Nyende v Mwenda & another (Civil Appeal E361 of 2023)
[2025] KEHC 2272 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E361 OF 2023

J NGAAH, J

FEBRUARY 14, 2025

BETWEEN

ROSELINE PAMELA NYENDE ..... APPELLANT

AND

ALEX MWENDA ..... 1ST RESPONDENT

AMOM MWANGO MZEE ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. D.O. Mbeja, Principal Magistrate delivered at Mombasa Chief Magistrates' Court in Civil Suit No. 854 of 2020 on 17 November 2023)

JUDGMENT

1. On 14 March 2020, the appellant was travelling as a fare paying passenger in an auto rickshaw (popularly known "tuk tuk") along Makupa Causeway, Kibarani area in Mombasa when it collided with a motor vehicle, registration no. KCP 256Z. This latter vehicle was a public service vehicle and it is hereinafter referred to as "the matatu". As a result of the road traffic accident, the appellant sustained an injury on her right foot. To be precise she had her right big toe dislocated.

2. The appellant sued for both special and general damages in Mombasa Chief Magistrates Court Civil Suit No. 854 of 2020. In a judgment delivered by the Honourable D.O. Mbeja on 17 November 2023, the respondents were held to be solely responsible for the accident and the appellant was awarded Kshs. 150, 000/= as general damages and special damages of Kshs. 10, 184/=.

3. The appellant was dissatisfied with the award of general damages as being too low hence this appeal. She has raised the following grounds in the memorandum of appeal:

    1. That the learned magistrate erred in law and in fact in awarding general damages of Kshs. 150,000/= an amount that was inordinately low in the circumstances.

2. That the learned magistrate erred in law and in fact in failing to consider the nature and serious (sic) of the injuries suffered by the Plaintiff.

3. That the Learned Magistrate erred in law and in fact in failing to consider in totality (sic) the Appellant's evidence on record in determining the issue of general damages for pain and suffering.

4. That the learned magistrate erred in law and in fact in failing to consider or properly consider the evidence on record and the Plaintiff's submissions."

4. She prays that the appeal be allowed and the award of Kshs. 150,000/= as general damages be set aside and, instead, this Honourable Court awards her the sum of Kshs. 700,000/= under that head. She also wants the court to "re-assesses the general damages for pain and suffering" in her favour and be given costs of the appeal.

5. The respondents were also dissatisfied with the judgment and, therefore, they too, filed an appeal against it, by way of a cross appeal, contesting the learned magistrate's determination on liability. In their memorandum of cross-appeal, they have raised the following grounds:

1. That the learned trial magistrate erred in law and in fact in his award arriving at unjust decision, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

2. That the learned trial magistrate erred in fact and in law reaching a decision that was thus unjust, against the weight of evidence and was misguided to condemning the appellant liable for the accident when the police and plaintiff testimony blamed the 1st Respondent for the accident.

3. That the learned trial magistrate erred in law and in fact disregarding the defendant's submissions on the issue of liability thus condemning the appellants liable for the accident.

4. That the learned magistrate erred in law and in fact in finding the Applicant liable for the accident yet the plaintiff had failed to proof negligence on the applicant's (sic) part."

6. The respondents have urged that the appeal herein be dismissed and the cross appeal be allowed and that the judgment of the trial magistrate dated 17 February 2023 be set aside or varied. Although there is no particular ground in their memorandum of cross appeal against the award on general damages, they want the court to review the award. They also seek the costs of the appeal and cross-appeal.

7. In Mwanasokoni v Kenya Bus Services Ltd (1985) eKLR it was held that although an appellate court on appeal will not lightly differ from the judge at first instance on a finding of fact, it is undeniable that the appellate court has the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. In so holding, the Court of Appeal followed the decision of the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 16, 1983 where it was held:

> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

8. Again, in Peters v Sunday Post Ltd (1958) EA 424, as decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:-

> " It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.

9. It is against this background that I consider the evidence before the magistrates' court.

The record from the magistrates' court shows that, at the hearing, corporal Julius Oketch took the stand first as one of the plaintiff's two witness. It was his evidence that indeed a road traffic accident involving the auto rickshaw registration no. KTWA 6715 and the matatu occurred along Makupa Causeway on 14 March 2020. The auto rickshaw was travelling in the direction of Changamwe and had three passengers on board who included the appellant.

10. According to corporal Oketch, the accident occurred when the driver of the autorickshaw lost control of his vehicle and collided with the matatu which was travelling in the opposite direction. The driver of the auto rickshaw died on the spot as a result of the impact but the passengers sustained slight injuries. As far as the appellant is concerned, she was injured on the right leg.

11. The vehicles were towed to Makupa police station. They were found not to have any pre-accident defects. The appellant collected a P3 form and the police abstract from the police station. It was corporal Oketch's evidence that the driver of the auto rickshaw was to blame for the accident.

12. In cross-examination, corporal Oketch testified as follows:

> " I am not the I.O in the matter. It was investigated by CPL Simiyu. I have the police file with me. P3 and police abstract. It was the conclusion of the accident. The driver was not blamed for the accident. KTWA came to the lane of the matatu. Tuk Tuk driver was blamed for the accident."

13. Dr. Ajoni Adede testified for the plaintiff and stated that he examined the appellant on 26 June 2020 and on 28 September 2021. It was his evidence that the appellant dislocated the right big toe. He also testified that "there were fractures of 1st and 2nd toes." He produced two medical reports in respect of the injuries.

14. In making his reports, the doctor testified that he relied on treatment notes from Port Reitz Hospital and his own examination of the fractures. It was his opinion that the deformity of the appellant's right toe was permanent. However, upon cross-examination, he testified that he rated the disability at 3%; that the appellant would partially be disabled.

15. The appellant testified last and in her testimony she adopted the statement and documents she had filed in court as her testimony. As to who was to blame for the accidents she testified that:

> " I blame both drivers. The tuk tuk driver lost control. The matatu driver did not attempt to avoid the accident."

16. The auto rickshaw driver, according to her evidence, died on the spot. She denied causing the accident and that she had buckled up at the time of the accident. It was also her evidence that she was seated in the middle of the auto rickshaw and, therefore, from that position, she could clearly see ahead. She also testified that she had not healed and that she had been crippled as a result of the accident. When she was cross-examined she reiterated that the autorickshaw lost control and veered into the matatu's lane.

17. Corporal Simiyu testified on behalf of the respondents and stated that on 14 March 2020 at 9 AM, he received information to the effect that a fatal road accident had occurred along Makupa Causeway near Mitchell Cotts area in Mombasa. The accident involved an auto rickshaw and a matatu. In the course of his investigations, corporal Simiyu established that the accident occurred when the driver of the auto rickshaw lost its control and veered into the matatu's lane which was travelling in the opposite direction. As a result of the impact, the driver of the auto rickshaw died on the spot. The appellant was among the three passengers in the rickshaw who sustained injuries as a result of the accident.

18. The vehicles involved in the accident, corporal Simiyu testified, did not have any pre-accident defects. When the investigation file was referred to the Director of Public Prosecutions for advice on the action to be taken, he formed the opinion that the accident was as a result of the negligence of the deceased.

19. During cross-examination, corporal Simiyu testified that there were no skid marks on the road and that the weather was what he described as "clear and dry". The point of impact was on the extreme left of the matatu's lane, meaning that the matatu driver attempted to avoid colliding with the auto-rickshaw.

20. In the judgment of the Hon. Mbeja, the evidence of the witnesses was not captured as recorded. It is not apparent from the judgment to tell what each of the witnesses said as no reference has been made to their testimony. On the question of liability, in particular, the learned magistrate proceeded to make a generalized statement about drivers taking responsibility for accidents on roads. He noted as follows:

> " Drivers take the biggest blame for the occurrence of road accidents. For it is assumed that, by virtue of the professional capability, they are not only supposed to react momentarily to various changes in the vehicle and its surroundings, but are also expected to be in full control of the situation. They are credited for causing accidents through speeding, negligence, carelessness, driving under influence of alcohol and drugs, fatigue, bad health and lack of driving skills. All these are within the parameters of human behavior."

21. The learned magistrate then concluded:

> " Evidence so far on record suggest that the defendants are to blame for causing the accident. They ought to have taken reasonable measures to avoid the accident by slowing down or otherwise acting in a manner that could have aided them to avoid the accident. It is apparent from the evidence so far on record that the defendants were reckless and negligent in the manner they drove the suit vehicles. This court is inclined to hold the defendants liable for causing the accident jointly and severally. Given the circumstances obtaining above, this court is satisfied that the plaintiff has established a prima facie case against the defendants on a balance of probabilities. I will hold the defendants liable for causation of the accident wholly all circumstances considered. Consequently, judgment is entered in favour of the plaintiff against the defendants jointly and severally on liability at 100% all circumstances of this case considered."

22. The immediate result of the omission by the learned magistrate to capture the evidence of the witnesses is apparent from the conclusion that the respondents in the appeal were held 100% liable for the accident. The learned magistrate fell into error in reaching this conclusion because it is obvious that the conclusion is inconsistent with the evidence of the investigating officer and even that of the appellant.

23. Both the police officer and the appellant were consistent that the driver of the auto rickshaw lost control of his vehicle and veered off his lane into the lane of the oncoming vehicles which, in the case before the magistrate, included the matatu. As a matter of fact, according to the appellant, both the drivers were to blame and the matatu driver was only to take a share of responsibility for the accident because,

according to the appellant, he did not do enough to avoid the accident. So that even with the appellant's evidence alone, the least the learned magistrate could do was to apportion liability between the two drivers in equal measure.

24. According to the uncontroverted evidence of corporal Simiyu, the point of impact was on the far left of the matatu's lane and, based on this fact, he concluded that the driver of the matatu attempted to avoid the collision with the auto rickshaw by swerving to the left. In these circumstances, the driver of the matatu can be said to have done as much as he could to avoid the collision of the two vehicles.

    It follows that by reaching the conclusion he did, the learned magistrate did not just misapprehend or misdirect himself on the facts and reached a wrong factual conclusion, he simply disregarded or ignored the evidence placed before him.

25. Based on the evidence presented before the learned magistrate, there was no basis for attributing the accident, to any degree, to the respondents. In short, there was no proof of negligence on the part of the respondents and, for this reason, the appellant's claim ought to have been dismissed.

26. On quantum, the learned magistrate did not cite any case of comparable injuries for a comparable award before making the award of Kshs. 150,000/= as general damages. Granted, he cited the case of Mohamoud Jabane versus Highstone Butty Tongoi Olenja (1986) KLR where the court of Appeal laid down the principles to be followed in awarding damages and even listed verbatim these principles. One of these principles and which the learned magistrate did not apply in his award is, of course, that comparable injuries should attract comparable awards. Having failed to cite any decision in which a comparable award had been made for comparable injuries, the award of Kshs. 150,000/= was arbitrary and, therefore, contrary to the very principles which Mohamoud Jabane versus Highstone Butty Tongoi Olenja (supra) espoused.

27. That said, I note that respondents, in their submissions before the learned magistrate, were prepared to pay the appellant the sum of Kshs. 450, 000/= as general damages. In this regard, they cited Said Abdulahi & Another versus Alice Wanjira (2016) eKLR where the claimant sustained a fracture of the right humerus and was awarded Kshs. 300,000/= in 2016; Daniel Otieno Owino & Another versu Elizabeth Atieno Owuor (2020) eKLR where the claimant was awarded Kshs. 400,000/= for fractures of tibia/fibula bones and Jitan Nagra versus Abednego Nyandusi Oigo (2018) eKLR in which the trial court had awarded Kshs. 1,000,000/= as general damages but this Honourable Court (Majanja,J.) reduced the award to Kshs. 450,000/= on appeal. In this latter case, the claimant had sustained several bodily injuries that were particularised as lacerations on the occipital area; deep cut wound on the back; right knee and lateral land; bruises at the back extending to the right side of the lumbar region; blunt trauma to the chest; bruise on the left elbow; and, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur.

28. Upon considering these decisions, the respondents then submitted:

    > "We therefore submit that an award of Kshs. 450,000/= will be sufficient compensation under this head since the injuries were not severe".

29. If the respondents were willing to pay this amount as general damages and, considering that their proposal was backed by comparable awards for comparable injuries, the learned magistrate had no reason to award anything lower than the award proposed by the respondents.

30. Of course it is trite that when it comes to award of damages, the appellate court will not interfere with the award of damages unless it is satisfied that the award made by the trial court is clearly wrong because it misdirected itself in some material respect or the award is inordinately high or low as to present an

entirely erroneous estimate. InButt v Khan (1978)eKLR the Court of Appeal held in respect to this question of quantum as follows:

> " 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." (Per Law, JA).

31. In this case the learned magistrate ignored the applicable principles and arrived at a wrong figure. If liability had been proved, I would have enhanced the award of damages to Kshs. 450,000/=.

32. For reasons I have given the appeal is dismissed. For the same reasons, the cross-appeal is allowed. The decision allowing the appellant's claim in the magistrates' court is substituted with an order dismissing the suit. I make no order as to costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 14 FEBRUARY 2025

NGAAH JAIRUS

JUDGE