Owiro v Ogedah (Civil Appeal E052 of 2022)
[2024] KEHC 490 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEHC 490 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E052 OF 2022

RE ABURILI, J

JANUARY 22, 2024

BETWEEN

OLIVER ODHIAMBO OWIRO ..... APPELLANT

AND

JACOB OGEDAH OGEDAH ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable R.S. Kipngeno in the Senior Principal Magistrate's Court at Nyando delivered on the 10th May 2022 in Nyando SPMMC 143 of 2019)

JUDGMENT

Introduction

1. This matter is part of a series that includes Civil Appeal E053, E054 & E055 of 2022 which were all determined in the Senior Principal Magistrate's Court at Nyando as Nyando SPMCC 143, 142, 140, & 141 of 2019 respectively. At the trial court Nyando SPMCC 140 OF 2019, Mary Goretty Owiro v Jacob Ogedah Ogedah was used as the test suit.

2. The appellant herein, vide a plaint dated 10th June 2019 and through his next of friend Mary Goretty Owiro, his mother, sued the respondent for injuries sustained in an accident that occurred on the 22nd December 2018 at Korowe area along the Ahero – Kisumu road when the respondent's driver allegedly negligently and carelessly drove motor vehicle registration number KCC 332L that he hit the motorcyclce on which the appellant was a passenger.

3. The respondent filed a statement of defence dated 6th April 2021 denying all the averments made by the appellant and putting him to strict proof. The respondent further averred the appellant through his negligent actions contributed to the accident.

4. The trial court took evidence of the four appellant's witnesses after which the respondent elected to call no witness in his defence and closed his case. In the impugned judgment, the trial court found that

appellant had boarded the motorcycle with 3 other passengers including her mother who was the adult therein and thus she risked their lives. The trial court further found that from the evidence adduced before it in cross-examination of the appellant's witnesses, the said motorcycle was being driven at a high speed and that the appellant and his siblings as well as their mother had no helmets or reflective jackets and as such, proceeded to apportion liability equally between the appellant and the respondent.

5. Aggrieved by the said ruling, the appellant preferred the instant appeal brought by way of memorandum dated 7th June 2022 and filed on the 14th June 2022 raising the following grounds of appeal;

   i. That the learned magistrate erred in law and in fact by apportioning liability on the appellant herein notwithstanding the fact that the appellant herein was a minor who had sued through his mother and next friend one Mary Goretty Owiro.

   ii. That the learned magistrate erred in law and in fact by failing to appreciate that the appellant was a pillion passenger and hence could not have contributed to the said accident.

   iii. That the learned magistrate erred in law and in fact by awarding a different award from the one which he had awarded when the matter had proceeded for a formal proof hearing without any justification.

   iv. That the learned magistrate erred in law and in fact by disregarding the next friend's testimony when the same was not rebutted as the respondent did not avail any witness.

   v. That the learned magistrate erred in law and in fact in disregarding the appellant's submissions and authorities and proceeded to rely on his own views not supported by law.

6. The parties filed submissions in determination of the appeal.

Appellant's Submissions

7. The appellants submitted that that the Respondent having failed to join Next Friend as a third party pursuant to third party proceedings under Order 1 Rule 15 of the Civil Procedure Rules and having shown that a child of tender years cannot be found liable for contributory negligence, the Respondent ought to be held 100% liable for the accident. Reliance was placed on the case of Kubai Kithinji Kaiga (Suing as the Legal Representative of the Estate of John Kaiga v Kenya Wildlife Service (2021) eKLR where it was held interalia that persons who are not party to a suit cannot and should not be affected by the decisions of the court in the suit.

8. The appellant further submitted that at the time when the suit was being instituted the Plaintiff in this particular case was a child aged 5months and that courts have held that such a child cannot be found liable for contributory negligence in accident as was held in the case of Ewo (Suing as the Next Friend of Minor Cow) v Chairman Board of Governors Agoro Yombe Secondary School (2018) eKLR.

9. It was submitted that when the matter proceeded for Formal proof hearing the court awarded Kshs 280,000 on the 19th of November 2019 and despite the fact that the respondent failed to adduce any evidence, the court awarded a Judgment of Kshs 200,000 on the 10th of May 2022 thus revising the initial award without any justification considering that the facts were still the same. The appellant submitted that the court ought to have awarded the initial amount of Kshs 280,000.

10. The appellant submitted that no evidence was placed before court by the Defence to warrant the court to hold that Appellant was negligent in the way.

11. It was submitted that there was no legal basis as how the court arrived at the amount that was awarded as was evidenced from the judgement wherein there was no single court decision that the Learned Magistrate relied on to arrive at the decision that he made and thus it was evident that the trial magistrate relied on views which were not supported by law.

The Respondent's Submissions

12. The respondent submitted that the (next friend of the minor) having failed to tender evidence for and on behalf of minor, (Plaintiff before the Trial court), the Trial Court was perfectly in order to find that the liability determined at Nyando Civil Suit No. 140 of 2019 do apply to this matter and that Further, it would have been an absurdity in law for the Court to apportion liability at a different ratio especially when there was no evidence adduced by the next friend.

13. It was submitted that the Court's apportionment of liability was based on riding as excess passengers and failing to put on riding gears expected of a pillion passenger and further that the Appellant's own witness, the Police officer, did not lay any blame upon the Respondent and as such the Appellant did not discharge the burden of proof under section 107 of the *evidence Act*.

14. The respondent submitted that under the *Traffic Act* Cap 403 rule 60(1), it is an offence to allow oneself to be carried in a motor cycle when there is already another passenger on board.

15. The respondent relied on the Court of Appeal case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Anor (2014) eKLR where the Court stated interalia that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted where the claimant lays on the table evidence of facts contended against the defendant and the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved and if the evidence falls short of the required standard of proof, the claim is and must be dismissed. The respondent further relied on the case of Milka Akinyi Ouma v Kenya Power & Lighting Company Ltd & Another (2020) eKLR where the court reiterated the Court of Appeal's sentiment in the Daniel Torotich Arap Moi (supra) case.

16. The respondent relied on the case of Paul Lawi Lokale v Auto Industries Limited & Another (2020) eKLR, where the High Court upheld the trial magistrate's decision which had found an excess pillion passenger at 50% contributory negligence and dismissed the appeal.

17. It was submitted that there was no legal basis for the appellant's submissions that since the Trial Court at the ex-parte proceedings arrived at an award which is at variance with the current Court award, when the injuries remain the same then the Court ought to have maintained the same award.

18. The respondent urged the Court to disallow the Appellant's appeal on quantum and not interfere with the trial court's decision but rather dismiss the instant appeal.

Analysis and Determination

19. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in Selle & Another v Associated Motor Boat Co. Ltd (1968) EA 123.

20. In my view, the issues for determination before this court are whether the trial court erred in apportioning liability equally between the appellant and the respondent and further whether the trial court erred in awarding the quantum of damages that it awarded.

On liability

21. The law is clear that he who alleges must proof. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

22. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

23. 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 plaintiff minor was allegedly injured.

24. It is undisputed that on the 22nd December 2018 at Korowe area along the Ahero – Kisumu an accident occurred involving the appellant herein, his 2 siblings and their mother who were on a motorcycle and the respondent's driver who was at the time driving motor vehicle registration number KCC 332L.

25. When the matter came up for hearing the appellant's mother/next friend had already testified in Nyando SPMCC 140 OF 2019, Mary Goretty Owiro v Jacob Ogedah Ogedah, which was the test suit in the lower court wherein she applied that her testimony therein do apply to the other cases in the suit, Nyando SPMCC 143, 142, & 141 of 2019.That being the case, that her testimony was adopted as evidence in the other cases listed in the series, then she did not have to testify again for the appellant minor herein.

26. The appellant's mother had testified that on the material day she and her 3 children were lawful pillion passengers on board the suit motorcyclce which was hit by the respondent's motor vehicle from behind leading to her and the children sustaining the injuries cited in the appellant's plaint. It was her testimony that she blamed the driver of the respondent's motor vehicle for the accident as he hit them from the rear.

27. In cross-examination, PW3's mother stated that thy were 3 pillion passengers on the motorcycle with a baby strapped to her back and that only the motorcycle rider had a helmet. She further stated that had the motorcycle rider ridden a little slowly then the accident would not have happened. In re-examination it was her testimony that the vehicle that hit them came from the front.

28. PW3, No. 64748 CPL Rodgers Simiyu who produced the police abstract testified in cross-examinations that no one was to blame for the accident.

29. It is worth noting that the respondent did not call any witnesses in support of their case, it follows that the respondent's defence as it was regarding the manner in which the accident was pleaded and testified on by the appellant's next friend and mother.

30. See the cases of North End Tradign Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited V City Council of Nairobi (2019) eKLR and that of CMC Aviation LTD v Crusair LTD (NO.1) (1987) KLR 103.

31. The appellant, however had the onus of proving his case against the respondent whether or not the respondent adduced evidence. This is because appellant's case not being a liquidated claim had to be proved on a balance of probabilities.

32. I have considered the evidence adduced by the appellant's mother, his next friend. It is evident that despite her adopting her testimony in Nyando SPMCC 140 of 2019, the appellant herein was 4 months and 12 days old at the time of the accident. I refuse to be persuaded that a child of this age ought to have known the risks or consequences of being carried on its mother's back who proceeded to board a motorcycle that her 3 other siblings had boarded.

33. In Bottorff v South Construction Company,184 Ind. 221, 110 N.E. 977 (1915), although the holding was based on proximate cause, the Indiana Supreme Court stated:

> " It has been laid down by law writers and the courts that the time of infancy is divided into three distinct periods, during each of which different presumptions prevail; the first period is that up to the age of seven years, during which the infant is conclusively presumed to be incapable of understanding the nature of crime and can in no way be held responsible therefor; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act. The third period is after the age of fourteen years when the infant is presumed to be capable of committing a crime and can be held the same as an adult. It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases. (Emphasis added.).

34. In the persuasive case of Miller v Graf 196 Md. 609, 78 A. 2d 220 (1951), the Plaintiff, a little girl aged four, was struck by the Defendant's westbound taxicab as she was crossing a street from South to North in the middle of the block. From a directed verdict for the Defendant, the Plaintiff appealed. The Court, after deciding that there was sufficient evidence of negligence, from skid marks and other evidence of speed, to allow the case to go to the jury, said:

> " It is also plain that the child in this case cannot be held guilty of contributory negligence as a matter of law. In considering the question of contributory negligence, the Court recognizes that a child is required to exercise only that degree of care which a reasonably careful child of the same age and intelligence would exercise under similar circumstances. The mere fact that a young child, when frightened or bewildered, turns around in the street near one sidewalk and starts to come back to the other sidewalk when called by the screams of a parent is not necessarily evidence of negligence. In this case the child was only four years old at the time of the accident. We have definitely held that a child four years old cannot be guilty of contributory negligence under any circumstances."

35. In the case of Bashir Ahmed Butt v Uwais Ahmed Khan (1982 – 88) IKAR 1 (1981) KLR 349 the Court of Appeal held that:

> " It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness...A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child....
>
> Clearly each case must depend on its peculiar circumstances. In the instant case the learned judge was right in finding that the defendant had been negligent, and that the plaintiff

was struck when almost half-way across the road, and that at the most the plaintiff had committed an error of judgment for which contributory negligence should not be attributed to him....

The practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had capacity to know that he ought not to do that act or make the omission...."

36. In Rahima Tayab & Others v Anna Mary Kinanu (1983) KLR 114 & I KAR 90 it was held:

> " The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission....
>
> The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

37. The latter 2 cases were cited with approval in the case of EWO supra by this court.

38. Accordingly, it is my finding that the appellant had discharged the burden of proof and proved on a balance of probabilities, that the Respondent's driver was negligent. I find that there was no material to apportion liability between the appellant minor and the Respondent's driver, even if the minor's mother did contribute to a larger extent, to the injuries she herself sustained as she rode on the motorcycle without a helmet and with three children. The little baby herein could not sit on his own on the motorcycle.

39. I therefore find that the respondents' driver was liable 100% for the accident involving the minor herein.

On quantum

40. The appellant herein pleaded and submitted that at the formal proof hearing the court awarded Kshs 280,000 but subsequently following the interpartes hearing awarded a Judgment of Kshs 200,000 and that the court ought to have awarded the initial amount of Kshs. 280,000. The appellant further pleaded and submitted that there was no legal basis as how the court arrived at the amount that was awarded as there was no single court decision that the Learned Magistrate relied on to arrive at the decision that he made

41. On the first issue, I am in agreement with the respondent herein that there was no legal basis upon which the trial court ought to have awarded the same quantum as that it had awarded following formal proof hearing. Further to this it is noteworthy that vide its ruling dated 9th March 2021, the trial court set aside its award following the formal proof hearing and thus there was no legal basis upon which it would rely on the same following interpartes hearing.

42. I am fortified by the Court of Appeal's decision in the case of Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, where the Court of Appeal 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 damage 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." (Emphasis my own).

43. In his judgement, the trial court awarded general damages of Kshs. 200,000 and did not quote any authorities relied on. From my re-evaluation of the evidence, I find that the learned trial magistrate made reference to the relevant evidence on record. That said, it is for this court to now determine whether the award was consistent with comparable awards made for similar injuries sustained.

44. It was pleaded on behalf of the appellant herein that he suffered the following injuries:

    i. Severe soft tissue injuries of the hand.

    ii. Blunt injury to the anterior chest wall lading to soft tissue injuries.

    iii. Soft tissue injuries of both arms.

    iv. Soft tissue injuries of both legs.

45. These injuries were corroborated by the medical report prepared by Dr. Obed Omuyoma that was produced as PEX4. In the said report, Dr. Obed noted that the injuries had subsided.

46. From the evidence it was thus clear that the appellant sustained soft tissue injuries to the hands, arms, chest and legs. No permanent disabilities were noted as a result of the injuries.

47. In dealing with an appeal on quantum, I am fortified by the decision of the Court of Appeal decision in Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 where the Court held 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"

48. In the case of Savanna Saw Mills Ltd v Gorge Mwale Mudomo (2005) eKLR the court stated as follows:

> " It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ..."

49. The other critical point of convergence for the court is to bear in mind the fact that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the Learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. (See Simon Tavera v Mercy Mutitu Njeru [2014] eKLR).

50. In considering comparable cases, I note that in Fred Barasa Matayo v Channan Agricultural Contractors [2013] eKLR,the court reviewed downwards an award of Kshs. 250,000 to Kshs. 150,000 to moderate soft tissue injuries that were expected to heal in eight months' time.

51. In Purity Wambui Muriithi v Highlands Mineral Water Company Ltd [2015] eKLR, the award of Kshs.700,000 was reduced to Kshs.150,000 for injuries to the left elbow, pubic region, lower back and right ankle.

52. In Jyoti Structures Limited & another v Truphena Chepkoech Too & another [2020] eKLR the Respondent sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs. 250,000 and another Respondent that had sustained bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand, general damages were assessed at Kshs. 200,000. On appeal, the court set aside both awards and substituted them with Ksh. 125,000 each.

53. In the case of Maimuna Kilungwa v Motrex Transporters Ltd [2019] eKLR, the court awarded Kshs. 125,000 for injuries to the neck, left ear and left shoulder.

54. Similarly, in the matter referenced by Counsel for the Appellant, Ndung'u Dennis v Ann Wangari Ndirangu & another (2018) eKLR where the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands, the trial court awarded Ksh. 300,000 which was reduced to Ksh. 100,000/= on appeal.

55. Finally, in John Wambua v Mathew Makau Mwololo & another [2020] eKLR the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers. The trial court assessed general damages for pain and suffering in the sum of Ksh. 120,000 and this was affirmed by the High Court.

56. Taking a cue from the above decisions, I am persuaded that the award of Kshs. 200,000 is an appropriate award for general damages for the injuries sustained by the appellant herein.

57. The upshot of the above is that I allow this appeal and set aside the trial court's judgment on liability as follows and substitute it with judgment on liability against the respondent at 100% in favour of the appellant. The appeal against quantum of damages is hereby dismissed.

    General Damages – Kshs. 200,000

    Special Damages - Kshs. 8,550

    Grand Total Kshs 208,550

58. Each party to bear their own costs of the appeal as the appeal is only successful on liability not on quantum as challenged.

59. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE