Onsongo v Owino & another (Civil Appeal E102 of 2023)
[2024] KEHC 2483 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E102 OF 2023

HI ONG'UDI, J

MARCH 12, 2024

BETWEEN

WYCLIFFE ONDIEKI ONSONGO ..... APPELLANT

AND

CHRISPINUS OWINO ..... 1ST RESPONDENT

WANGWE NASIAKA ISABELLAH ..... 2ND RESPONDENT

(Being an appeal from the Judgment and decree of Honourable C. A Ocharo Senior Principal Magistrate in Kisii CMCC No. 470 of 2018, delivered on 10{{^th}} August 2023)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Kisii Chief Magistrate's Civil Suit No. 470 of 2018. In the said suit, the appellant (who was the plaintiff) sued the respondents (who were the defendants) for both general and special damages arising from a road traffic accident in which he sustained personal injuries and suffered loss and damage.

2. The 1st respondent was the driver of the motor vehicle registration No. KBG 162V Toyota Station Wagon which allegedly hit the appellant who was the rider of motorcycle registration number KMEG 511V. The 2nd respondent was the registered owner of the motor vehicle driven by the 1st respondent. The claim was fully defended and the trial Magistrate delivered Judgment on 10th August,2023 in which she found the appellant 100% liable for the accident. She dismissed the suit with costs to the respondents.

3. The appellant being aggrieved by the whole judgment lodged this appeal on 6th September,2023 setting out the following grounds: -

    i. That the learned trial magistrate misdirected herself on several matters of law and fact.

ii. That the learned trial magistrate erred in law and fact in disregarding the Appellant's evidence.

iii. That the learned trial magistrate erred in law and fact in dismissing the Appellant's case against the weight of evidence tendered by the Appellant.

iv. That the learned trial magistrate misdirected herself in setting the standard of proof higher than on balance of probabilities.

v. That the learned trial magistrate erred in law and fact in disregarding the Appellant's submissions and failing to properly analyze and consider the evidence before her thus arriving at an erroneous decision.

vi. That the learned trial magistrate erred in law and fact in failing to consider the Appellant's evidence and submissions in her judgment as regards to the issue of liability.

vii. That the learned trial magistrate erred in law and fact by solely relying on the Respondents' testimony while disregarding that of the Appellant.

viii. That the trial magistrate erred in law in deciding the matter against the weigh of the evidence that had been adduced.

ix. That the learned trial magistrate erred in law and fact in awarding damages which were inordinately low.

x. That the learned trial magistrate's decision on both liability and quantum albeit a discretionary one was plainly wrong.

xi. That the judgement of the honourable trial magistrate has occasioned a failure of justice and or resulted in a gross miscarriage of justice.

4. The Appeal was canvassed through written submissions.

The Appellant's submissions

5. The appellant's submissions were filed by G.B Shilwatso advocates and are dated 6th December, 2023. Counsel identified three issues for determination. The first issue is whether the appellant proved his claim. On this she submitted that the trial court erred in failing to consider that the appellant had proved his case on a balance of probabilities as against the respondents.

6. She submitted further that the appellant had established his case on a balance of probabilities to a percentage of 51% as opposed to 49% of the opposing party and thus the trial magistrate relied on erroneous evidence. She placed reliance on the case of *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 198, where the court held as follows;

> "Apportionment of blame represents an exercise of a discretion with which the appellant court will interfere only when it is clearly wrong or based on no evidence or on the application of a wrong principle."

7. On the second issue, as to whether the award of damages is inordinately low, counsel submitted that the trial court failed to apply the correct principles while assessing damages payable to the appellant. She urged the court to re-assess and enhance the damages awarded to the appellant as the same was inordinately low.

8. In support of this position she placed reliance on the case of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M.M. Lubia & Another [1998] eKLR as cited *in Mutungi v David Muasya Ndeleva* [2015] eKLR, where court held as follows;

> "The Appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

9. Lastly, on whether the trial Magistrate applied the wrong principles of law in the entire judgment, she submitted that from the evidence of the appellant and the Investigating officer, it was clear that negligence was proved against the 1st respondent. She however contended that the trial magistrate erroneously applied the wrong principles of the law in the entire judgment. She urged the court to review and/ or set aside the decision of the trial court.

The Respondents' submissions

10. The respondents' submissions were filed by Nyamori Nyasimi advocates and are dated 11th December, 2023. Counsel identified two issues for determination by this court. The first issue was on liability on which she submitted that the trial court blamed the appellant for causing the accident since he was unqualified to ride the motorcycle on a public road. She added that the trial court considered the fact that the appellant was carrying excess passengers and was also overtaking from the wrong side therefore ramming into the respondents' vehicle.

11. Counsel further submitted that the accident took place at 7:30pm when visibility was poor, that the appellant fled from the scene of the accident and that the respondent was not charged with any traffic offence. She urged the court to dismiss the appeal on liability.

12. The last issue was on quantum and counsel submitted that the trial court's assessment on general damages was well guided by relevant case law where the injuries sustained were comparable to the present case. She added that awards made in comparable cases for such minor tissue injuries sustained by the appellant ranged between Kshs. 50,000/= to Kshs. 120,000/=. Counsel urged this court to maintain the trial court award of kshs. 100,000/= based on the following authorities: -

    i. *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018]eklr, where the award of kshs. 100,000/= was deemed adequate to compensate for the injuries suffered by the plaintiff to wit soft tissues injuries to the lower right leg and to the back.

    ii. *George Kinyanjuii t/a Climax Coaches & Another v Hussein Mahad Kuyale* [2016] eklr, where the high court reviewed downwards an award of Kshs. 650,000/= to 109,890/= for soft tissue injuries.

13. She thus urged the court to dismiss the appeal.

Analysis & Determination

14. This being a first appellate court, I am guided by the dictum in the case of *Selle v. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and

evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

15. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

> " An 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"

16. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are:

    i. Whether the appellant was wholly liable for the accident.

    ii. Whether the award on general damages was inordinately low.

17. In addressing the first issue, I refer to the Court of Appeal in *Michael Hubert Kloss & Another V David Seroney & 5 Others* [2009] eKLR where it stated;

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) A.C. 663 at p. 681 as follows:
>
> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....
>
> "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

18. Guided by the above cited authority, I find that in determining liability I must consider the facts of the case and find out what mostly contributed to the cause of the accident. The court will always consider the manner of driving, identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

19. This court has considered the evidence adduced before the trial court. It is not in dispute that the appellant was hit by the respondents' motor vehicle. He stated that the said motor vehicle was approaching from the opposite direction when it turned abruptly to enter Cardinal Otunga school as a result of which it collided with his motorcycle.

20. The investigating officer (PW2) stated that the motorcycle was coming from Mosocho towards Nyakoe while the motor vehicle was from Nyakoe heading towards Mosocho. Further that as the motor vehicle was turning to enter the school it hit the motorcycle which was on the left side facing Kisii. He blamed the driver of the motor vehicle for not giving way.

21. The 1st respondent on his part stated that there was a stationery matatu parked on the left side as one approached the school offloading passengers. He turned to the right to enter the school gate and that was when a motor cycle carrying two passengers abruptly came and hit his vehicle.

22. He stated further that the motor cycle was coming from the opposite direction and overtaking the matatu on the left side, therefore he was not able to see him. He blamed the appellant for overtaking on the wrong side and not being licensed.

23. The trial court in its judgment faulted the investigating officer (PW2) for failing to support his set of facts since he claimed that the scene of the accident had been interfered with and he also did not draw any sketches. PW2 was also faulted for not charging the 1st respondent after establishing that he was to blame for the accident.

24. The trial magistrate also held that there was probable evidence that the appellant was overtaking from the left side which was the wrong side. She added that the appellant was carrying excess passengers and was not qualified, and hence found to be 100% liable.

25. After analysing all the evidence above, I find that the appellant's evidence plus that of the investigating officer (PW2) proved on a balance of probability (which is the standard of proof in civil cases) that what mainly contributed to the cause of this accident was the manner of driving by the 1st respondent (DW1). This court however notes that when PW2 visited the scene it was already tampered with and so he did not draw any sketches or take any photographs.

26. The evidence by DW1 was that the stationery matatu was parked on the left side as one approached the school and he turned right which is the opposite direction to enter the school gate. I do not see how the matatu obstructed his view when he had turned in the opposite direction.

27. The accident took place at night at around 7:30 pm and DW1 admits to not seeing the appellant before the accident took place. This contradicts his earlier statement which was that the motorcycle was coming from the opposite direction overtaking the matatu from the left side. According to DW1's evidence the matatu and motorcycle were on opposite sides of the road and there was no way the motorcycle could have overtaken the matatu. Secondly if DW1 was not seeing well he should have stopped behind the matatu and waited for it to take off. He never did that. Instead he overtook the matatu by turning right and colliding with motor bike from the opposite direction.

28. The fact that the rider of the motor cycle was not qualified as observed by the trial magistrate, did not by itself make him responsible for the accident. This case is about the causation of the accident. The Appellant ought to have been careful as he rode his motorbike.

29. In view of the foregoing, it is this court's finding that the appellant ought not to have been found 100% liable. I therefore set aside the said decision by the trial magistrate and substitute it with 70% liability for the driver of the motor vehicle and find the appellant 30% liable.

30. Lastly, on whether the proposed award on general damages was inordinately low. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (*No.2) (1987)) KLR 30 stated that:-

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages

took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly."

31. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated as follows: -

> " comparable injuries should attract comparable awards".

32. In the instant suit, the injuries suffered by the appellant were listed in the treatment notes and the medical report by Dr. Morebu Peter Momanyi as:

    i. Laceration on the lower lip.

    ii. Chest contusion.

    iii. Blunt trauma to the left thigh.

33. This court has looked at the award of Kshs. 100,000/= as was considered by the trial magistrate based on the authorities cited by the parties in submissions at the trial court. The appellant cited cases which did not indicate the injuries sustained by the plaintiffs therein and therefore the said cases in my opinion could not justify his claim for the award of kshs. 1,000,000/=. I have considered other comparative cases where awards for soft tissues injuries were made as follows:

    i. In *Hantex Garments (Epz) Ltd v Haron Mwasala Mwakawa* (2017) eKLR, Njoki Mwangi J upheld an award of Khs. 100,000/= in a case where the respondent had sustained bruises, blunt trauma, swelling and tenderness on the right leg.

    ii. In *Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others* [2019]eKLR where Majanja J. set aside the lower court`s award of Kshs. 55,000/- for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000/-.

    iii. In *Ndungu Dennis – v- Ann Wangari Ndirangu & Another* [2018] eKLR, the award was reduced from Ksh. 300,000/= to Ksh. 100,000/= where the respondent had sustained soft tissue injuries to the lower leg and soft tissue injuries to the back.

34. In view of the above cited authorities, and the evidence on record, I find that the award of kshs.100,000/= by the trial magistrate was not inordinately low and I confirm it.

35. On special damages, it is trite law that the same ought to be specifically pleaded. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (1992) KLR 177 stated that:-

> " ..... Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

36. Special damages were specifically pleaded by the appellant in the plaint at kshs. 8,890/=. The receipts for the said amount were produced as exhibit in court and are found at pages 16, 22 and 23 of the record of appeal. Therefore, the award on special damages will not be disturbed.

37. The Appeal therefore succeeds and the following orders are issued:

    i. The lower court Judgment is set aside and substituted with a Judgment on the following terms

Liability is apportioned in the ratio of 70:30 in favour of the appellant.Appellant awarded Ksh 100,000/= as general damages.Special damages of Ksh 8,890/= awarded by the trial court is upheld.The general damages award is subject to the contributory negligence of 30%

ii. Costs in the lower court and Magistrate's court to the appellant

iii. Interest to run from the date of Judgment in the Lower court.

38. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MARCH 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE