**Njane & another v Warui (Civil Appeal E467 of 2021)**
**[2024] KEHC 9096 (KLR) (Civ) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9096 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E467 OF 2021**

**AC BETT, J**

**JULY 19, 2024**

**BETWEEN**

**BENSON MWANGI NJANE ..... 1ST APPELLANT**

**KENNEDY NJOROGE KABURI ..... 2ND APPELLANT**

**AND**

**NANCY NYAMBURA WARUI ..... RESPONDENT**

***(Being an appeal from the Judgement and Decree of the Honorable Court delivered on 3rd April 2019 by Hon. P. Muholi SRM)***

## JUDGMENT

1. On 19th June 2016, the respondent was a lawful passenger aboard motor vehicle registration number KBA 677T when the 2nd appellant so negligently drove and controlled motor vehicle registration number KCD 209J that he caused it to collide with motor vehicle registration number KBA 677T. As a result, the respondent sustained injuries. The respondent filed suit claiming damages. The trial magistrate found the 2nd appellant 100% liable for the accident and awarded the sum of ksh.320,000/= being general damages for pain and suffering plus special damages and costs of the suit.

2. The appellants were dissatisfied with the decision of the trial magistrate and filed an appeal in which they challenged the finding on liability and the quantum. According to them, the respondent did not prove the injuries and the award was too high in view of the failure to prove the same. In the alternative it was the appellant's case that the general damages awarded were too high in view of the injuries sustained by the respondent.

3. I have perused the memorandum of the appeal and the parties' written submissions. There are two issues for determination which is the issue of liability and the is the issue of quantum.

4. In the case of Selle And Another Vs Associated Motor Boaat Co. Ltd And Another (1968) EA 123 the Court of Appeal held that the duty of an appellate court is to re-evaluate and re-examine the evidence adduced at the trial court in order to reach an independent conclusion having in mind the fact that the court had no opportunity to hear and observe the parties as they testified. The court also held that:

> " A court on appeal will not normally interfere with the finding of facts by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principle in reaching his conclusion."

5. In the case of Mbuthia Macharia Vs Annah Mutua Ndwiga And Another (2017) eKLR, the Court of Appeal stated:

> " The Judge alluded to the provision of section 107 of The *Evidence Act*, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleged his case depends upon exist. This is known as the legal burden and we need not repeat save to emphasize the same principle of law is amplified by the learned authors of the leading textbook The Halsbury's Laws of England, 4th Edition, volume 17 at paras 13 and 14 describes it thus: -
>
> "The legal burden of proof which remains constant throughout a trial, it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy a court or a tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential part of his case. These may therefore be separate burdens in a case with separate issues."

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burden initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during trial varies, so will the evidential burden shift to the party who would fail without further evidence."

6. The respondent adduced evidence that she sustained injuries because of the accident. Immediately after the accident, it was the respondent's testimony that she went to a pharmacy for treatment where she was bandaged and given analgesics. She produced a cash sale receipt dated 19th June 2016 from Dawaplus Pharmaceuticals. She also produced a letter from the said Pharmacy dated 20th July 2017 confirming that she was attended to on the date of the accident when she presented herself with pain. The respondent also produced a treatment sheet from Mukurweini District Hospital where she was eventually diagnosed with an avulsion fracture to the distal end of the radius. I have perused the treatment sheet. On her first presentation, she gave a history of painful and swollen wrist joint for one month. This was on 14th July 2016, a month after the accident. Initially, she was given treatment for tenosynovitis. On 21st July 2016, the respondent returned to the hospital with severe pain to the wrist where an x-ray revealed the fracture. I find that the respondent was able to demonstrate, on a balance of probabilities, that the accident resulted in the fracture to her wrist. There was no suggestion made

at the hearing that her injuries arose from anything else other than the accident that occurred on 19th June 2016.

7. The injury was a fracture of the distal end of the right radius. In her evidence, the respondent said that she also sustained injuries to the knee. However, the only particulars listed in the plaint was the fracture of the distal end of the right radius. It is trite law that a party is bound by their pleadings. The respondent was examined by Dr. W. M. Wokabi whose medical report was produced by consent. According to the doctor, who is a surgeon, the fracture united well and the hand was reasonably rehabilitated. In his opinion, the residual pains from the injury would be felt for an indefinite long time. He assessed permanent disability of 8%.

8. On its part the appellants called a witness who produced the medical report of Dr. J. Kahuthi, a general practitioner who subjected the respondent to a second medical examination and found the wrist joint movement normal and the fracture adequately united.

9. Unfortunately, since both doctors did not attend court, their evidence could not be subjected to cross-examination. However, both are in agreement that the respondent sustained a fracture to the wrist. Dr Kahuthu was of the opinion that a fracture is an extremely painful injury to be missed for one month. However, the treatment history shows that an x-ray was only done after one month as the doctor misdiagnosed the patient. In the circumstances, I agree with the trial magistrate that the respondent discharged the burden of proof and that she indeed sustained the injury as pleaded in the plaint.

10. The appellants urged the court to set aside the award of ksh.320,000/= and substitute the same with a sum between ksh.50,000/= and ksh.100,000/=. Court awards must be within consistent limits and must be made upon considering comparable or similar injuries and awards. See Denshire Muteti Wambua Vs Kenya Power And Lighting Co., Ltd [2013] Eklr And Michael Okello Vs Priscilla Atieno [2021] eKLR.

11. In the lower court, the appellants submitted that ksh.80,000/= would be adequate compensation. They relied on the case of Paul Karimi Kithinji Vs Joseph Mutai Kireria [2018] eKLR where ksh.150,000/= was awarded for segmental fracture of the right proximal ulna and minor laceration of the face. They also relied on the case of Jaldessa Diba T/a Dikus Transporters And Another Vs Joseph Mbithi Isika [2013] eKLR where ksh.350,000/= was awarded for back injury, injury to shoulder joints, fractured and dislocated right clavicle.

12. On her part, the respondent relied on the case of Gogni Construction Company Limited Vs Francis Ojuok Olene [2015] eKLR where a sum of ksh.350,000/= was awarded for fracture and dislocation of the elbow. She placed further reliance on Josephat Kaliche Ambani Vs Farm Industries Limited [2016] eKLR where the plaintiff sustained a cut wound on the left knee and was awarded ksh.200,000/= as general damages.

13. It is well established that in reviewing an award of general damages on appeal the court is governed by the principles laid down by Law JA in Butt Vs Khan 1977 KAR that: -

> " An Appellate court will not disturb an award of damages unless it is so inordinately high or low 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 is either inordinately high or low."

14. In light of the foregoing the court must address itself to the question whether the court took into account irrelevant factors or left out relevant factors and whether the award was inordinately excessive as to be a wholly erroneous estimate of the damages.

15. I find that in awarding ksh.320,000/=, the court took into account alleged recurrent pain and suffering which recurrent pain was not proved by the respondent. The evidence by both doctors were that the fracture had healed with no malunion. In my view, the trial Magistrate was influenced by Dr. Wokabi's report, which report was never subjected to cross examination. This report was made a month after the accident. Conversely, Dr. Kahuthi's report was that there were no present complaints nor physical disability resulting from the injury. Therefore, the trial Magistrate's award on the basis of Dr. Wokabi's report of recurrent pain was erroneous.

16. I also find that the award of ksh.320,000/= for a simple fracture to the wrist was inordinately high having regard the extent of the injuries, the prognosis and the current trend of awards for similar injuries. It has been held, time and again, that damages are meant to compensate a party, for loss suffered, and not to enrich him. The court should also be guided by past decisions although each case depends on its own facts. See Jennifer Mathenge Vs Patrick Muriuki Maina [2020] eKLR.

17. Upon careful consideration of the parties' submissions and the past awards made in respect to similar injuries and the prevailing inflationary trends, a sum of ksh.120,000/= would be adequate compensation for the respondent. I therefore make an order setting aside the award of ksh.320,000/= and substitute it with an award ksh.120,000/=.

18. On costs, I order that each party bear their own costs on appeal as the appeal succeeded partially.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 19TH DAY OF JULY 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:

No appearance for the appellants

Ms. Bwire for the respondent