Maina v Njeri (Civil Appeal E358 of 2024)
[2024] KEHC 11928 (KLR) (Civ) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E358 OF 2024

TW OUYA, J

SEPTEMBER 24, 2024

BETWEEN

FRANCIS KAHORO MAINA ..... APPELLANT

AND

ELVIS MAINA NJERI ..... RESPONDENT

(Being an Appeal against the Judgement and decree of Hon. N. Ruguru (PM) delivered on 9th February, 2024 at the Chief Magistrate Court at Nairobi in Nairobi CMCC No. E36 of 2022)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 9th February, 2024 in Nairobi Milimani CMCC No. E367 OF 2022. The suit was commenced by way of the plaint dated 9th December, 2021 and filed by Elvis Maina Njeri being the plaintiff in the lower court (hereafter the Respondent) against Francis Kahoro Maina, the defendant in the lower court (hereafter the Appellant). The claim was for general and special damages arising out of a road traffic accident which occurred on or about the 28th of May, 2021. It was alleged that the Appellant was at all material times the driver and registered owner of the motor vehicle registration No. KCH 694F (hereafter the subject motor vehicle). It was further alleged that the subject motor vehicle was so negligently, carelessly driven or controlled and managed on the material day that it collided with the motorcycle registration number KMEY 126D (the motorcycle) being ridden by the Respondent along Mombasa Road, causing him to sustain bodily injuries. The particulars of negligence were set out under paragraph 4 of the plaint.

2. Upon service of summons, the Appellant entered appearance and filed his statement of defence dated 1st November, 2022 denying the key averments in the plaint and liability. Alternatively, the Appellant

pleaded contributory negligence against the Respondent by setting out the particulars thereof in the statement of defence.

3. The suit proceeded to full hearing, with the respective testimonies of the Respondent and Appellant.

4. In the end, the trial court by way of the judgment delivered on 9th February, 2024 awarded damages in the following manner:

    a. General damages for pain, suffering and loss of amenities Kshs. 1,000,000/-

    b. Loss of earning capacity NIL

    b. Special Damages Kshs. 233,237/-

    Total Award Kshs. 1,233,237/-

The Appeal

5. Being dissatisfied with the outcome, the Appellant moved the court by way of the present appeal (vide the memorandum of appeal dated 11th March, 2024) challenging the trial court's finding on both liability and quantum, premised on the following grounds:

    i. That the Learned Trial Magistrate proceeded on wrong principles in entering judgment for the Plaintiff/Respondent for the sum of Kshs. 1,000,000/- in General damages;

    ii. That the Learned Trial Magistrate erred in failing to scrutinize/evaluate the evidence tendered in support of the damages to correctly relate them to case law cited therein; and thus failed to arrive at a fair and reasonable compensation to the Plaintiff.

    iii. That the learned Trial Magistrate erred in awarding such an inordinately high and excessive award of damages and the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the Respondent.

    iv. That the Learned Trial Magistrate erred in law and fact in failing to scrutinize and evaluate the evidence tendered and to correctly relate them to case law cited and thereby misapprehended the facts by finding the Appellant 100% liable for causing the accident;

    v. That the Learned Trial Magistrate erred in law by validating the Plaintiff/Respondent's evidence in determining liability; which evidence had not been supported factually and was marred with inconsistencies and hearsay in its entirety;

    vi. That the Learned Trial Magistrate erred in law in failing to note that the Plaintiff/Respondent had failed to strictly prove the particulars of negligence pleaded in the Plaint contrary to the trite rule of evidence that negligence must be strictly proven;

    vii. That the Learned Trial Magistrate erred in law and fact in failing to apportion liability taking into account the totality of evidence laid by the Appellant and Respondent; (sic)

6. The Appellant consequently seeks the following orders:

    i. That the appeal be allowed.

    ii. That the Learned Trial Magistrate's decision finding the Appellant 100% liable be reviewed, varied, reserved and/or struck out and replaced with a finding that the Plaintiff/Respondent failed to prove his case on a balance of probabilities.

    iii. That the award of General damages in the sum of Kshs. 1,000,000/- be set aside and/or varied.

iv. That this Honourable Court be pleased to assess liability and damages due to the Respondent.

v. The costs of the appeal be awarded to the Appellant.

Submissions

7. The appeal was canvassed by way of written submissions. Counsel condensed the Appellant's grounds of appeal into two salient issues: namely, the trial court's respective findings on liability and general damages. Addressing the first issue, counsel contends that the trial court erred in finding the Appellant wholly liable for the accident and yet the said court had not considered the evidence tendered in defence of the claim. Counsel further contends that the Respondent herein purely relied on the contents of the police abstract, without calling a police officer to shed light on the events surrounding the accident. Counsel further faulted the trial court for disregarding the testimony by the Appellant on the manner in which the accident occurred, thus urging the court to disturb the trial court's finding on liability and to instead find both Respondents entirely liable. In arguing so, counsel cites the case of Kennedy Nyangoya v Bash Hauliers [2016] KEHC 2616 (KLR) where the court reasoned that notwithstanding the fact that the defendant in that instance was deemed liable according to the police abstract, in the absence of any additional supporting evidence, the said abstract did not constitute conclusive proof of liability. Consequently, counsel urges that the Respondent's suit be dismissed for want of proof; adding that should this court be inclined to apportion liability instead, then the same be apportioned equally between the parties herein.

8. Concerning quantum of damages, counsel faults the trial court for failing to scrutinize the totality of the medical evidence tendered before it, in respect of the injuries sustained by the Respondent. Counsel proceeded to argue that the trial court awarded an inordinately high sum on general damages, incommensurate to the injuries sustained by the Respondent as well as comparable awards previously made. Reliance was placed on the case of Elizabeth Wanjira Ngure & Simon Waweru Ngure v Nyaka Agencies Limited & John Mwangi Maina [2008] KEHC 1121 (KLR) in which the court held that damages awarded ought to constitute reasonable compensation.

9. In turn, the Appellant's counsel proposes an award in the sum of Kshs. 500,000/- on general damages, with reliance inter alia, on the case of Savanna International Ltd v Muka [2022] KEHC 675 (KLR) and the case of Vincent Mbogholi v Harrison Tunje Chilyalya [2017] KEHC 7765 (KLR) where the respective courts awarded the sums of Kshs. 500,000/-for fracture and related injuries. In conclusion therefore, it was contended that the trial court's judgment ought to be disturbed in the manner set out hereinabove.

10. The Respondent defended the trial court's findings in their totality. On liability, his counsel contends that contrary to the position being taken by the Appellant, the trial court considered both the police abstract and additional evidence tendered before it, namely the testimonies by the respective parties herein. Counsel thus argues that there is no reason to disturb the impugned judgment.

11. On quantum, counsel supports the award made by the trial court on general damages, arguing that in awarding the sum of Kshs. 1,000,000/- the trial court considered various comparable authorities cited before it and further considered in totality the medical evidence tendered at the trial. In addition, counsel cites the decisions in Meshack Odongo v Stephen Muathe Masila [2019] KEHC 8318 (KLR) and David Kariuki & Budget Payless Car Hire & Tours v Joshua Wambua Muthama [2017] KEHC 1649 (KLR) where the courts awarded the respective awards of Kshs. 800,000/- and Kshs. 850,000/- in respect of comparable fracture injuries. Consequently, it was asserted that the appeal lacks merit and it ought to be dismissed with costs.

Analysis and Determination

12. This court has considered original record, record of appeal and the submissions on record plus the authorities cited. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Peters v Sunday Post Limited (1958) EA 424; Selle and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123 and Williams Diamonds Limited v Brown (1970) EA 1. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278 stated that:

> "A court of appeal will not normally interfere with a finding of fact by the 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 principles in reaching the findings he did."

13. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on two (2) key issues, namely: whether the finding of the trial court on liability was well founded, and if so, whether the award on general damages was justified.

14. Concerning liability, the legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

15. Moreover, the Court of Appeal in Karugi & Another v Kabiya & 3 Others (1987) KLR 347 rendered itself thus still on the above subject:

> "The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

16. The Respondent's case rode primarily on his personal testimony as PW1. Therein, he stated that he was a matatu conductor at the time of giving his evidence, before proceeding to adopt his signed witness statement as his evidence-in-chief and to produce his bundle of documents dated 9th December, 2021 as P. Exhibits 1-8. The Respondent then stated that on the material date, the Appellant was driving at a high speed and did not give any indication that he intended to make a turn immediately thereafter, which led to the accident. That consequently, the Appellant was to blame for the accident as well as the resulting injuries to the Respondent. In cross-examination, the Respondent further stated that on the material date, he was riding the motorcycle behind the subject motor vehicle when the Appellant; without first putting on the indicator; proceeded to make the turn. That though the Respondent applied brakes, he could do little to avoid the collision. That the Appellant was therefore solely to blame for causing the accident. There was no re-examination.

17. The Appellant; being the sole defence witness; testified as DW1. His evidence-in-chief consisted of the adoption of his executed witness statement and the averment that the Respondent was solely responsible for the accident. The Appellant further averred that prior to exiting the highway, he slowed down and signaled the indicator, adding that he was never charged in court in relation to the accident. During cross-examination, he testified that like all vehicles using the relevant route, he made a legal U-turn at the designated point; adding that the Respondent was driving the motorcycle at a high speed at the time. His testimony above was echoed in re-examination, save to add that the Respondent did not stop to enable him make the turn.

18. The trial court upon restating the said evidence in its judgment stated the following on the subject of liability:

> " I have carefully considered the evidence by both parties, their pleadings and submissions. It is not in dispute that; the plaintiff was on the highway when the defendant joined the road. It is also not in dispute that; it was the plaintiff who rammed into the rear of the defendant's M/V. Indeed the defendant testified that, he joined the road after being given way by other motorists but plaintiff who was at high speed rammed into the rear of his M/V. The plaintiff produced a copy of police abstract that squarely puts blame on the defendant. In the result, it is my finding that, the defendant was to blame for the accident. Therefore, the plaintiff has on a balance of probabilities proved his case against the defendant. Defendant is therefore found 100% liable for the accident." (sic).

19. From my re-examination of the pleadings and material on record, it is not in dispute that an accident occurred on the material date involving the subject motor vehicle being driven by the Appellant; and the motorcycle being ridden by the Respondent; the result of which the latter sustained bodily injuries. This position was confirmed by the contents of the police abstract dated 20th September, 2021 tendered as P. Exhibit 1.

20. Suffice it to say that, the mere occurrence of an accident cannot in itself be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant(s). The court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, while reiterating the foregoing, stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

21. Upon further re-examination of the material and evidence tendered, I took note of the contradictory positions taken by the Appellant and the Respondent by way of their respective testimonies. While the Appellant on the one hand claimed that he put on the indicator sign before making a turn and that it was the Respondent who was riding the motorcycle at a high speed prior to the accident, it was the latter's evidence that the former suddenly made a turn the road and without first indicating, thereby making it impossible for him to brake in ample time to avoid ramming into the subject motor vehicle.

22. Be that as it may, according to the police abstract (P. Exhibit 1), the subject motor vehicle (being driven by the Appellant) was to blame for the accident, which position was similarly acknowledged by the learned trial magistrate in the impugned judgment. From the record, there is nothing to indicate that criminal charges were preferred against the Appellant in relation to the accident. That notwithstanding, no contrary evidence was tendered to refute the contents of the police abstract as is. In this sense, I am satisfied that the learned trial magistrate arrived at a reasonable finding that Respondent had tendered sufficient evidence to prove the particulars of negligence against the Appellant.

23. Further to the foregoing and contrary to the allegations brought forth by the Appellant on appeal, I noted that the Respondent being present at the scene of the accident, constituted a key eyewitness to the events of the material date, leading up to the accident. In addition, his testimony laying blame on the Appellant is supported by the police abstract whose contents have not necessarily been challenged by the Appellant through any contrary evidence. In my view, the above evidence reasonably supports the pleadings by the Respondent and more particularly, the particulars of negligence.

24. Separately and on the subject of contributory negligence raised by the Appellant and which would give rise to apportionment of liability, upon my re-examination of the pleadings and material on record, I did not come across any credible evidence tendered by the Appellant to support or warrant such apportionment.

25. In the absence of any credible material or evidence to the contrary, therefore, I am convinced that the learned trial magistrate upon reasonably considering all the relevant material placed before him in arriving at his decision, arrived at a proper finding on liability in the circumstances; which finding I am not inclined to interfere with. consequently, the grounds of appeal pertaining to liability automatically fail.

26. The second issue on appeal has to do with the award made to the Respondent specifically on general damages for pain, suffering and loss of amenities. The main contention in the appeal as relates to that particular head of damages, is that the same is either inordinately high or awarded on the basis of wrong principles.

27. The Court of Appeal in Catholic Diocese of Kisumu v 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."

28. The same court previously stated in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 that:

> "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".

29. The Respondent particularized his injuries in the plaint dated 9th December, 2021 as comprising compound (open) fractures of the left tibia and fibula malleolus and a compound (open) dislocation of the left joint. The aforesaid injuries were confirmed by the medical evidence constituting the Respondent's bundle of documents adduced at the trial, more so the medical report prepared by Dr. W.M. Wokabi and dated 19th October, 2021 (P. Exhibit 4) who assessed permanent incapacity arising from the Respondent's injuries at 8%.

30. From the record, it is apparent that the Respondent subsequently underwent a second medical examination at the request of the Appellant's advocate, thereby resulting in preparation of the medical report by Dr. P.M. Wambugu and dated 15th February, 2023. The said doctor assessed permanent incapacity at 4%.

31. At the submissions stage, the Respondent proposed an award of Kshs. 1,500,000/- whilst placing reliance on the authorities of Ndathi Mwangi, David Kilo & Joshua Mwaura v Benson Lumumba Ndivo [2018] KEHC 1905 (KLR) where the court awarded a sum of Kshs. 1,250,000/- under a similar head in respect of open fracture injuries with no degree of permanent incapacity, and James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Moses Kiasalu Kilonzi [2015] KEHC 5586 (KLR) in which the court awarded a sum of Kshs. 1,500,000/- at the instance of a plaintiff with various fracture injuries with a degree of incapacity ranging between 10% and 20%. The Appellant on his part suggested an award of Kshs. 500,000/- upon relying on the authorities also cited in his submissions on appeal and referenced hereinabove.

32. In his judgment, the learned trial magistrate upon setting out the summary of the pleadings, evidence tendered and awards suggested by the parties, settled for an award in the sum of Kshs. 1,000,000/- under the relevant head of damages.

33. Upon considering the respective authorities cited, I am of the view that those by the Respondent featured comparable injuries though decided a few years back and with the case of James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Moses Kiasalu Kilonzi (supra) in particular constituting a higher degree of incapacity compared to that assessed in respect of the Respondent herein. Similarly, the court finds that the authorities cited by the Appellant constitute slightly less severe injuries than those suffered here.

34. I therefore considered the fairly recent case of Haco Industries (K) Limited v Tabitha Njoki Njeru [2021] KEHC 3158 (KLR) where the High Court awarded the sum of Kshs. 1,000,000/- on appeal in relation to a plaintiff who sustained compound (open) fractures of the tibia, left fibula talus bones, an extensive degloving injury on the right leg in the region of the ankle joint among others, with a permanent incapacity assessed at a higher degree of 15% in comparison to that of the Respondent herein; as well as the more recent case of Kapoor v Dominos Pizza Kenya Limited t/a Dominos Pizza, Next Gen Mall [2024] KEHC 3231 (KLR) in which a plaintiff who had sustained a fracture of the left

tibia malleolus and a fracture of the left fibula malleolus with 15% permanent incapacity, was awarded a sum of Kshs. 800,000/- on general damages, which award was upheld on appeal.

35. Taking the above comparable authorities into account as well as the nature and extent of the injuries sustained, the degree of permanent incapacity and the inflationary trends, I find that the learned trial magistrate's award under the above head of general damages for pain, suffering and loss of amenities, fell on the higher side and ought to be interfered with. In my view, an award of Kshs.700,000/ would be reasonable in the circumstances.

Disposition

36. In the end therefore, the appeal partially succeeds. Consequently, the court hereby sets aside the trial court award of Kshs. 1,000,000/- made on general damages for pain, suffering and loss of amenities and substitutes the same with an award in the sum of Kshs. 700,000/-.

37. Consequently, the judgment on appeal shall now read as follows:

    a. General damages for pain, suffering

       and loss of amenities Kshs. 700,000/-

    b. Loss of earning capacity NIL

    c. Special Damages Kshs. 233,237/-

    d. The Respondent shall have costs of the appeal and interest on general damages at court rates from the date of judgment until payment in full, and;

    e. Interest on special damages at court rates from the date of filing suit until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF SEPTEMBER, 2024

ROA 14 days.

HON. T. W. Ouya

JUDGE

For Appellant Ms Njenga

For Respondent Ms Kanana for Mr. Kaburu

Court Assistant Martin Korir