Kiama v Makena & 2 others (Civil Appeal E416 of 2023)
[2024] KEHC 9713 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9713 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E416 OF 2023

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

EVANS MAINA KIAMA ..... APPELLANT

AND

LORNA MAKENA ..... 1ST RESPONDENT

NYARIGU RODGERS SANDANYI ..... 2ND RESPONDENT

BASHY INVESTMENTS LIMITED ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. M. Kinyanjui in Kiambu Chief Magistrate's Court civil case number 537 of 2017 dated 23rd October 2023)

JUDGMENT

1. On 18-06-2017 the 1st respondent was involved in a road traffic accident with motor vehicle registration number KAK 355N which was being driven by the appellant. The said vehicle was said to have been co-owned by the 2nd and 3rd respondents. Subsequent thereto, the 1st respondent instituted in Kiambu Chief Magistrate's Court civil case number 537 of 2017. The matter went on for trial and the Honourable trial magistrate found the appellant, 2nd and 3rd respondents 100% liable for the accident and awarded the 1st respondent Kshs 1,600,000.00 as damages for pain and suffering and loss of amenities, Kshs 340,650.00 as special damages, Kshs 300,000.00 for future medical expences, costs of the suit and interest.

2. The appellant was aggrieved by this judgment and preferred this appeal. The grounds of appeal were;

    1. That the learned magistrate erred in law and in fact in holding that the appellant was wholly liable for the accident giving rise to the claim by the 1st respondent.

2. That the learned magistrate erred in law and in fact in holding and finding that the appellant was wholly to blame when the evidence tendered was clear that the accident was solely and largely caused by the 1st respondent and hence liability ought to have been apportioned.

3. The learned magistrate erred in law and in fact in awarding general damages that was excessive in the circumstances.

4. That the learned magistrate erred in law and in fact in awarding future medical expences of Kshs 300,000.00.

5. That the learned magistrate erred in law and fact in not considering the injuries sustained by the plaintiff could have warranted an award of Kshs 1,00,000/= (sic) as general damages.

6. That the learned magistrate erred in law and in fact in not considering the evidence tendered and submission and authorities cited by the defendant.

3. I will start with the issue of liability. The 1st respondent's evidence was that she was standing beside the road when the appellant drove the motor vehicle negligently, veered of the road and hit her from behind. She was rushed to hospital by a good Samaritan where she was admitted for two months after which she went to the police station where the accident had already been reported. She called a police officer from the police station who confirmed that the accident was reported by the appellant.

4. The appellant testified and called one witness. The appellant's evidence was that he was driving at a moderate speed of 50 kph when the 1st respondent suddenly dashed onto the road and despite his efforts to avoid the accident, he hit her as she was crossing from his right. The appellant's witness testified that the 1st respondent entered the road from the left side and this is where the trial magistrate drew the line as to the consistency of the defence witnesses.

5. The appellant has submitted that the magistrate was wrong in drawing the above conclusion. He urges that if there was any inconsistency, it was by the 1st respondent who testified that she was off the road yet her other evidence showed that she was crossing the road. The appellant states that the police officer spoke of the 1st respondent having been crossing the road. I have gone through the recorded proceedings and I am unable to see such evidence.

6. PC Zacharia Kibe from Karuri police station (PW2) stated that the appellant reported that he hit the 1st respondent when she was crossing the road. It is clear to me that the allegations of the appellant crossing the road came from the appellant when he went to report the accident. One would expect a motorist to give a story which is favourable to him when he visits a police station. The fact that the 1st respondent did not indicate to the police how the accident occurred when she went to report does not mean that she could not tell how the accident occurred.

7. The appellant has put emphasis on the fact that the P3 form produced as plaintiff's exhibit 4 indicated at paragraph *2* that the appellant was crossing the road. The part is supposed to be filed by the medical officer who was not called to testify and in any event, he was not at the scene of the accident. It is the same history given in the occurrence book by the appellant. Should the court have believed this part of the document more than the account given by the witnesses? In my considered view a P3 form is meant to assess the degree of injuries and not the proof of the offence or incident. I do not see the reason to disturb the magistrate's finding on this issue especially considering that I did not have the advantage of seeing the demeanor of the witnesses. The appellant's account of the way the accident occurred was inconsistent and the magistrate who had the opportunity to watch the demeanor of the witnesses was justified to make conclusions the way she did. I uphold the finding of the magistrate that

the appellant was 100% to blame for the accident. He was in control of a lethal machine and ought to have been more careful.

8. On the issue of general damages for pain and suffering, the appellant submits that the same was too high such that it amounted to erroneous estimate as compared to other cases of similar nature. He relied on the several authorities which he submits are comparable to the 1st respondent's case. One of the authorities cited by the appellant is *George Raini Atungu v Jared Ogwoka Ondari* (2021) eKLR in which the court awarded a sum of Kshs 1,000,000.00 where the respondent had sustained head injury with cut wounds on the left parietal region of the head, chest contusion, fracture of the ribs on the right side, multiple bruises on the upper limb bilaterally, fracture of the right tibia/fibula bones, fracture of the pelvis and multiple bruises on the lower limb. The appellant also urged this court to consider award in *Daneva Heavy Trucks & Another v Chrispine Otieno* (2022) eKLR where the court settled for Kshs 800,000.00 for fracture of pelvis and fracture of the left tibia and fibula. The 3rd authority by the respondent was Mwangi v Siloma & Another, civil appeal number E102 of 2022 where the Honourable Justice D.S. Majanja awarded Kshs 1,200,000.00 for injuries which appears to me to have been more serious than in the other authorities.

9. The 1st respondent did not file submissions in this appeal but I have given consideration to the authorities she cited in the lower court. She cited *Peace Kemuma Nyangéra v Michael Thuo & Another* (2014) eKLR and *Dennis Nyamweno Openda v Anwarali & Bothers Limited & Another* (2015) eKLR. I have given due consideration to all the above authorities and in my view, the 1st respondent's authorities involved more serious injuries and resultant effects than the 1st respondent's case. For instance, in the Peace Kemuma case, the plaintiff underwent three serious surgeries and had to be taken through several physiotherapy sessions. Her permanent incapacity was assessed at 45% unlike the 1st respondent's case where her incapacity was put at 20%. In the Dennis Openda case, in addition to serious injuries, his nerves were affected and he suffered what was described as wasting of muscles. In the 1st respondent's case, he appeared to have healed except for the pending removal of implants. Although the 1st respondent in his evidence made claim that she was unable to walk for long or conceive, the medical report had no such findings.

10. Having considered the above analysis and doing all the best I can, I find that the award of Kshs 1,600,000.00 was on the higher side and I am minded to disturb the same by reducing it to Kshs 1,200,00.00.00.

11. The appellant has also challenged the award of Kshs 300,000.00 for future medical expences. The only reason he gives for the challenge is that the doctor had indicated that the 1st respondent had already spent 494,600.00. The appellant suggested an award of Kshs 200,00.00 without giving the justification for the same. I must confess that I don't understand this line of submissions. The doctor's report dated 1-09-2017 gave his estimate which in my view was an expert opinion. Neither the appellant nor his advocate is an expert in the medical field. The appellant should have challenged this opinion by calling for a second opinion from his own doctor which he did not. I have no basis to doubt the doctor's expert opinion and I decline the invitation by the appellant to set aside this award.

12. Since the appellant has partially succeeded in this appeal, I proceed to award him half costs of the appeal. Interest on the damages shall attract interest from the date of the lower court's judgment until payment in full.

13. In conclusion, the lower court's judgment dated 23-10-2023 in Kiambu Chief Magistrate's Court civil case number 333 of 2021 is hereby set aside and substituted for judgment for the 1st respondent against the appellant and the 2nd and 3rd respondents in the following terms;

a. Liability - 100%

b. General damages for pain and suffering and loss of amenities - Kshsh 1,200,000.00.00.

c. Future medical expences - Kshs 300,000.00.

d. Special damages - Kshs 340,650.00

e. Costs of the suit in the lower court.

f. The appellant shall have half costs of this appeal

g. Interest on (b), (c) and (d) above from the dated of the lower court's judgement at courts rate until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.