Mungai v Kirui (Civil Appeal 11 of 2020) [2024] KEHC 5606 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 11 OF 2020

RL KORIR, J

APRIL 11, 2024

BETWEEN

MUTURA MUNGAI ..... APPELLANT

AND

ERICK CHERUIYOT KIRUI ..... RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate, Omwansa B. at the Magistrate's Court at Sotik, Civil Suit Number 179 of 2016)

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for General and Special Damages that arose from a road traffic accident involving Motor Vehicle Registration Number KBS 267J (driven by the Plaintiff) and Motor Vehicles KAX 465J (driven by the Defendant) and GK A 215Y.

2. The trial court conducted a hearing where the Respondent (then Plaintiff) testified in person and closed his case. The Defendant (Appellant) did not attend court on the hearing date and the trial court closed the Defendant's case. The Defendant (Appellant) did not produce any witness or evidence.

3. In its Judgment delivered on 25th October 2020, the trial court awarded Kshs 2,297,895.20/= as General and Special Damages to the Respondent (then Plaintiff).

4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 24th September 2020 and relied on the following grounds:-

    I. That the learned trial Magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.

II. That the learned trial Magistrate erred in law and fact in awarding Kshs 2,872,369/= as general damages for pain and suffering which amount was inordinately high, unjustified and contrary to the evidence on record.

III. That the learned trial Magistrate erred in law and fact in awarding special damages of Kshs 372,369/= which were not pleaded and strictly proved as required by law.

IV. That the trial Magistrate erred in law and fact by failing to consider the Appellant's evidence and submissions on record thereby arriving at an excessive award.

V. That the learned trial Magistrate erred in law and fact by failing to consider the evidence tendered on quantum thus arriving at an erroneous finding on the injuries sustained particularly loss of teeth.

5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. See *Peters v Sunday Post Ltd* (1958) EA 424.

The Plaintiff's/Respondent's case.

6. Through his Amended Plaint dated 19th March 2018, the Respondent stated that on 4th December 2015, he was driving Motor Vehicle Registration Number KBS 267J along Kericho - Litein road when the defendant who was driving Motor Vehicle Registration Number KAX 465J drove his motor vehicle carelessly thereby causing a collision between his (Respondent) vehicle and Motor Vehicle Registration Number GK A 215 Y.

7. It was the Respondent's case that the Appellant was negligent in causing the accident. The particulars of the negligence were stated in paragraph 4A of the Amended Plaint.

8. That as a result of the accident the Respondent suffered the following injuries:-

I. Chest contusion.

II. Fracture of the right femur.

III. Right foot laceration.

IV. Bimalleolus fracture (Right Ankle).

9. The Respondent prayed for Special and General Damages against the Appellant.

The Appellant's/Defendant's Case.

10. The Defendant did not file a corresponding amended defence in response to the Plaintiff's Amended Plaint. The Defence in the court record was the original Defence dated 16th September 2016. In the Defence, the Appellant denied the occurrence of the accident on 4th December 2015 and further denied that that the Motor Vehicle Registration Number KAX 465J was under his care or management. The Appellant also denied being negligent and causing his car to collide with the Respondent's car and Motor Vehicle Registration Number GK A 215Y.

11. It was the Appellant's case that if the accident occurred then it was caused by the negligence and recklessness of the Respondent. The particulars of negligence were contained in paragraph 7 of the Defence. It was the Appellant's further case that the suit did not disclose any reasonable cause of action against him.

12. On 16th March 2023, this court directed that the Appeal be heard by way of written submissions.

The Appellant's Submissions.

13. In his submissions dated 28th June 2023 and filed on 27th July 2023, the Appellant submitted that the award of Kshs 2,297,895.20/= was inordinately high and ought to be disturbed.

14. It was the Appellant's submission that the Respondent did not plead any amputation or disability and he was not entitled to the award. That the claim for amputation and amenities were introduced at the ex-parte hearing stage and through the Respondent's submissions in the trial court. It was the Appellant's further submission that parties are bound by their pleadings. He relied on Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) eKLR, Raila Amolo Odinga & Another v IEBC & 2 others (2017) eKLR and Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others (2014) eKLR.

15. The Appellant submitted that in light of the injuries sustained by the Respondent, this court should replace the trial court award of Kshs 2,297,895.20/= with an award of Kshs 800,000/=. The Appellant urged this court to consider the various authorities attached in his submissions in which the injuries suffered were similar to the ones the Respondent suffered. He further stated that the comparable pleaded injuries ought to be compensated by similar awards. The authorities attached included *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* (2019) eKLR and *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* (2019) eKLR.

16. It was the Appellant' submission that costs follow the event. That they prayed for the costs of this Appeal based on section 27 (1) of the *Civil Procedure Act*.

The Respondent's Submissions.

17. The Respondent submitted that he had proved his case on a balance of probabilities. That through his testimony, he proved that the accident occurred on 4th December 2015, demonstrated that he was lawfully driving Motor Vehicle Registration Number KBS 267J and demonstrated that the Appellant or his driver was negligent in causing the accident between Motor Vehicles Registration Numbers KBS 267J, KAX 465J and GK A 215J. He further submitted that he produced documents in support of his case.

18. It was the Respondent's submission that the Appellant, despite being given an opportunity to ventilate his case, did not attend court when the matter was due for hearing and never tendered any evidence in court. That his evidence was not rebutted and the Appellant's particulars of negligence attributed to him were mere allegations. He relied on *Zumtel Communications Ltd v DM (minor suing through the father and next friend of MMI)* (2021) eKLR, *Motrex Limited v Nduruhu Julius & another* (2018) eKLR and *Stephen Maina Kiman'ga t/a Acacia Crest Academy & another v Sarah Cherere Obara (suing as the legal representative of Debra Wambui Njogu (deceased)* (2019) eKLR.

19. The Respondent submitted that the contents of the Appellant's Defence remained averments and unproven by evidence. That the Appellant should be held 100% liable for the accident.

20. On quantum, the Respondent submitted that the trial court award of Kshs 2,500,000/= for general damages was fair compensation for the injuries he suffered. That the award was based on previous comparative awards.

21. It was the Respondent's submission that he produced documents (P3 Form and Medical Report) to show that he suffered the injuries pleaded in the trial court. That during the hearing, he stated that his right leg had been amputated due to rotting and produced documents in court.

22. On special damages, the Respondent submitted that the trial court was correct in awarding the amount of Kshs 372,369/=. That he pleaded and proved the same in the trial court.

23. It was the Respondent's submission that the Appellant had failed to demonstrate that the award of general damages was inordinately high, that the trial Magistrate proceeded on the wrong principles or that he misapprehended evidence. It was his further submission that the Appeal should be dismissed with costs to the Respondent.

24. I have perused and considered the Record of Appeal dated 30th June 2021, the Supplementary Record of Appeal dated 28th July 2021, the Appellant's written submissions dated 28th June 2023 and the Respondent's written submissions dated 8th May 2023. The only issue for my determination was liability was apportioned correctly and whether the quantum was inordinately high.

25. The burden of proof in the trial court lay with the Plaintiff (now Respondent). The standard of proof is on the balance of probabilities. In James Muniu Mucheru v National Bank of Kenya Ltd (2019) eKLR, the Court of Appeal stated as follows: -

> " Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

Liability

26. The Appellant did not submit on liability while on the other hand, the Respondent submitted that the Appellant ought to be held 100% liable for the occurrence of the accident.

27. The Respondent narrated to the trial court the circumstances of the accident. That on the material day (4th December 2015), while driving along the Kericho-Litein road, the Appellant who drove Motor Vehicle Registration Number KAX 465J overtook him and collided with a Police Motor Vehicle Registration Number GK A 215Y. He stated that upon collision, the Police vehicle collided with his car. The Respondent blamed the Appellant for the cause of the accident as he was overtaking carelessly.

28. It was the Respondent's case that the Motor Vehicle Registration Number KAX 465J belonged to the Appellant. He produced a copy of the Motor Vehicle Search as P.Exh 5. I have looked at P.Exh 5 and it indicated that the Motor Vehicle Registration Number was registered to Mutura Mungai, the Appellant.

29. The veracity of the Respondent's testimony and exhibit (P.Exh 5) were not challenged by the Appellant. The Appellant neither testified nor produced any evidence to controvert the Respondent's testimony and evidence. In the premises therefore, I find that the Motor Vehicle Registration Number KAX 465J that was the subject of the trial suit, belonged to the Appellant.

30. Regarding the circumstances of the accident, the trial court had the benefit of only one side of the story i.e. the Respondent's version. As earlier stated, the Respondent through his testimony narrated the circumstances of the accident and blamed the Appellant for causing the accident. Again, his evidence was uncontroverted or unchallenged.

31. However, there was a Defence on record in which the Appellant denied the occurrence of the accident on the material day and shifted the negligence back to the Respondent. The Court of Appeal in the case

Charterhouse Bank Limited (under statutory management v. Frank N. Kamau (2016) eKLR stated that:-

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

32. From my analysis of the evidence, the Respondent produced a Police Abstract as P.Exh 3 which was prima facie evidence that the accident occurred on 4th December 2015 between Motor Vehicles Registration Numbers KAX 465J and KBS 267J. This evidence was not challenged by the Appellant.

33. Even though the Respondent had the legal burden to prove his claim in the trial court, the Appellant had the evidential burden to prove his claim that the Respondent was negligent in causing the accident. Section 109 of the *Evidence Act* provides:-

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

34. Section 112 of the *Evidence Act* provides:-

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

35. In interpreting the above provisions, in *Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & Another* (2005) 1 EA 334, the Court of Appeal held that:-

> "As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

36. The Appellant did not prove his claim that the Respondent was negligent in causing the accident. I must agree with the Respondent's submission that in the absence of evidence to back up such a claim, the claim remained an allegation.

37. I respectfully disagree with the trial court's award apportioning 20% liability on the Respondent. In my view, there was no basis for the trial court to apportion the liability on the Respondent. It was a legal misnomer to lay blame upon the Respondent for his failure to show what he did to avoid the occurrence of the accident. The Respondent had the burden of proving the occurrence and the circumstances of the accident which he satisfactorily did.

38. In the circumstances thereof, it is my finding that the trial court erred in apportioning 20% liability on the Respondent. I hereby vacate the award of 20 % liability on the Respondent and find the Appellant be 100% liable for the occurrence of the accident.

Quantum

39. The trial court awarded the Respondent Kshs 2,500,000/= as general damages and Kshs 372,369/= as special damages.

40. As per the Amended Plaint, the Respondent suffered the following injuries:-

    i. Chest contusion.

    ii. Fracture to the right femur.

    iii. Right foot laceration.

    iv. Bimalleolus fracture.

41. In proving the said injuries, the Respondent produced a P3 Form as P.Exh 2 and a Medical Report by Dr. Kiboss Ezekiel as P.Exh 4(a). I have looked at the two exhibits and they confirm the injuries sustained by the Respondent as the same ones as the ones the Respondent pleaded in his Amended Plaint. The Appellant neither challenged this evidence nor offer any opposing evidence. I am therefore satisfied that the Respondent sufficiently proved that he suffered the aforementioned injuries as a result of the road traffic accident on 4th December 2015.

42. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice.

43. In the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* (2006) eKLR, the Court of Appeal stated that:-

> "It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated *H. West & Son Ltd v. Shephard* [1964]AC 326 at page 353- 'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

44. In the present case, the Appellant submitted on the issue of general damages that the award of Kshs 2,500,000/= was inordinately high and they proposed an award of Kshs 800,000/=. On the other hand, the Respondent asked this court to uphold the award of Kshs 2,500,000/= as it represented a fair award.

45. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards.

46. The Respondent suffered a fracture to his right femur and ankle and soft tissue injuries. I have found the following cases quite helpful in terms of comparison:-

I. In *Peter Namu Njeru v Philemone Mwagoti* (2016) eKLR the court held that Kshs 700,000/- was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.

II. *Akamba Public Road Services v Abdikadir Adan Galgalo* (2016) eKLR where the award of Kshs.800,000/= was substituted with an award of Kshs.500,000/= on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.

III. *Pauline Gesare Onami v Samuel Changamure & another* (2017) eKLR where the plaintiff suffered fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, Laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft and the court upheld the trial court's award of Kshs. 600,000/=.

IV. In *Tirus Mburu Chege & another v JKN & Another* (2018) eKLR, the sum of Kshs.800,000/= was reduced on appeal to Kshs.500,000/= for fracture on tibia and fibula on both legs, blunt injury on forehead, broken upper right second front tooth, nose bleeding and loss of consciousness.

47. I have considered the authorities above and the nature of the injuries suffered by the Respondent and I find that the Kshs 2,500,000/= awarded as General Damages by the trial court was excessive. Taking my cue from the aforementioned authorities and taking into consideration the inflationary trends, I hereby set aside the award of Kshs 2,500,000/= as general damages and substitute it with Kshs 1,200,000/=.

48. With regards to the Special Damages, the 1st Respondent particularized them as follows:-

Medical Report Kshs 5,000/=

Search Kshs 500/=

Medical Expenses Kshs 9,828/=

49. It is trite law that Special Damages ought to be specifically pleaded and proved. In *Caltex Oil (Kenya) Limited v Rono Limited* (2016) eKLR, the Court of Appeal held that:-

> "…….If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

50. The Respondent only produced the copy of the receipt for the Medical Report as P.Exh 4(b) which showed that he had incurred Kshs 5,000/= for the Medical Report. The Respondent did not produce the receipt for the payment of the Motor Vehicle Search.

51. On medical expenses, the Respondent stated that he had paid Kshs 90,000/= and produced two receipt as P.Exh 1(b). One receipt showed that the Respondent paid an in-patient bill of Kshs 74,570/= on 12th December 2015 at AIC Litein Hospital and the other receipt showed that the Respondent paid

a bill of Kshs 19,000/= at Tenwek Hospital on 16th June 2017. I dismiss the second receipt because that the bill was paid almost two years after the occurrence of the accident. It is not certain that the bill was incurred due to the injuries sustained in the road traffic accident of 4th December 2015. Therefore the only receipt for this court's consideration was that of AIC Litein Hospital which showed that the Respondent incurred Kshs 74,570/=.

52. The Respondent pleaded Kshs 9,828/= for medical expenses. It is trite that parties are bound by their pleadings. In *Raila Amolo Odinga & Another v. IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya held:-

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

53. I also find persuasion from Mrima J. in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) eKLR, where he held:-

> "It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded....."

54. Flowing from the above, this court can only grant what the Respondent pleaded. For the medical expenses, this court grants the Respondent Kshs 9,828/=.

55. In relation to the amputation costs, it is my finding that the trial court erred in awarding Kshs 277,369/=. As demonstrated by the authorities above, parties are bound by their pleadings and from his pleadings, the Respondent did not plead for amputation costs. I observe that there was evidence of the amputation being P.Exh 6 as at 19/4/2018 while the Plaintiff testified on 30/5/2018. I also observe that his advocate amended the Plaint on 22/3/2018 meaning that he had a chance to amend the Plaint to include the future medical expenses but failed to do so. He also had a chance to plead the special damages in the medical expenses already incurred by the Plaintiff as at that date but failed to do so. Therefore the trial court misdirected itself when it awarded an amount that had not been pleaded and did not form part of the pleadings. Accordingly, even though I empathize with the Plaintiff, I must set aside the award of Kshs 277,369/= in amputation costs.

56. In the circumstances thereof and flowing from the above, I hereby set aside the award of Kshs 372,369/= as special damages and substitute it with the award of Kshs 14,828/=.

57. The final computation is as below:-

    i. General Damages Kshs 1,200,000/=

    ii. Add Special damages Kshs 14,828/=

    Total Kshs 1,214,828/=.

58. In the final analysis, the trial court's award of Kshs 2,297,895.20/= is substituted with Kshs 1,214,828/=.

59. In the end, the Memorandum of Appeal dated 24th S is merited as the damages awarded to the Respondent is Kshs 1,214,828/=.

60. The Appellant having partially succeeded shall have half the costs of the Appeal. The Respondent/Plaintiff shall have costs of the suit and interest thereon until payment in full.

61. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 11TH DAY OF APRIL, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the parties.