Gicheha & another v Owuor (Civil Appeal E450 of 2024)
[2025] KEHC 2877 (KLR) (Civ) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2877 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E450 OF 2024

TW OUYA, J

MARCH 13, 2025

BETWEEN

DAVID MUIGAI GICHEHA ..... 1ST APPELLANT

SAMUEL KIMANI GICHACHA ..... 2ND APPELLANT

AND

ROBERT EVANCE OWUOR ..... RESPONDENT

(Being an appeal against the judgement and decree of Hon. V.M Mochache, RM, in Milimani Small Claims Court Civil Suit no. 6012 of 2023, delivered on the 8th of March, 2024)

JUDGMENT

1. This appeal emanates from the judgement and decree of the lower court in SCCC No. 6012 of 2023 delivered on the 8th of March, 2024. The suit was initiated by Robert Evance Owuor, (respondent herein) against David Muigai Gicheha and Samuel Kimani Gichacha (1st and 2nd appellants respectively) for injuries sustained as a result of a road traffic accident that occurred on the 17th of February, 2023, involving the respondent (rider) of Motor Cycle registration number KMFW 735K and Motor vehicle registration number KCR 969P, controlled by the appellants and/or their agents. The particulars of the appellants alleged negligence were pleaded at paragraph 4 of the respondent's statement of claim dated the 21st of November, 2023.

2. The matter went for full trial and the trial court found the appellants 100% liable thereby awarding the respondent general damages for pain and suffering in the sum of Kshs.520,000 and Kshs.46,352 as special damages together with costs of the suit and interest.

3. The appellants were dissatisfied with the trial court's findings on both liability and quantum and proffered an appeal to this court vide a Memorandum of Appeal dated the 4th of April, 2024.

4. In the Memorandum of Appeal, the appellants faulted the learned adjudicator for failing to find that the respondent also contributed to the cause of the accident when he failed to slow down, swerve or avoid the accident. They also blamed the learned adjudicator for making an award that was not within the limits of already decided cases; and for awarding the respondent general damages of Kshs.520,000, which is inordinately high and excessive considering the injuries sustained by the respondent.

5. The appeal was prosecuted by way of written submissions following the directions issued by this court on the 22nd of July, 2024. In their written submissions dated the 14th of August, 2024, the appellants submitted that liability for the accident should be apportioned equally between the appellants and the respondent; given that the respondent, in his testimony before court admitted to having noticed the vehicle but was unable to stop, slow down or avoid the accident due to the fact that he was riding his motor cycle on high speed.

6. They contended that failure by the respondent to control his motor bike and keep a proper look out was a predominant factor in the causation of the accident; and that failure by the respondent to slow down in the face of danger confirms that he did not exercise care for his own safety.

7. As regards quantum, the appellant submitted that the award of Kshs.520,000 awarded by the learned adjudicator as general damages, was not only excessive and inordinately high, but it was also an erroneous estimate of the damages, compared to the injuries sustained by the respondent; and that the same is not in line with recent authorities for comparable injuries. The appellant submitted that an award of Kshs. 250,000 as general damages will be sufficient compensation for the respondent.

8. On the other hand, the respondent in his written submissions dated the 19th of August, 2024, supported the trial court's findings on both liability and quantum. He submitted that the trial court's finding on liability was based on the credibility of witnesses; whereas the appellant's version regarding how the accident occurred could not be substantiated as the appellants failed to call any witnesses to controvert his assertions.

9. As regards quantum, the respondent submitted that the learned trial magistrate exercised her discretion in awarding him a sum of Kshs. 520,000 as general damages; and that the said award was not inordinately high as to present an erroneous estimate of compensation which he was entitled to.

10. He submitted that the injuries contained in the authorities relied upon by the appellants at the trial court are not comparable to those that he sustained and as such, it cannot be said that the damages awarded by the trial court was high.

11. Having carefully considered the grounds of appeal, the parties rival written submissions together with all the authorities cited, I find that the issues arising for my determination as follows;

    a. Whether the trial court erred in finding the appellants 100% liable.

    b. Whether the award of Kshs.520,000 was manifestly excessive given the injuries sustained by the respondent.

12. This being a first appeal, this court is duty bound to re-analyse, re-consider and re-evaluate the evidence on record and to draw its own independent conclusion on whether the findings of the trial court should stand; although it should bear in mind that it neither heard nor saw the witnesses and to make due allowance in that respect.

13. This principle was reiterated in the court of appeal case of Selle –vs- Associated Motor Boat Co. [1968] EA 123; as follows: "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form 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."

14. On the first issue, it is a well settled principle of law that an appellate court should be slow to interfere with findings of fact made by the trial court unless they were based on no evidence or a misapprehension of the evidence or unless the court was satisfied that the trial court acted on wrong legal principles in reaching the findings.

15. This principle was reiterated by the Court of Appeal in Kiruga Versus Kiruga & Another, [1988] KLR 348, in which the court expressed itself as follows: "An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellant court has jurisdiction to review the evidence in order to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution. Where it happens that a decision may seem equally open either way, the appellant approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellant court become of paramount importance and ought not to be disturbed."

16. Being that as it may, from my appraisal of the evidence on record, it is not disputed that an accident occurred at the material date involving the respondent who was riding the aforesaid motor cycle and the appellants motor vehicle which was being driven by their authorised agent and/or driver.

17. To prove that the appellants were to blame for the occurrence of the accident, the respondent who testified in court as CW3, and adopted his witnesses statement as his evidence; indicated in his witness statement that on the material day, while riding his motor cycle along Mombasa road from Imara Daima to Syokimau, the driver of Motor vehicle registration KCR 969P, made a wrong U-turn and stopped his vehicle on the middle of the road, which resulted in a violent collusion with his motor cycle, leading to him sustaining severe bodily injuries.

18. CW1, PC Jackeline Naeku, a police officer from Embakasi Police station, testified that she was the officer assigned the duty of investigating the occurrence of the accident; and that her investigations revealed that the appellants were to blame for the accident. She confirmed that the accident had occurred when the appellants motor vehicle made a wrong U-turn, which led to the collusion with the respondents Motor Cycle. She also produced a Police abstract that blamed the appellants for the occurrence of the accident.

19. Whereas the appellants allege that the respondent failed to exercise due care for his safety as he failed to slow down in the face of danger, there is uncontroverted evidence on record showing that the speed limit on the highway where the accident occurred was 100km/hr; and that the appellants joined the said highway abruptly and stopped in the middle of the road, without due regard for other motorists and while the respondent was riding on the said highway at the required speed limit of 100km/hr. The respondent could not therefore have expected that a motorist would stop in the middle of the highway whose speed limit is 100km/hr, it is the appellants who in my view, risked the lives of other motorists by abruptly stopping on a highway where the speed limit is 100km/hr.

20. The appellants on the other hand did not adduce any evidence whatsoever to demonstrate how the accident occurred. In my considered view, the evidence adduced by the respondent was credible and

uncontroverted, as such, the learned trial magistrate cannot be faulted for coming to the conclusion that the appellants were 100% to blame for the occurrence of the road traffic accident.

21. Turning now to the issue of quantum, it is a well settled principle of law, that in assessing damages for personal injuries, the general method of approach is that comparable injuries should be compensated by comparable awards, although regard must be had to the fact that no two cases can be exactly similar.

22. This principle was discussed in the persuasive case of Odinga Jactone Ouma versus Moureen Achieng Odera [2016] KEHC 2922 (KLR); where Majanja, J (as he then was) expressed himself as follows: "In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR thus: The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

23. In this case, the injuries sustained by the respondent have not been disputed. According to paragraph 4 of the statement of claim filed in the small claims court, the injuries the respondent is said to have sustained were enumerated as follows:

    i. Fracture tooth 21;

    ii. Fracture mobile 22;

    iii. Fracture Mobile 31;

    iv. Fracture Mobile 32;

    v. Fracture Mobile 41;

    vi. Fracture Mobile 42;

    vii. Deep cut on the scalp;

    viii. Deep cut wound on the lower lip;

    ix. Limited Mouth opening;

    x. Recurrent pains on the upper jaws;

    xi. Recurrent pains on the lower jaws;

    xii. Recurrent headaches;

    xiii. Lacerated scars on the scalp;

    xiv. And lacerated scars on the lower lip.

24. These injuries were proved by the medical reports produced by the respondent before the trial court. The respondent produced a medical report from Mama Lucy Kibaki Hospital dated the 20th of April, 2023, which indicated that the appellant had a wound on his hip and scalp, mobile grade iii tooth 11, fracture tooth 21, mobile tooth 22, 31, 32, 41 and 42. The medical report further indicated that the respondent had limited mouth opening.

25. The respondent had also produced another medical report from Al-Amin Hospital dated the 27th of February, 2023, which showed that the respondent had several teeth that were mobile and he was missing tooth 21. The medical report further indicated that splinting was done to restore the firmness of the teeth and scaling was also done on the patient.

26. The medical report from Dr. Cyprianus Okoth Okere dated the 8th of June 2023 confirmed that the respondent had sustained a deep cut wound on the lower lip; fracture tooth 21; fracture mobile 22, 31, 32, 41, 42; limited mouth opening; deep cut on the scalp; recurrent pains on the upper and lower jaws; recurrent headache. Upon physically examining the respondent, Dr. Okere noted that the respondent had lacerated scars on his scalp and lower lip and that tooth 21 was fractured. He formed the opinion that the respondent had suffered severe harm.

27. There was also on record a medical report from Worksafe Afya Clinic dated the 31st of January, 2024, and upon examination of the respondent, the doctor from the said facility formed the opinion that the respondent has since recovered from the accident, although he had a missing tooth. He assessed the respondent's degree of residual permanent disability at 4%.

28. My perusal of the judgement of the trial court, reveals that in awarding the respondent a sum of Kshs. 520,000 as general damages, the learned adjudicator relied on the case of Washington Mukunya Karanja & another versus Margaret wambui Maina (2020) eKLR: wherein an award of Kshs. 271, 800, was made for the victim who had sustained swelling on the upper part of the mouth; Alveolar fracture of both incisor teeth, soft tissue injuries on right leg and superficial injuries. The court in its judgement also noted that the respondent herein had sustained more severe injuries; and considered the passage of time.

29. On my part, I have considered the authorities relied on by both parties at the trial court and before this court. having done so, I am of the considered view that the authorities relied on by the appellants contain injuries that are less severe than those sustained by the respondent in the instant case.

30. I also note that as per the medical report from Worksafe Afya Clinic, the respondent's permanent disability was assessed at 4% and that in his testimony before the trial court, the respondent indicated that he could not eat hard food, as his teeth were still weak.

    Based on the above, and considering the rate of inflation, I am of the considered view that the award of Kshs.520,000 as general damages is not excessive or inordinately high in the circumstances. The said award is consequently upheld. Flowing from the foregoing, this court finds that this appeal lacks in merit and should be dismissed with costs to the respondent.

Determination

31. This appeal is hereby dismissed with costs to the respondent. The judgement and decree of Hon. V.M Mochache (RM) in Milimani Small Claims Court Civil Suit no. 6012 of 2023, delivered on the 8th of March, 2024 is hereby upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....njuguna

For Respondent...no Appearance

Court Assistant.....jackline