Mukile v Mwita (Civil Appeal 55 of 2022) [2024] KEHC 86 (KLR) (15 January 2024) (Judgment)

Neutral citation: [2024] KEHC 86 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 55 OF 2022

DK KEMEI, J

JANUARY 15, 2024

BETWEEN

KENNEDY JUMA MUKILE ..... APPELLANT

AND

KEPHAS OCHIENG MWITA ..... RESPONDENT

(Being an Appeal from the Judgment/Decree of the Honourable A. A. Odawo-SRM delivered on the 13th June 2022 in Bungoma CMCC No. 34 of 2019)

JUDGMENT

1. This appeal challenges the trial magistrate's judgment on the twin issues of liability and quantum. The Appellant was the Plaintiff in a suit wherein he claimed general and special damages in regard to personal injuries sustained in an accident that occurred along the Mumias-Bungoma Road on 8th December 2018. The accident involved the Respondent's m/vehicle registration No. xxxx and the Appellant's motor cycle registration number xxxx, which he was riding. At the trial, the Appellant testified and called four witnesses with the Respondent testifying during the defence hearing. After considering the evidence before him and the submissions of both parties, the trial magistrate found the Appellant had failed to prove his case on a balance of probabilities and dismissed the suit with costs to the Respondent. Being aggrieved the Appellant preferred this appeal which is premised on grounds that: -

    i. That the learned trial magistrate erred in law and in fact by disregarding the evidence tendered by the Appellant thereby arriving at a wrong conclusion on liability.

    ii. That the learned trial magistrate erred in law and in fact by dismissing the Plaintiff's suit despite the evidence tendered.

    iii. That the learned trial magistrate erred in law and in fact by suggesting that an award of Kshs. 500,000/= would have been reasonable for general damages as the same would be too low considering the gravity of injuries sustained by the Appellant.

2. By this appeal it is urged that this court do set aside the trial magistrate's findings on liability and quantum and replace it with its own assessment and that the costs of this appeal be provided for.

3. The appeal proceeded by way of written submissions. Both parties filed and exchanged their respective submissions.

4. The duty of an appellate court in civil proceedings is well known. In words of De Lestang V-P in the Court of Appeal for East Africa case of *Selle v Associated. Motor Boat Co*. (1968) EA 123, 126:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Shalom* (1955), 22, E.A.C.A. 270)."

5. It is trite that the burden of proof lies with the Appellant in accordance with sections 107, 108 and 109 of the *Evidence Act*, and no case law authority is necessary for that cardinal principle.

6. As regards the applicable standard of proof to the suit subject of the appeal herein, the learned authors of Phipson On Evidence, 16th ed. (2005) at pp. 154-5, paragraph 6 – 53 observe as regards the standard of proof in civil cases as follows:

> " The standard of proof in civil cases is generally proof on the balance of probabilities. If, therefore, the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not."

7. Similarly, under section 3 (2) of the *Evidence Act* -

> " A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists."

8. In cases, however, of serious allegations, the balance of probabilities requires cogent evidence as observed in Phipson on Evidence, ibid. at paragraph 6-54 as follows:

> " (b) serious or criminal allegations
>
> Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and a breach of warrant, the court might hold that the warranty claim was proven and the fraud cliam not proven on the same facts. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, and thus to prove the allegation."

9. The question therefore is whether the Appellant herein discharged the burden of proof that the Respondent was liable in negligence for the occurrence of the accident wherein the Appellant was allegedly injured.

10. First and foremost, there is no doubt that an accident occurred in which the Appellant was injured. Hence, the only question is who caused the said accident.

11. On the issue of liability, this being a first appellate Court, I must consider the evidence in the trial Court so as to arrive at my own independent conclusion while bearing in mind that I did not hear or see the witnesses. The Appellant's evidence, as contained in a statement which was adopted as his evidence and which was inter alia; that the Respondent's motor vehicle was being driven at an excessive speed; that the driver failed to observe due of care and attention to other road users particularly the Appellant; that the driver driving a defective and unroadworthy motor vehicle; that the driver driving without taking into consideration the nature of the road and the driver failing to adhere to traffic rules. The Respondent did adduce evidence to rebut or controvert the Appellant's evidence. According to him, his vehicle did not come into contact with the motorbike and that he blames the Appellant for the accident. He told the Court that as he was overtaking a lorry, there was an oncoming saloon car and the rider also decided to overtake after him. The Appellant had carried two pillion passengers who decided to jump when they saw the rider would not complete the overtaking. On cross examination, he told the Court that the motor cycle was behind the lorry and that he was overtaking both of them. According to the Appellant, the Respondent hit his motorcycle from behind. If the accident occurred while the motor vehicle was overtaking the lorry while the motorcyclist was behind the motor vehicle also trying to overtake the lorry, it is not possible for the motor vehicle to hit the motor cycle that was behind it. As duly noted, the Appellant trying to overtake was not able to maneuver the oncoming vehicle and the pillion passengers seeing the oncoming danger, they pushed the rider forward as they jumped off the motor cycle, causing the rider and the motor cycle to fall down and hit the right panel of the lorry and the subsequent running over of the motor cycle by the right rear tyre of the lorry. The lorry drove off without stopping and the Respondent testified that his motor vehicle never came into contact with the motor cycle. PW2 testified that he was not the investigating officer nor did he have the police file with him. He did not have the authority to testify on who was to blame for the accident.

12. From the foregoing, it is clear that the Appellant did not adduce any evidence to show that the Respondent was to blame for the accident and therefore his averments in the Plaint are just but allegations. It is instructive that the appellant did not call his pillion passengers to give their side of the story so as to shed light on the true circumstances of the accident. I therefore concur with the holding of the trial Court that the Appellant failed to prove his case on a balance of probabilities.

13. Despite the above, this Court is still expected to deal with how much it would have awarded the Appellant had he been successful in his appeal on liability. On quantum, as was held in the cases of *Paul Kipsang Koech & another v Titus Osule Osore* [2013] eKLR and *Kiwanjani Hardware Ltd & another v Nicholas Mule Mutinda* [2008] eKLR an appellate Court will only interfere with the award of the trial Court if it is inordinately so high or low as to represent an entirely erroneous estimate or it is based on some wrong legal principle or on a misapprehension of the evidence.The trial Court is bound by the principle of compensation which requires comparable awards for comparable injuries. Whatever the proposals for award of damages made by parties, it is the discretion of the Court to award damages in a particular case, the principle only being that like injuries should be compensated by comparable awards. Although it be desirable that Courts take submissions on the question of quantum for the parties, it is the compliance with the principles for the award of damages that matters: an award that is otherwise consistent with the principles for the grant of damages will not be set aside for failure to invite or consider or apply quantum supported by a party's submissions. Indeed, in *Gicheru v Morton*,

the Court of Appeal held that in that case "several High Court cases cited to the Court concerning the quantum of damages in matters libel did not appear to have solid juridical grounding and they were not to be taken as persuasive or as guidelines to be followed by trial courts."

14. The doctor (PW4) testified as regards the injury of the Appellant to the effect that the Appellant only sustained a fractured left femur and that he needed internal fixtures and that there was no need for medical expenses as he must have recovered as the accident occurred three years ago. He told the Court that he never assessed any permanent disability. He produced the medical report in Court as PEXH.6A. DW3 on the other hand testified that she noted the Appellant only suffered soft tissue injuries and one fracture and that future medical expenses were not required for the Appellant. She produced the medical report in Court as DEXH.2.

15. I do find that the general award and special damages in this case was not so inordinately high as to amount to an unreasonable estimate to justify this appellate court on the principle of *Butt v Khan* [1982-88] 1 KAR: 1, to interfere with the trial court's award. The amount awarded were reasonable in the circumstances and thus I see no reason to interfere with the same. I therefore uphold it.

16. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

    Order accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JANUARY 2024

D. KEMEI

JUDGE

In the presence of:

Angode for Appellant

Miss Bii for Respondent

Kizito Court Assistant