Karau & another v Mutemi (Civil Appeal E075 of 2023) [2024] KEHC 9403 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9403 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E075 OF 2023

LM NJUGUNA, J

JULY 24, 2024

BETWEEN

PAUL BUNDI KARAU ..... 1ST APPELLANT

DANIEL MAITHIMA RUKUNGA ..... 2ND APPELLANT

AND

PETER MUTEMI ..... RESPONDENT

(Appeal arising from the decision of Hon. .J.W. Gichimu SPM in Runyenjes SPMCC No.E048 of 2021 delivered on 07th November 2023)

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 07th December 2023 challenging the decision of the trial court and seeking the following orders:
    a. That the judgment of the trial court be set aside;
    b. That the respondent's suit in the trial court be dismissed with costs;
    c. That the assessment of general damages be set aside and the award be reduced downwards;
    d. That the assessment of special damages be set aside in its entirety; and
    e. That the respondent do bear the costs of the appeal.
2. The appeal is premised on the grounds that:
    a. The learned trial magistrate erred in law and fact in allowing the respondent's suit without any proof of negligence on the part of the appellants;

b. The learned trial magistrate gravely erred in law and fact by misdirecting himself in holding that the 2nd appellant did not witness the accident and therefore entered judgment in favour of the respondent against the appellants;

c. The learned trial magistrate erred in law and fact by disregarding the appellant's evidence that the respondent was a passenger and not a pedestrian as alleged;

d. The learned trial magistrate erred in law and fact by disregarding the evidence that this was a self-involved accident and there was no third party involved;

e. The learned trial magistrate erred in law and fact by awarding special damages yet the respondent admitted that the medical bill was cleared by the appellants' agent;

f. The assessment and award of general damages for pain and suffering and loss of amenities is inordinately high as to represent an erroneous estimate; and

g. That the learned trial magistrate erred in law and fact by disregarding the appellant's pleadings, evidence and submissions.

3. The respondent filed plaint dated 18th June 2021 seeking judgment against the appellants for general damages for pain and suffering and loss of amenities and future medical expenses, special damages of Kshs.17,550/= and costs. It was the respondent's case that he was a pedestrian along Embu-Meru Road when at Kathangeri area, the appellants or their driver or agent drove motor vehicle registration number KBU 795Y and caused it to veer off the road and hit the respondent. He blamed the appellant's negligence for the injuries he sustained.

4. The appellants filed a statement of defence dated 25th February 2022 wherein they denied the averments made in the plaint and alluded contributory negligence on the part of the respondent. In his reply to defence, the respondent reiterated the averments made in the plaint. The matter proceeded to hearing and PW1 was the respondent. He stated that on the day of the accident, he was a pedestrian at Kathangeri when the appellants' motor vehicle lost control, fell and knocked him down. That as a result of the impact, he lost consciousness and when he woke up the following day, he found himself at Embu Level 5 Hospital where he was admitted until 07th January 2020. That he sustained several cut wounds on the left arm and injury to his fingers. That he also sustained head injuries.

5. He stated that he reported the accident at Runyenjes Police Station and he was issued with a P3 form and police abstract. He produced documentary evidence in support of his case. On cross-examination, he stated that after the accident, he was taken to the hospital by a motorcycle rider. That an employee of the 2nd appellant from the Embu office, known as Sammy, visited him in hospital severally and paid the medical bill.

6. PW2 was PC Winnie Sembeyo of Runyenjes Police Station who stated that the accident was reported at the station and that the plaintiff was injured. She produced the police abstract On cross-examination, she stated that the respondent was a pedestrian walking on the right-hand side of the road towards Meru and the lorry veered off its lane, crossed the road and knocked him down. That the respondent was not a passenger in the motor vehicle, and the accident was not self-involving.

7. DW1 was the 2nd appellant, who stated that he is the registered owner of motor vehicle registration number KBU 795Y which is used to transport farm produce from Meru to Nairobi. That on the day of the accident, he was informed that the driver of the said motor vehicle and the respondent had been taken to Embu Level 5 Hospital following the accident. That he sent his employee known as Samuel Kathimba to visit them in hospital and pay their bills, which he did but the respondent did

not return any receipts. On cross-examination, he stated that the motor vehicle was involved in the accident and the respondent was injured in the same accident. He stated that he did not witness the accident. The trial court found the appellants 100% liable for the accident and awarded general damages of Kshs.300,000/= and special damages of Kshs.770/=

8. The court directed the parties to file their written submissions but none of them complied.

9. The issue for determination is whether the trial court erred in its award of general and special damages in the circumstances of the case.

10. It is worth reiterating that the appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of *Okeno v. Republic* (1972) EA 32 wherein the court held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

11. It was the testimony of PW1 and PW2 that the respondent was a pedestrian on the road at the time of the accident. On their part, the appellants herein allege that the respondent was a passenger in the said motor vehicle. The standard of proof is on a balance of probabilities. From the available evidence, it is more likely that the respondent was a pedestrian and not a passenger. The appellants allege that the testimony showed that the accident was self-involving and that there were no third parties involved. From the testimonies of PW1 and PW2, the accident was caused by the driver of the said motor vehicle when he lost control of it and knocked down a pedestrian who was walking on the opposite side of the road, who is the respondent herein. From the evidence on record, it is my considered view that the appellants were to blame for the accident.

12. DW1, the 2nd appellant, stated that he did not witness the accident but he was informed of it and he sent one of his employees to the scene and another one to the hospital. That it is his employee who paid the hospital bill for the driver of the motor vehicle and the respondent. He stated that the respondent was supposed to return some receipts to his office once he was released from the hospital but he failed to do so. The fact that the 2nd appellant paid the hospital bill for the respondent does not mean that he was a passenger in the motor vehicle.

13. On the issue of damages, the trial court awarded Kshs.300,000/= as general damages for pain and suffering. The respondent suffered the following injuries: mild head injury, swelling and pain on the right arm and cuts on the left arm and a degloving injury on the left hand. The medical report by Dr. Kenneth Munyi was generated from the respondent's hospital treatment records and it states the same injuries. He estimated that the respondent would suffer 10% permanent incapacity and he will require physiotherapy sessions to restore functions in his right hand. He estimated future medical expenses at Kshs.100,000/=.

14. In the case of *Cornilliac v St. Louis* [1968] WIR 491 the court stated that assessment of damages is motivated to be within the following factors:

    1) The nature and extent of the injuries sustained;

2) The nature and gravity of the resulting disability;

3) The pain and suffering endured; and

4) The loss of amenities and the effect of future pecuniary prospects.

15. At the trial, the respondent proposed an award of Kshs.800,000/= as general damages and he relied on the cases of *Easy Coach Ltd v. Emily Nyangasi* (2017) eKLR where the High Court upheld an award of Kshs.700,000/= for soft tissue injuries and degloving injuries to the right hand and right leg and *Moses Wakibi Njoroge v. PMM & Another* (2021) eKLR where the High Court increased an award of Kshs.250,000/= to Kshs.500,000/= for head injury, deep abrasions over the left upper hip and chin, degloving injury to the left shoulder, degloving injury to the right hand and wrist, abrasion on the left knee join and disability assessed at 5%. In these cases, the injuries are slightly more severe than the ones suffered by the respondent.

16. The appellants relied on the cases of *Theresia Mukhayi Inji v. Solo Plant (K) Limited* (2016) eKLR where the court awarded Kshs.70,000/= for blunt injuries to the shoulders and trunk, *Lilian Achieng (a minor suing through Rusalia Atieno Omaya) v. Nation Media Group* (2005) eKLR where Kshs.60,000/= was awarded for general damages in the year 2005 for soft Tissue injuries and *HB (a minor suing through next friend DKM) v. Jasper Nchonga Magari & Another* (2021) eKLR where the court upheld an award of Kshs.65,000/= for soft tissue injuries without disability. The appellants proposed an award of Kshs.60,000/= as general damages for pain and suffering.

17. As mentioned earlier, the respondent is reported to have suffered 10% disability from the injuries sustained. After considering the cases placed before it, the trial court awarded Kshs.300,000/=. I find this award to be fair and just and there is no reason to interfere with it. In the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5, the Court of Appeal held:-

> " 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...."

18. As for special damages, the trial court awarded Kshs.770/= after finding that it was the only amount that was specifically pleaded and strictly proved. I also see no need to unsettle this finding because the same is correct.

19. I find that the appeal lacks merit and it is hereby dismissed.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent