**Murunga v Murono (Civil Appeal 98 of 2017)**
**[2024] KEHC 5544 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5544 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL 98 OF 2017**

**PJO OTIENO, J**

**MAY 8, 2024**

**BETWEEN**

**RODGERS MURUNGA ........................................................................ APPELLANT**

**AND**

**EMMANUEL SOLE MURONO ....................................................... RESPONDENT**

***(Being an appeal from the Judgment of Hon. F. Makoyo (SRM) in Butere SRMC Civil Suit No. 225 of 2014 dated 21st August, 2017)***

**JUDGMENT**

**Background ofthe Appeal**

1. By way of a plaint dated 19th December, 2014, the Respondent sued the Appellant for general and special damages, costs and interest of the suit on account of an alleged road traffic accident said to have occurred on the September 17, 2017.

2. The Respondent's case was pleaded to have been that on 17/9/2014 he was riding, the cycle type and registration particulars were never disclosed, along Mumias Bungoma Road when the Appellant carelessly drove Motor Vehicle Registration Number KBQ 215T Toyota Wingroad thus knocking the Respondent and resulting in the Respondent suffering a fracture on the right femur, a blunt injury to the back and loss of consciousness. The particulars of negligence were set out to include careless driving, disregard of the safety of other road users and failing to take any evasive action to avoid the collision.

3. In a statement of defence dated 7th May, 2015, it was the Appellant's claim that the Respondent was to blame for the accident since he entered the main road without stopping at a junction and that the Respondent was an unlicensed motor cyclist using an unlicensed motorcycle on a public road.

4. In a decision of the trial court delivered on 31st August, 2017, the trial court found both parties equally liable for the accident and apportioned liability at a ratio of 50:50. The court then awarded Kshs. 20,150/- as special damages and Kshs. 300,000/- as general damages with each party bearing their own costs.

5. It is this judgment that provokes the appeal initiated by the Memorandum of Appeal dated 13th September, 2017 which faults the Judgment on the grounds that;

    a. The learned trial magistrate erred in law and fact by proceeding on the wrong principles and arriving at a wrong decision on liability.

    b. The learned trial magistrate erred in law and fact by failing to establish liability between the parties.

    c. The learned trial magistrate erred in law and fact by failing to find that the respondent an unlicensed and uninsured rider was not 100% liable for the accident.

    d. The learned trial magistrate erred in law and fact in disregarding the inconclusive evidence of PW2 the police officer who testified.

    e. The learned trial magistrate erred in law and fact in giving an award which was excessively high considered the injuries suffered by the respondent.

    f. The decision of the trial magistrate is against the weight of evidence on record.

    g. The learned trial magistrate erred in law and fact in failing to give reasons for the decision of each point.

    h. The learned trial magistrate erred in law in awarding special damages not pleaded or proved.

6. Those eight grounds of appeal syncronise into two grounds and seek the answers on whether; the finding on liability was in consonance with the evidence on record and whether the sum awarded was too high and excessive. The court will thus determine the appeal upon appraising the evidence on record and resolving the two issues. The third issue would have been whether the special damages awarded were indeed pleaded and proved to the requisite standards, but by the submissions filed by the Appellant that ground has been abandoned.

7. The appeal has been canvassed by way of the very brief written submissions filed by both parties in which both counsel chose not to cite to court any decision nor provision of the law. That however does not diminish the courts duty as a first appellate court, even though it reveals reduced responsibility on the part of counsel to assist court meet its overriding objectives.

**Appellant's Submissions**

8. The Appellant faults the trial court's decision to apportion liability at a ratio of 50:50 instead of finding the Respondent 100% liable. It is pointed out that, according to the evidence of the Respondent, he was an unlicensed and uninsured rider and he ought not to be on a public road at the time of the accident. He argues that PW2, the police officer who produced the abstract was not the Investigating Officer thus making her evidence hearsay and inadmissible.

9. On the quantum of general damages, the Appellant contends that the Respondent suffered a fracture of the right femur and loss of consciousness which according to PW3, Dr. Andai, the Respondent was expected to fully recover in one and a half years upon removal of the K-nails. It was then urged that the appeal be allowed with costs both here and in the court below.

**Respondent's Submissions**

10. On the apportionment of liability at 50:50, the Respondent supports the trial court because the Respondent testified that he was riding towards Bungoma general direction to Shibale area when the Appellant who was overtaking another motorist came into his lane and knocked him causing him to fall on the left side of the road while facing Bungoma. That same position was added by PW2, the police officer, who testified that, from the occurrence book, the Respondent was overtaking others in traffic when he knocked the Respondent on the Respondent's lane.

11. On assessment of damages it is submitted that the award of Kshs 300,000/- was not excessive but modest taking into account the extent of injuries and the residual effects.

**Issues, Analysis and Determination**

12. The court has considered the grounds of appeal, the proceedings of the lower court and the Submissions by both the appellant and the Respondent and discerns the issues for determination to the two isolated at the onset of this Judgment.

**Whether the trial court erred in apportioning liability at the ratio of 50:50**

13. Because court disputes must be determined on the pleadings filed and the evidence offered, it is the duty of the trial court to give to every piece of evidence adduce all the due regard. In the appeal, the evidence led by both sides on causation was that of PW1 and 2 and that by DW1. Both admit the occurrence of the accident. The point of disagreement is how the accident occurred. While the Respondent and his witness stood that the Respondent was on his correct lane when the Appellant swerved on that side and hit him, the Appellant was of the position that, the Respondent merely emerged from a left feeder road onto his lane affording him no chance to manoeuvre and thus hit his motorcycle by the right front edge of the motor vehicle. With such evidence, it was the duty of the court to weigh the evidence and determine which version was more credible. The court found that it was not clear how the accident occurred and relied on the decision of the Court of Appeal in *Lakhamshi v the Attorney General* (1971), for the proposition that, where it cannot be precisely determined who between two drivers was to blame for the accident, the liability is shared equally.

14. As an appellate court, the court finds no error in that approach and upholds same as the accurate exposition of the law. It is however necessary to point out that the account of the Appellant does not appear credible when the usual cause of thing is taken into account. For this court, if the Respondent was indeed crossing from left to right, the most likely part of the motor vehicle to collide with him should have been the left side. It is thus improbable that the Respondent was hit by the right front part of the motor vehicle but still landed on the left side off the road. The agreed resting position of the Respondent after the accident align more with the Respondents version as opposed to that of the Appellant. However as observed by the trial court, a production of the scene sketch plan would have been more useful to the court but the parties withheld same.

15. Faced with such a scenario, a court is entitled to take the approach by the English court in *Stapley v Gypsum Mines Limited (2)* (1953) A.C 663 at P. 681 where Lord Reid reasoned 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 fact of each particular case. One may find that a matter of history,

several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally."

16. With evidence that the Appellant was on the wrong in colliding with the Respondent on the latter's lane and that the Respondent was unlicensed rider on a motorcycle that was not insured, presented the court with the duty to establish who between the parties' conduct was the more proximate cause of the accident. To this court, that the Respondent was not licensed was in fact an outright illegality under both the *Traffic Act* and *National Transport and Safety Authority (Operation of Motorcycles) Regulations* 2015. The question is however, how did that illegality contribute to the accident? The court finds that had the Appellant kept to his lane, there would have been no collision, the illegal conduct by the Respondent notwithstanding. Had the court sat at trial, it would have found the Appellant more to blame if not wholly liable. However, there is no cross appeal and the court hesitates to reverse the trial court as the trier of facts because the findings are not perverse to the evidence on record. The decision on liability is upheld and the appeal on that limb is dismissed.

**Whether the general damages awarded were excessive**

17. The Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR had this to say on an appellate court overturning the amount of damages awarded by a trial court: -

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:
>
> > '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."

18. The Respondent in this case suffered a fracture if the right femur, a blunt injury to the back and loss of consciousness to which injuries the trial court awarded general damages of Kshs. 300,000/-. The Appellant contends, without citing any authority to persuade or guide the court, that the damages were high while the Respondent submits that the same was reasonable. It being that there exists no standard scientific formula for assessment and/or calculation of damages other than comparison with other awards made in the past in comparable cases, and the matter being whole in the realm of judicial discretion, the court is not permitted to substitute its discretion for that by the trial court.

19. Being bound to proceed by way of a retrial, the court has given regard to the previous decisions in *Erick Muthuma Mutise & Another V Boniface Njoroge Nguuri* [2012] eKLR, which was binding upon the

trial court, where the plaintiff had suffered a fracture of the tibia in the distal 1/3 and a fracture of the right femur and was awarded kshs 450,000/-. Having done so, it finds the award of Kshs 300,000/- as general damages to be not only reasonable but very modest deserving no interference.

20. The appeal thus is adjudged to be of no merit and is therefore dismissed.

21. On costs, it is trite law that costs follow the event but the court has a discretion to exercise provided there are recorded reasons to divert costs from the event of success or failure. In the judgment subject of this appeal, both sides were adjudged blameworthy in equal measure and each was to bear own costs of the trial court. The court finds that the trial court was not at fault in finding that each party bears the costs of the suit.

22. For the reasons set out above, this appeal is dismissed in its entirety and the Respondent having succeeded, he is awarded the costs of the appeal.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MAY, 2024.**

**PATRICK J O OTIENO**

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Polycap