West Kenya Sugar Co Ltd v Lukosi & another (Civil Appeal 22 of 2022) [2024] KEHC 3041 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3041 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 22 OF 2022

REA OUGO, J

MARCH 6, 2024

BETWEEN

WEST KENYA SUGAR CO LTD ..... APPELLANT

AND

ALFAYO SINDANI LUKOSI ..... 1ST RESPONDENT

LUCAS KIMANI ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. Mutai delivered on 11/2/2022 in Bungoma CMCC No. 298 of 2018 between Alfayo Sindani v Lucas Kimani and West Kenya Sugar Co. Ltd)

JUDGMENT

1. The appeal before the court challenges the trial magistrate's decision on both liability and quantum. The 1st respondent at the trial court filed a plaint seeking general damages, special damages, costs and interest. The suit was filed following a road traffic accident that was alleged to have taken place on 20th February 2017. The 1st respondent was a passenger in motor vehicle registration number KAS 424A Toyota Hiace, the 2nd respondent's vehicle, which was travelling along Kitale-Webuye Road. At Shadumba area, the appellant's motor vehicle KTCB 163M Mahindra Tractor was driven negligently by the appellant's agent who applied emergency brakes and as a result, the 2nd respondent's vehicle rammed into the appellant's vehicle. The 1st respondent sustained serious personal injuries. The 1st respondent claimed to have sustained bruises on the occiput and his knees, laceration to his left 2nd finger, and blunt injury to the head and chest.

2. The appellant filed his statement of defence and denied being the owner of the tractor and also that the accident was caused as a result of negligence on its part. It was pleaded without prejudice that if an accident occurred and the 1st respondent suffered injuries then the same was wholly occasioned by the 2nd respondent's negligence.

3. A full hearing ensued and at the end of the hearing the trial court found that the appellant was 100% liable for the accident. A judgment was entered in favor of the 1st respondent and he was awarded Kshs 300,000/- as general damages, Kshs 5,200/- special damages, cost and interest of the suit.

4. The appellant dissatisfied with the finding of this court has filed this instant appeal. The appeal is based on the following grounds:

    1. That the learned trial magistrate erred in law and fact holding the appellant 100% liable in view of the evidence on record.

    2. That the learned trial magistrate erred in law and in fact in failing to hold the 2nd respondent wholly liable for the occurrence of the accident in line with the evidence adduced in court.

    3. That the learned trial magistrate erred in law and in fact in failing to hold that the 1st respondent had not proved his case against the appellant and dismiss the claim.

    4. That the learned trial magistrate erred in law and fact in adopting the wrong principles in assessment of damages payable to the 1st respondent thereby arriving at an erroneous decision.

    5. That the learned trial magistrate erred in law and fact awarding excessive amounts in damages in view of the evidence on record and the medical documents produced.

Appellant's submissions

6. The appellant submits that the issues for the court's consideration are who is to be blamed for the accident and whether damages are awardable. The appellant submits that it was not 100% liable for the accident as the 1st respondent testified that the matatu he was aboard was the one speeding and as a result rammed into the tractor. The matatu was not keeping a safe distance hence the reason why it rammed into the tractor. The police officer Pw2, testified that he was not the investigating officer, he did not visit the scene of the accident and that he had not carried the police file to court and cannot exactly explain how the accident occurred. It relied on the decision of the court in Civil Appeal No. 17 of 2020 *Pesa Hamisi v P.N. Mashru Ltd* [2020] eKLR. It was argued that the evidence adduced by the 1st respondent did not meet the threshold on a balance of probabilities and the evidence of how the accident occurred was not exhaustively adduced to the court.

7. On damages, it was submitted that the 1st respondent sustained soft tissue injuries that have completely healed with no degree of permanent disability. Reliance was placed on the following cases; Civil Appeal No. 72 of 2019 *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR where the court set aside an award of Kshs 350,000/- by substituting it with Kshs 140,000/- for general damages for soft tissue injuries which has since healed with no residual permanent disability. Civil Appeal No. E017 of 2022 Tahmeed Transporters Ltd & Anthony Mulinge v Evans Wekesa Simiyu (unreported), the court substituted an award of Kshs 300,000/- with an award of Kshs 150,000/- for general damages. The appellant submits that an award ranging from Kshs 70,000 – 80,000/- would be reasonable.

8. On the special damage claim, it was alleged that the 1st respondent pleaded Kshs 5,200/- but only produced receipts of Kshs 2,700/-.

1st Respondent's Submissions

9. The appeal was opposed. The 1st respondent submitted that the appellant's motor vehicle applied emergency brakes and the 2nd respondent's motor vehicle rammed into it from behind as it was not keeping safe distance. The appellant's agent is also to blame for applying emergency brakes in the

middle of the road. The appellant did not convert this. The learned trial magistrate was right to blame both the appellant and the 2nd respondent and apportion liability at 100%.

10. On quantum, the 1st respondent relied on his submissions in the lower court as filed in the supplementary record of appeal. The 1st respondent suffered soft tissue injuries and the award of Kshs 300,000/- awarded by the learned trial magistrate is, to say the least, reasonable if not on the lower side.

Analysis and Determination

11. This appeal is against both liability and damages. As a first appellate court, this court's role is to subject the whole of the evidence to fresh and exhaustive scrutiny and make my conclusions about it, bearing in mind that I did not have the opportunity to see and hearing the witnesses first-hand. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.

12. Alfayo Sindani Lukosi (Pw1) testified that on 20/2/2017 he was aboard motor vehicle KAS 424A heading to Kamkuywa when the accident occurred at Shadumba and he was rushed to Dreamland Hospital. He testified that he later reported the accident at Kimilili police station. Pw1 was injured in the head, chest and both knees and his middle finger had bruises. He saw Dr. Kubasu who prepared his medical report. He explained that their vehicle was being driven at high speed and that the tractor had stopped in the middle of the road without putting a lifesaver. He blamed both drivers.

13. No. 60587 Richard Ombati (Pw2) testified that he is attached at Kimilili Police station. He testified that an accident occurred along Kitale-Webuye road on 20/2/2017 and was reported at Kimilili police station as O.B10/2012/17. Pw2 issued the police abstract which was signed and stamped, Pexh3. The matter was being investigated by CPL Ngaya. He testified that he was not able to tell who caused the accident as he did not have the police file. On cross-examination, he testified that he did not visit the scene and did not know how the accident occurred.

14. PC Mark Baraza (Dw1) testified that he is attached at Kimilili police station. Corporal Carcus Munyayo and P.C Kiiru carried out the investigations. The finding of the investigations was that the driver of the Matatu was liable. He was charged in Kimilili Law Courts vide traffic case No. 132/2017. He was convicted and sentenced to 12 months imprisonment or pay a fine of Kshs. 20,000/-.

15. In this case the appellant has argued that it was not 100% liable for the accident and pointed out that Dw1 testified that it was the driver of the matatu who was found liable for the accident in the criminal proceedings in the traffic case. However, I find the appellant's argument to be flawed because a conviction for a traffic offense does not automatically imply complete liability for negligence. In *Charles Ocharo Momanyi v United Millers Limited* [2017] eKLR the court found as follows:

> " 26. In my humble opinion, what the foregoing provisions mean is that once a conviction becomes conclusive by virtue of the aforesaid provision, the issue whether or not the convict was guilty of the offence cannot be subject of a subsequent inquiry. It does not necessarily mean that that person is 100% liable in negligence. Courts have on many occasions held that the decision to charge one and not the other person with the offence of careless driving is usually at the discretion of the police and the mere fact that one of two drivers is charged does not necessarily mean that the other driver is not liable at all. Whereas the person convicted of a criminal offence cannot, where the circumstances under section 47A of the *Evidence Act* aforesaid prevail question that conviction, the issue of contributory negligence is always open to the party despite the conviction...

27. In the case of *David Kinyanjui & 2 Others v Meshack Omari Monyoro* Civil Appeal No. 125 of 1993, the Court of Appeal held that a conviction does not close the door to a defence on liability, as the issue of contributory negligence is open to the defendant. However, in *Francis Mwangi V Omar Al-Kurby* Civil Appeal No. 87 of 1992 the same Court was of the view that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence and therefore where both the Appellant and the Respondent do not give evidence but there is evidence of conviction, there is nothing on record to show in what way, if at all, the Respondent contributed to the accident."

16. In this case, the only eyewitness was Pw1. His evidence was very clear and unshaken on cross-examination. He recalled that the matatu was being driven at high speed and that the tractor had stopped in the middle of the road without putting a lifesaver. The evidence of Pw1 is that both drivers were to blame. The trial court was correct to find that the accident was caused as a result of negligence of the appellant and the 2nd respondent. They are both jointly and severally liable.

17. I now turn to consider the award of damages. It is a well-settled principle that an Appellate court will not disturb the award on quantum of damages awarded by a trial court unless the trial court in assessing the damages took into account an irrelevant factor or left out a relevant one or that, the amount awarded is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages (see *Butt v Khan* [1982 – 1988] 1 KAR 1 and *Mariga v Musila* [1982 – 1988] 1 KAR 507).

18. It is not in dispute that the 1st respondent sustained soft tissue injuries following the accident. He sustained bruises to the occiput and both knees, blunt injury to the head and chest and laceration of the 2nd finger. The trial court awarded Kshs 300,000/- stating that he had considered the authorities cited. The 1st respondent supported the finding of the subordinate court while the appellant cited decisions of the High Court where the plaintiffs were awarded Kshs 140,000/- to 150,000/- for soft tissue injuries. Interestingly, it urged the court to make an award of Kshs 70,000 – Kshs 80,000/-. In *Pascal v Ouko* (Civil Appeal E005 of 2022) [2023] KEHC 24463 (KLR) (18 October 2023) (Judgment) the plaintiff therein was awarded Kshs 150,000/- after he sustained the following injuries: chest contusion, blunt trauma to the back, scalp, neck, lower limbs, upper limbs and a laceration to the right knee. After considering awards made for comparable injuries, I find that an award of Kshs 300,000/- for general damages was inordinately too high.

19. The lower court's award of general damages in the sum of Kshs 300,000 is hereby set aside and substituted with the award of Kshs 150,000 for general damages. The 1st respondent availed receipts for the medical report, Kshs. 2,500, and the filing of P3 form at Kimilili sub-county hospital, Kshs 500, all totalling to Kshs 3,000/-. Therefore, special damages pleaded and proved was Kshs 3,000/-.

20. In the end, I find the appeal is successful andallow the appeal on the following terms:

    a. The award of Kshs. 300,000/- as general damages is set aside and substituted with an award of Kshs. 150,000/-

    b. Special damages of Kshs. 5,200/- is set aside and substituted with an award of Kshs. 3,000/-

    c. The appellant shall have 2/3 costs of the appeal.

    d. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 6TH DAY OF MARCH 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Were - For the Appellant

Mr. Okangi h/b Mr. Mwebi For the Respondents

Wilkister -C/A