Ayieko v Opiyo (Civil Appeal 56 of 2020) [2024] KEHC 920 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 920 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 56 OF 2020

RE ABURILI, J

FEBRUARY 1, 2024

BETWEEN

CLEOPHAS AYIEKO ..... APPELLANT

AND

GEORGE ONYANGO OPIYO ..... 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 3rd March 2020 in Nyando SPMCC No. 33 of 2015)

JUDGMENT

Introduction

1. The respondent George Onyango Opiyo sued the Appellant Cleophas Ayieko in the lower court for general damages for injuries sustained in a road accident that occurred on the 22nd April 2013 when the appellant's motor vehicle registration number KTCA 493B was driven negligently that it collided with the respondent's motorcycle registration No. KBF 971T along Muhoroni- Koru road near Muhoroni Stadium. The particulars of negligence attributed to the appellant's driver, agent, servant or employee are listed in the plaint filed on 2nd April, 2015 and so are the injuries allegedly sustained by the respondent herein.

2. In the statement of defence filed on 13th April 2015, the defendant denied particulars of negligence attributed to him, his driver, agent, servant or employee and pleaded contributory negligence on the part of the respondent. The appellant also denied all the particulars of injuries allegedly sustained by the respondent and put him to strict proof thereof.

3. The respondent filed a relpy to defence on 5th may 2015 joining issues with the appellant in his defence and reiterating the pleaded facts in the plaint.

4. The trial court after hearing the evidence adduced by both the appellant and respondent, found that both parties were to blame for the material accident and it proceeded to apportion liability in the ratio of 40:60 in favour of the respondent against the appellant and proceeded to award the respondent general damages of Kshs. 2,000,000 which was reduced by 0% to Kshs. 1,200,000 factoring in liability.

5. Aggrieved by the said decision, the appellant filed the instant appeal vide his memorandum of appeal dated 19th August 2020 raising the following grounds of appeal:

   i. The learned trial magistrate erred in law and in fact in not finding that the respondent had failed to attribute and did not prove any of the pleaded particulars of negligence to the appellant.

   ii. The learned trial magistrate erred in law and in apportioning liability of 60% against the appellant without any basis in law and in fact.

   iii. The learned trial magistrate erred in law and in fact in finding that the appellant was liable when the evidence on record was that the respondent soley caused the accident as he was driving under the influence of Alcohol as at the time of the accident.

   iv. The learned trial magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law, as clearly captured in his judgement.

   v. That the learned trial magistrate grossly misdirected himself in treating the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.

   vi. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellant.

   vii. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable.

   viii. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstance was excessive in the circumstances occasioning miscarriage of justice.

6. The appeal was canvassed by way of written submissions as is summarised below:

The Appellant's Submissions

7. It was submitted that the Respondent failed to discharge his burden of proving on a balance of probabilities that the Appellant was in any way liable for the road traffic accident that occurred on 22nd April 2013, and that the Learned Trial Magistrate therefore erred in law and in fact in finding the Appellant partially liable while the Respondent was solely and/or wholly liable for the same.

8. The appellant submitted that the Respondent was solely and/or wholly to blame for the accident that occurred on 22nd April 2013 and that neither the Appellant nor his driver contributed to the same in any way, and that the Learned Magistrate therefore erred in law and in fact in holding the Appellant partially liable and further that the respondent did not substantiate and prove any of the particulars of negligence against the Appellants, and that the Learned Trial Magistrate consequently erred in law and in fact in holding to the contrary.

9. The appellant thus submitted that the Learned Trial Magistrate's finding on liability be disturbed to reflect Respondent's sole and/or whole liability for the accident.

10. On quantum, the respondent submitted that the Learned Trial Magistrate did not take into account the cardinal principle that comparable injuries should as far as possible be compensated by comparable awards in his assessment of damages and that the award of Kshs. 2,000,000/= as General Damages was inordinately high and excessive in the circumstances such that it represented an entirely erroneous estimate vis-à-vis the injuries suffered by the Respondent.

11. The appellant relied on the following cases in his submissions on quantum of damages:

    i. *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR, where Justice D. S. Majanja in a judgment delivered on the 12/10/2018, reduced an award of Kshs. 1,000,000/= to Kshs. 450,000/= for a Respondent who had sustained compound fracture of the right tibia/fibula, segmental distal fracture of the right femur, injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, and where a permanent disability was anticipated.

    ii. *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR, where the High court awarded Kshs. 500,000 to the 3rd party who sustained the injuries of fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on right knee, fracture of the right tibia and fibula in addition to a 30% permanent disability as she was unable to walk without support.

The Respondent's Submissions

12. It was submitted that the appellant's witness statement were filed on the 2nd August 2018 yet the defendant entered appearance on the 13th of April 2015, a period of 5 years since the accident took place and a period of 3 years since the respondent came on record hence the respondent's testimony could not be taken as the true account of the events since the alleged driver was not at the scene of the accident and thus the evidence of the appellant at the trial Court cannot be relied upon as the true account of events that took place at the time of the accident since the witnesses that were brought to testify in favour of the appellant were not at the scene of the accident.

13. The respondent submitted that even though the respondent said that he drank a little alcohol, there was no proof that the same impaired his judgment as it was the driver of the appellant who veered off the road and knocked the respondent on his lane.

14. In the circumstances, the respondent submitted that the Respondent proved liability against the Appellant and thus the Appellant should be solely blamed for the accident.

15. The respondent submitted that the trial court was right in the award he made as general damages and as such, the same should be upheld and the instant appeal dismissed with costs.

16. The respondent relied on the following authorities:

    i. *Ahmed Mohamed v Abdulhafidh Mohamed Banragah* HCCC No.319 of 2001 where Plaintiff suffered fracture left femur sub trochanteric and comminuted compound fracture left tibia and fibula. The court awarded him Kshs. 750,000/= for pain, suffering and loss of amenities

    ii. *Joseph Musee Mua v Julius Mbogo Mugi& 3 Others* [2013] eKLR. The Plaintiff sustained fractures of the right tibia and fibula, 2 broken upper jaw teeth and a chest injury. The injury left the Plaintiff with a permanent injury of 5% and the court awarded Kshs. 1,300.000 general damages for pain. suffering and loss of amenities.

iii. *James Katua v Simon Mutua Muasyva* (2008) eKLR. The plaintiff sustained fractures including comminuted fracture of the left tibia and fibula a fracture of the acetabulum roof and of the left hip and other soft tissue injuries, the Court awarded Kshs., 2.000.000/- General damages for pain and suffering and loss of amenities.

Analysis and Determination

17. This being a first appeal, this court is under a duty to re-evaluate and re assess the evidence adduced before the trial court and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

18. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

> "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

19. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, the issues for determination before this court are whether the trial court erred in apportioning liability, by laying blame against the appellant at 40% and the respondent at 60%. Secondly, whether the award of Kshs 2,000,000 as general damages was manifestly excessive as to warrant interference by this court.

On liability

20. 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. 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.

21. The question therefore is whether the appellant herein discharged the burden of proof that the Respondent was wholly to blame in negligence for the occurrence of the accident wherein the respondent was allegedly injured.

22. It is undisputed that on the 22nd April 2013 at the Muhoroni Stadium Area along the Muhoroni – Koru road, an accident occurred involving the appellant's driver who was driving motor vehicle registration number KTCA 615B a tractor, and the respondent's motorcycle registration No. KBF 971T.

23. The respondent testified as PW2 and stated that on the material night, he was from Muhoroni heading home and the appellant's motor vehicle was from the factory on the left side facing Koru. He testified

that he was on the left side facing Koru. The respondent testified that the appellant's tractor was being driven at a high speed and that it had no head lights when it hit a pothole and came to his side thus colliding with him. The respondent's testimony was corroborated by PW3, who was a witness to the accident and further by PW4, a Police Officer who was called to the scene of the accident.

24. In cross-examination, stated that he had a helmet, rain coat, dust coat and gumboots on. He stated that he did not have a reflective jacket on. The respondent testified that he had drank a little alcohol and that the accident occurred at 9pm when it was dark. He confirmed that his motorcycle had lights.

25. The appellant who never witnessed the accident testified that he was informed of the accident after a week. He stated that the tractor driver was not charged with an offence before a traffic court and further that the tractor was in good condition. He insisted that the respondent was to blame for the accident.

26. DW2 Moses Otali Lucia Johana who was the driver of the appellant's tractor testified that the respondent hit himself on the tractor. This testimony was the same as that of DW3 Michael Otieno who corroborated DW2's testimony. He testified that he was in the tractor with DW2. He also insisted that the respondent hit himself on the tractor.

27. I have considered the evidence adduced by the appellant and the respondent on liability. I observe that that the accident occurred at night and from the evidence adduced before the trial court, the appellant's tractor had no headlights on. This demonstrates a level of negligence that is unfathomable. The appellant's testimony that the tractor was in good condition is an obvious lie and an attempt to mislead the court.

28. That notwithstanding, it is worth noting that the respondent though clad in a helmet, admittedly had taken alcohol. He stated that it was a little alcohol. This court takes judicial notice of the fact that drunk driving or in this case, drunk riding is a pandemic in this country that has led to the loss of numerous life's and for that reason, the respondent cannot walk away without sanction. However, the appellant's driver was in control of a larger and much more dangerous machine than what the respondent was controlling. In my view, he bore slightly more responsibility and was thus expected to be more careful on the road. However, as the respondent did not cross appeal, I would say no more.

29. It is a well settled principle that 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. In my view, the trial magistrate properly addressed his mind to the law and facts in determining the issue of liability, I would have no reason to interfere with the apportionment of liability by the trial magistrate.

30. Thus, the ground of appeal on liability is found to be devoid of any merit and is hereby dismissed. The apportionment by the trial court is hereby upheld. of

On quantum of damages

31. The respondent pleaded that he sustained the following injuries in the material accident:

> Multiple/commuted fractures of the right femur at the distal and which involved the patella.
>
> Complete dislocation of the left knee joint.
>
> Head injury with multiple bruises on the facial aspect of the scale.
>
> Dislocation of the right finger

32. PW1's testimony corroborated the injuries and the medical report produced as Pex1. It was his testimony that the respondent was likely to recover in 2 years if he complied with treatment. In cross-

examination, PW1 testified that if the respondent had complied with treatment then by the time the trial was taking place, he ought to have been okay.

33. PW5, Dr. John Odhiambo, a consultant surgeon, testified and produced P3 form filled on behalf of Pex4 and further stated that the respondent had sustained the major injury of a complex fracture of the lower part of the right femur thigh bone. In cross-examination, he stated that it was not possible for the respondent to recover to the pre-accident state.

34. The trial court awarded the respondent Kshs. 2,000,000 as general damages

35. I have considered the authorities relied on by the parties herein. In my view, none of them are comparable to the respondent's case. Those relied on by the appellant are not comparable while those relied on by the respondent contain more serious injuries that those injuries sustained by the respondent. It should however be noted that no two injuries can be exactly the same.

36. I will therefor consider comparable awards.

37. In *Alphonce Muli Nzuki vBrian Charles Ochuodho* [2014] eKLR, the plaintiff was awarded Kshs. 800,000 for compound commuted fracture of the right tibia and fibula as well as degloving injury medial aspect of right leg and foot;

38. In *Godfrey Wamalwa Wamba & Another v Kyalo Wambua* [2018] eKLR, the Plaintiff suffered injuries particularized as compound fracture of the right distal tibia/ fibula and cut wound on the scalp, chest and lower lip and was awarded Kshs. 700,000.

39. In the circumstances of this case, I find that the award by the trial court was excessive. I hereby set it aside and taking into consideration the authorities cited above, as well as inflation, I substitute the award of Kshs 2,000,000 with an award of Kshs 1,000,000 as appropriate general damages.

40. In the end, the appeal against apportionment on liability is dismissed. The appeal against quantum of damages succeeds. General Damages Kshs. 1,000,000 less 60% contribution leaving a balance of Kshs 400,000.

41. As the appellant has only succeeded on the appeal against quantum, I order that each party bear their own costs of this appeal.

42. The lower court file to be returned with a copy of this judgment and order.

43. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF FEBRUARY, 2024

R. E. ABURILI

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JUDGE