Atira v Namungaba (Civil Appeal 105 of 2022)
[2024] KEHC 1528 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1528 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 105 OF 2022

PJO OTIENO, J

FEBRUARY 16, 2024

BETWEEN

VINCENT MANYASA ATIRA ..... APPELLANT

AND

FRANCIS MUSIKOYO NAMUNGABA ..... RESPONDENT

(Being an appeal against the Judgment of Hon. C. Cheruiyot, RM/Adjudicator in Kakamega SCCC. No. E010/2022 delivered on 21st November 2022)

JUDGMENT

1. By a Judgment dated 21.11.2022, the trial Court dismissed the Appellant's claim for general and special damages arising out of a road traffic accident alleged to have occurred on the 11.12.2021 along Malaha-Shianda. In dismissing the claim no attempt was made at assessing damages that would have been warded had the suit succeeded.

2. The decision aggrieved the Appellant (the Plaintiff) who has now lodged the current appeal faulting the trial Court for dismissing the suit against the weight of evidence and by failure to properly and judicially evaluate the evidence which otherwise showed that the case had been proved on a balance of probabilities.

3. A reading of the pleadings and evidence reveal that the case was founded upon the tort of negligence and the Respondent, as the Defendant in the suit, was blamed for having caused the accident by way of failure to exercise due diligence in the control and management of motor vehicle KCK 032H while on a public road thus permitting same to collide with motorcycle Reg. No. KMED 611K ridden by the Appellant thus occasioning severe body injuries to the said Appellant.

4. The Appellant then set out the particulars of his injuries, in the statement of claim, to include fractured skull, epidural haematoma and blunt injury to the nose.

5. The claim was resisted by the Respondent who filed a response to the statement of claim by which it denied the occurrence of the accident and made an alternative plea that, if the accident ever occurred, then the same was wholly or substantially caused or contributed to by the negligence of the Appellant. Particulars of such negligence were given to include failure to take due precaution while on a public road.

6. At the hearing, the Appellant gave evidence on his behalf by relying on his witness statement filed and produced the document filed, by consent, and was then cross examined and re-examined. He also called a police officer from Mumias Police Station to produce the police abstract.

7. When the Appellant was cross-examined, a question arose about the date of the accident as disclosed in the medical report and whether the Appellant emerged from a feeder road onto the path and way of the Respondent's motor vehicle. To both questions the Appellant was adamant that the date in the medical report was an inadvertent error by the doctor and that he was riding on his left side of the main road when hit by the Respondent's motor vehicle, which was at a high speed, from behind.

8. The evidence by CW2, a Police Officer from Mumias Police Station was to the effect that there was a record of the accident recorded in the station Occurrence Book to have involved a motorcycle and motor vehicle as pleaded in the Plaint. He confirmed being the Investigating Officer but had not recorded a statement from the owner of the motor vehicle but that had formed the opinion that the driver of the motor vehicle was blameworthy for knocking the motorcycle from behind.

9. For the Respondent, the evidence was given by one Raphael Brown Meyakhwe the driver and the Respondent himself. RW1 who was the driver of the Respondent's motor vehicle on the material day admitted the occurrence of the accident but attributed same to the sudden entry into the road by the cyclist which led him to apply emergency brake but he still hit him and blame the cyclist for failure to put on helmet. He however said that the area was built up and he was driving just 40 KPH.

10. The Respondent equally gave evidence as PW2 and told the Court that he was a passenger in the motor vehicle on the material day and witnessed the collision occur when the motor cyclist suddenly and abruptly entered the main road from a feeder road on the left side of the main road thus affording the driver no chance to take evasive maneuver and that when emergency brake was applied it was too late and collision happened. He equally blame the rider for the causation of the accident.

11. When cross-examined, the witness reiterated that the driver was doing 40 KPH and that the accident occurred at 6.30 adding that the motor vehicle was damaged at the front.

12. Having reviewed the evidence so presented to the Court, the Court came to its conclusion as follows: -

> "From the above, the claimant had a corresponding duty to disprove the Respondent's version of the accident that the claimant suddenly and abruptly entered and joined the road from the feeder was not true, which he has failed to do. Secondly if the suit vehicle hit the motor cycle from behind the court finds it difficult to believe that the impact would push the claimant to fall on the windscreen of the vehicle then by the roadside. The Respondents version is more plausible than the claimant's especially on the claimant falling on the windscreen."

13. Being a first appellate Court, proceeding by way of a re-trial, the Court's duty is to re-examine the evidence afresh with a view to reaching own conclusions, without feeling too constrained to concur with the trial Court, of course subject the caution that the Court lacks the benefit enjoyed by the tier of facts in seeing and hearing the witnesses testify.

14. The Court has re-appraised the evidence in full. It finds that there was rival evidence on how the accident occurred. With such state of evidence on the occurrence of the accident being conceded, the Court's duty was to established who between the two controllers of the two vehicles of transport contributed to the collision, and if both, to what extent.

15. In coming to a determination, the Court must bear in mind that the standard of proof in Civil cases is on a balance of preponderance. When the Court cannot precisely assign the blame on causation, it is permissible that the Courts holds both equally to blame[1].

16. The rival evidence availed was that the motor cycle was either hit from behind, according to the Appellant, or it rammed onto the motor vehicle from the left side. In the evidence by both witnesses for the Respondent the motor vehicle was damaged at the front without much precision.

17. In coming to its conclusion, the trial Court decided the matter on its opinion how the motorcycle would have landed after the collision. This Court finds such opinion not to be based on the evidence on record nor conventional knowledge on how moving objects rest after collision. The Court finds that the decision was not guided on evidence but rather on the opinion of the Court expressed as though the Court was an expert in that respect. That was an error in principle which entitles the Court to set aside.

18. The second reason the Judgment on liability must be set aside is that, there having been proof of collision and resultant injury, the Court was expected to address its mind on the standard of prof and not merely burden of proof. To this Court, when both parties agreed on the occurrence of the accident and at the place pleaded, the matter of the tort was settled. It was thus erroneous for the Court to fail to ask itself whether each of the two, rider and driver, was to blame and to what extent.

19. Upto this level, the Court finds that based on the evidence recorded, it was not concretely possible to determine, who between the rider and the driver, was to blame or if both were to share the liability equally. The Court apportions liability between the Appellant and the Respondent at 50:50.

20. In coming to this conclusion, the Court has taken judicial notice of the law enunciated in *Kakhamishi -vs- AG* [1971] EA 118, as cited by the trial Court and hasten to note that by a later, and most recent decision of the Court of Appeal, the law is now settled by the decision in *Hussein Omar Farah -vs- Lento Agencies* [2006] eKLR.

21. For the foregoing, the decision of the trial Court dismissing the claim in its entirety is set aside in whole.

22. The third reason the decision must be disturbed is that even where the Court dismisses a claim for personal injury, it is duty bound to assess the damages awardable had the claim succeeded. In the Judgment appealed from, the court penned off upon dismissing the suit. That was an error in principle – See *Lei Masaku -vs- Kulpana Builders Ltd* [2014] eKLR.

23. Having come to the conclusion that it was the duty of the Court to assess damages and it failed in that respect, and this Court being a first appellate Court, and further that the time within which the trial Court was to dispose of the matter has since lapse, the Court deems it just to assess damages.

24. In doing so the Court has appreciated the opinions offered in submissions at trial by both sides. From those submissions, the Appellant proposed an award of Kshs. 900,000 /= while citing decisions in which awards of Kshs. 750,000/= and 800,000/= were made for comparable injuries. On his part the Respondent proposed a sum of Kshs. 80,000/= but cited two very recent decisions in which awards of Kshs. 500,000/= were made for comparable injuries.

[1] **Hussein Omar -vs- Lento Agencies [2006] eKLR**

25. In exercising the discretion in assessment of damages, the Court awards to the Appellant the sum of Kshs. 600,000/= for general damages. The Court further awards to the Appellant the costs of this appeal as well as the costs at trial. Such costs shall be subjected to the determined based contribution on liability.

25. The sum awarded for general damages shall attract interest at Court rates from the date of the Judgment of the trial Court till payment in full.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 16TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

No appearance for the parties

Court Assistant: Polycap Mukabwa

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