants resisted the Respondents suit wholly and to that end filed a statement of defence dated 24th June, 2021 and sought that the same be dismissed with costs.

9. The Respondent testified before the trial court as PW1 and adopted the contents of his witness statement dated 20th April, 2021. In his statement, the Respondent stated that on 28th January, 2020, he was a lawful "pillion driver" at Neema Uhai area off Thika Road, opposite Safari Park Hotel when the 2nd Appellant so negligently drove, managed and/or controlled motor vehicle registration number KCC 811H Toyota Vitz thereby causing the same to hit the Respondent as a result of which he sustained bodily injuries which included a fracture to his right leg.

10. The Respondent was treated at Neema Uhai and Kiambu Hospitals. He later reported the accident to Kasarani Police Station where he was issued with a police abstract and a P3 form.

11. The Respondent blamed the driver of the vehicle for the accident and stated that he was negligent in that he made an illegal u-turn and then used the wrong exit and as a result caused the accident.

12. The Respondent produced the following documents in support of his case:Copy of the Respondent's national identity card.Police abstract.P3 form.Copy of records.Receipt for copy of records.WhatsApp correspondence.Demand letter and statutory notice.

13. Upon being cross examined, the Respondent told the trial court that he was riding a motor cycle when the accident occurred and was not a pillion passenger. He stated that he was a holder of a valid driving licence at the time. He stated that police officers visited the scene of accident and took police action.

14. The Respondent called Dr. Cyprianus Okoth Okere as PW2. The witness told the court that he examined the Respondent on 10th August, 2020 and prepared a medical report on his findings. The

witness produced the report as an exhibit together with two receipts, one for Ksh.3,000/- for the report and the second for Ksh.10,000/- for court attendance.

15. As per the report, the Respondent sustained comminuted displaced fractures of the right tibia and fibula. At the time of examination, he experienced pain in the right leg, was unable to perform heavy duties and to walk fast and run. The healed fracture site on the lower leg was palpable and slightly tender on a deep palpation. He also walked with a limp.

16. The doctor classified the injuries that the Respondent sustained as grievous harm and assessed permanent incapacity at 30%.

17. The Respondents did not call any witness.

18. Having considered the Memorandum of Appeal, the submissions filed by the parties and the record in its entirety, the issues for determination are whether the trial Magistrate reached proper findings on liability and quantum.

19. On the issue of liability, the only evidence available on how the accident occurred was that of the Respondent, who told the trial court that the 2nd Appellant was the author of the accident as he made an illegal u-turn on the road before using a wrong exit as a result of which he hit the Respondent's motorcycle, injuring him.

20. Police investigations confirmed this position and the 1st Appellant was wholly blamed for causing the accident, thereby corroborating the Respondent's testimony that the accident occurred when the 1st Appellant failed to give way to the Respondent.

21. The contents of the police abstract that was issued after the accident confirms that the police wholly blamed the driver of motor vehicle registration number KCC 811H. The driver's name is therein stated as Elias Ireri, the 2nd Appellant.

22. In civil cases, the burden of proof lies upon the party who alleges the existence of a fact and the standard thereof is that of proof on a balance of probabilities.

23. The issue then is whether on the basis of the material provided to the learned trial Magistrate, the Respondent proved liability as against the Appellants at 100% on a balance of probabilities.

24. In Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

25. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J. (as he then was) in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%

as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. It is instructive from the record of the trial court that the Appellants did not discount or challenge the testimony of the Respondent or the findings of the police investigations as they did not call any witness. The Appellants complained that the trial court failed to consider the witness statements that the Appellants filed in the lower court.

27. A witness statement contains the evidence which the witness intends to give orally. A witness statement does not amount to evidence unless the author is called as a witness, placed under oath or is affirmed and testifies or adopts the contents of the statement as his evidence. The same may then be put to test through cross examination.

28. The trial court was therefore under no duty to consider filed statements of witnesses who were not called to testify.

29. In the premises, as to whether I should interfere with the trial court's finding on liability, I take guidance from the decision of Mburu & 6 others v Kirubi (Civil Appeal E246 of 2021) [2023] KEHC 3599 (KLR) (20 April 2023) (Judgment) in which L.N. Mugambi, J. stated thus:

> " This court nevertheless appreciates 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 the court is shown demonstrably to have acted on wrong principles in reaching the findings."

30. The finding of the trial magistrate that the 1st Appellant was 100% to blame for the accident cannot in the circumstances be faulted. The copy of records produced confirmed that the motor vehicle was registered in the name of the 1st Appellant and vicarious liability therefore attached against her to the same extent. There is nothing on record to show that the Respondent contributed to the accident in any way. This court has no basis, therefore, of interfering with the said findings as they were based on the evidence that was placed before the trial court.

31. With regard to special damages, the rule in evidence is that the same must be specifically pleaded and strictly proved (see Equity Bank Limited v Gerald Wang'ombe Thuni [2015] eKLR).

32. The Respondent pleaded Ksh.550/- for the copy of records; Ksh.10,000/- for medical expenses; and Ksh.5,000/- for the medical report. The lower court record bears it that the receipts that were produced were for Ksh.550/- for the copy of records and Ksh.2,500/- for the medical report (although the doctor referred to a wrong amount of Ksh.3,000/-).

33. Thus then, what was pleaded and proved under the head of special damages was Ksh.3,050/- and the trial court was correct in making the award.

34. In respect of general damages, the issue for this court to determine is whether the amount assessed and awarded as compensation to the Respondent was in error and/or inordinately high or excessive. The evidence that was placed before the trial court was that the Respondent sustained comminuted displaced fractures of the right tibia and fibula. He experienced pain in the right leg, was unable to perform heavy duties and to walk fast and run. He also walked with a gait. Permanent incapacity was assessed at 30%.

35. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of Price & another v Hidler [1996] KLR 95 as follows:

> " The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

36. Further, in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damages to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.
>
> It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:
>
> "An appellate court will not disturb an award of 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."

37. There is also the authority of Mbogo & Another v Shah [1969] EA 93, where it was held, inter alia, that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

38. In the present appeal, the Appellants merely stated that the award in compensation that were made in favour of the Respondents was too high. The Appellant did not proffer and/or demonstrate to this court that the exercise of the discretion by the trial court was clearly wrong or that the learned trial Magistrate misdirected herself or acted on matters which she should not have acted upon or failed to take into consideration matters which she should have taken into consideration and in doing so arrived at a wrong conclusion.

39. The learned trial Magistrate demonstrated that she was guided by judicial precedent. There is therefore no basis upon which I can interfere with the discretion of the trial court.

40. Being of the foregoing persuasion, I find that the appeal herein lacks merit. I proceed to dismiss it with costs to the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 23RD DAY OF JANUARY, 2025.

JOE M. OMIDO

JUDGE

For The Appellants: Ms. Kimiti.

For Respondent: Ms. Foza.

Court Assistant: Mr. Ngoge & Mr. Juma.

Ms. Kimiti: I seek 30 days stay of execution.

Ms. Foza: No objection.

Court: There shall be stay of execution for 30 days.