Chepnyangoi & another v Wanjiru (Suing as Next Friend of Lavine Wanjiru) (Civil Appeal E068 of 2023) [2024] KEHC 10927 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10927 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E068 OF 2023

RN NYAKUNDI, J

SEPTEMBER 20, 2024

BETWEEN

REUBEN KIPKEMBOI CHEPNYANGOI ..... 1ST APPELLANT

ROYAL GROUP INDUSTRIES (K) LIMITED ..... 2ND APPELLANT

AND

PETER MWANGI ..... RESPONDENT

SUING AS NEXT FRIEND OF LAVINE WANJIRU

JUDGMENT

Representation:

M/s Kimaru Kiplagat & Co. Advocates

M/s Kimondo Gachoka & Co. Advocates

1. The appeal is both on quantum and liability. At the trial court, the Respondent sued the Appellant claiming special damages, general damages for pain and suffering and loss of amenities, Costs of the suit plus interests arising from the accident that occurred on 19th June, 2022, wherein it is alleged that the Respondent was a lawful passenger aboard motor cycle registration number KMFR 912R along Eldoret-Ilula Road when at Kao La Amani Junction area, the Appellants' agent, servant and or driver so negligently drove managed and/or controlled motor vehicle registration number KCB 421W Toyota Probox in a careless manner, causing it to lose control and knocked down and/or rammed into motor cycle registration number KMFR 912R which the Respondent was aboard and in consequence whereof the Respondent sustained severe personal injuries.

2. In response to the statement of claim dated 5th July, 2022, the Appellants apportioned blame on the Respondent for contributing to the accident. The Appellants denied that the accident occurred as a result of negligence on the part of the 1st Appellant authorized driver in driving, managing and

or controlling motor vehicle registration KCB 421W. The Appellants equally denied ownership of the subject motor vehicle. The Appellants denied that the respondent suffered injuries and incurred expenses as pleaded.

3. After trial Judgment was delivered on 31/03/2023 and the Appellants were found 100% liable and damages assessed as hereunder: -

   a. General Damages ..... Kshs. 200,000/=

   b. Special Damages ..... Kshs. 6,000/=

   c. Total ..... Kshs. 206,000/=

4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (10) grounds: -

   a. That the learned trial magistrate/adjudicator erred in law and in fact by failing to dismiss the Respondent's suit whereas negligence on the Appellants was not proven during trial.

   b. That the learned trial magistrate/adjudicator erred in law by failing to dismiss the Respondent's suit whereas the respondent failed to discharge the burden of proof so as to warrant a judgment in her favour.

   c. That the learned trial magistrate/adjudicator erred in law and in fact by failing to take into account the relevant facts relating to the suit thus arriving at a decision that is wholly erroneous in law and facts and/or that a reasonable tribunal would arrive at in view of the evidence adduced.

   d. That the learned trial magistrate/adjudicator erred in law and in fact by holding the Appellants 100% liable for causing the accident contrary to the evidence on record and/or adduced during trial.

   e. That the learned trial magistrate erred in law and in fact by holding the Respondents 100% for the accident yet the court acknowledged that the witness contradicted themselves in their testimony.

   f. That the learned trial magistrate/adjudicator erred in law and in fact by failing to elaborate on a balance of probability, how the Respondent proved negligence and/or adduce reasons for holding the Appellants liable to the degree of 100%.

   g. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's written submission and legal authorities and/or precedents both on liability and quantum thereby arriving at a determination which is wholly erroneous in law.

   h. That the learned trial magistrate misdirected herself by failing to take into account the well-established principle requiring comparable awards to be made for comparable injuries sustained thereby failing into an error by awarding Kshs. 200,000/= which award is manifestly excessive.

   i. That the sum of Kshs. 200,000/= as general damages which award is excessive in view of the injuries sustained by the respondent thereby deviating from the principle of stare decisis requiring comparable awards being made for comparable injuries sustained.

j. That the learned trial magistrate erred in law in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering at Kshs. 200,000/= which very high all circumstances and injuries considered.

5. The appeal was canvassed vide written submissions. On record, I have submissions filed by both parties. They are summarised as hereunder: The Appellants' Submissions

6. The appellants made their submissions on both quantum and liability.

7. On the question of liability, learned Counsel Mr. Amihanda submitted that this court should dismiss the trial magistrate apportionment of liability of 100% as the Respondent has not proven any negligent acts or conducts by the appellant on a balance of probability and in the alternative this Honourable court should apportion liability at the ratio of 50:50 as the testimonies of both parties failed to assist the court to decide who was to blame for causing the accident. Additionally, it was counsel's submission that negligence should accrue to the Respondent for reasons that he did not have a helmet, reflectors and a licence which shows that they contributed to the injuries they sustained.

8. It was also pointed out by counsel that the trial court in its judgment noted that the eye witness accounts on the accident the sketch maps, skid maps and the abstract did not shed light on who was to blame for the accident, the appellant submitted that both parties are to blame for causing the accident and the trial court erred in holding the Respondent 100% liable when which therefore means that the parties are to blame for causing the accident. On this, counsel relied on the case of Welch versus Standard Bank Ltd (1970) EA 115 at 117 and Simon Versus Carlo (1970) EA 285.

9. On quantum, it was submitted for the Appellants that the Award by the trial court was inordinately high considering the injuries sustained by the Respondent being soft tissue injuries. The Appellants urged this curt to award Kshs. 100,000/= which according to them would be reasonable considering the injuries suffered. On this counsel cited the decisions in Power Lighting Company Limited & another versus Zakayo Saitoti Naingola & another (2008) eKLR cited in the case Jennifer Mathenge v Patrick Muriuki Maina (2020) eKLR.

10. Learned Counsel Mr. Amihanda submitted that in determining whether to interfere with quantum or not, the court has to bear in mind the following principle on assessment of damages;

a. Damages should not be inordinately too high or too low

b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.

c. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.

d. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shilling, then at the time of the judgment. Counsel further invited the court to consider the cases of Ndungu Dennis v Ann Wangari Ndirangu & another (2018) eKLR and the case of HB (Minor Suing through mother & next friend DKM) v Jasper Nchonga Magari & Another (2021) eKLR.

11. In concluding the appellants prayed that the appeal herein be allowed as prayed and the Appellants be awarded costs of the appeal.

The Respondent's Submissions

12. The Respondent started by pointing out that the appellate court will not normally interfere with a trial court's judgment on a finding of fact unless the same is founded on the wrong principles of facts or law as was set out in the Court of Appeal in Selle & Another versus Associated Motor Boat Co. Ltd. & Another (1968) EA 123.

13. The Respondent submitted on two limbs as well; liability and quantum. As to liability, it was the Respondent's submissions that at the trial court, the investigating officer led evidence to the fact that the Appellants' motor vehicle was overtaking when it was not safe. He therefore apportioned blame on the Appellants.

14. It was further Counsel's submission that in an attempt to shift blame on the Respondent, the Appellants testified in court, he testified and stated that it was the rider of the motorcycle who was to be blamed for the occurrence of the accident. He further stated that the motorcycle encroached into his lane thus causing the accident. That however, on cross examination, he admitted that the accident occurred on the motorcycle's lane. He further admitted that the statement he wrote and filed in court was not the correct version of the true occurrence of events. He further admitted that he was not having a driving license to prove that he was qualified to be on the road at the time of the accident.

15. According to the Respondent, the driver admitted the impact was on his front Bumper of his Motor Vehicle and that the accident occurred on the left lane as you face Eldoret town from Ilula, the rightful lane of the Motorcycle. Therefore, the respondent concluded that the Appellants' driver evidence cannot be relied on for reasons that it is contradicting and cannot be relied upon. The Respondent therefore prayed that the Appellants be found 100% liable.

16. On quantum, it was submitted for the Respondent that the award of Kshs. 200,000/= as general damages by the trial court was reasonable and commensurate to the injuries sustained by the Respondent. In support of this, the Respondent relied on the cases of Veronica Mkanjala Mnyapara versus Charles Kinanga Babu (2020) eKLR and the decision in Jyoti Structures Ltd & Another versus Charles Ogada Ochola (2022) eKLR. In the Respondent's view, the aforementioned authorities give a clear picture of the awards given in injuries that are comparable to the circumstances of this case.

17. It was submitted for the Respondent that the appeal is merely meant to deprive the Respondent of his right to enjoy the fruits of his judgement and the same should not be allowed as it would amount to injustice. The Appellants are not entitled to the orders sought in the appeal.

18. On special damages, the Respondent submitted that the award of Kshs. 6,000/= was supported by exhibits produced before the trial court.

Analysis & Determination

19. Being a first appeal, the court is called upon to look into the evidence and factual information presented at the trial court, evaluate the same and make a determination, conscious of the fact that the trial court had the advantage of observing the demeanour of the witnesses. The Court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "...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 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 into account of particular circumstances or probabilities materially to estimate the evidence."

20. I have indicated elsewhere in this judgment that the two limbs to this appeal are quantum and liability. I shall start with the issue of liability and then address the question of damages. The appellant has argued that the trial court erred in apportioning liability against the Appellant at 100% contrary to the evidence on record and/or adduced during trial.

Liability

21. Liability in road traffic accidents is ordinarily determined by identifying the party that caused or contributed to the accident. Whose fault was the accident?

22. The provisions of section 107,109 and 112 of the *Evidence Act* were extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

23. The Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR held:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> > 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."'

24. It is evident that an accident indeed occurred on 19/6/2022, involving motor vehicle registration number KCB 421W Toyota belonging to the Appellants and motor cycle registration number KMFR 912R and that as a result of which the Respondent sustained injuries.

25. On one hand the Appellants blame the Respondent for the accident whereas on the other hand the Respondent blames the Appellants for causing the said accident.

26. What then is the extent of the Respondent's liability? To determine this the Court will draw upon the evidence at the trial Court.

27. The account narrated by the Respondent's witness PC Sitty Mohammed was that an accident occurred involving motor cycle registration number KMFR 912R and motor vehicle registration KCB 421W ridden by the Respondent and the 1st Appellant respectively occurred on 19th June, 2022. She testified that the motor vehicle KCB 421W was being driven towards illulla and at the location of the accident, the said vehicle attempted to overtake another motor vehicle ahead of it and in the process collided with the motor cycle. She produced the abstract the abstract and confirmed that the matter was still pending under investigations.

28. The Respondent also testified that the Appellants' motor vehicle overtook another motor vehicle and in the process collided on his Motorcycle KMFR 912R. He equally produced a statutory notice and a demand letter.

29. Wycliffe Nyambane, testified that he is a Clinical Officer attached at Uasin Gishu County Hospital. He produced the attendance card, a prescription form, patient treatment card and the medical report done by Dr. Sokobe.

30. The evidence by the Respondent when placed on legal scale of balance of probabilities, it is more probable than not that the Appellants' was not paying attention to traffic rules and other road users when the accident occurred. The Respondent evidence in this matter was further corroborate by PC Sitty Mohammed.

31. I find no tangible evidence to disapprove the account of Respondent's witnesses' testimony and in the circumstances therefore, the will Court will not disturb the finding of liability by the trial Court. Accordingly, the trial Court did not err in apportioning liability at 100% against the Appellant.

32. In Chao vs. Dhanjal Brothers Ltd & 4 Others [1990] KLR 482 the court held that:

> " Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred in spite of the defendant having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff's case must fail."

Quantum

33. As regards quantum, in Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to

prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

34. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

35. I am to determine whether the award of general damages of Kshs. 200,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".

36. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.

37. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] Kneller. J.A, stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilangov.Manyoka[1961] E.A. 705, 709, 713; Lukenya RanchingandFarming Co-operativesSociety Ltdv. Kavoloto[1970] E.A., 414, 418, 419. This Court follows the same principles."

38. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

39. The injuries suffered by the Respondent were enlisted in the pleadings as:

a. injury to the chest

b. Blunt injury to the back

c. Blunt injury to both upper limbs

d. Blunt injury to the left leg

e. Bruises on the left ankle.

40. It should be appreciated that money cannot renew a physical frame that has been shattered or battered. The Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.

41. In Joseph Mwangi Kiarie & Another vs Isaac Otieno, H.C.C.A No. 30 of 2018, the award of Kshs. 300,000/= was reduced to Kshs. 180,000/=, for soft tissue injuries. In Michael Odiwuor Obonyo vs Clarice Odera Obunde, H.C.C.A. No. 01/2020, the award of Kshs. 500,000/= was reduced to Kshs. 200,000/= for soft tissue injuries.

42. It is important to note that when it comes to the issue of assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. The court is however conscious of the fact that no two cases are usually similar in terms of the nature and extent of the injuries sustained. The Court of Appeal in Stanley Maore vs Geoffrey Mwenda [2004] eKLR stated as follows-

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

43. I have considered the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that an award of Kshs. 200,000/= issued by the trial court is sufficient. I find no fault in the assessment of damages as appropriately guided in the Kemfro case (supra) on the jurisdictions of an appeal court to interfere or sustain the findings of the trial court.

44. Turning to special damages, Kshs. 6,000/= was pleaded. In the case of *Hahn vs. Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows;

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

45. The appellant never raised an issue with the special damages and therefore the same remains undisturbed.

46. In the end the Court finds no merit in this appeal and therefore proceeds to enter judgment in favour of the Respondent in the following terms;

i. Liability .....100% against the Appellant

ii. General Damages..... Kshs. 200,000/=

iii. Special Damages..... Kshs. 6,000/=

iv. Total .....Kshs. 206,000/=

v. Plus, costs and interest

SIGNED, DATE AND DELIVERED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2024.

In the Presence of:

Mr. Kiptoo for the Appellant

Mr Chonji for the Respondent

.....

R. NYAKUNDI

JUDGE