Kioko v Kitavi (Civil Appeal E043 of 2022)
[2024] KEHC 10706 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10706 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E043 OF 2022

FR OLEL, J

SEPTEMBER 16, 2024

BETWEEN

BONAVENTURE MUTINDA KIOKO ..... APPELLANT

AND

MBULA ROSE KITAVI ..... RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant was the defendant in the primary suit, where he was sued as the registered owner of Motor vehicle registration Number KAT 174A KAP Toyota Hiace (hereinafter referred to as the suit motor vehicle). It was alleged that on 15th February 2020, the respondent was boarding a motor cycle at Kimutwa shopping center- stage along Machakos -Kimutwa Road, when the suit motor vehicle was carelessly and recklessly driven and allowed to veer off the road and hit the respondent, off the road and while at the matatu stage and as a result she sustained sever bodily injury and suffered loss and damages.

2. The Appellant did file his statement of defence where he denied all the allegations made with respect to ownership of the suit motor vehicle and the accident. Further he denied the particular of negligence attributed to him and/or his driver and in the alternative averred that if an accident did occur, the same was substantially contributed to by the respondent's negligence and/or factors beyond his agents control and thus was not liable for the same.

3. During trial, the respondent called three (3) witnesses, a police officer, the respondent and a medical doctor. The Appellant on the other hand did not call any witness and their case was closed. The trial Magistrate after considering the evidence adduced and submissions made did find that the Appellant was 100% liable for the accident and proceeded to assess general damages for pain and suffering at Kshs.1,200,000/=, General damages for diminished earning capacity at Kshs.60,000/=, Special damages of Kshs.6,350/= plus costs and interest of the suit.

B. The Appeal

4. The Appellant, being dissatisfied by the whole judgment did file their memorandum of Appeal dated 13th April 2022 and raised the following grounds of appeal namely:-

    a. That the learned Magistrate erred in fact and in law in finding that the respondent was entitled to General damages of Kshs.1,200,000/=.

    b. That the learned Magistrate erred in law and in fact in awarding damages for loss of diminished earning capacity of Kshs.60,000/= when the said claim was not proved to the required standards.

    c. That the learned Magistrate erred in law and fact in assessing general damages for diminished earning capacity awardable to the respondent which was inordinately excessive and unjustified in the circumstance.

    d. That the learned Magistrate erred in fact and in law in failing to consider the Appellants evidence on quantum.

    e. That the learned Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

5. At the hearing, the Plaintiff called three witnesses. PW1 PC Gideon Kipruto from Machakos Traffic base testified that on February 15, 2020 an accident did occur at Kimutwa area and was reported at the police station. It involved the suit motor vehicle driven by one Silvester Musyoki and the respondent. The investigations had revealed that the suit motor vehicle was travelling toward Kimutwa direction and it hit the motor cycle, which was also on its left lane facing Kimutwa and as a result, the pillion passenger/ the respondent sustained serious injuries and was rushed to Machakos level 5 hospital. PW1 produced the police abstract and further indicated that Investigations were carried out revealed that the driver of the suit motor vehicle was to blame for the accident.

6. Upon cross examination PW1 indicated that he was not the investigating officer and relied on information retrieve from the OB and police abstract. He did not know why the motor cyclist ran away after the accident , but it was conclusively determined that the driver of the suit motor vehicle one Sylvester Musyoki was to blame for the accident which occurred.

7. PW2 Rose Mbula Kitavi adopted her witness statement, where she stated that on the material day, she was boarding a boda boda at Kimutwa shopping center stage to go back home from work. Before they had set off, the suit motor vehicle came from behind at high speed veered off the road and knocked them down and as a result found herself under the suit motor vehicle. She was rescued and rushed to Machakos level 5 hospital. As a result of the accident she had sustained serious injuries and sought for compensation. PW2 produced her claim supporting documents and further stated that she had not fully healed and had pains on her leg restricting her movement over a long distance.

8. PW2 reiterated that they were hit while off the road and she was still in the process of climbing the motor cycle and it was the appellants driver to wholly blame for the accident as he knocked them from behind while they were still stationary. Under cross examination PW2 maintained her earlier evidence as to the circumstances of the accident and stated that as a result she had sustained a waist fracture and injuries to the neck and limbs. At the hospital she was treated and discharged the same day and had not completely healed. She still had pains on her back and leg. In reexamination, she stated that she had carried out a NTSA motor vehicle search and it revealed the Appellant as the owner of the suit motor vehicle and was thus liable for his driver's negligence.

9. PW3 Dr Titus Ndeti testified that he had examined the respondent, who had as a result of the accident sustained blunt injuries on the right side of the head, blunt injuries to the neck, blunt injuries to the anterior chest wall, multiple bruises on both hands/ fingers, blunt injury to the left hip thigh, incomplete fracture of proximal. At time of examination, the respondent had not fully healed and still complained of pain on the injured body parts. In conclusion PW3 stated that the respondent had sustained soft tissue injury and had 8% incapacitation.

10. Upon cross examination, PW3 confirmed that the respondent had suffered a single fracture, which would heal within 6 months but had assessed her injuries as grievous harm due to the nature of skeletal injuries sustained. Any bone injury would take long to heal and remained a degree of disability, which in his assessment was 8% and according to the Gazetted medical/disability scale that ranged to between Kshs.30,000/= to Kshs.60,000/=.

11. The Appellant was given time to call his witnesses, but failed to do so and their case was closed without any evidence being tendered in their favour.

C. Determination

5. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

6. In *Coghlan v Cumberland* (1898) 1 Ch, 704, the court of

> " Appeal of England stated as follows;
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> > "Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen."

5. In *Peters v Sunday Post Limited*(1968) EA 123 the court of

Appeal for East Africa stated as follows;

> " It is a strong thing for the appellate court to differ from the finding, on a question of fact, of a judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine, whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a difference conclusion."

5. Therefore, this court has solemn duty to delve at some length into factual details and revisit facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

6. In this appeal, the Appellant is only challenging the quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant 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 in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors or 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".

5. The Court of Appeal in *Sheikh Mustaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 held that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

5. From the record, it is not in dispute that an accident occurred involving the suit motor vehicle and the respondent and as a result she sustained serious bodily injuries. The injuries sustained were soft tissue injuries to the neck, anterior chest wall, right and left fingers, left thigh and left hip region. She also sustained a fracture on the left proximal femur (incomplete fracture). The treatment notes, P3 and medical report by Dr. Titus Ndeti Nzina dated March 12, 2020 confirmed this fact, and in his opinion was that the injuries sustained grievous harm with 8% loss of functionality.

6. The respondent's evidence was not rebutted in any manner and the appellant never called any witness to testify. It remains basic law that the only forum where the same could have been challenged was at trial and since the respondent failed to call any witness and thus the respondent's case on balance of probability was proved.

7. In *Motrex Knitwear v Gopitex Knit wear Mills Ltd* Nairobi (Millimani)HCCC No 834 of 2002 Lessit J citing the case of *Autar Singh Bahra & Another v Raju Govindji*, HCCC No 548 of 1998 where it was appreciated that;

> " Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the

defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail."

5. The appellant challenged the award of general damages for pain and suffering awarded at Kshs.1,200,000/=and also the award of general damages for diminished earning capacity at Kshs.60,000/= and urged the court to reduce the same based on conventional awards in case of similar nature. The respondent on the other hand urged the court to maintain the award and proceed to dismiss this Appeal.

6. I have considered the appellant's submission and authorities relied on. In *Mwavita Jonathan v Silivia Onunga* (2017) eKLR and *Ibrahim Kalema Lewa v Esteel Company Limited* (2016) eKLR for injuries including fracture of the left femur the courts awarded between Kshs.300,000 to Kshs.400,000/= , the respondent on the other hand relied on *Kornelius Kweya Ebichet v C & P Shoes Industries Ltd* (2008) eKLR & *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* (2013) eKLR, where for comparable injuries awards were issue for Kshs.1,300,000/= to Kshs.1,500,000/= in general damages.

7. I take into consideration the sentiments by Madan (JA) (as he then was),in *Ugenya Bus ServicevGachiki*, (1976-1985) EA 575, at page 579:

> "General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."

5. The respondent suffered severe soft tissue injuries all over the body and had an incomplete fracture of the left proximal femur. Having considered other similar injury awards, I do find that the trial magistrate acted on wrong principles and made an award which was excessive, when considered against the nature of injuries suffered and therefore arrived at the wrong decision. Consequently, I do set aside the sum of Kshs.1,200,000/= awarded for general damages for pain and suffering and reduce the same to Kshs.750,000/=. While considering adjustment for inflation, the respondent's pain and suffering and period of partial morbidity/post-accident pain due to the injuries suffered. See *Pestony limited & Another v Samuel Itonye Kagoko* (2022) eKLR & *Jacaranda Bodaboda operators & Another v Nyasero* (civil Appeal 774 of 2022), (2023) KEHC 23806(KLR).

6. The appellant also challenged the award of Kshs.60,000/= given under general damages for diminished earning capacity. The evidence of Dr Titus Ndeti in this regard was not challenged and it formed the basis of this award. The appellant failed to rebut the same and it remained proved.

D. Disposition

5. Accordingly, this Appeal succeeds to that extent. The finding of the learned trial Magistrate in Machakos CMCC No. 286 of 2020 with respect to general damages for pain and suffering is set aside and substituted with an award of Ksh.750,000/= .

6. The Appellant is awarded costs of this Appeal which is assessed at Kshs.150,000/= all inclusive.

7. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF SEPTEMBER, 2024.

In the presence of:-

Mr. Njunguna for Appellant

No appearance for Respondent

Susan/Sam Court Assistant