Mwanzia v Ruguru (Civil Appeal E065 of 2023)
[2024] KEHC 11233 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11233 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL E065 OF 2023

GMA DULU, J

SEPTEMBER 23, 2024

BETWEEN

BENJAMIN MULINGE MWANZIA ..... APPELLANT

AND

LEAH MUTHONI RUGURU ..... RESPONDENT

(From the decision in Civil Case No. E063 of 2023 delivered by Hon. C. K. Kithinji (PM) on 22nd November 2023 at Voi Law Courts)

JUDGMENT

1. In a judgment delivered on 22nd November 2023, the learned trial Magistrate found in favour of the plaintiff, now respondent on 100% liability and concluded as follows:-

> " 20. I thus entered judgment for the plaintiff against the defendant as follows:
>
> Liability 100%
>
> General damages Kshs. 2,700,000/=
>
> Future Medical Expenses Kshs. 1,200,000/=
>
> Special damages Kshs. 792,318/=
>
> Total judgment sum Kshs. 4,692,318/=
>
> The sums awarded will attract interest at court rates from the date of this judgment.
>
> 21. Costs follow the event. The plaintiff is the successful party. He will have costs of the suit."

2. Dissatisfied with the above decision, the appellant who was the defendant in the trial court has come to this court on appeal through counsel Murimi, Mbago & Muchela Advocates on the following grounds:-

    1. The learned trial Magistrate erred in law and fact in finding the appellant wholly liable for the accident.

    2. The learned Magistrate erred in law and fact and misdirected herself in finding the appellant 100% liable notwithstanding the evidence on record to the contrary in a claim of negligence.

    3. The learned trial Magistrate erred in law and in fact in failing to take into account relevant factors evaluating the evidence on record on quantum of liability.

    4. The learned trial Magistrate erred in law and in fact in totally disregarding the appellant's submissions and relying entirely on the respondent's submissions.

    5. The learned trial Magistrate misdirected himself (should be herself) in law by assessing damages that were excessive and incomprarable to the current judicial awards for analogous injuries.

    6. The learned trial Magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages.

3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Murimi Mbago & Muchela Advocates for the appellant, as well as the submissions filed by M. M. Uvyu & Company Advocates for the respondent. I have to acknowledge that both sides relied upon decided court cases.

4. This is an appeal against both liability and quantum of damages.

5. In determining this appeal, I have to be guided by the legal principle restated repeatedly and consistently by courts, as highlighted in the case of Selle v Associated Motor Boat Company Ltd [1968] EA 168, wherein the East African Court of Appeal stated as follows:-

> "An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression or demeanour of a witness is inconsistent with the evidence generally.....Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions."

6. With regard to the assessment of quantum of damages, I am bound to apply the legal principle stated by the Kenya Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR 55 wherein the Court of Appeal held that assessment of general damages is at the discretion of a trial court and an appellate court will only interfere with that discretion if satisfied that the trial court applied the wrong principles as by taking into account an irrelevant factor or leaving out of account a relevant factor or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate of the award.

7. I also have to bear in mind that the legal burden was on the plaintiff (now respondent) to prove the allegations against the appellant. This legal burden is codified under Section 107, 108 and 109 of the *Evidence Act* (Cap.80). This being a civil case, the standard of proof was on the balance of probabilities.

8. In proving their case, the respondent called two (2) witnesses. On their part, the appellants called one witness, a doctor. No police witness testified on either side. However, reliance was made on the evidence of PC Nicholus Kosgei who testified in a related case Voi CMCC No. E064 of 2023.

9. The evidence on record herein regarding liability or how the traffic accident occurred, was only that of the respondent, who was plaintiff, Leah Muthoni Ruguru (PW1) as neither the driver of the accident motor vehicle, nor the police testified. However, as stated above, a police officer PC Nicholus Kosgei of Mackinon Traffic Base had already testified in a related case, and his evidence was considered herein. It was PW1's evidence that she was travelling in a Toyota vehicle to Machakos when the driver of the vehicle speeded and smashed into a stationary trailer, and as a consequence she sustained injuries.

10. It was the further evidence of PC Nicholus Kosgei who testified in CMCC No. Voi E064 of 2023, that at 0550hours on 17th July 2021 the police at Mackinon Road Trading Centre, received a report of a traffic accident which occurred along Nairobi – Mombasa highway involving motor vehicle KCP 530D Toyota Forte driven by Titus Mulwa and KBD 070F/ZE 2937 Mercedes Benz Lorry, both of them facing same direction.

11. He testified that, they proceeded to the scene and found that the Mercedes Benz lorry KBD 070F/ZE 2927 had stalled on the road and was stationery, and that the Toyota vehicle KDP 530D rammed into it from the rear. According to this witness, Fredrick Mutua died on the spot, while Leah Muthoni (PW1) and Wilfred Ndumi sustained serious injuries. They recommended the driver of the Toyota vehicle KCP 530D to be charged with causing death by dangerous driving, as the driver of the Mercedes Benz lorry had put precautions to warn other drivers approaching.

12. In my view, with the evidence of PW1 Leah Muthoni and the police evidence from a related case, the Magistrate cannot be faulted for the finding of 100% liability against the appellant for the accident, as the respondent Leah Muthoni was a mere passenger and there is no evidence on record to show or even suggest that she was to blame in any way for the accident. There is also no evidence to suggest that anyone else was to blame for the accident.

13. Thus like the trial Magistrate, I find that the respondent proved liability against the appellant the balance of probabilities, and it was 100% liability.

14. With regard to quantum of damages, I note that the appellant's counsel has submitted for an award of Kshs. 700,000/= for general damages in the place of the Kshs. 2,700,000/= awarded by the trial court. Counsel relied on a number of court decisions, and filed the judgment in the case of Pestony Ltd & Another v Samuel Itonye Kagoko [2022] eKLR, a decision of the High Court on appeal wherein general damages of Kshs. 1,400,000/= were reduced to Kshs. 800,000/=.

15. I note that in the above appeal at paragraph *19*, the learned Judge acknowledged the injuries sustained were fracture of left femur shaft and swollen tender thigh, which injuries were classified as grievous harm and 5% permanent incapacity assessed.

16. In our present case, the respondent was examined by two doctors, and the injuries suffered were described as a fracture lower left radia ulna bone, comminuted fracture both femur bones, fracture left tibia bone, respiratory distress and hypovolemic shock, and loss of large volume of blood. She underwent several operations, and permanent incapacity was assessed at 25%.

17. The injuries herein were more severe. However, I find that the award of Kshs. 2,700,000/= for general damages was not based on any decided cases. Even taking into account the seriousness of the injuries suffered and loss of the value of the Kenya Shilling, in my view, an award of Kshs. 2,000,000/= for the

described injuries and 25% permanent disability sustained, would suffice. I will thus reduce the award for general damages for pain and suffering to Kshs. 2,000,000/=

18. As for the award for future medical expenses, there was a doctors estimate of Kshs. 1,800,000/=. The second doctor proposed a very low figure, but on information received by him and not apparently verified. In those circumstances, the learned Magistrate's award of Kshs. 1,200,000/= for future medical expenses cannot be faulted, as both doctors agreed that there would be future medical expenses to be incurred anyway. I will uphold this award.

19. With regard to the special damages awarded, in my view, the trial Magistrate awarded what was pleaded and proved. I will uphold the amount awarded for special damages.

20. I thus allow the appeal in part with respect only to the general damages awarded.

21. Consequently, the final orders of this court are that I vary the award for general damages and enter judgment for the respondent against the appellant as follows;-

    Liability 100%

    General damages Kshs. 2,000,000/=

    Future Medical Expenses Kshs. 1,200,000/=

    Special damages Kshs. 792,318/=

    Total judgment sum Kshs. 3,992,318/=

    Plus interest at court rates till payment in full.

22. The parties will each bear their respective costs of this appeal. The appellant will pay the respondent's costs of the case in the trial court.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Ms. Atieno for appellant

Mr. Uvyu for respondent