Owiro v Ogedah (Civil Appeal E054 of 2022)
[2024] KEHC 447 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEHC 447 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E054 OF 2022

RE ABURILI, J

JANUARY 22, 2024

BETWEEN

MARY GORETTY 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 140 of 2019)

JUDGMENT

Introduction

1. This appeal is part of a series that includes Civil Appeal E053, & E055 and E052 of 2022 that were determined vide Nyando Senior Principal Magistrate's Court in Civil Suits Nos 140, 142, 143, & 141 of 2019 respectively. In the trial court, Nyando SPMCC 140 of 2019, *Mary Goretty Owiro v Jacob Ogedah Ogedah,* which is subject of this appeal was used as the test suit.

2. The appellant herein, Mary Goretty Owiro vide a plaint dated 10th June 2019 sued the respondent for damages following the 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 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 her to strict proof thereof. The respondent further averred that the appellant through her negligent actions contributed to the accident.

4. The trial court heard the test suit on liability, with the plaintiff/ appellant herein calling four witnesses. The respondent/ defendant closed his case without calling any witness. to support his defence. In his

ruling, the trial court found that the appellant had boarded the motorcycle with 3 other passengers including her children and that the appellant was the adult therein and thus she risked their lives. The trial court further found that from the evidence adduced in cross-examination of the appellant's witnesses, the said motorcycle was being driven at a high speed and that the appellant and her children had no helmets or reflective jackets and as such, they were partly to blame hence the apportionment of liability equally between the appellant and the respondent.

5. Aggrieved by the said judgment on liability, the appellant preferred the instant appeal ought by way of memorandum dated 7th June 2022 and filed on the 14th June 2022 raising the following grounds of appeal:

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

    2. 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 formal proof hearing without any justification.

    3. The learned Magistrate erred in law and in fact in disregarding the appellant's testimony when the same was not rebutted as the Respondent dd not avail any witness.

    4. 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.

    5. That the learned Magistrate erred in law and in fact by failing to hold the Respondent largely and or wholly to blame for the accident.

6. The parties filed submissions to canvass the appeal.

Appellant's Submissions

7. The appellan's counsel submitted that there was a silent contract between a lawful passenger who with authority of the driver and owner in a private vehicle that upon payment of the requisite fare, he is expected to be safely delivered to his destination and thus cannot be held liable or even contribute to an accident unless it is demonstrated that the said passenger contributed to the occurrence of the accident as was held by Mulwa J in the case of *Vivian Anyango Onyango & Another v Charity Wanjiku* [2017] eKLR and thus it was evident that the trial magistrate erred in the apportionment of liability.

8. On quantum of damages awarded, 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.

9. 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.

10. It was submitted that there was no legal basis as to 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

11. The respondent's counsel submitted that the appellant herein conceded in her testimony that they were three pillion passengers on the motorcycle and that only the rider had his helmet on. Further, that according to the police officer who testified, investigations showed that no one was to blame for the accident.

12. Relying on the case of *Bahari Parents Academy v LBZ (Minor suing through his father and next friend) NBZ* [2020] it was submitted that although the respondent did not adduce any evidence in defence, the burden of proof lay on the appellant as espoused in section 107 of the *Evidence Act* to prove her case, which burden did not shift. Further reliance was placed on *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR where the court held that even where the defendant had not denied the claim by filing of defence or an affidavit or even where the defendant did not appear or formal proceedings are conducted, the plaintiff was under a duty to prove his case on a balance of probabilities even in the absence of any rebuttal by the other side. Further reliance was placed on *Milka Akinyi Ouma v Kenya Powwr & Lightining Company Limited & Another* [2020] eKLR. wherein the court followed the above decision and a submission made that the plaintiff having admitted that she was on board as an excess pillion passenger on undisclosed motor cycle, that was negligence on her part. He reiterated the finding by the trial magistrate that the appellant risked her life by being four pillion passengers on a motor cycle hence she contributed to the occurrence of the accident, citing section 60(1) of the *Traffic Act* which outlaws more than one pillion passenger on any two wheeled motorcycle as applied in *Rosemary Kaari Murithi v Benson Njeru Muthitu* [202] eKLR and in *Paul Lawi Lokale v Auto Industries Limited & Another* [2020] eKLR where Nyakundi J found an excess pillion passenger 50% contributorily liable for the accident and dismissed the appeal hence the trial court's finding on liability cannot be faulted. It was further submitted that courts have held claimants 50% liable where there was no sufficient evidence that the defendants were to blame for the accident 100%. Reliance was placed on Nairobi HCC No. 3321 of 1993, *Susan Mumbi Wititu v Kefala Crebedhin*.

13. On the appellant's assertion that the trail court ought to have relied on the doctrine of res ipsa loquitor to find the respondent reliable for the accident, it was submitted that the doctrine applies only where the plaintiff does not try to explain the circumstances of the accident unlike in the present case where the plaintiff filed a witness statement explaining how the accident occurred, albeit without proof. Reliance was placed on *Public Road Services Ltd v Riimi* EALR, 22 on the applicability of the doctrine of res ipsa loquitor.

14. On whether this court should interfere with the trial court's discretion in determining liability, reliance was placed on *Mbogo & Another v Shah* (1968) EA. It was submitted that the trial Court correctly directed himself on the evidence tendered and applied the law and principles and arrived at the correct decision hence the decision on liability cannot be faulted.

15. Finally, on quantum of damages, 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, as the injuries remain the same, then the Court ought to have maintained the same award.

16. 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

17. This being the first appellate court, the court has a duty as stipulated in section 78 of the *Civil Procedure Act* and interpreted in many decisions, to re-evaluate, re-assess 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. This court is guided by the decision in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.

18. Having considered the grounds of appeal and submissions by both parties 'counsel, I find 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 Apportionment of Liability

19. The law is clear that he who alleges must proof. This is provided for under Section 107 of *Evidence Act*. Subsection (2) refers to the legal burden of proof. 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.

20. The question therefore is whether the appellant herein discharged the burden of proof that the Respondent was wholly liable in negligence for the occurrence of the accident wherein the her and her minor children in the other appeal files were injured.

21. It is undisputed fact from the pleadings and evidence adduced in the lower court that on the 22nd December 2018 at Korowe area along the Ahero – Kisumu an accident occurred involving the appellant herein and her 3 children were on a motorcycle and that the respondent's driver who was at the time driving motor vehicle registration number KCC 332L knocked the motor cyclist thereby injuring the pillion passengers.

22. At the hearing, the appellant testified as PW4 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.

23. In cross-examination, the appellant stated that they 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.

24. PW2 was a Senior Clinical Officer from Ahero Hospital who testified and produced a P3 form for the appellant, showing the injuries sustained and the degree of the said injury.

25. PW3, No. 64xxx CPL Rodgers Simiyu who produced the police abstract as an exhibit testified in cross-examination that no one was to blame for the accident.

26. It is worth noting that the respondent did not call any witness in support of his defence case. It therefore follows that the respondent's defence remained mere allegation. 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.

27. However, the appellant had the onus of proving her case against the respondent whether or not the respondent adduced evidence. This is because appellant's case not being a liquidated claim ought to have been proved, on a balance of probabilities that indeed, the respondent was to blame for the material accident 100%.

28. I have considered the evidence adduced by the appellant. As correctly by the respondent herein, the *Traffic Act* Section 60 (1) places a restriction on the number of passengers that can be carried on a motorcycle at any given time, clearly stating that It shall not be lawful for more than one person in addition to the driver to be carried on any two-wheeled motorcycle.

29. I also note that the appellant did not have a helmet or reflective vest as she boarded the said motorcycle and thus not only placed herself in danger but also her 3 children who were also aboard the motorcycle. A helmet would have mitigated the injuries especially on the head, on impact. This court further notes that the appellant testified that had the motorcycle been driven in a slow manner, then the accident would not have occurred.

30. In the case of *Christopher Njoroge Ngugi & Stella Kathure v Cosmas Kithusi Nzioka* [2018] eKLR, Muriithi J stated as follows regarding apportionment of liability:

> " As regards apportionment of liability, as held by the East African Court of Appeal in *Railways Corporation v. E.A. Road Services Ltd.* (1975) EA 120, 130, per Musoke, JA:
>
> "As regards the appeal itself it is a well settled principle that this court will not interfere with apportionment of liability assessed by a trial judge, except where it can be shown that there is some error in principle, or the apportionment is manifestly erroneous."

31. Thus, an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong.

32. In this case, it was not disputed that the appellant and 3 other persons were pillion passengers on the said motor cycle. The law does not permit more than one pillion passenger to be carried on a motor cycle. Further, the appellant did not have any safety clothing as required by law, by riding on the said motor cycle against the law, the appellant exposed herself to danger. Such conduct cannot go un-condemned and it should not be rewarded.

33. . It is on the basis of this evidence that the trial court found the appellant to have contributed to having sustained the injuries she did following the accident. The trial magistrate properly addressed his mind to the law and facts in reaching that finding and I would have no reason to interfere with the apportionment of liability by the trial Magistrate. I uphold it.

On quantum

34. The appellant herein pleaded and submitted that at the formal proof hearing, the court awarded her Kshs 280,000 but subsequently following the interpartes hearing, he awarded damages 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 trial Magistrate relied on to arrive at the decision that he did.

35. 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 which 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 made during formal proof hearing and thus there was no legal basis upon which it would rely on the same award following interpartes hearing.

36. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, 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, JA 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 added).

37. 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 determine whether the award was consistent with comparable awards made.

38. The appellant herein pleaded that she suffered the following injuries;

    i. Soft tissue injuries of the chin.

    ii. Soft tissue injuries of the face.

    iii. Blunt injury to the anterior chest wall leading to soft tissue injuries.

    iv. Blunt injury to the lower back leading to soft tissue injuries.

    v. Blunt injury to the left shoulder leading to soft tissue injuries.

    vi. Soft tissue injuries of the right thigh.

39. The same were corroborated by the medical report by Dr. Obed Omuyoma that was produced as Pex5. In the said report, Dr. Obed noted that the injuries had subsided and that the appellant had healed.

40. From the pleaded and proved injuries, it is clear that the appellant sustained soft tissue injuries to the chin, face, chest, back, shoulder and thigh. These injuries healed without any complications.

41. In dealing with an appeal on quantum, Iam guided by the Court of Appeal decision in the case of *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"

42. In *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 ..."

43. further, 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).

44. 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.

45. 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.

46. In *Jyoti Structures Limited & another v Truphena Chepkoech Too & another* [2020] eKLR where the Respondent had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs. 250,000. On appeal, the court set aside both awards and substituted them with Ksh. 125,000 each.

47. 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.

48. 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.

49. 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.

50. Taking cue from the above decided case, I find and hold that the award by the trial court was generous enough and as there is no cross appeal, I shall not interfere with the same with a reduction. I uphold it and dismiss the appeal against Quantum of damages awarded to the appellant.

51. In the end, I find this appeal against liability and quantum not merited. I dismiss it and uphold the judgment of the trial court on both liability and quantum of damages.

52. As the damages are minimal, I order that instead of the appellant paying costs of the appeal herein which costs might, if taxed, exceed the award thereby rendering her penniless, I exercise discretion and order that the costs of this appeal which I hereby assess at Kshs 20,000 shall be paid by the appellant to the respondent but to be offset from the interest which has accrued on the general damages from the date of judgment until payment in full.

53. I so order.

54. This file is closed.

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

R.E. ABURILI

JUDGE