Muti v Wambua (Civil Appeal E172 of 2018)
[2024] KEHC 3808 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3808 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E172 OF 2018

FROO OLEL, J

APRIL 12, 2024

BETWEEN

BENARD NGANDA MUTI ..... APPELLANT

AND

FRANCIS MUTHAMA WAMBUA ..... RESPONDENT

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Honourable B. BARTOO SRM dated 21st November 2018, delivered in Machakos CMCC No. 706 of 2009 where she awarded the Respondent a sum of Ksh.973,126/=, plus costs and interest.

B. The Pleadings

2. The Respondent vide his plaint dated 4th June 2009 sought for General and Special damages arising out of severe injuries sustained arising from a road accident which occurred on 8th February 2008. It was alleged that on the material day, at about 6.00pm, the respondent herein was a lawful passenger in the appellant motor vehicle Registration no. KAH 967Z (hereinafter referred to as the 1st suit motor vehicle), when the appellant, his authorized driver, agent and/or employee so negligently, carelessly and/or recklessly drove managed and/or controlled motor vehicle registration Number KAH 919Z (herein after referred to as the 2nd suit motor vehicle) that it was allowed to loss control and violently collided with the 1st suit motor vehicle where the respondent was a passenger and as a result caused him to suffer severe bodily injuries. The Respondent particularized the negligence and/or carelessness alleged as against the appellant and thus sought for compensation for the injuries suffered as pleaded, plus special damages.

3. The appellant in response filed his statement of defence wherein he denied liablility for this accident either directly and/or vicariously and put the respondent to strict proof thereof. The appellant further denied owning the 2nd suit motor vehicle and/or the fact that an accident did occur on the material date as between the 1st and 2nd suit motor vehicles. In the alternative and without prejudice to the above the appellant did aver that if indeed an accident did occur then it was caused by the negligence of the deceased, which was particularized in the statement of defence. Further the appellant averred in the alternative that if the accident did occur, then it was cause and/or substantially contributed to by the negligence and/or carelessness of the driver of the 1st suit motor vehicle and gave notice, that he would institute third party proceeding as against him.

4. Indeed, the Appellant did issue third party notice as against the registered owners of the 1st suit motor vehicle (Trustees church Province of Kenya (Mombasa Cathedral), who subsequently filed their statement of Defence, wherein they also denied all the particulars of negligence set out in the third-party notice. Further the 3rd party pleaded that as at the time of the alleged accident, the third party was not the legal and/or beneficial owner of the 1st suit motor vehicle as they had sold it to one Benjamin Masaku on 22.02.2007 and had given him full possession thereof. They therefore could not be held to be vicariously liable for the accident that occurred.

C. Evidence at trial

5. PW1 the respondent herein did testify that he was a businessman and a farmer at Kibwezi where he operated a shop. On 8th February 2008 he was travelling from wote to Kibwezi and was in the 1st suit motor vehicle, (a pick up) which belonged to his friend and was seated in front next to the driver. At about 6.00pm when they reached the junction of Kathonzweni and Nziu he noticed the 2nd suit motor vehicle came from the opposite direction, while at high speed and being driven in a zig zag manner. The 2nd suit motor vehicle violently crashed into their motor vehicle and he lost consciousness. He later regained consciousness at Machakos General Hospital, where he under went surgery and was admitted for two weeks.

6. As a result of the accident he suffered severe injuries which include dislocation of the left knee joint, raptured spleen, two broken ribs and soft tissue injuries all over the body. Eventually, the raptured spleen had to be surgically removed and this condemned him to medication for the rest of his life. Pw1 produced various documents and receipts as Exhibits to support his case and further stated that he had not fully recovered and could not farm or lift heavy objects due to removal of his spleen. He blamed the Appellants driver for causing the accident as he left his lane and rammed into the 1st suit motor vehicle. In cross examination the respondent stated that the accident occurred when it was not dark and reiterated that the driver of the 2nd suit motor vehicle was at fault and caused the accident.

7. PW2 P.C Samaul Odhiambo Owino, testified that he was based at Makueni police station and on 08.02.2008 at about 6.00 pm a report was made on the occurrence of an accident at a place called "Kwa Ngurewe", which accident involved the 1st and 2nd suit motor vehicles. The pick up had been hit on the passenger door by the 2nd suit motor vehicle and its passengers had been rushed to Makueni Hospital. The witness confirmed that he was one of the investigating officer's who went to the accident scene and their conclusion was that the driver of the 2nd suit motor vehicle was on the wrong as he had left/ moved off his lane, passed the yellow line and hit the pick up on the passenger door. A police Abstract was issued and he produced the same into evidence.

8. In cross examination the witness confirmed that he indeed visited the scene of the accident and found that the 1st suit motor vehicle had rested outside of the left lane as one faced Kathonzweni direction

and was partly off the road, while the 2nd suit motor vehicle was off the road on the left as one faced Wote direction. The police abstract also stated that the case was referred to the insurance and did not mention which motor vehicle was to blame for the accident nor did he have pictures of the accident scene. PW2 was recalled and clarified that the police abstract issued to the respondent was the genuine one and did not know the source of the police abstract issued to the Appellant.

9. The appellant also testified and stated that he was a teacher at Emah Township secondary school. On the date of the accident he was from Kilili secondary school and was heading to Wote. When he arrived at Kividani Junction, he turned and about 10 meters from the junction he saw the 1st suit motor vehicle, which suddenly swerved towards the left into the bush and again turned to the road. In the process he braked as the 1st suit motor vehicle encroached onto his lane and hit his motor vehicle on the right side and landed on the ditch. The Appellant blamed the driver of the 1st suit motor vehicle for leaving his lane and hitting the 2nd suit motor vehicle at the far end of his left lane.

10. In cross examination he denied causing the accident and again laid blame on the driver of the 1st suit motor vehicle for causing the said accident. Further he did visit the respondent in hospital and saw that he had sustained a deep cut on the head. DW3 Nicholas Nzive Nzili also testified and confirmed that he was with the Appellant in the 2nd suit motor vehicle, when the accident occurred. As they we rejoining the tarmac, a pick emerged from the opposite direction. It swerved to the left side and moved back to their lane thereby causing the accident. In cross examination, he confirmed that he was not injured and reiterated that the driver of the 1st suit motor vehicle was to blame for the said accident.

11. The trial magistrate did consider the evidence presented and proceeded to find that the Appellant was 100% liable for the accident and proceeded to award the respondent a sum of Kshs.800,000/= as General damages and Special damages of Kshs.173,126/=, plus costs and interest of the suit. Being wholly aggrieved and dissatisfied by the judgment/decree issued, the appellant did prefer this appeal and raised three (3) grounds of Appeal namely;

    a. The learned chief magistrate erred in law and in fact by awarding Kshs 800,000/= as General damages which award was inordinately high considering the injuries sustained by the plaintiff.

    b. The learned trial magistrate erred in law and in fact by deciding that the Defendants were 100% liable for the accident and dismissed the 3rd party case yet there was overwhelming evidence given by the defense witness to show that the 3rd party was to blame for the accident.

    c. The learned chief magistrat erred in law and in fact by deciding the suit against the weight of evidence on both the issue of liability and quantum

12. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect to quantum and liability be set aside and this court be pleased to reassess the said judgment and substitute it with a reasonable award.

D. Submissions

(i). Appellant's Submissions

13. The appellant filed their submission dated 13th October 2023 wherein they submitted that they would argue ground (1) and (2) of the grounds of Appeal and abandon ground (3) of the grounds of Appeal. It was his contention that the damages awarded by the trial magistrate were excessive given the nature of injuries sustained by the appellant. The parties had agreed to admit the 2nd medical report by consent and unfortunately the trial magistrate had omitted to consider the same and that constituted an error which would then allow this court to interfere with the quantum awarded. A sum of Kshs.600,000/=

would have been more appropriate in the circumstance. Reliance was placed on Kakamega High Court Civil Appeal No 21 of 2018West Kenya sugar Ltd Vrs Zablon Ndula.

14. Further the appellant faulted the trial court for ignoring his evidence that the 3rd party was to blame for this accident, and though they filed their statement of defence, they had failed to attend court during hearing to defend themselves. The Appellants evidence as to how the accident occurred was therefore not challenged and the 3rd party ought to have been held liable for the accident, or at worst apportionment of liability should have at 50% on each party, (The Appellant and the 3rd party).

15. The Appellant therefore prayed that this Appeal be allowed on both quantum and liability. Further he urged the court to reduce the award of General Damages to Kshs.600,000/=.

(ii) Respondents Submissions

16. The respondent did file his submissions dated 15th October 2023 where he rehashed that facts of the case and further submitted that this Appeal lacked substance as it was not denied that indeed an accident did occur on 08.02.2008 and as a result he had sustain serious life changing injuries including peritoneal hemorrhage, a rapture of the spleen (which was eventually removed surgically), broken Ribs and soft tissue injuries. The spleanectomy had confined the respondent to be on a lifetime of medication and had to live a life on the edge because without a spleen, any simple infection could easily attack his immune system, and could send his to an early grave.

17. Further, there was no basis to interfere with the award as it was low and ought to have been advance to Kshs.3,000,000/= as was submitted before the trial court. The assessment by the trial court could not be faulted as the Appellant had not shown where the court erred in arriving at the award challenged. Reliance was placed on Butt Vs Khan (1981) KLR 470, Kitavi Vs Coastal Bottlers Ltd (1985) KLR 470 & Kilda Osbourne Vs George Barned & Metropolitan Management Transport Holding Ltd & Another , claim No 2005 HCV 294.

18. The respondent finally urged the court to take Judicial Notice of the fact that the respondent had been greatly prejudiced as he had been in the court corridors for over 15 years seeking justice. The award appealed against when considered as against the permanent injuries sustained and lifelong medication needed to sustain him was low and did not warrant the interference of this court. The appeal therefore had no merit and the same ought to be dismissed with costs to the respondent.

Analysis and Determination

19. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

20. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties shave a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Ouseph AIR 1969 Keral 316.

21. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

I. Whether the trial court erred in finding the Appellant 100% liable

22. On the question of proof of liability, the Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR did succinctly proffered that ;

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. 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...",.

23. In this appeal, the Appellant has challenged both liability and quantum arrived at by the trial Magistrate and averred that the trial court erred in law and in fact in holding that he was 100% liable for the accident which occurred, yet this was against the weight of the evidence that was adduced during trial. PW1 blamed the driver of the 2nd motor vehicle for being recklessly driven and causing this accident.PW2 who was the investigating officer too also blamed the driver of the 2nd suit motor vehicle and specifically stated that, "The pick up had been hit at the passenger's door by the car. The car was damaged on the driver's side."

> " I was one of the investigating officers. The conclusion was that the driver of the saloon car had left his lane and passed the yellow line and hit the pick up on the passenger door."

24. The Appellant who also testified confirmed that when he reached Kivandani Junction, he turned at the junction and saw the 1st suit motor vehicle approach from about 10 meters away. The said 1st suit motor vehicle suddenly swerved to the left and headed to the bush, then turned to the road. He braked but it was too late as the 1st suit motor vehicle had encroached into his rightful lane and hit the 2nd suit motor vehicle on the right side and it landed on a ditch. DW2 in his evidence in chief was very clear that, " when we joined the tarmac, a pick up emerged from the opposite direction suddenly the motor vehicle swerved to the left and re- appeared and moved to our lane. We were on the left side of the road. We were on the left side of the road."

25. The explanation offered by the Appellant and respondent were incoherent, but from the evidence of PW2 and DW2 it is clear that the 2nd suit motor vehicle hit the 1st suit motor vehicle (pick up) at the passenger door. DW2 was also clear that, "they were joining the tarmac" Based on the said evidence the

only logical conclusion, which explains why the 1st suit motor vehicle was knocked on the passenger door, was that the Appellant who was driving the 2nd suit motor vehicle failed to give way as he entered the main road at Kivandani Junction and as a consequence of which his vehicle collided with the 1st suit motor vehicle. On a balance of probability, the 2nd suit motor vehicle could be safely adjudged to have been on the wrong by failing to give way for the 1st suit motor vehicle which was already on the main road and on its rightful lane.

26. Further even though the Appellant did file third party proceedings, he did not adduce any evidence to prove that indeed the said third party was negligent and/or reckless so as to contribute to the said accident. The burden of proof lies upon the party for whom substantiation of that particular allegation is essential to his case and having failed to adduce concrete evidence to prove otherwise, the trial court cannot be faulted for holding that the Appellant was 100% liable for this Accident.

(II) Whether Quantum Awarded was Excessive.

27. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case Khambi & Another v Mahitu &Another (supra). Further the Court of Appeal in the case Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 Stated:

> " Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 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 "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 ..."

28. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors 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".

29. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the

figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

30. The Appellant faulted the trial Magistrates finding on quantum on the basis that it was excessive and prayed that the same be reduced to Kshs.600,000/=. The respondent on the other hand did submitted that given the permanent nature of the injuries sustained, especial rapture of the spleen and its removal condemned the respondent to a lifetime of medication. He prayed that the award be enhanced t0 Ksh.3,000,000/= to support the respondent's life sustaining drugs.

31. As a result of the accident, the respondent raptured his spleen, which was later surgically removed, fractured the 8th rib, had a dislocated left hip joint, peritoneal hemorrhage and soft tissue injury. He was admitted at Machakos county Hospital for 2 weeks from 8th February 2008 to 22nd February 2008, the treatment discharge notes from the Hospital and both medical reports produced into evidence indeed conformed that extent of the injuries sustained.

32. It is obvious that the injuries sustained were life threatening and has left the respondent with a permanent medical condition, requiring lifelong medication. The award of Ksh.800,000/= for the injuries suffered was low and ought to have been enhanced, save that the respondent did not file a counter appeal for enhancement. There is therefore no basis upon which the same can be reduced and or interfered with by this court.

Disposition

33. Having exhaustively analyzed all the issues raised in this appeal I find that this Appeal lacks merit and proceed to dismiss the same with costs to the respondent.

34. The respondent is awarded costs of this Appeal which is determined at Kshs.180,000/= all inclusive

35. It is so ordered.

JUDGMENT WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 12TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the Virtual Platform, Team this 12th Day of April, 2024.

In the presence of: -

Ms Njambili for Appellant

Mr Musyoka for Respondent

Sam Court Assistant