Kanyia v Mukeku (Civil Appeal 84 of 2019) [2024] KEHC 7300 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 84 OF 2019

FROO OLEL, J

JUNE 19, 2024

BETWEEN

STEPHEN MAKAU KANYIA ..... APPELLANT

AND

RICHARD NDUNDA MUKEKU ..... RESPONDENT

((Being an appeal from the judgement and decree of Hon I. Kahuya Principal Magistrate dated 30th May 2019 In Machakos CMCC NO 231 of 2018)

JUDGMENT

A. Introduction

1. The Appellant was the Defendant in the primary suit where he was sued for special damages of Kshs.154,970/=, general damages for pain, suffering and loss of amenities and future medical expenses of Kshs.150,000/=, costs of the suit and interest arising from a road traffic accident which occurred on 16.10.2017 along Machakos-Kathiani road at Kwa Muiu area.

2. It is alleged that on the said date, the respondent was riding his motor cycle Registration number KMCW 194V,(hereinafter referred to as the suit motor cycle) while the driver, servant and/or agent of the Appellant was was driving Motor vehicle registration number KCA 931 W,(hereinafter referred to as the suit motor vehicle) when she allowed it to veer off its lane, into the respondents lane and knocked him down, as a result of which he sustained the following injuries; Blunt Injury to the forehead with bruises, Fracture of the midshaft right femur , fracture of the right patella and traumatic amputation of digits (right middle finger).

B. The Evidence at Trial.

3. PW1 PC TOMO stated that this accident occurred at Isyukoni area and was reported to him, involved the suit motor vehicle driven by one Eve and the suit motor cycle driven by the respondent. The said accident was recorded under OB NO 8 of 16/10/2017 and his findings were that the suit motor vehicle

was heading towards Machakos direction and on reaching the location of the accident, the driver failed to keep onto her side thereby hit the suit motor cycle, thereby causing the respondent to suffer serious injuries. He produced the police abstract and blamed the Appellants driver for causing this accident by failing to observe traffic lane rules.

4. Upon cross- examination he indicated that he did not have the police file neither did he have the accident sketch plans. The OB did not state who was to blame for the accident, but the abstract did place fault on the Appellants door step.PW2, the respondent herein adopted his witness statement as his evidence and further testified that after the accident he was taken to Kathiani Level 4 Hospital for first aid before being referred to Machakos level 5 Hospital where he was admitted for treatment. He produced into evidence all his claim supporting documents and blamed the Appellants driver for causing the accident, by hitting him while he was riding on his lane. In cross examination he confirmed that the accident occurred at a bend, and it was due to the said bend that the Appellants driver, had swerved into his lane and hit his motor cycle.

5. DW1, EVE MAKAU adopted her witness statement, where she stated that on fateful day at about 4.10pm she was driving the suit motor vehicle along Machakos – Kathiani road and was negotiating a curve at about a speed of 40km/hr, when the respondent emerged from the opposite end, driving at high speed on her lane and as a consequence thereof hit the driver's mirror/door and was thrown down on the opposite direction due to the impact of the accident. DW1 blamed the respondent for causing this accident as it was him who was riding on the wrong side of the road/off his lane and he did not have any driving licence/motor cycle insurance.

6. After the collusion she stopped, and they escorted the rider to Kathiani Hospital, as she proceeded to report the same to Kathiani police station. The case was later taken over by traffic department at Machakos police station, she met the investigating officer and explained to him how the accident occurred. Upon cross examination, DW1 confirmed that the suit motor vehicle accident was registered in the Appellants name, but she was the beneficial owner on the subject date. She was driving towards Kathiani going downslope while the motorcycle was on the right side going uphill, and due to the impact of the accident, the suit motor vehicle was damaged on the right-hand side.

7. The trial Magistrate did consider the evidence tendered, the parties submissions and found in favour of the respondent and proceeded to enter judgment in favour of the respondent as against the Appellant as follows; General damages Ksh.750,000/= , Special damages Kshs.50,150/=, cost of future medical expense's Ksh.100,000/= plus cost and interest.

C. The Appeal

8. Dissatisfied by this decision of the trial court, The Appellant filed the present appeal seeking to have the said judgment set aside on the grounds that;

    a. The learned Principal Magistrate erred in law and in fact by awarding Kshs.950,000/= as general damages which award was inordinately high considering the injuries sustained by the Plaintiff.

    b. The learned Principal Magistrate erred in law and in fact by deciding that the Defendant was 100% liable for the accident yet there was overwhelming evidence given by the defence witness to show that the plaintiff was to blame for the accident.

    c. The learned Principal Magistrate erred in law and in fact by stating that although the defendant called a witness who stated that the Plaintiff was to blame for the accident the defendant ought

to have called another witness to corroborate this evidence and also call a police officer to clarify the contents of the OB thereby shifting the burden of proof from the Plaintiff to the defendant.

d. The learned Principal Magistrate erred in law and in fact by deciding the suit against the weight of the evidence on both the issue of liability and quantum.

9. The Appellant therefore prayed that this Appeal be allowed, the judgment of the trial court be set aside and/or the same be substituted with a more reasonable judgment. This Appeal upon admission was canvassed by way of written submissions.

D. Submissions

i. The Appellants Submissions

10. The Appellant filed submissions dated 24.05.2023 and submitted on four grounds. It was submitted that the awards herein were excessive in the circumstances. While relying on the case of Otieno vs General Motors East Africa Limited & 2 others [2022] KEHC and Agroline Hauliers Limited vs Michael Abongo Kisemba [2015] e KLR, it was submitted that the general damages was excessive and an award of Kshs.350,000/= would have been sufficient, when considered with similar injury cases.

11. On special damages, it was submitted that only receipts of Kshs.8,340/= were produced and the trial court erred in awarding the respondent Kshs.150,150/=.On future medical expenses, it was submitted that the medical report of Dr. Mutunga was vague as it did not indicate where the surgery was to be done, while Dr. Wambugu , who carried out the second medical assessed costed the surgery at Kshs.75,000/=, which was the assessment the trial court ought to have relied on.

12. As regards liability, it was submitted that the Respondent did not prove his case on a balance of probabilities. That failure to take any evasive action to avoid the accident connotes negligence on his part and thus the Respondent should have been held 100% to blame for the accident. The Appellant relied on the case of Christine Mwigina Akonya vs Samuel Kairu Chege [2017] e Klr, Ahmed Mohammed Noor Vs Abdi Aziz Osman (2019) eklr and Raila Amolo Odings & Another vs IEBC & 2 Others [2017] e KLR to emphasis on this point. If the court were to find otherwise, the Appellant urged the court to place liability at 50% on each party as guided in the case of Ndatho Muthengi Gerald Vs Hellen chebet, where it was held that where the court is unable to determine who is to blame for the accident, liability will be apportioned equally.

ii. The Respondents Submissions.

13. The Respondent on the other hand filed submissions on 24.05.2023 and proffered that; on the issue of Liability, they had produced the police abstract which blamed the Appellants driver for causing the accident and that DW1 had admitted to being at the scene of the accident on the material day, and from her testimony, she had further admitted to her motor vehicle resting on the left lane as one faced Machakos direction and that was the respondents rightful lane.

14. Given that the suit motor vehicle was going downhill, it was more probable that it was being driven at a high speed and more probable that it went off its lane, other than the converse of the respondent being the one riding off his lane, and if the later position was true, there would have been a head-on collusion. The respondent had therefore proved his case on a balance of probability and the trial court was right to so find. Reliance was placed on Palace Investment Ltd Vrs Geoffrey Kariuki Mwendwa & Another (2007) eklr & Miller Vs Minister of Pension (1974) 2ALL ER 374.

15. On Quantum awarded, it was submitted that the medical report by Dr. Mutunga had indicated that the Respondent had suffered 40% incapacity, while that by Dr. Wambugu placed the respondent's

disability at 14%. While the reports differed on degree/level of permanent injuries sustained, both reports concurred on the nature and extent of injuries suffered by the respondent. It had not been shown that the trial Magistrate, had considered any irrelevant factor or misapprehended the evidence adduced in this case, thus this court had no basis to interfere with the findings of the trial magistrate. Reliance was placed on the cases of Catholic Diocese of Kisumu vs Sophia Achieng Tete [2004] EKLR and Jabane vs Olenja , Kisumu civil appeal no 2 of 1986.

16. The respondent further urged this court to find that the award of Kshs 700,000/= was low and consider increasing the same. He also urged this court to dismiss this Appeal.

E. Analysis & Determination

17. I have considered the memorandum of Appeal, the Trial Court record and the submissions of the parties and find that two issues stand out for determination, namely; whether liability was correctly apportioned and whether the quantum awarded was adequate. In determining this Appeal, am guided by the case of Selle & Another Vs Associated Motor Boat Company Limited & others (1968) EA 123 where it was stated that;

> " 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 principals 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 conclusion 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 demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270

18. It is not in dispute that an accident occurred on 16.10.2017 along Machakos-Kathiani road at Kwa Muiu area between the Appellants wife, who was driving Motor vehicle registration number KCA 931 W and the Respondent who was riding his motor bike number KMCW 194V. As a result of the said accident, the respondent suffered Blunt Injury to the forehead with bruises, Fracture of the midshaft right femur, fracture right patella and traumatic amputation of digits (right middle finger). It is also not in contention that as a result of the said accident, the Respondent suffered some level of disability and would need future surgery to remove the metal implant placed on his leg to hold the fracture suffered.

19. The first issue is that of liability. In the case of Christine Kalama v Jane Wanja Njeru & another [2021] eKLR the court had this to say on proof of negligence;

> " It is a basic element of a cause of action in negligence that the claimant can allege that he or she has suffered loss and damage falling within the scope of a duty of care owed to her or him by the defendant. For that matter it was the duty of the appellant to show that she was owed a duty of care on the material day of the accident. It is a nexus between the harm and negligence on the part of the respondents. How is the scope of negligence and duty of care determined?
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> (1). First that the respondents owed a duty of care to the appellant.

2). Second, that the respondents breached that duty of care in the manner of their driving.

3). That the breach caused the appellant to suffer personal injuries attracting recoverable damages at Law.

4). That the injury suffered by the appellant was as a result of the breach and negligence which was reasonably foreseeable.

In Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 highlighted the determinants of negligence as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."

In Caparo case (Supra) the Court stated:

> " What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

20. In Berkley Steward v Waiyaki Vol 1 KAR 1118 {1986 – 1989} it was held:

> " Under Section 119 of the *Evidence Act*, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case."

21. In Baker v Market Harborough in his trial Co-operative Society Ltd {1953} 1 WLR 1472 it was observed:

> " That everyday proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence the Court would unhesitantly hold that both are to blame. They would not escape simply because the Court had nothing by which to draw any distraction between them." (Also see Lakhamshi v Attorney General {1971} EA 118; Welch v Standard Bank Ltd {1970} EA 115.)
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> Similarly, the *Traffic Act* Cap 403 the Laws of Kenya imposes a duty of care on drivers, to take necessary precautions to avoid accidents. In the event, they breach the *Traffic Act* and Highway Code they are liable for penal sanctions in cases of careless or reckless driving or causing death by dangerous driving."

22. Both parties at the trial, blamed each other for the accident and the trial court found the Appellant 100% liable for the accident. PW1 blamed the Appellants driver for failing to keep to her lane, but was not the investigating officer to the said accident. Further, he did not attend to the accident scene, nor did he produce the accident scene sketch Map and confirmed that the OB did not state who was to blame for the accident, but the Abstract clarified that it was DW1 to blame.

23. DW1 on the other hand blamed the respondent for riding at a high speed on her rightful lane and as a result, crushed onto the right side of the suit motor vehicle, despite her best efforts to avoid the said accident. As stated in Miller Vs Minister of Pension (1974) 2 ALL ER 372, with respect to burden of proof, where it was held that; "The degree is well settled, it must carry a reasonable decree of probability, but not so high as is required in a criminal case, if the evidence is such that the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probabilities are equal it is not."

24. Both parties confirmed that the accident occurred at a bend, the suit motor vehicle was going downhill towards Kathiani, while the suit motor cycle coming up hill from Kithiani direction. No accident sketch Map was produced to show exactly where the point of impact was, nor was the specific details of how the accident occurred captured in the OB. That being so the court cannot rely on the position as stated in the police abstract that it was the Appellants driver to blame, for there is no bases of that information, to wit; it was not captured in the OB, wherefrom the Abstract details are extracted from.

25. Secondly the respondent did submit that considering the fact that the suit motor vehicle was damaged on the right side, was an indication, that it went to the suit motor cycles lane and further DW1 had admitted that the motor vehicle final resting point was on the left side as one faced Machakos. This was the respondent's rightful lane and therefore it proved that DW1 was on the wrong. Respectfully the point of damage on the suit motor vehicle only confirms that an accident did occur, but does not prove point of impact.

26. Also after re-examining and reviewing the whole context of DW1 cross examination, the same reveals that it was the suit motor cycle that rested on the left side facing Machakos direction (though wrongly indicated as the suit motor vehicle)- and she add it was his rightful lane. This is further confirmed by DW1 clear testimony that she was going downhill towards Kathiani, while the respondent was coming up hill towards Machakos. None of the witness said that that the suit motor vehicle spurn as a result of the said accident to face the direction it was coming from.

27. From the above analysis this court is faced with two sets of circumstances and is duty bound to make a determination thereon however difficult the circumstances are. This was appreciated by Madan, J (as he was then) in Welch Vs Standard Bank Limited (1970) EA 115 where he expressed himself as hereunder;

> " When there is no material to generate actual persuasion in the courts mind, still the court cannot un-concernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability.
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> Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court has nothing by which to draw and distinction between them. So, also, if they are both dead and cannot give evidence enabling the court to draw a distinction

between them, they must both be held to blame, and equally to blame.....justice must not be denied because the proceedings before the court failed to conform to conventional rules provided, in it judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion.....There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does so in this case.

28. The inescapable conclusion, after considering the evidence adduced will lead to the finding that indeed an accident did occur, but the respondent failed to discharge the burden of proof with a reasonable degree of certainty that it the Appellants driver to blame for the same. Under such circumstances, liability then has to be shared 50% as between the parties.

29. As regards quantum, the principles upon which the Appellate Court will interfere with an award of damages are set out in the case of Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 where the Court of Appeal stated: that

> " Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88]I KAR 1 at pg 5 as follows-
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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 ...

30. The Court of Appeal in Ugenya Bus Service v Gachuki CA No. 66 of {1981 – 1986} KLR 567 stated that:

> " General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task and one cannot aim for precision."

31. The Respondent was awarded Kshs.700,000/= in general damages for blunt injury to the forehead with bruises, fracture of the midshaft right femur, fracture to right patella and traumatic amputation of digits (right middle finger).In the case of the case of Pyramid Packaging Limited v Humphrey W. Wanjala (2012) eKLR the court awarded Kshs.650,000/= for amputation of the left index, middle and ring fingers. It was also noted that the plaintiff was left handed and the injuries rendered him incapacitated to work.

32. In Sino Hydro Corporation Ltd v Daniela Afila Kuminda (2016) eKLR the plaintiff middle and ring fingers of the right hand were also amputated with a resulting 10% disability, an award of Kshs.600,000/= was made in favour of the plaintiff. In the case of Charles Wanyoike Githuka v Joseph Mwangi Thuo & 2 Others Nakuru HCCC No 68 of 2005 decided in 2008; where the plaintiff suffered a fracture mid-shaft of the right femur amongst other injuries and was awarded KShs.2,500,000/= for general damages.

33. In Mary Pamela Oyioma v Yess Holdings Limited [2011] eKLR the plaintiff was awarded Ksh.900,000/= for commuted fracture of the right femur; a compound fracture of the right tibia; a fracture of the left tibia; soft tissue injuries of the right shoulder and multiple cut wounds over the

whole body. Guided by the above cases, I find that the award of the Trial court was reasonable low in the circumstances, especially considering the amputated fingers and fractured midshaft right femur. A more appropriate award would have been in the region of Kshs.1,200,000/=. But since the respondent did not file a cross appeal on quantum, the trial courts finding on the same will remain undisturbed.

34. As regards Special Damages, the Respondent pleaded Kshs.154,970/= and was awarded Kshs.150,150/=. It is trite law that special damages must be specifically pleaded and proven. The Appellant did produce all the receipts for the medical expenses incurred after the accident, and the same amounted to Kshs.154,970/=. The Appellant urged that court to find that the receipts produced were only for Kshs.8,340/= but that is misleading information based on the incomplete record of Appeal which they filed. All the original receipts produced and which are in the primary file confirmed that special damages was proved.

35. As regards future medical Expenses of Kshs.150,000/=, the same was pleaded and the trial court awarded Kshs.100,000/=. The medical report by Dr. John Mutunga indicates the Respondent would need further surgery to remove the implant at cost of Kshs.150,000/= all-inclusive and had a degree of 40% degree of permanent incapacitation. The Report by Dr. Wambugu's report dated 22.11.2018 indicated that the surgery will cost Kshs.75,000/= and the respondent had suffered a degree of 14% permanent incapacitation. It is therefore common ground that the respondent will need to undergo surgery to remove the implant. The trial court placed this cost at the average of the two proposed cost of the said surgery. I find no reason to interfere with this award as the court placed the cost at an average of the two sums proposed.

E. Disposition.

36. The upshot is that this Appeal is partially successful. The judgment/decree of Hon I. Kahuya, Principal Magistrate delivered in Machakos CMCC NO 231 OF 2018 is partially set aside as related to the finding on liability and the same is settled at 50% - 50% , to be borne by both parties.

37. The award on General damages being Ksh.750,000/= will therefore be apportioned at 50% by each party. The award of Special damages and Cost of future treatment will remain as awarded in the primary suit. The respondent too will have costs of the primary suit.

38. Each party will bear their costs of this Appeal.

39. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JUNE, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 19TH DAY OF JUNE, 2024

In the presence of;

No appearance for Appellant

A.K Mutua for Respondent

Sam Court Assistant