Ontiri v Mulwa (Civil Appeal 175 of 2020)
[2024] KEHC 5162 (KLR) (Civ) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5162 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 175 OF 2020

HI ONG'UDI, J

MAY 17, 2024

BETWEEN

KEVIN ONTIRI .... APPELLANT

AND

PATRICK MULWA .... RESPONDENT

(Being an appeal from the Judgment of Honourable B. J Ofisi Resident Magistrate in Nairobi CMCC No. 5889 of 2018, delivered on 13th March, 2020)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Resident Magistrate's Civil Suit No. 5889 of 2018. In the said suit, the respondent (who was the plaintiff) sued the appellant (who was the defendant) for both general and special damages arising from a road traffic accident in which he sustained serious bodily injuries.

2. The appellant was the driver of the motor vehicle registration number KBJ 054C which hit a motor cycle along Jogoo road on which the respondent was lawfully aboard as a pillion passenger. The claim was fully defended and the trial magistrate delivered a Judgment on 13th March, 2020 in which she apportioned 100% liability in favour of the respondent against the appellant.

3. The Court awarded general damages of Kshs. 1,000,000/= and special damages kshs. 14,699/= together with interest at court rates payable from the date of the judgement until payment in full. The respondent was also awarded costs of the suit.

4. The appellant being aggrieved by the whole judgment lodged this appeal dated 1st April, 2020 setting out the following grounds: -

i. The Learned Magistrate erred in law and fact in holding and finding that the Appellant was to blame for the accident giving rise to the suit before the lower court.

ii. The Learned Magistrate erred in law and fact in failing to take into account the evidence presented before the trial court and in particular failing to appreciate that the Respondent was not able to sufficiently establish to the court which of the vehicles involved in the accident giving rise to the claim before the trial court was to bear the larger blame for the accident.

iii. The Learned Magistrate erred in law and fact in failing to take into account the evidence presented before the trial court that the Respondent was a pillion passenger on motorcycle which was involved in an altercation with the Appellants vehicle but the Respondent was not able to narrate the exact circumstances of the accident that would assist the court in establishing who between the motor cycle and the Appellants vehicle was to blame for that altercation.

iv. The Learned Magistrate erred in law and fact in not appreciating the evidence adduced and arriving at the conclusion reached that the Appellant was solely to blame.

v. The Learned Magistrate erred in law and fact in placing the burden of bringing the proper culprit for the accident on the Appellant and not on the person who sought to prove the claim.

vi. The Learned Magistrate erred in law and fact in holding and finding that the Respondent had proved his claim against the Appellant.

vii. The Learned Magistrate erred in law and fact in failing to find that the evidence presented by the Respondent could sustain the pleaded claim.

viii. The Learned Magistrate erred in law and fact in making an award of damages that was manifestly excessive and unsupported by the evidence before him.

ix. The Learned Magistrate erred in law and fact in making an award of damages that was unwarranted, grossly excessive and inconsistent with the evidence and or case law.

x. The Learned Magistrate erred in law and fact in holding and finding for the Respondent.

5. The appeal was canvassed through written submissions.

Appellants' submissions

6. The appellant filed his submissions dated 18th August, 2023 by Ann W. Kimani Advocates. Counsel submitted on both liability and quantum. He submitted that he was a good Samaritan who took an injured respondent to hospital following an accident only to be blamed when the respondent was received in hospital. He submitted that the respondent did not give the circumstances of the accident and why he blamed him. He further submitted that the motorcyclist had caused the accident and fled the scene. He also submitted that there were no defects on his motor vehicle to warrant any accident that occurred involving his vehicle.

7. On quantum, counsel submitted that the respondent sustained amputation of the 4th and 5th toes of his left foot. He however submitted that no evidence was led to show that the amputation incapacitated his daily activities. He submitted that an award of Kshs. 400,000/= would be sufficient to compensate the respondent.

8. He relied on the case in John Kipkemboi & another V Bramwel Vukinu [2020] eKLR where the court of appeal set aside the trial court's award of Kshs. 3,000,000/= on sustained fracture of big toe and substituted it with an award of Kshs. 200,000/=.

9. He further relied on the case in Top Tank Company Limited V Amos Ondiek Wanaye [2018] eKLR where on appeal the court substituted the trial court's award of Kshs. 480,000/= with Kshs. 350,000/= to the respondent who sustained amputation of two toes.

10. The appellant also relied on the case of Peter Kioko & Another V Hellen Muthee Muema [2018] eKLR where on appeal, the court set aside the trial court's award of Kshs. 300,000 and substituted it with Kshs. 200,000/= where the respondent had sustained amputation of one toe.

The Respondent's submissions

11. The respondent filed his submissions dated 19th October, 2023 by Kamende D.C and Company Advocates. Counsel submitted on two issues, liability and quantum. On liability, she submitted that the police abstract dated 2nd March, 2016 and an extract from the occurrence book showed that the appellant's vehicle was to blame for the accident. She also submitted that the appellant did not challenge the said police abstract and so the trial court was right in assessing liability at 100% against the appellant.

12. On quantum, she submitted that it was not in dispute that the respondent sustained severe injuries to the left foot, amputation of the 4th and 5th toes of the left foot and soft tissue injuries.

13. counsel relied on the case of Anthony Munene Nyaga V Oketch Moses [2016] eKLR where the court awarded the Plaintiff Kshs. 500,000 for loss of 3 toes which had resulted to difficulties in walking. She submitted that considering the inflation rate as at 2020, the said award of Kshs. 1,000,000 was not excessive. She thus, urged the court to uphold the trial court's decision and dismiss the appeal with costs.

Analysis and Determination

14. This being a first appellate court, I am guided by the dictum in the case of Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

15. In Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal held that –

> " ...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:
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>> '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." (Emphasis mine).

16. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find the issues for determination to be:

    a. Whether the trial magistrate erred in finding the appellant wholly to blame for the accident.

    b. Whether the award on general damages was excessively high.

17. On the first issue, the appellant contends that the trial magistrate was wrong in holding that he was to wholly blame for the accident.

18. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

19. Further, in Farah Vs Lento Agencies [2006]1 KLR 124,125, the Court of Appeal held that: -

> " ...Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame."

20. This court notes that the trial magistrate assessed liability based on the evidence presented before the court. According to her the evidence adduced clearly brought out the appellant as the one to wholly blame for the accident. This was on based on the police abstract dated 2nd March, 2016, which confirmed that the appellant's motor vehicle was blamed for the accident. She further found that the appellant did not avail any witness to corroborate his averments.

21. The respondent who testified as PW2 stated that the accident occurred due to the appellant's negligence. PW3 No. 84229 PC Patrick Yongo attached to Makongeni police station, testified on behalf of the investigating officer PC Kipngetich. He stated that the driver of motor vehicle KBJ 054C belonging to the appellant was driving the said vehicle from city service headed to Donholm. That after hitting the respondent the appellant kicked him and rushed him to Mama Lucy Hospital where the officers took information of the accident. He further stated that the motor cycle rider took off from the scene of accident. and that the OB indicated that motor vehicle registration number KAV 415N was to blame for the accident.

22. The appellant in his evidence stated that the motor cycle rider requested him to take the respondent to hospital. He stated that he did not hit the respondent and only acted as a good Samaritan. Upon cross examination, he stated that he was driving towards Donholm and that there was a handcart in front of the motorcycle. He further stated that the handcart stopped and the motorcycle fell on the next lane. He stopped two meters away from the accident and voluntarily took the respondent to hospital.

23. It is noteworthy that the police abstract was never disputed by the appellant. He did not avail any evidence to show that he only acted as a good Samaritan in taking the respondent to hospital. The appellant being the driver of motor vehicle registration number KBJ 054C was to wholly blame for the accident. The trial Magistrate did not err in her finding on this.

24. Going to the second issue of quantum, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate 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 at first instance. The appellate court can justifiably interfere with the quantum of damages 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 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."

25. Additionally, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated as follows: -

> " comparable injuries should attract comparable awards".

26. In the instant suit, the injuries suffered by the respondent were listed in the clinic cards and the Medical report by Professor Kiama Wangai as follows;

    i. Degloving injury dorsum of the left foot.

    ii. Blunt injury on the left foot.

    iii. Fracture proximal phalange of the left 4th and 5th toes with eventual amputation of the same.

    iv. Pains, blood loss and soft tissue injuries.

27. This court has considered the award of Kshs. 1,000,000/= as made by the trial magistrate based on the authorities cited by the parties in submissions at the trial court. The appellant and respondent each cited one case which was similar to the injuries sustained where the court awarded Kshs. 400,000/= and Kshs. 500,000/= respectively. I have considered other comparative cases where awards for amputation of toes injuries were made as follows:

    i. National Cereals and Produce Board v Protas Wafula Wanyama ELD HCCA No. 89 of 2016 [2018] eKLR. In this case, the plaintiff sustained a swollen and tender right foot, cut wound on the right middle toe which was tender, traumatic amputation of the right 4th toe which was tender and a cut wound on the right 5th toe which was tender. The court reduced an award of Kshs. 400,000/= to Kshs. 200,000/= in 2018.

    ii. John Kipkemboi & another v Bramwel Vukinu [2020] eKLR. The Court of Appeal set aside the trial court's award of Kshs. 3,500,000/= on damages sustained a fracture of left mid-shaft tibia, amputation of the left leg toe, cut wound on the left leg at the knee and injury to the right leg. The same was substituted with an award of Kshs. 200,000/=.

28. In view of the above cited authorities, this court is convinced that the award of kshs.1,000,000/= by the trial magistrate was excessively high and this court ought to interfere with it.

29. I therefore partially allow the Appeal and make the following orders:

    a. The decision on liability is upheld

    b. The award on general damages is set aside and substituted with an award of Kshs. 400,000/=

c. Special damages of Kshs. 14,699/=

d. Half costs to the respondent in both the lower court and High court.

e. Interest at court rates from date of Judgment.

30. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 17TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE