Nyakundi v Kamotho (Civil Appeal 123 of 2020)
[2024] KEHC 9604 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 9604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 123 OF 2020

DO CHEPKWONY, J

MAY 17, 2024

BETWEEN

ELIJAH WYCLIFFE NYAKUNDI ..... APPELLANT

AND

CLEMENT GACARA KAMOTHO ..... RESPONDENT

(Being an appeal from the Judgment of the Senior Principle Magistrate's court at Ruiru before Honourable J. A. Agonda, SRM delivered on the 23rd September, 2020 in Ruiru SPMCC. No.106 of 2019)

JUDGMENT

1. The facts of this case are that the Respondent was a lawful passenger in Motor Vehicle Registration Number KBV 825R along Eastern bypass that when at or near Corner area, Motor Vehicle Registration Number KAQ 822P belonging to the Appellant collided with the said Motor Vehicle Registration Number KBV 825R. As a result of this collision, the Respondent sustained personal injuries and suffered loss and damages. The matter proceeded for hearing and the trial court found the Appellant to be wholly liable for the accident and awarded the Respondent the sum of Kshs. 400,000/= as general damages and Kshs, 2,650/= as special damages.

2. Aggrieved, the Appellant filed this Appeal against the Judgment of Ruiru CMCC No. 106 of 2019 delivered by Hon. J. A. Agonda on 23rdSeptember, 2020 which was as follows:-

    a. Liability 100% against the Defendant/Appellant.

    b. General damages Kshs. 400,000/=

    c. Special damages Kshs. 2,650/=

    Total Kshs. 402,650/=

3. The Grounds of Appeal as listed in Memorandum of Appeal dated 19th October, 2020 are as follows:-

   a. That the Learned Magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant/ Defendant.

   b. That the Learned Magistrate erred in law and in fact in finding the Appellant wholly liable for the accident.

   c. That Learned Magistrate erred in law and in fact in awarding general damages of Kshs. 400,000/= which were excessive in the circumstances.

Determination

4. The appeal was admitted for hearing on 5th May, 2022 and the parties directed to canvass the same by way of written submissions.

5. In the Appellant's Submissions filed on 5th October, 2022, he argued that the trial court erred in finding him wholly liable for the accident by holding that the Appellant moved into the path of Motor Vehicle Registration Number KBV 825R causing the collision. He also argued that there was no conclusive evidence that was adduced to confirm that he was liable. And in particular, he held that the police abstract indicated that the case was still pending investigations. He has thus urged that the court sets aside the finding on liability and either dismiss the Respondent's case or apportion liability.

6. On their part, the Respondent did not file any submissions on the Appeal.

7. This being a first appeal, the court is reminded of its duty as was stated in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others [1968] EA 123 in the following terms:-

> " I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate
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> it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

8. From the evidence of the Respondent before the trial court, at Page 42 of the Record of Appeal, it was stated that on the material date, the Respondent had boarded Matatu Motor Vehicle Registration KBV 825R from Ruiru to Ruai when the said Motor vehicle was hit by another Motor Vehicle Registration Number KAQ 822P which was on the opposite direction, having left its lane and moved to the Respondent's lane which resulted into a collision. He blamed the driver of Motor Vehicle Registration Number KAQ 822P for the accident.

9. PW2, Corporal John Mwangi Ndungu confirmed the occurrence of the accident involving Motor Vehicle Registration Number KBV 825R and Motor Vehicle Registration Number KAQ 822P. He stated that at the scene, the driver of the saloon Motor Vehicle Registration Number KAQ 822P was overtaking and as a result, collided with Motor Vehicle Registration Number KBV 825R. On cross examination, PW2 he stated that he was not the investigating officer in the matter and confirmed that

in the police abstract, the matter was indicated as pending investigations. On re-examination, PW2 stated that he had relied on the initial report that the owner of Motor Vehicle Registration Number KAQ was to blame.

10. In his Defence, at Page 50 of the Record of Appeal, the Appellant stated that he was driving on the left side of the road when a motor cycle appeared on the left side of the road and being 5 metres away, he swerved to the right so as to avoid hitting the motor cycle and he collided with the oncoming Motor Vehicle Registration No. KBV 825R. He stated that the police did not blame him for the accident. He stated that he was forced to move slightly to the right to avoid the accident and denied that he was driving negligently.

11. Having analysed the evidence and Judgment of the trial court as above, this court finds that the main Grounds of Appeal are based on liability and quantum of damages.

12. Having analysed the evidence and find from the analysis of the evidence, it is common ground that an accident did occur between the subject motor vehicles. In his evidence, the Appellant stated that he moved to the right lane to avoid hitting a motor cycle and as result collided with Motor Vehicle Registration Number KBV 825R. It is the court's view that this confirms liability on the part of the Appellant as he owed a duty of care to other road users and not only the motor cycle but also the oncoming motor vehicle. For those reasons the court finds that the trial court did not err in finding the Appellant wholly liable for the accident.

Quantum of Damages

13. With regard to the issue of quantum of damages, I have read through the Plaint and find that the Respondent listed the following injuries which also appear in the Medical Report from Plains View Nursing Home as follows:-

    a. Fracture of left ankle joint.

    b. Blunt injury to the scalp.

14. A second Medical Report was also produced and it also showed the injuries sustained blunt trauma left ankle joint. And under this head, the trial court awarded the Respondent Kshs.400,000.00 as general damages.

15. The Appellant argues that there was no proof of fracture since the Plaintiff/Respondent admitted that he never received any treatment from Plains view nursing home as he was only treated at Kalimoni Hospital but was never hospitalised and neither did he have radiologist report. As for the x-ray report, the same did not show any fracture nor the left ankle having been immobilised in a Plaster of Paris.

16. According to the Appellant, there are only two ways of treating ankles and since the Respondent was not treated in any of them, it could not be said that there was a fracture of the ankle but only suffered soft tissue injuries for which he urged the court to award Kshs. 100,000/= as general damages and relied on the authorities of:-

    a. Eastern Produce K Ltd v Joseph Mamboleo Khamadi [2015]eKLR

    b. Paul Gatheru Mureithi v AA Growers Limited [2019] eKLR

17. The medical evidence of the Respondent attached in the file particularly the medical report dated 22nd February, 2018 showed the injuries sustained by him to be fracture of the left ankle joint and blunt injury to the scalp. The Respondent stated that he got a fracture of the ankle which was shown in the xrays and that he was bandaged and not plastered.

18. The Appellant relied on an article by Rohit Singh et al ' The ankle fractures: A Literature Review of Current treatment methods' appearing in open Journal of Orthorpaedics November, 2014 at Page 7 which stated in part as follows:-

> "...Ankle fractures can be treated conservatively or surgically depending on the type of fracture and the surgeon's opinion, the question of whether surgery or conservative treatment should be used for ankle fractures remains controversial..."

19. Also, the court in the case of Dhiraj Manji v Tyson Ouma [2021] eKLR where the court cited the case of Siaya Civil Appeal No. 39 of 2019 - Pitalis Opiyo Ager –vs- Daniel Otieno Owino & Anor, where R. E. Aburili J. stated:-

> 64. In the instant appeal, I have considered other evidence on record being that following the material accident, the appellant was treated as an outpatient and released to go home and that there is no evidence of inpatient or treatment
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> for fractures and or dislocations that he alleges he sustained. Further, I have found that despite the initial requests for X-rays in the supposedly injured areas, no X-ray films were produced and or evidence that the said X-rays were done and
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> what followed in the management of the alleged fractures or dislocation, after the said X-ray films if at all the X-ray reports ever proved or confirmed the alleged fractures or dislocations.
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> 65. This court observes and takes judicial notice of the fact that body parts allegedly fractured or dislocated such as the neck, elbow, head left shoulder and left elbow joints are sensitive areas. The P3 form was not produced as an exhibit even after being marked for identification. But that aside, there is no mention of any fracture, or treatment that involved plaster paris cast or immobilization of the neck, shoulder or elbow joints etc. as a form of management of the fractured areas. No treatment plan for the alleged fractures such as plaster cast or immobilization or physiotherapy was mentioned in the treatment notes and even Prof. Okombo in his medical report only mentioned the need for an orthopedic
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> surgeon and physiotherapy as being for the future. He never mentioned what had been done on the fractured or dislocated sites immediately after the accident on 10/7/2015 yet he was examining the patient on 20/1/2016 nearly six months later.
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> 66. For all the above reasons, I am inclined to reject the medical report, the injuries pleaded and testimony by Prof. Dr. Okombo as being speculative....."

20. In this case, the Medical Report dated 22nd February, 2018 and the P3 form showed that there was fracture of the ankle. The medical report indicated that only a crepe bandage was applied. The second medical report done shows that the xrays which were taken at the time he was at Plainsview Hospital did not show any bone or joint lesion.in the doctor's opinion, the injuries of the ankle were consistent with a blunt trauma occasioned during the accident.

21. Having considered all these facts, this court adopts the reasoning of the Appellant and hold that if at all the Respondent had suffered a fracture of the left ankle, there could have been evidence of plaster of Paris having been applied since a crepe bandage cannot sufficiently restore a fracture. For that reason, the court finds that the trial court erred in awarding Kshs 400,000/= for the injuries the Respondent is alleged to have sustained. Having found that there was no fracture suffered by the Respondent, the other injury which was sufficiently proved was soft tissue injuries which the Appellant has urged the court to award Kshs 100,000/= which it finds too low. In view of this, the court is guided by the case

of Wahinya –vs- Lucheveleli (Civil Appeal E045 of 2021) [2022] KEHC 13762 (KLR) (12 October 2022) (Judgment) where the court awarded Kshs. 200,000/= for soft tissue injuries, this court proceeds to find an award of Kshs.200,000.00 reasonable.

22. In the upshot, this Appeal is partly successful and the award of general damages of Kshs. 400,000/= is hereby set aside and substituted with an award of Kshs. 200,000/=. The Appellant shall only have the costs of this Appeal.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH DAY OF MAY, 2024.

D.O CHEPKWONY

JUDGE

In the presence of:

M/s Njeri Ikubi holding brief for Mr. Maina Ngechu for the Appellant

Court Assistant - Martin