Barasa v Khaemba (Suing Through His Brother and Next Friend Alex Simiyu Mulongo) (Civil Appeal 76 of 2023) [2024] KEHC 9849 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 76 OF 2023

REA OUGO, J

JULY 19, 2024

BETWEEN

PROTUS WAFULA BARASA ..... APPELLANT

AND

AMOS WANJALA KHAEMBA (SUING THROUGH HIS BROTHER AND NEXT FRIEND ALEX SIMIYU MULONGO) ..... RESPONDENT

(An appeal from the judgment and decree of Ho. J.O.Manasses (RM) delivered on 6/7/2023 in Sirisia PMCC No. 53 of 2021)

JUDGMENT

1. This is an appeal against the trial magistrate's finding on quantum and liability. The respondent sued the appellant, the owner of motor vehicle registration number KBQ 790A. It was alleged that the appellant drove the vehicle negligently causing it to knock a motorcycle where the respondent was a pillion passenger. This happened on the 5.9.2021. It was alleged that the respondent sustained a cut wound on the upper lip, blunt injury to the chest, and bruises on the left-hand palm, and left thumb.

2. The trial court found the appellant 100% liable for the accident and awarded Kshs. 400,000/- as general damages and special damages of Kshs 6,550/-.

3. The appellant is dissatisfied with the judgment of the subordinate court and has lodged this appeal on the following grounds:

    1. That the learned trial magistrate erred in law and fact in holding the appellant 100% liable for negligence without taking into account the evidence on record.

    2. That the learned trial magistrate erred in law and fact in failing to apportion liability on the basis of contributory negligence on the part if the respondent and third party.

3. That the learned trial magistrate erred in law and in failing to consider the submissions by the appellant on both the issues of liability and quantum.

4. That the learned trial magistrate erred in law and fact in using the wrong principles in the assessment of damages payable to the respondent thereby arriving at the erroneous decision.

5. That the learned trial magistrate erred in law and fact in awarding excessive amount in damages in view of the injuries pleaded and proved.

Analysis And Determination

4. The appellant submits that the police officer, Pw4 did not help the respondent's case as she was not the author of the police abstract, and neither did, she produce the police file. Pw4 testified that the appellant had not been charged with the accident. The police abstract produced by the witness cannot be conclusive proof of liability on the part of the appellant. It was further submitted that Pw1 and Dw1 gave two different versions of how the accident occurred. When the court is faced with two conflicting versions of how the accident occurred, the liability is usually apportioned equally among both parties. See *Hussein Omar Farah v Lento Agencies* [2006] eKLR. On quantum it was submitted that the respondent had sustained soft tissue injuries and he was recovering well. The report from Dr. Gaya dated 11/3/2022 confirmed that the respondent had recovered well from the injuries and there was no degree of permanent disability awarded from the two doctors. Guided by the decisions in the following case; *Penina Waithira Kaburu vs Lp* [2019] eKLR , *Rege v L A (Minor suing through her father and next friend GAA)* (Civil Appeal E111 of 2021) [2022]KEHC eKLR and *FM (Minor suing through mother and next friend MWM v JNM & Another* [2020] eKLR, the appellant urged this court to award the respondent between Kshs. 80,000/- to Kshs. 100,000/-.

5. The respondent in his submissions highlighted that the accident occurred and Dw1 confirmed to be the driver of the vehicle. The accident could not have happened if the appellant had not joined the highway from the feeder road without a proper lookout. The pillion passenger did not cause the accident. The appellant was 100% to blame.

Analysis And Determination

6. This being the first appeal, the Court must reconsider and re-evaluate the evidence and draw its conclusion. However, the Court must make due allowance for the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another v Associated Motor Boat Company Ltd.& Others* [1968] EA 123:

> 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 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 made 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 (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955], 22 E.A.C.A. 270).

7. Alex Simiyu Mulongo (Pw1) testified that they were heading to Bungoma along the Bungoma Malaba road and were on the left side of the road. On the opposite lane, he saw the vehicle being driven at high speed on a feeder road towards the Bungoma-Malaba main highway. The feeder road was on the right-

hand side. At Nambuchi, the driver without making any indication suddenly joined the highway from the feeder road to the extreme left side of the road and rammed onto the motorcycle.

8. Dw1 testified that he was driving from Malaba towards Bungoma. He arrived at the centre called Nambuchi and was to turn left. He indicated and drove at low speed. He testified that the tail of the vehicle was still on the road when he heard a loud bang and stopped the vehicle. His vehicle had been hit by a motorcycle at high speed. The left tyre burst and the vehicle's front part got damaged. Dw1 explained that the motorcycle was overtaking from the left. On cross-examination, he confirmed that the feeder road is on the right. He also testified the left side of the vehicle was damaged.

9. In this case, the respondent was a pillion passenger and could not have contributed to the accident. I also note that the appellant took out third-party notice and on 3/11/2022 the appellant's advocate informed the trial court that an interlocutory judgment had been entered against the third party. The court in *Janet Kathambi v Charity Kanja Njiru* [2021] eKLR observed that:

> " 17. It is not in dispute that the deceased was a pillion passenger. Authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident from carrying since he does not have control over the motorcycle. This Court agrees as much. This Court pronounce itself on this issue in the case of Civil Appeal No. 136 of 2019 *Kubai Kithinji Kaiga (Suing as the legal representative of the estate of John Kaiga (Deceased) v Kenya Wildlife Service*."

10. The trial court therefore did not err in apportioning the appellant 100% liability.

11. I now turn to consider the award of damages. I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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"

12. The appellant submits that an award of Kshs 80,000/- would be sufficient. He relied on the case of *Rege v LA (Minor suing through her father and next friend GAA* Civil Appeal E111 of 2021 [2022]KEHC 16634 eKLR where the court substituted an award of Kshs 400,000/- with 80,000/-. The respondent submitted that the award of the subordinate court was reasonably low. The appellant also relied on the case of *FM (Minor suing through mother and next of friend MWM) JNM & another* [2020] eKLR, where an award of Kshs. 100,000/- was made where the plaintiff sustained multiple soft tissue injuries.

13. The respondent submitted that in his submissions in the lower court, he had sought an award of Kshs. 500,000/- and that the award of Kshs.400,000/- was reasonable albeit low. That the amount that was awarded was not inordinately high nor excessive to warrant this court to interfere with it and he urged the court to uphold the lower court award.

14. The injuries sustained by the respondent were not disputed. He proved that he sustained the soft tissue injuries enumerated in his plaint. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR the court awarded damages of Kshs 140,000/- where the plaintiff sustained soft tissue injuries. In my view the award of Kshs. 400,000/- was inordinately high.

15. In conclusion, I substitute the award of Kshs 400,000/- with an award of Kshs 140,000/- as general damages. The award on special damages was not challenged. The appellant shall have the cost of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF JULY 2024

R.E. OUGO

JUDGE

In the presence of:

Miss Nyabuto - For the Appellant

Respondent -Absent

Wilkister/ Diana - C/A