Mwatha v Owuor (Civil Appeal E089 of 2022)
[2024] KEHC 4489 (KLR) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4489 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E089 OF 2022

RE ABURILI, J

APRIL 2, 2024

BETWEEN

EDWARD MWATHA ..... APPELLANT

AND

PHELIX OCHINEG OWUOR ..... RESPONDENT

(An appeal arising out of the Judgement and Decree of the Honourable R.S. Kipngeno in the Senior Principal Magistrate's Court at Nyando delivered on the 19th July 2022, in Nyando SPMCC No. 113 of 2019)

JUDGMENT

Introduction

1. The appellant herein Edward Mwatha was sued by the respondent Phelix Ochieng Owuor vide a plaint dated 28th May 2019 for general damages, future medical expenses, cost of a helper, loss of income/ capacity to earn and costs of the suit following injuries sustained by the respondent following a road traffic accident on or about the 20th March 2019. along Ahero--Awasi road.

2. It was the respondent's case that on the aforementioned date, the appellant's motor vehicle registration number KCH 166L, Toyota Lexus, was driven carelessly and recklessly by the appellant's servant, agent or driver thus causing the said vehicle to lose control, veer off its lane thereby ramming into/knocking/ hitting the respondent's motorcycle KMDX 193B.

3. In response, the appellant filed a statement of defence dated 3rd September 2019 denying the respondent's allegations and imputing negligence on the part of the respondent.

4. In his judgement, the trial Magistrate found in favour of the respondent on liability in the ratio of 30:70 against the appellant. The trial court then awarded general damages of Kshs. 2,500,000 which when factoring in contribution on liability was reduced to Kshs. 1,750,000.

5. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 18th August 2022 raising the following grounds of appeal;

    1. That the learned trial magistrate erred in law by apportioning liability in the ratio of 70:30 as against the appellant and in favour of the respondent, despite there being no act or omission attributed to the appellant and substantially proven during trial to have been the cause of the accident.

    2. That the learned trial magistrate erred in law and in fact by failing to appreciate the evidence on record as regards the circumstances under which the accident occurred, thereby arriving at an erroneous decision in terms of apportionment of liability and constituting an injustice.

    3. That the learned trial magistrate erred in law and in fact by failing to appreciate, in view of the evidence on record, that the respondent failed to prove on a balance of probability, fault on the part of the appellant warranting the apportionment of liability in the ratio of 70:30 in favour of the respondent and against the appellant.

    4. That the learned trial magistrate erred in law and in fact by failing to appreciate that there were two distinct versions regarding the manner in which the accident occurred and at the very least, liability in this case ought to have been apportioned equally between the parties.

    5. That the learned trial magistrate erred in law and fact by awarding the respondent Kshs. 2,500,000 as general damages which award was manifestly too high in the circumstances of this case as to constitute an injustice, contrary to the principles of such awards in similar cases, which constitutes an injustice, contrary to the principles of such awards in similar cases, which constitutes an erroneous exercise of discretion, and ought to be reduced substantially.

    6. That the learned trial magistrate erred in law and fact by failing to appreciate the ranges of the awards of various courts on injuries similar to those sustained by the respondent herein.

6. The parties filed written submissions to canvass the appeal.

The Appellants' Submissions

7. On liability, it was submitted that the testimony of DW1 was not controverted by the respondent as no eye witness was called and therefore the appellant did not omit or commit anything that substantially caused the accident and thus could not be blamed for the accident. It was submitted that liability should thus be apportioned equally between the appellant and the respondent.

8. On future medical expenses, it was submitted that the trial magistrate was right in not awarding the same as although the same was pleaded as per the amended plaint filed on the 12.11.02, the claim was not proved. Reliance was placed on th case of Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR.

9. On loss of income, it was submitted that the same must be both pleaded and proven as was held in the case of John Kibicho Thirima v Emmanuel Parsmei Mkoitiko [2017] eKLR and that although the respondent testified that prior to the accident he could earn Kshs. 1,200 per day, there was no evidence produced in support of this allegation.

10. The appellant submitted that Loss of capacity to earn is awardable for real assessable loss proved by evidence whereas diminution of earning capacity is awarded as part of general damages and that therefore although the respondent made a prayer for loss of capacity to earn, the same can only be claimed and awarded under the head of general damages.

11. As for the costs of a helper, it was submitted that this was a special damage which must be both pleaded and proven before the same is awarded and that in the instant case, the respondent failed to show that he had any nurse or domestic worker that cared for him and whose payment ought to have been accommodated in the judgement and the same was not proven.

12. On general damages, the appellant submitted that the only injuries proven to have been sustained by the respondent included a swollen forehead, neck tenderness, fracture of the pelvis, dislocation of the shoulder as well as a perineal tear extending to the abdomen and thus an award of Kshs. 1,000,000 would suffice instead of that awarded by the trial court.

The Respondent's Submissions

13. On behalf of the respondent, it was submitted that there was primafacie evidence that the respondent was hit by the appellant, fell off the road and not in control of the vehicle thus implying liability on the appellant and further that the appellant failed to adduce evidence that he took precautions to avoid the accident.

14. It was submitted that based on the testimonies before the trial court, the appellant was negligent and ought to be held liable for the accident and that this court ought not to interfere with the trial court's finding on liability as was held in the case of Ishmael Musembi Mutie v Everlyne Mwikali John [2017] eKLR.

15. On general damages, the respondent submitted that he sustained injuries that were grievous and incapacitated him to 40% and further that the injuries as confirmed in the medical report admitted by consent further estimated the treatment cost at Kshs. 500,000.

16. Reliance was placed on the case of Gitonga v Kalunge (Civil Appeal E034 of 2021) where the plaintiff suffered similar serious injuries with 35% incapacity and the High Court substituted an award of Kshs. 1,000,000 with one of Kshs. 1,700,000 as general damages.

17. The respondent submitted that in the circumstances, this Court should dismiss the instant appeal with costs.

Analysis and Determination

18. This being a first appeal, this court is under a duty as stipulated in section 78 of the *Civil Procedure Act* to re-evaluate and re assess the evidence and reach its own conclusion. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. 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."

19. In addition, it is a settled principle that an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

20. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, the two issues for determination before this court are whether the trial court erred in apportioning liability at 70:30 in favour of the respondent against the appellant and further whether the trial court erred in awarding the quantum of damages that it did.

On liability

21. The law is clear that he who alleges must proof. 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. On the other hand, 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.

22. 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 wherein the plaintiff was allegedly injured.

23. The respondent testified as PW1 and stated that he was 25 years old. That on 20.3.2019, he was involved in a road traffic accident along Ahero – Awasi road at Boya centre as he was riding his motorcycle heading towards the Awasi direction on the left side of the road. He testified that an overtaking motor vehicle registration number KCH 166L hit him from behind and he landed on the left side of the road and lost consciousness. He testified that he was subsequently admitted for 3 – 4 months. According to the Respondent, prior to the accident, he was a motorcycle rider and would make Kshs. 1,200 per day and he now could not work.

24. In cross-examination, the respondent testified that the car which hit him was being driven at a high speed and he further reiterated that he was hit from behind and so he could not see what was happening behind him. In re-examination, the respondent confirmed that apart from the general attire, he had worn a reflective jacket. He testified that he was riding at 40km/hr.

25. None of the other witnesses presented by the respondent witnessed the accident and thus did not testify as to how the accident occurred. PW3 Sammy Esirongo testified and produced the Police Abstract from Ahero Police station where the accident in issue was reported. He stated that the driver of the accident motor vehicle was not charged with any offence and that the case was still pending under investigations. He denied visiting the scene of accident.

26. On his part, the appellant Edward Ochieng Mwatha testified that it was a clear night when he was involved in a traffic accident involving his vehicle and the respondent's motor cycle. He testified that he was driving to Kisumu at a speed of about 70km/hr and when he turned on the stretch to Boya, he saw 2 oncoming motor vehicles that were similarly not driving very fast. He testified that a motor cycle, which was being ridden fast, emerged overtaking the 2 motor vehicles when they collided as the

rider could not control the motor cycle. The appellant testified that the motor cycle rider did not have a helmet or reflector jacket on. The appellant testified that the rider did not ride at a speed or distance that was safe for him.

27. In cross-examination, the appellant testified that he was doing a speed of about 70km/hr and that the collision happened in front of him. In re-examination, the appellant reiterated that the motor cycle suddenly appeared behind the oncoming car and moved onto his lane thus ramming the motor cycle on his motor vehicle.

28. The appellant contends that liability should have been apportioned in the ratio of 50:50 because he did not omit or commit anything that substantially caused the accident and thus could not be wholly blamed for the accident while the respondent submitted that there was primafacie evidence that he was hit by the appellant, fell off the road and that the appellant was not in control of the vehicle thus implying liability on the appellant.

29. The *Traffic Act* (Cap 403 Laws of Kenya) provides for the law relating to traffic on the road. Section 68 of the Act provides for the Highway Code. Section 68(3) of the *Traffic Act* provides that:

> (3) A failure on the part of any person to observe any provisions of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

30. The Act further creates offences relating to the manner of driving the motor vehicles on the road. These are provided for under Sections 46, 47 and 49. These Sections require motorists to drive with due care and attention.

31. The law is also 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, vide Kisii HCC.A 29/2016 cited with approval the Court of Appeal decision in the case of Berkly Steward Limited v Waiyaki [1982-1988] KAR where it is 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."

32. The learned Judge in the above case stated that where the court is unable to determine who is to blame, it apportions 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 was 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."

33. In the end he 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."

34. In the instant case, it is clear that an accident occurred on the 20.3.2019 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent collided with him from the front while the respondent claimed that he was hit from behind. No sketch plan of the accident scene was produced and apart from the statement of the appellant and the respondent, no other person testified on how they saw the accident happen. Obviously, it is not always the case that there are eye witnesses to an accident and I take cognizance of that fact.

35. It is also a well 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.

36. In the instant case, I have read the judgment of the trial magistrate Hon. R.S.Kipngeno and this is what he stated concerning liability:

> " There are only 2 issues for coming up for determination, namely, liability and quantum. On liability, I apportion the same in the ratio of 70:30 in favour of the plaintiff. On the issue of quantum, the injuries mainly involved bot fractures and soft tissue injuries....."

37. The trial magistrate did not assess the evidence adduced on liability before arriving at the apportionment that he did. That being the case yet each party gave different versions of how the accident occurred, it is my finding that the trial magistrate failed to properly address his mind to the principles applicable in the determining the issue of liability. that failure gives this court legitimate reason to interfere with the apportionment of liability by the trial magistrate as there was no basis upon which he found the appellant to be liable at 70% against the respondent's 30%. I set aside the finding on liability and as there were different versions of how the accident occurred, thereby making it impossible for the court to find with certainty that one parry was more to blame than the other, I find and hold that each of the parties was equally to blame for the accident.

On quantum

38. I must reiterate, from the onset, that assessment of damages is an exercise of judicial discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal held that:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)

39. Additionally, in Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

> "...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

40. Applying the above principles to this case, and having examined the pleadings and evidence of the respondent as to the exact nature of his injuries. The respondent pleaded that he sustained the following injuries:

i. Swollen forehead

ii. Loss of teeth

iii. Paralysis of the left leg

iv. Fracture of the pelvis

v. 4th degree perineal tear with open book fracture

vi. Neck tenderness

vii. Dislocation of the shoulder

viii. Injury to the abdomen

ix. Injuries to the back

x. Injuries to the chest

xi. Injuries to the elbows – bruises and lacerations

xii. Cut wounds on the right lower limb

xiii. Bruises on the knee joint

41. The P3 form produced as PEX4 detailed the nature of injuries sustained by the respondent as:

i. Swollen tender neck

ii. Tenderness and dislocated shoulder

iii. Fracture of the pelvic region

iv. Perineal tears

42. Further, PEX4 categorized the nature of injuries sustained by the respondent as grievous harm. I do note that the medical report dated 5.6.2019 by Dr. Okombo was only marked for identification as PMFI-6 but was never produced as an exhibit in support of the respondent's injuries and the extent thereof. Nonetheless, the trial court observed that the mere mention of fractures of whatever nature and description is no reason for exaggerated awards and concluded that an award must be reasonable and just compensation in the circumstances of each case. he awarded the respondent Kshs 2,500,000 general damages and deducted 30% contribution leaving a sum of Kshs 1,750,000 plus costs and interest.

43. Based on the aforementioned as well as the testimony by the respondent, I find the following injuries were proven as stated in the P3 form:

i. Loss of 2 teeth

ii. Soft tissue injuries to the neck, back and chest

iii. Fracture of the pelvis

iv. Perineal tear

44. I have considered the authorities cited by each if the 'counsel in their submissions. In my view, none of them are comparable to the injuries sustained by the respondent, albeit no two injuries can be exactly the same. Those authorities relied on by the appellant are not comparable while those relied on by the respondent contain more serious injuries.

45. I will consider comparable injuries and awards from the cases below, while appreciating, as above stated, that no two injuries can be exactly the same:

a. In Boniface Njiru v Tohel Agencies & Anor [2011] eKLR, the Plaintiff sustained blunt head injury, loss of 4 teeth, fracture of shaft and right tibia was awarded Kshs. 1,000,000.

b. In Michael Maina Gitonga v Serah Njuguna [2012] eKLR in which the plaintiff sustained multiple fractures to the pelvis and was awarded Ksh. 1,500,000.

c. In Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR in which the plaintiff was awarded Kshs. 2,000,000 for injury to the pelvis involving fracture of ramus and diastasis of the symphysis pubis.

d. In Dennis Nyamweno Openda v Anwarali & Brothers Limited & Another [2015] eKLR the plaintiff was awarded general damages of Ksh 1,800,00 for multiple fracture which included fracture of the left clavicle, fracture right humerus and unstable multiple fractures of the pelvic bones.

46. In this case, the respondent sustained injuries leading to his being hospitalized for close to 4 months and he underwent surgeries. The trial magistrate did not make any awards outside what was pleaded and there was no cross appeal. In the circumstances, I find that the injuries sustained by the respondent are similar to the injuries sustained by the claimants in the above cases and therefore the award ought to be in the range of the cited cases above. Having done so, I find and hold that the trial magistrate awarded damages that are commensurate with the injuries sustained by the respondent, although he did not make any proper comparisons. I find no reason to interfere with the trial court's award on damages, the same being comparable to the authorities cited herein above.

47. The upshot of the above is that the instant appeal is partially successful. The trial court's apportionment on liability is hereby set aside and substituted with one an order that each of the parties are liable for the accident in the ratio of 50:50. The general damages as awarded is sustained subject to contribution of 50% leaving a balance of Kshs 1,250,000. Accordingly, the appeal against quantum of damages is dismissed.

48. As the appeal is only partially successful, I order that each party bear their own costs of the appeal.

49. This file is therefore closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF APRIL, 2024

R.E. ABURILI

JUDGE