Kenya Power & Lighting Company Limited v Omwoyo (Civil Appeal E082 of 2023) [2024] KEHC 5120 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E082 OF 2023

RE ABURILI, J

APRIL 11, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT

AND

KENNEDY ODHIAMBO OMWOYO ..... RESPONDENT

(An appeal arising out of the judgment and decree of the Honourable G. Serem in the Chief Magistrate's Court at Kisumu delivered on the 10th May 2023 in Kisumu CMCC No. E90 of 2020)

JUDGMENT

Introduction

1. The appellant, Kenya Power and Lighting Company Limited was sued by the respondent herein Kennedy Odhiambo Omwoyo for general and special damages for injuries sustained following a road traffic accident that occurred on the October 29, 2020 when the respondent was riding motorcycle registration No. KMES 750N along the Kisumu – Busia road and at the airport round about was allegedly hit from behind by motor vehicle registration number KAV 572E, a Mitsubishi lorry truck belonging to the appellant. The respondent pleaded particulars of negligence on the part of the appellant as per the plaint contained in the record of appeal.

2. In response, the appellant filed its defence on the December 14, 2020 denying the respondent's averments and imputing negligence on the part of the respondent.

3. The trial court found that the appellant's driver owed the respondent a duty of care and similarly that the respondent ought to have been careful when entering the roundabout thus she apportioned liability at 70% against the appellant. The trial court then awarded the respondent general damages of Kshs. 200,000 and proven special damages of Kshs. 4,200.

4. Aggrieved by the decision of the trial court on liability and quantum of damages awarded, the appellant its Memorandum of Appeal dated 31st May 2023 raising 11 grounds of appeal that can be summarized as follows

    i. The learned trial magistrate erred in law and fact in finding that the appellant was 70% liable for the accident, a finding not supported by the evidence and pleadings.

    ii. The quantum of general damages for pain and suffering and loss of amenities is inordinately high erroneous, oppressive and punitive and amounts to a miscarriage of justice.

    iii. The learned trial magistrate erred in law and in fact in making an award of Kshs. 200,000 without giving any reason for such an ward or showing what comparable cases she was applying and thus made an award that was arbitrary, capricious and inordinately high, erroneous and which amounts to a miscarriage of justice.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that in reaching her conclusion on negligence, the trial court failed to consider the evidence carefully as she was required to and that had she done so, she would have found that the greater blame lay with the respondent who for hitting the lorry at the rear ought to have been found largely to blame. The appellant submitted that it ought to have been held to bear 20% liability.

The Respondent's Submissions

7. The respondent's counsel submitted, reproducing the pleadings in the plaint and the principles applicable on a first appeal as well as the duty of the person who alleges in proving liability. It was submitted that the fact that the respondent was hit by the back tyre of the appellant's lorry did not absolve the appellant from causing the accident as claimed by the appellant.

Analysis and Determination

8. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for that.

9. 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."

10. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, it appears to this court that the issues for determination are Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case and whether the trial court's award of quantum was inordinately high as to be considered excessive in the circumstances.

11. On liability, in *Khambi and another v Mahithi and another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

12. That was the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

13. The law is clear that he who alleges must proof. The term burden of proof draws from the latin phrase *onus probandi* and when we talk of burden we sometimes talk of onus.

14. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

15. 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.

16. 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.

17. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident leading to the deceased's passing.

18. On whether the respondent proved negligence on the part of the appellant, the respondent testified as PW1 stating that he was approaching the roundabout when the appellant's vehicle veered off its lane and on to his and hit him. He denied that he was trying to overtake and miscalculated thus causing the accident or that he skidded and as he jumped off the motor cycle collided with the appellant's vehicle.

19. The respondent further testified that the back left tyre of the appellant's vehicle hit him.

20. On his part, the appellant called the driver of the vehicle one Robert Maritim as DW1 and he testified that at the airport roundabout, he heard a loud bang at the right rear tyre and immediately stopped to check what had happened where he found a motorcycle lying under his vehicle with the respondent inside the roundabout. He reiterated that he did not hit the respondent but that it was the respondent who hit him.

21. The trial court held that the driver in the present case owed the respondent a duty of care as he ought to have maintained his lane and conversely that the respondent ought to have been careful when entering the roundabout. She thus apportioned liability at 70:30 in favour of the respondent against the appellant.

22. The parties gave varied accounts of how the accident occurred. How should the court resolve such tension between the account rendered by the Appellant and Respondent on liability?

23. The established judicial method, which rests on the singular dependability of the fact-base, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

24. The evidence in support of each of the opposing accounts herein is barely sufficient. The law is trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. In the case of *Platinum Car Hire Limited v Samuel Arasa Nyamesi and another*, Majanja J, H.C Kisii C.A 29/2016 quoted with approval the Court of Appeal decision in the case of *Berkly Steward Limited v Waiyaki* [1982-1988] KAR which cited with approval the decision in *Baker v Market Harborough Industrial Co-operative Society Ltd* (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed *inter-alia* that-

> " Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them."

25. Justice Majanja in the above cited case stated that where the court is unable to determine who is to blame it has apportioned liability equally as illustrated by the Court of Appeal in *Hussein Omar Farar v Lento Agencies* C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it observed that –

> " In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

26. In the end the learned Judge held that –

> " I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party."

27. In the instant case, I find it strange that the respondent collided with the appellant's rear left tyre and at a roundabout. In my view this points towards the fact that the respondent was behind the appellant. That being said, this was a roundabout and therefore both parties using the road and while approaching the roundabout ought to have been more careful.

28. It is a 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 the instant case, however, it is my view that the trial magistrate failed to properly address her mind to the circumstances giving rise to the material accident in determining the issue of liability. The circumstances of, and evidence presented in this case warrant a 50:50 contributory negligence between the appellant and the respondent because each one of them was not careful when approaching the roundabout. I thus find that the trial magistrate erred in apportioning liability at 70:30 against the appellant.

29. I set aside the apportionment and substitute it with an apportionment of liability at 50: 50 for each of the parties herein.

30. On quantum, it has been reiterated innumerable times that an appellate Court can only interfere with the sum awarded where an appellant demonstrates that the award is too high or so low as to amount to an outright error in assessment of damages, or that in coming to that assessment, the Court took into account an irrelevant matter or that it failed to take into account a relevant matter. The Court of Appeal in *Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR held as follows-

> " We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled... This principle was adopted with approval by this Court in *Butt v Khan* [1981] KLR 349 where it was held per Law, JA:
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> > "... 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 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..."

31. The award of the amount of Kshs. 200,000 in general damages was challenged for being such inordinately high and excessive in light of the injuries sustained by the respondent. It was contended that the Trial Court did not take into account the authorities submitted by the appellants and in addition, that the Trial Court in its award considered that the respondent sustained a broken femur which was not proved by the respondent when making the award for damages.

32. In this case, the respondent pleaded that he sustained the following injuries:

    Injury on the head with a deep cut wound and bruises

    Blunt injury to the chest

    Injury on the right hand with cut wounds and bruises

    Injury on the back

    Injury on the right and left knees

33. PW3 testified that the nature of injuries sustained by the respondent were soft tissue in nature. I have considered comparable awards for the same injury. In the case of in the case of *Ephraim Wagura*

Muthui & 2 others v Toyota Kenya Limited & 2 others [2019] eKLR where the court assessed damages at Kshs. 100,000 for similar soft tissue injuries.

34. In *Ephraim Wagura Muthui 2 others v Toyota Kenya Limited & 2 others* [2019] eKLR Majanja J set aside the lower court 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.

35. The award in the case of *Ephraim Wagura* (*supra*) was made five years ago and as this court must take passage of time and inflation into account. I find that an award of Kshs. 200,000 would suffice. In the premises, I find that the award by the trial court was well within comparable cases. I uphold it.

36. Taking into consideration liability which I determined at 50:50, the award for general damages thus becomes Kshs. 100,000

37. The award for special damages was not contested and I shall therefore not disturb it.

38. In the end, I find and hold that the instant appeal is partially successful to the extent stated above.

39. Each party to bear their own costs of the appeal as the damages have been reduced substantially.

40. This file is closed and the lower court record to be returned forthwith together with copy of this judgment.

41. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE