Okinyo v Kotecha (Civil Appeal E008 of 2023)
[2025] KEHC 2876 (KLR) (3 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2876 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E008 OF 2023

AB MWAMUYE, J

FEBRUARY 3, 2025

BETWEEN

SAMUEL AKUMU OKINYO ..... APPELLANT

AND

HARISH KOTECHA ..... RESPONDENT

(Being an Appeal from the Judgement of Honourable F.M Rashid (PM) in WINAM MCCC NO. E 202 OF 2021 delivered on 6/12/2022)

JUDGMENT

Background

1. The Appellant herein has approached this Court aggrieved by the Judgment of the Trial Court delivered on 6th December, 2022 in the Magistrates Court at WINAM Civil Suit No. E202 of 2021. The Memorandum of Appeal dated 10th January, 2023 has five grounds which revolve around two issues, liability and quantum. The Trial Court found both the Appellant and the Respondent were equally to blame for the accident, placing liability at 50%:50% and awarded Kshs.300,000/= for general damages. The Appellant's main grievance is that the Respondent should be held 100% liable for the accident and that the amount issued for quantum was inordinately too low.

2. The Appellant filed his Written Submissions dated 10th January, 2024 while the Respondent filed her Written Submissions dated 17th January,2024.

3. In his written submissions, the Appellant argues that he was a pedestrian walking along Odinga Oginga road next to crown paint area when a moving motor vehicle registration number KDC 487 F was over speeding while reverse parking and hit him from behind and blamed the Respondent for causing the accident. He further submitted that as a result of the accident he sustained fracture on his left leg, head and chest injuries. He relied on two cases; Rivatex Ltd -vs- Phillip Mochache (1999) eKLR and Njora Samuel v Richard Nyang'au Orechi [2018] eKLR. The Appellant further contends that the award of

Ksh.300,000/= awarded for general damages be set aside and the same be substituted with an award of Kshs.1,000,000/= for the injuries sustained.

4. The Respondent, on her written submissions contends that decision of the Trial Court reflects the in-depth facts and evidence and this court should uphold it. She further submitted that the Appellant was to blame for the accident as he gave self-contradictory evidence on how the accident occurred and who was to blame for the accident thereby failing to prove negligence against her. The Respondent placed reliance on various case laws and urged this court to uphold the judgment of the Trial Court.

5. This being a first appellate court, I am guided by the dictum in the case of Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the Trial Court, assess it and make its own conclusions in the circumstances.

6. I have examined the judgment of the Trial Court in light of the testimony given and the evidence tendered by the parties during the trial, and have considered the pleadings and submissions filed at this appellate stage. The issues to be determined by this Court are Whether the Trial Court erred in apportioning liability at 50%:50% and whether the quantum of damages awarded was inordinately low.

7. In terms of Section 107, 108 and 109 of the *Evidence Act*, the duty of proving negligence on a balance of probabilities lay squarely on the Appellant. In Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR, the Court quoting Charles worth & Percy on Negligence, 9th Edition at P. 387 and stated that:

> " In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise,
>
> (1) whether on that evidence, negligence may be reasonably inferred and
>
> (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

8. In Nickson Muthoka Mutavi v KenyaAgricultural Research Institute [2016] eKLR, the court quoted a passage on burden of proof from Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 where it was stated that:

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff, between which and the breach of duty a causal connection must be established."

9. On the first issue, the appellant contends that the Trial Magistrate was wrong in holding that he was equally liable to blame for the accident. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and

an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

10. The Appellant testified in Trial Court that the accident was caused by the Respondent reversing without checking for pedestrians and that the accident was primarily caused by the Respondent's failure to exercise due caution while reversing. PW2, the investigating officer, testified that the defendant was parking the said motor vehicle and while reversing it, hit the plaintiff's leg and further stated while being cross-examined that he was not familiar with the circumstances leading to the accident. The Respondent, in her defense, admitted to hearing a bang and stopping but claimed she was unaware of the Appellant's exact position at the time.

11. Both Appellant and Respondent blamed each other for the accident. The investigating officer did not offer any assistance for he failed to lead evidence to demonstrate who was at fault when the accident occurred.

12. In Hussein Omar Farah v Lento Agencies [2006] eKLR, the Court of Appeal held that: -

> " In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

13. This court notes that the Trial Magistrate assessed liability based on the evidence presented before the court. According to the Trial Court, the evidence adduced clearly brought out both the Appellant and the Respondent to be equally blame for the accident.

14. There are two elements in the assessment of liability, namely causation and blameworthiness. See Baker v Willoughby [1970] AC 467. In my opinion there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. I would not disagree with the learned magistrate's finding that both parties equally contributed to the said accident. I respectfully agree that the learned magistrate was right to apportion the blame 50 percent to the appellant and 50 percent to the respondent.

15. On the second issue of quantum, the court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55, set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the Trial Court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the Trial Court only if it is satisfied that the Trial Court applied the wrong principles, (as by taking into account some irrelevant factors leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

16. Additionally, in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR settled the principles to be applied in assessing damages and stated that:

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

17. In this instant suit, the injuries suffered by the Appellant were listed in the treatment notes from Kisumu County Referral Hospital and medical report by Professor L.W Okombo as follows;

    i. Head injuries

    ii. Fracture L metatarsal bone

    iii. Tenderness on the chest

18. This court has considered the award of Kshs.300,000/= as made by the Trial Magistrate based on the authorities cited by the parties in submissions at the Trial Court and in this appeal. The Appellant suffered one fracture and two soft tissue injuries. At Trial Court, the Appellant testified that he had not fully healed but on cross-examination, he admitted he has healed.

19. Looking at the cases cited before the Trial Court, I find that the one cited by the Appellant relates to more serious injuries than those suffered in this case. In this appeal, the appellant could have cited more recent and relevant cases that is reflective of the general trend of injuries in similar cases. On the other hand, the ones cited by the respondent was more reflective of the injuries sustained by the appellant.

20. From the foregoing, I do not detect any error on the part of the Trial Magistrate that would warrant interference.

21. Consequently, I dismiss the appeal with no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE

JUDGE