Kilanga v Breakthrough Chapel International Ltd (Civil Appeal 224 of 2022) [2024] KEHC 16942 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KEHC 16942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 224 OF 2022

F WANGARI, J

JUNE 21, 2024

BETWEEN

KAVINYA KILANGA ..... APPELLANT

AND

BREAKTHROUGH CHAPEL INTERNATIONAL LTD ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. D.W Mburu, Senior Principal Magistrate delivered on 1/12/2022 Mombasa CMCC No. 1414 of 2016. The Appeal is on both liability and quantum.

2. The Memorandum of Appeal raises only two issues, that is: -

    a. Liability

    b. The Quantum of Damages

3. The Plaint dated 28/7/2026 claimed damages for an accident that occurred on 10/4/1016 involving Motor Vehicle Registration Number KBR 491B owned and driven by the driver of the Defendant/ Respondent, while the Plaintiff/ Appellant was driving his tri-cycle registration number KTWB 703A.

4. It was pleaded that the Plaintiff was lawfully and carefully driving his tri-cycle when the Defendant's carelessly drove his motor vehicle and hit the Plaintiff's tri-cycle from behind hit him from behind, resulting to serious injuries sustained by the Plaintiff.

5. The Plaintiff set forth particulars of negligence for the accident. The Plaintiff pleaded Kshs. 4,948/= as Special Damages and injuries as follows:

    a. Fracture of the lower end of radius right side.

    b. Bruises over right elbow

c. Bruises over right forearm

d. Bruises over hand

e. Bruises over occiput area

6. The Respondent entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint.

7. The Trial Court heard the parties and proceeded to render judgement on 1/12/2022. In the Judgement, the Court found 100% liability against the Plaintiff and stated if the Plaintiff would have been successful in his suit, he would have been awarded Kshs. 500,000/- in General Damages for pain and suffering, with special damages of Kshs. 4,448/-.

8. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

The Appellants' case

9. The Appellant case was that he was driving his tri-cycle when the Defence driver hit him from behind thus causing him to sustain injuries. He stated that even though he was charged in a traffic court, he was acquitted for lack of evidence against him.

10. His witness, a Traffic Police Officer gave evidence that the Plaintiff was to blame for the accident for he failed to give way at a junction, thus causing the accident. He was charged with the offence of careless driving but he was acquitted.

11. The Plaintiff produced the P3 form, Medical Report showing the nature and degree of injuries. He proposed an award of Kshs. 800,000 as general damages.

The Respondent's Case.

12. The Defendant witness blamed the Plaintiff for the accident. It was stated that the Plaintiff failed to give way at a junction and joined the road instead of stopping and waiting for the road to be clear.

13. This court directed that the appeal be disposed of by way of written submissions and both parties complied by filing of rival submissions.

The Appellants' Submissions.

14. The Appellants submitted and reiterated that the court erred in finding that the was 100% liable for the accident. He submitted that the fact that the criminal court, which is a court of competent jurisdiction, had made its determination on liability by acquitting the Plaintiff in the traffic case. He relied inter-alia on the case of Joash M. Nyabicha v Kenya Tea Development Authority & 2 others [2013] eKLR. He submitted that the decision on liability be set aside and find the Defendant wholly liable for the accident.

15. On the award of general damages, the trial court was faulted for proposing an award of Kshs. 500,000. Counsel relied among others on the case of *Joseph Njuguna Gachie v Jacinta Kavuu Kyengo, Civil Appeal No. 31 of 2017* where an award of Kshs. 600,000 was granted as general damages. The Appellant submitted that going by the lapse of time, and the nature of injuries suffered, Kshs. 800,000 would be sufficient and adequate compensation in this case.

16. On the part of the Respondent, it was submitted that the trial court based on the evidence adduced was right in not feeling itself being bound by the decision in the traffic case, since the standard of proof in civil cases is on balance of probabilities and not beyond reasonable doubt as in the criminal cases. Reliance was placed on the case of Christine Kalama v Jane Wanja Njeru & another [2021] eKLR, on standard of proof in non-criminal cases.

17. On quantum, the Respondent submitted that if the appellant had proved liability on the part of the Respondent, he ought to have been awarded Kshs. 180,000 as general damages for pain and suffering. Reliance was inter-alia on the case of Patrisia Adhiambo Omolo v Emily Mandala [2020] eKLR. It was submitted that the appeal should be dismissed with costs to the Respondent.

Analysis

18. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its 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.

19. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 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..."

Liability

21. The Appellant urge this court to find that the trial court erred in finding him 100% liable because the Respondent was to wholly blame for the accident. He proposes that the Judgement of the trial court be set aside and the Plaintiff's suit therein be allowed with costs. On the other hand, the Respondent's case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed.

22. I have perused the Record of Appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. I am asked to established whether the trial court erred in finding, on a balance of probabilities that the Appellant was wholly liable for the accident.

23. In Anne Wambui Ndiritu –vs- 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 case 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."

24. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. Further, in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

25. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

27. Furthermore, in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

28. It is settled that the standard of proof on civil cases is on a preponderance of probabilities. In reevaluating the evidence, I note that both parties admit that there was an occurrence of the accident. The Plaintiff stated that it was the defendant's driver who negligently drove his motor vehicle and hit the Plaintiff's tri-cycle resulting to injuries sustained by the Plaintiff.

29. Further, the police officer who testified on behalf of the Appellant informed the court that the Plaintiff was to blame for the accident as he joined the road from a junction, without stopping to give way. He was thereafter charged with a traffic offence but acquitted. I acknowledge that this court has to do so carefully guided by the law because the burden of proof still remains with the Respondent.

30. Even though the police officer was not the investigating office in the traffic case, he relied on the police file in adducing his evidence. The evidence by the Defence witness corroborated the evidence of the police officer. There was no independent eye witness.

31. I have perused through the judgement of the trial court where it was found that the Plaintiff caused the accident was caused by the careless driving of the Plaintiff. The trial court acknowledged that the Plaintiff had been acquitted in the traffic court but the said decision was not binding as it was from a court of concurrent jurisdiction.

32. The issue is whether this court should interfere with the trial court's findings. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & 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"

33. Stemming from the stated finding of the Learned Magistrate, I find no reason to interfere with the trial court's finding on liability. The liability at 100% as against the Appellant is upheld.

Quantum

34. The Appellant submitted that an award of Kshs. 800,000/- would be adequate compensation while the Respondent submitted that the trial court correctly assessed general damages for pain and suffering as commensurate compensation in the circumstances of this case at Kshs. 180,000/=.

35. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant

one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages."

36. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.

37. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

38. There is no dispute that the Respondent suffered a fracture of the right radius and bruises of the hand. Though the trial court did not rely on any comparable authorities in its determination, but stated that reliance was on the parties' submissions, I have perused through the said submissions which are similar to the submissions filed before this court.

39. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Maureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

40. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

41. Having taken into consideration the cases relied on by the parties, the nature of injuries sustained, I find no reason to interfere with the proposed award of Kshs. 500,000/= in General Damages would in my view be adequate compensation based comparable authorities cited above. The appeal on General Damages is thus unmerited and is hereby dismissed.

42. On costs, I consider that the suit was filed in year 2016. Litigation must come to an end, and no further proceedings need to be entertained. I hereby exercise the discretion of the court and order that each party shall do bear its own costs.

Determination

43. In the upshot, I make the following orders: -

    a. The Appeal on liability and quantum lacks merits and is hereby dismissed.

b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 21ST DAY OF JUNE, 2024.

…….

F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Mr. Okello Advocate for the Respondent

Barile, Court Assistant