Omondi v Anzofu (Civil Appeal 04 of 2020)
[2024] KEHC 2675 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 04 OF 2020

JN NJAGI, J

MARCH 13, 2024

BETWEEN

GEOFREY OMBACHI OMONDI ..... APPELLANT

AND

JOHN KANGU ANZOFU ..... RESPONDENT

(Being an Appeal from the judgment and decree of Hon. D. O. Mbeja, S.R.M, in Milimani Commercial Courts CMCC No. 6152 of 2018 delivered on 13th December 2019)

JUDGMENT

1. The respondent herein brought suit against the appellant after he was hit and injured by the appellant`s motor vehicle at Karen Shopping Centre. The trial court found the respondent wholly to blame for the accident and entered liability at 100% against the appellant. The court awarded the respondent Ksh.1,000,000/= in general damages and Ksh.3,550/= in special Damages. The Appellant was aggrieved by the trial court`s finding on liability and on the award on quantum and lodged the instant appeal.

2. The grounds of appeal are that:

    1. The learned trial Magistrate erred in law and fact in failing to find that the Respondent contributed to the cause of the accident by crossing the road without due care and attention for his own safety.

    2. The learned trial Magistrate erred in law and fact in failing to find that the Respondent as a pedestrian like all other road users had a duty to exercise proper look out, caution and due care when crossing a busy public road.

3. The learned Magistrate erred in law and in fact in failing to consider the medical report by Dr Wambugu – P M which showed that the Respondent sustained soft tissue injuries only without any fractures as alleged in the plaint.

4. The learned trial Magistrate erred in law and fact in making an award which was not within limits of already decided cases of similar nature.

5. The learned trial Magistrate erred in law and fact in awarding the Respondent General damages of Kshs.1,000,000/- which award is inordinately high and excessive considering the injuries sustained by the Respondent were soft tissue injuries.

6. The learned trial Magistrate erred in law and fact in failing to consider that the injuries sustained by the Respondent had fully healed without any permanent incapacitating and thereby arrived at an award that is inordinately high and excessive.

3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The appellant submitted that the evidence tendered in Court showed that the Respondent was hit while crossing the road. That during cross- examination he stated that he saw the accident vehicle after it had reached him.

5. It was submitted that the Highway Code requires all road users, pedestrians and motorists alike, to be on the lookout and exercise due care for their own safety. The appellant made reliance on the case of Nance –vs-British Columbia Electric Ry (1951) A.C. 601 AT 611 where it was held that

> "When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care."

6. It was submitted that the respondent crossed the road without having a proper lookout of the traffic on the said road and failed to give way to an oncoming motor vehicle. That failure to keep a proper look-out was the predominant factor in causation of the accident.

7. It was submitted that though the appellant did not testify in the case, it was the Respondent's duty to tender satisfactory evidence to discharge the burden placed upon him that the appellant is the one who was to blame for causing the accident. The appellant submitted that it is not enough to say that since the appellant did not testify in the case, the evidence of the respondent must be taken as truthful. He stated that there wasn't enough evidence to require him to rebut the respondent`s case.

8. It was submitted that the Respondent's attempt to rely on the Police Abstract as a basis to blame the Appellant lacks any foundation in law. It was the submission of the appellant that the Police Abstract only confirms report of an accident and the alleged blame is merely an opinion that must be corroborated.

9. The appellant urged the Court to set aside the trial court`s finding on liability and substitute it with a finding that the Appellant could only take 50% liability.

10. On general damages, the appellant`s counsel submitted that the respondent did not suffer a fracture of the skull and therefore the award of Ksh. 1,000,000/= was inordinately high.

Respondent's Submissions

11. The respondent submitted that whereas this court is mandated to re-evaluate the evidence that was produced before the trial court as well as the judgement and arrive at its own independent judgment, this has to be done bearing in mind that this honourable court did not have the opportunity of seeing and hearing the witness first hand. He placed reliance in Selle & another vs. Associated Motor Boat Co. Ltd& others [1968] E.A at page 126 and Peters vs. Sunday Post Limited (1968) EA 123. (1956) E.A page 424.

12. It was submitted that the appellant did not call any evidence to rebut the respondent's evidence. That the trial court found that the appellant had not adduced any evidence to challenge liability. It was the position of the respondent that his evidence was not controverted. Counsel for the respondent referred the court to the case of North End Trading Company Ltd vs. the city council of Nairobi in support of the proposition that where a party fails to adduce evidence, the party's pleadings are not to be taken as evidence but mere statements.

13. The respondent submitted that the appellant had not demonstrated how the trial magistrate misapprehended the evidence on record or acted on a wrong principle as was held in the case of Njeri Murigi vs. Peter Macharia & another (2016) eKLR.

14. The respondent pleaded the doctrine of res ipsa loquitor as was held in Susan Kamini Mwangangi & another vs. Patrick Mbithi Kavita (2019) eKLR and Kago vs. Njenga (1979).

15. The respondent defended the award of Ksh.1,000,000/= in general damages.

Analysis and Determination

16. This being a first appeal, the duty of the court is to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

17. I have considered the grounds of appeal, the evidence adduced before the trial court and the submissions by counsels for the parties. The issues for determination are on liability and quantum of damages.

Liability

18. The respondent testified in the case that on the morning of the material day he was walking along the road past Karen round about. That the respondent`s motor vehicle came from Ngong direction. That it was unable to negotiate the roundabout and as result hit the round-about. It then flew off like an aeroplane, veered off the road and knocked him down. He received serious injuries. He was taken to hospital. He later sued the appellant.

19. The appellant did not call any evidence in the case on how the accident took place. The trial magistrate in his judgment stated that the evidence of the respondent on how the accident took place was

uncontroverted. In that respect the magistrate cited the case of Uneek Electrical Company Limited v Joseph Fanuel Alela (2005) eKLR where the only evidence was that of the respondent and the court held the appellant wholly liable for the accident. Consequently, the magistrate in this case found the respondent`s evidence as unchallenged and held the appellant 100% liable for the accident.

20. It is trite that where a party does not give evidence in a case, its statements remain mere assertions that are of little probative value. The evidence of the Respondent in this case was unchallenged. Though counsel for the appellant submitted that the respondent was crossing the road when he was hit by the vehicle, there was no such evidence adduced in court. It was the evidence of the respondent that he was walking off the road when the vehicle veered off the road and hit him. There was no evidence that the respondent contributed to the occurrence of the accident. The trial court was therefore right in holding the appellant wholly liable for the accident. The submission that the court should share liability equally between the appellant and the respondent has no basis. The finding of the trial court on liability is upheld.

Quantum

21. The appellant`s counsel submitted that the law regarding award on quantum of general damages is as was settled in the case of Nyambura Kigarari vs. Agrippina Mary Aya (1982-1988) 1 KAR. Counsel submitted that general damages should be awarded within reasonable bounds and compensation must be fair in line with recent authorities of comparable injuries. He placed reliance in the case of Rahima Tayah & another vs. Anna Mary Kinaru (1987-88) 1 KAR 90 to buttress this position.

22. The appellant submitted that the respondent had particularized various injuries sustained but the trial court had failed to confirm whether indeed the respondent had sustained fracture of the skull. That the respondent's doctor had failed to examine x-rays to confirm the existence or non-existence of the fractures.

23. The appellant stated that the respondent had only been treated as an outpatient for one week and had never gone back to hospital again. That the appellant`s doctor stated that the x-rays did not disclose any fractures. That though the Respondent told the Court that X-ray Images were taken at Mama Lucy Kibaki Hospital, he failed to produce the X-ray Summary Report from the said Hospital which could have settled the issue of whether or not there was any fracture sustained by the Respondent.

24. The appellant urged this court to ignore the respondent's doctor`s expert statement. Counsel for the appellant relied on Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko, Civil Appeal No. 203 of 2001 [2007] 1 EA 139, to urge that the court can as well disregard expert opinion without cogent evidence.

25. The appellant submitted that the injuries sustained by the respondent were soft tissue injuries on the scalp and upper limb. Therefore, that the trial court's award of Kshs. 1,000,000/= was excessive, inordinately high and erroneous. The appellant urged this Court to set aside the award of the trial magistrate and award Ksh.200,000/= in general damages for soft tissue injuries. Counsel cited the following authorities:

    a. In the case of Baloch Faisal & another v Elloy Kawira Nthiiri [2019] eKLR the Court made an award of Kshs.200,000/- for injuries which included soft tissue injuries to the head, both knees, chest, back and injury to upper incisor teeth.

    b. In the case of Philip Musyoka Mutua v Mercy Ngina Syovo [2018] eKLR the Court made an award of Kshs.120,000/- to a claimant who had sustained Blunt injury to the head, 2. Blunt injury to both shoulders, 3. Blunt injury to

the ribs, 4. Blunt injury to the back, 5. Deep cut wounds both ankle joints and 6. Cut wound on the right knee.

c. In the case of Jacob Omulo Onyango & 2 others v Jubilee Jumbo Hardware Limited [2017] eKLR the High Court made an award of Kshs.220,000/- to each of the two claimants who had sustained:

i. First claimant suffered 5 hours loss of consciousness, head injury and damage to the skull and ear drums, blunt chest injury, dislocated left shoulder joint and dislocation of the hip joint and persistent headaches.

ii. Second Claimant suffered a head injury with concussion, dislocation of the right shoulder joint with multiple bruises and a dislocation of the lumbar spine. At the time of examination, the appellant complained of frequent headaches, memory lapses and pain all over the body.

26. Also cited is the case of Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, where the Claimant who alleged to have sustained cuts on the forehead and scalp occipital region and bruises was awarded Kshs.175,000/-. Further, the case of Dismas Kipyego v Philip Kiprono [2019] eKLR, the Court made an award of Kshs. 150,000/- to a Plaintiff who had sustained injuries that included a depressed fracture of the skull and subluxation of the right shoulder plus blunt injury.

27. Counsel for the respondent on the other hand submitted that the respondent suffered fracture of the skull, bruises (r) parietal scalp with profuse bleeding, trauma to the upper arm, trauma over the shoulder joint and blood loss. It was argued that the award of Ksh.1,000,000/= in general damages was well within the learned magistrate's discretion.

28. The respondent urged this court not to disturb the award of the learned magistrate as it was not issued based on a wrong principle of law or that the amount was extremely high or so very low. Reliance was placed in the cases of Butt vs. Khan (1981) KLR 349, Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs. A. M Lubia and Olive Lubia (182-88) 1 kar 727 at page 730 and Gicheru vs. Morton & another (2005) 2 KLR 333.

29. The issues for determination on quantum in this appeal are whether the respondent sustained a fracture of the skull and whether the award of Ksh.1,000,000/= was inordinately high.

30. The principles under which an appellant court may interfere with an award of quantum made by a lower court were stated in Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini Vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730, Kneller J.A. stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango V Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles."

31. In the case of Butt v Khan 1982 -1988 1 KAR the court pronounced itself as follows:

> " 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 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.

32. According to the medical report of Dr. Anthony Wandugu, PW1, the respondent sustained:

    a. Trauma to the head

    b. fracture of the skull;

    c. bruises (r) parietal scalp with profuse bleeding;

    d. trauma to the left upper arm;

    e. trauma over the shoulder joint as evidenced by bruises; and

    f. blood loss.

33. At the time of examination by the said doctor, the respondent complained of memory loss, headaches and pain on the left upper arm.

34. The appellant on the other hand argued that the respondent did not suffer any fracture of the skull. The appellant called one witness, Dr.Mwangi Wambugu DW1, who testified that he examined the respondent on 6/2/2019 and found him with a cut wound scar on the left side of the head and multiple bruises on the left upper limb. That the respondent presented to him x-rays which did not reveal any fracture of the skull. He formed the opinion that the respondent sustained soft tissue injuries from which he had made adequate recovery.

35. The report of Dr. Wandugu indicated that the documents he relied on to form the opinion that there was skull fracture were the P3 form and management notes from Kinani Family Dental and Medical Care. The doctor did not state that he examined any x-ray film to confirm whether there was skull fracture. So then, whose report is more reliable between the report of Dr. Wambugu who examined x-ay films and saw no evidence of a fracture and Dr. Wandugu who did not examine any x-ray films but still formed an opinion that there was a skull fracture? I am of the strong view that the report of Dr. Mwangi Wambugu was more reliable. He examined x-rays and found no evidence of fractures while Dr. A Wandugu did not examine any x-rays. The latter doctor did not explain why he formed the opinion that the respondent sustained a skull fracture when he did not review any x-rays confirming the fracture. I therefore find as opined by Dr. Mwangi Wambugu, DW1, that the respondent only sustained soft tissue injuries with no evidence of skull fracture. The injuries were: trauma to the head, bruises (r) parietal scalp that left him with a scar, trauma to the left upper arm and trauma and bruises over the shoulder joint.

36. Both doctors found that the respondent suffered headache as a result of the accident. This implies that the respondent sustained a serious trauma on the head though it did not result to a fracture.

37. In the case of Poa Link Services Co. Ltd & Another v Sindano Boaz Bonzemo, HCCA NO. 17 OF 2019, Riechi J upheld general damages of Ksh. 350,000/- for the plaintiff who had sustained blunt injury to the chest, bruises to lower abdomen, bruises of the right hip joint, bruises of the thigh and bruises on the knee.

38. In Kenya Power & Lighting Co. Ltd v Mary Akinyi, HCCA No. 72 of 2007, Korir J. as he then was) upheld an award of Kshs. 350,000/- as general damages for deep cut wound on the calf muscles of the left leg, laceration on the right knee and right shoulder and contusion on the chest.

39. In Francis Ochieng & another v Alice Kajimba [2015] eKLR, a sum of Ksh. 350,000.00 was awarded for multiple soft tissue injuries without fractures in addition to head injuries which aggravated the injuries.

40. I am of the view that a sum of Ksh.300,000/= is adequate compensation for soft tissue injuries sustained by the respondent.

41. The result of the appeal is that the finding on liability by the trial court is upheld but the award of Ksh.1,000,000/= made by the trial court is set aside and substituted with an award of Ksh.300,000/=.

42. As the appeal has partially succeeded, I order each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Njuguna for Appellant

Ms Small HB Wanyonyi for Respondent

Court Assistant – Amina

30 days Right of Appeal.