Otieno & another v Njuguna (Civil Appeal E097 of 2022)
[2024] KEHC 1302 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1302 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E097 OF 2022

RN NYAKUNDI, J

FEBRUARY 16, 2024

BETWEEN

EMILY OTIENO ..... 1ST APPELLANT

JOHN OTIENO OKELLO ..... 2ND APPELLANT

AND

JOHN NJUGUNA ..... RESPONDENT

JUDGMENT

Representation:

Kimondo Gachoka & Company

Mwinamo Lugonzo & Company

1. This appeal arises from the judgement and decree in in Eldoret CMCCC No. 94 of 2020 John Njuguna vs Emily Otieno and John Otieno Okello. The respondent instituted a suit in the trial court vide a plaint dated 31st January 202 seeking General Damages, Special damages, Costs of the suit and interest. The cause of action was the allegation that on 27th December 2019, while traveling as a passenger in in Motor Vehicle Registration KAE 291 B along the Eldoret -Webuye Road, the Appellants or their driver, agent, servant and or employee negligently drove, managed and or controlled Motor Vehicle Registration Number KAS 422 J causing it to be involved in an accident as a result of which the Respondent sustained injuries.

2. The Appellant filed statement of defence dated 16th March, 2020 and the matter was set down for hearing.

3. The plaintiff called Dr. John Sokobe as a witness. He testified that he treated the respondent on 28th December 2019 and produced the treatment chits as exhibit 1. He also produced the receipt for Kshs.

2000, the medical report, receipt for the medical report and the P3 form. He stated that the nature of the injuries were soft tissue and would fully heal.

4. The plaintiff testified and state that he blamed the driver as he was overlapping when the vehicle rolled. He confirmed his injuries to the court.

5. The defence did not call any witnesses and the parties were directed to file submissions. Upon considering the evidence tendered on court and the submissions by the parties, the trial court delivered judgement on 26th June, 2022 in favour of the Respondent against the Appellant in the following terms:-

    a. Liability 100% in favour of the Respondent against the Appellants.

    b. General Damages Kshs 300,000.

    c. Special Damages Kshs 8,000.

    d. Costs of the suit and Interest.

6. Being aggrieved with the judgement and decree, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 6th July, 2022 premised on the following grounds;

    a. That the learned trial magistrate erred in law and in fact by awarding Kshs. 300,000/- as general damages which award is inordinately high in view of the injuries sustained by the respondent.

    b. That the learned trial magistrate erred in law and in fact by failing to take into account the well-established principle requiring comparable awards to be made for comparable injurie sustained thereby falling into an error by awarding Kshs. 300,000/- which was manifestly excessive.

    c. That the learned trial magistrate erred in law and in fact by awarding Kshs 300,000/- as general damages which award is excessive in view of the injuries sustained by the respondent thereby deviating from the principle of stare decisis requiring comparable awards for comparable injuries sustained.

    d. That the learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very high.

    e. That the learned trial magistrate erred in law and in fact by disregarding and failing to appreciate the judicial authorities on quantum cited by the appellants in their written submissions thereby making an award on general damages that is unreasonably high in the circumstances and connotes an erroneous estimate of the award on general damages in view of the injuries sustained by the respondent.

7. The parties were directed to prosecute the appeal vide written submissions and the appellant did not file any submissions.

Respondents submissions

8. The respondent filed submissions through the firm of Mwinamo Lugonzo & Co advocates which were dated 31st August 2023. It is the respondent's case that there was sufficient evidence to support the conclusion reached by the Trial Magistrate both on liability and quantum of damages. Counsel urged that it was not in dispute that the alleged accident occurred. He stated that the evidence of the Respondent and the Police Officer was key in determining the issue of liability in the Parent suit. Further, that from the evidence of the Respondent PW3 in the Parent suit he was travelling as

a Passenger in Motor Vehicle Registration KAS 422 J along the Eldoret - Webuye Road when the Appellants and or their driver, agent, servant and or employee caused the said vehicle to lose control veer off the road, overturn and rolled. The Respondent stated that he was merely a passenger in Motor Vehicle Registration KAS 422 J when it lost control and rolled hence the accident. Having been merely a Passenger the Respondent did not in any way contribute to the accident. The respondent's version of events was confirmed by the Police Officer PW2 whose version corroborated with the circumstances of the accident as outlined by the Respondent. The Appellant did not call any evidence to challenge the version as to the circumstances of the accident as per the Respondent and his witnesses.

9. The Trial Magistrate's finding on liability was supported by the evidence of the Respondent and his witnesses which supported the conclusion and finding reached by the Trial Magistrate with regard as to who is to blame for the accident. He reiterated that the respondent's evidence was uncontroverted.

10. On quantum, counsel urged that the trial court's finding on quantum is not inordinately too low or so high so as to amount to a wholly erroneous estimate and the Appellate court should not therefore disturb this award. Further, that the Trial magistrate followed the proper principals in making the award. From the medical documents the Plaintiff sustained the following injuries:-

    a. Blunt injury to the head.

    b. Blunt injury to the chest.

    c. Blunt injury to the back.

    d. Blunt injury to the left shoulder.

    e. Blunt injury to the right thigh.

11. Counsel submitted that in view of the injuries sustained the award of Kshs 300,000 made by the trial court sufficed as just and adequate compensation to the Respondent for the injuries sustained. He cited Eldoret HCCA No. 32 OF 2017 Jyoti Structures Ltd & Anor vs Charles Ogada Ochola where the Respondent sustained blunt injury to the neck, head, chest and right shoulder and the court upheld an award of Kshs 300,000 as general damages. Additionally, he cited Nyeri HCCC NO. 320 OF 1998 Catherine W. Kingori & 3 others vs Gibson T Gichubi, Nairobi HCCA No. 791 OF 1999 Martin M Mugi vs Attorney General and Eldoret HCCA No. 51A of 2018 Epson Converters & Anor vs Robert Khaemba Khamala among other authorities. In his conclusion, he urged the court to dismiss the appeal with costs.

Analysis & Determination

12. Before setting out the issues for determination this court must state its duty as an appellate court. The duty of an appellate court was laid out in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where 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 re-analyse 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."

13. Upon considering the memorandum of appeal and the submissions tendered, the following issues arise for determination;

    1. Whether the trial court erred in its apportionment of liability

2. Whether the trial court's award on damages was excessive

Whether the trial court erred in its apportionment of liability

14. Viewing all of the elements of a prima facie case for negligence as argued in this appeal together one would find considerable practical and conceptual overlap between the duty of care element and the proximate causation. First, the elements of duty of care and proximate causation can be distinguished in that they look at the injury producing incident from different legal perspectives. The duty of care element gets at the question when must one be careful in a negligence scenario. On the other hand, proximate causation asks the questions which must be answered by way of evidence assuming you weren't careful just how much are you going on the hook for? These are the key concepts which must be borne in mind by a trial court cumulatively in arriving at a decision to apportion liability negligence. Ultimately, a distinction must be drawn between the duty of key element and the proximate causation element. The persuasive case in Nance Vs British Columbia Electric Railway Co. Ltd (1951) 2 ALL ER 448 is relevant and of valuable guidance on this question for in our jurisdiction it is English Law of negligence which forms the cornerstone of the jurisprudence in this branch of law. The court had this to say on contributory negligence:

> " The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due care, is, of course indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in Davies Vs Swan Motors Co. (Swansea) Ltd to which the Chief Justice referred. This however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owns to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in cases relating to running down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other duty to move with due care, and this is true whether they are both in control of vehicles, or both proceedings on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by this want of care in crossing the road, for he would owe to the plaintiff no duty to take care...."
>
> In the same perspective in Dahlia Byfield Vs Christopher Edwards 2018 JMSC CIV.167 Thomas J observed that:
>
> > "A claimant will be found guilty of contributory negligence if there is evidence that he did not act as a reasonable and prudent man in circumstances where he ought reasonably to have foreseen that if he did not act as a reasonable and prudent man, he might hurt himself, taking into account the possibility of others being careless. (see Denning, L.J. in Jones Vs Livox Quarries Ltd (1940) AC.

Therefore, in order to establish contributory negligence, the defendant must prove on a balance of probability that the claimant is partially to be blamed for his own injuries. That is, that he failed to take action that he could reasonably have taken, acting as a wise ad prudent road user to avoid injury to himself. The failure of the defendant to give evidence at the trial does not automatically result in him failing on this issue. Where he participates in the trial through his attorney at the law by cross examination of the claimants, the court must examine the evidence to see whether there is admission on the part of the claimants either by direct evidence of inescapable inference of contributory negligence. Once the claimant is found to be contributory negligent, the award in damages should be reduced based on his percentage of contribution as determined by the court."

Placing reliance in the above cases with regard to the grounds in the memorandum of appeal as to liability there is no material of value for this court to depart from the decision of the trial court. The evidence by the plaintiff John Njuguna and the police officer Elisheba Mweru when weighed alongside that of PW1 there is no inconsistency or contradictions to render the findings of the trial court fatal. Again in exercising this jurisdiction the court bears in mind the advantage the trial court has to observe the demeanour of witnesses and in conceiving that aspect proper exercise of discretion which goes to the root of liability is arrived at dependent on those facts pleaded by the parties. Looking at the precedents above the appellants have not discharged the burden of proof that the learned trial magistrate erred in law or facts in determining liability as between the respondent and the appellants.

15. It is not in dispute that the respondent was a passenger in the motor vehicle registration no. KAS 422J as the Appellant failed to rebut the allegation or produce any witnesses to controvert the allegation. The appellant failed to submit on the appeal and therefore has not addressed the issue of liability in the appeal either. It is trite law that he who alleges must prove and therefore, the burden of proof on the allegation that the respondent was not a passenger on the suit motor vehicle falls on the appellant. In the circumstances, it is my view that the appellant has failed to prove the allegation that the respondent was not a passenger in the motor vehicle on the material date.

Whether the award of damages was excessive

16. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of Butt v Khan {1981} KLR 470 where the court pronounced itself as follows;

> " An appellate court will not disturb an award for damages unless it is 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".

17. 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.

In the case of Cecilia W. Mwangi & Another Vs Ruth Mwangi (1977) eKLR where the court approval the case of Tayab Vs Kinanu (1982-88)1KAR 90 where the court therein stated that;

> " I state this so as to remove the misapprehension so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law she is only entitled to what is in the circumstances a fair compensation, fair both to her and to defendants. The defendants are not wrong doers. They are simply the people who foot the bill."

18. It is trite law that damages should attract awards similar to comparable awards for comparable injuries (see Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR).

19. The respondent sustained the following injuries;

    a. Blunt injury to the head.

    b. Blunt injury to the chest.

    c. Blunt injury to the back.

    d. Blunt injury to the left shoulder.

    e. Blunt injury to the right thigh.

20. These injuries were all soft tissue injuries with no permanent disability. In Michael Okello v Priscilla Atieno [2021] eKLR where the respondent sustained the following injuries; soft tissue injuries listed as being bruises, a cut wound and blunt injuries the court substituted the trial court's award with an award of Kshs. 225,000/- for general damages.

21. In Francis Ochieng & another v Alice Kajimba [2015] eKLR, Kshs. 350,000.00 was awarded for multiple soft tissue injuries without fractures in addition to head injuries which aggravated the injuries. In Isaac Katambani Iminya v Firestone East Africa (1969) Limited [2015] eKLR the court awarded appellant Kshs. 350,000.00/= as general damages for multiple soft tissue injuries.

22. I have considered the submissions tendered and the record of appeal and I am in agreement with the trial court on the quantum of damages. The appellant has not shown that the trial court awarded damages on wrong principles.

23. In the premises the appeal is dismissed in its entirety with costs to the respondent.

DELIVERED VIA EMAIL, DATED AND SIGNED AT ELDORET ON THIS 16TH DAY OF FEBRUARY, 2024

R. NYAKUNDI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR