Mwaura v Palm Travels & another (Civil Appeal E319 of 2014)
[2024] KEHC 16765 (KLR) (Civ) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16765 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E319 OF 2014

NIO ADAGI, J

SEPTEMBER 11, 2024

BETWEEN

GRACE WANJIKU MWAURA ..... APPELLANT

AND

PALM TRAVELS ..... 1ST RESPONDENT

DAVID MWEMA MUMO ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. Caroline Ndumia (SRM) in Milimani Small Claims Court in SCC No. 2466 of 2023 delivered on 27/6/2014)

JUDGMENT

1. By an amended Plaint filed on 02/10/ 2012 the Appellant sued the Respondents seeking for damages as a result of injury, pain, damage, loss and suffering occasioned when the Appellant a pedestrian was involved in a road traffic accident with the Respondents' motor vehicle.

2. The Appellant averred that on 30/5/2007, she was standing at a designated bus stop when the driver of motor vehicle registration number KAU 803E so negligently drove it that it swerved off the road and knocked her down that she suffered multiple injuries.

3. By a Defence Amended on 10/10/ 2012, the Respondents denied the Claim and pleaded contributory negligence against the Appellant.

   The matter proceeded for hearing.

4. Upon considering the parties pleadings, evidence and submissions, the Trial Court apportioned liability at the ratio of 30% : 70% and awarded the Appellant Kshs.800,000/= (less 30% contribution-Kshs.560,000/=) in general damages and Kshs.358,588/= in special damages plus costs and interest.

5. The Appellant being aggrieved by the whole of the said judgment lodged this appeal raising 7 grounds as follows:-

    1. That the Learned Magistrate erred in law and in fact by apportioning liability against the Plaintiff yet the 2nd Respondent had pleaded guilty to the charge of careless driving and fined by the Traffic Court.

    2. That the Learned Magistrate misdirected herself by proceeding to apportion liability against the Plaintiff notwithstanding the fact that the Respondents did not adduce evidence to controvert the Appellant's case.

    3. That the Learned Magistrate erred in law and in fact by proceeding to apportion liability against the Appellant despite the evidence adduced by the Police Officer on how the accident had occurred as reported in the Occurrence Book.

    4. That the Learned Magistrate and Adjudicator erred in law in failing to consider the Respondent's evidence on record and only considered the Claimant's documents yet parties agreed to proceed under section 30 of the *Small Claims court Act*.

    5. That the Learned Trial Magistrate and Adjudicator erred in Iaw 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;

    6. That the Learned Magistrate and Adjudicator erred in law by validating the Claimant's evidence in determining liability; which evidence had not been supported factually and was marred with inconsistencies in its entirety;

    7. That the Learned Magistrate and Adjudicator erred in law in failing to note that Claimant 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;

6. The Appellant opted to consolidate grounds 1,2 and 3 of our Memorandum of Appeal and submit on them under the heading of Liability and grounds 4,5,6 and 7 under the heading of Quantum.

7. On liability, the Appellant submits that during the hearing the Appellant called the Police officer one P.C Nelson Murefu who testified in court that the Appellant was standing beside the road when she was hit by the driver of motor vehicle registration number KAU 803E.

8. That the police officer further stated that the said driver one David Muema Mumo was the one who reported the accident at the Police station and that he was charged and fined Kshs.5,000/= a clear confirmation that he was to blame for the said accident. The said officer further confirmed that the Appellant was not crossing the road at the time of accident.

9. The Appellant submits further that the Respondent did not tender any evidence of whatsoever nature to rebut the Appellant's claim and cites the case of Embu Public Roads Services Ltd.-Vs-Riimi (1968) EALR,22. He also cites the case of Regina Wangechi-Vs-Eldoret Express Co. Ltd. (Supra) where the Court of Appeal stated as quoted by Approval by Justice Ngenye Macharia in Civil Appeal Number 126 of 2009 P I (Suing as a next of kin of C M (Deceased) -vs-Zena Roses Itd & Anor on page 6 that:-

> "The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby

discharges in the presence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident",

10. The Appellant faults the Learned Magistrate on page 127 of the Record of Appeal for appearing to be of the mind that the standard of proof in this case was strict proof which is not the case in civil matters. The Appellant has quoted the trial court's finding in paragraph 10 of the judgment where she observed as follows:

> "The authorities submitted by the plaintiff indicate different injuries from strict proof thereof. For example, she did not explain how the accident occurred in detail and what steps she took to avoid the oncoming vehicle but instead said that the vehicle just happened upon her and she later found herself in hospital, therefore, the Plaintiff is held 30% liable for the accident."

The Appellant's submissions

11. The Appellant submits that the learned magistrate's finding was wrong because it is not in dispute that an accident occurred when the driver of Motor Vehicle registration number KAU 803E hit the Appellant who was standing off the stage. The fact that the Appellant did not tell elaborately how the accident occurred doesn't make her negligent to warrant apportioning liability and that that was a wrong way of thinking which resulted in miscarriage of Justice

The Respondents' submissions

12. On the other hand, the Respondents submit that this honorable court should not interfere with the Lower Court's decision and proceed to dismiss this appeal with costs to the Respondents.

13. The Respondent further submitted that the police officer testified that the Appellant was hit by the 2nd Respondent driving motor vehicle registration number KAU 803E while she was standing beside the road. However, he did not explain the circumstances under which the accident happened and did not apportion liability on either party for occurrence of the accident.

14. That it is also clear from the police officer's testimony that the 2nd Respondent was charged and convicted with the offence of careless driving. However, this does not absolve the Appellant from being a contributory in the occurrence of the said accident. The Respondent invited this court to be guided by the Court of Appeal decision in Chemwolo & Another versus Kubende (1986) KLR 492 where the Court considered the import of a conviction in a road traffic accident-related offence on the civil proceedings that may ensue from the same accident. That the Court considered section 47A of the *Evidence Act* in this regard and said;

> "...section 47A of the *Evidence Act* (cap 80) declares that where a final judgment of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in civil proceedings which are contemplated, Mr Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter because it may also be that Kubende was guilty of carelessness, and if were to be so, then the position would be as explained in Queens Cleaners and Dyers Ltd versus EA Community & Others (supra); and despite Mr Chemwolo's conviction, the issue of contributory negligence may still be alive if the facts warrant it."

15. The Respondents have also referred this court to pages 123-124 of the Record of Appeal, that the Appellant does not recall how the accident happened. She has no recollection of the ordeal and that she woke up and found herself in a hospital. It is therefore the Respondents' submissions, that the Appellant chose to forget the circumstances of the accident as she was a negligent pedestrian and Trial Court's finding on liability was reasonable.

16. I have perused the Record of Appeal, considered and weighed the evidence that was adduced and rival submissions on the appeal and I now proceed to determine the appeal herein.

Determination on liability

17. The claim herein being an action for negligence, like in all civil litigation, the burden is always on the Claimant to prove that the Respondent was negligent.

18. I have considered the record and at paragraph 7 of the Statement of Defence the Respondents pleaded and contended that the accident was caused solely or substantially contributed to by the Appellant and the particulars are set out thereof. The Respondents also denied for the claim for the reasons that it is the Appellant who was inattentively standing off the stage without taking any reasonable steps or measure to ensure her safety. The Appellant did not tell elaborately how the accident occurred The Appellant also testified stating how the accident occurred and the element of contributory negligence clearly comes out.

19. In Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, the Court held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> > ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

20. On whether the Appellant is liable for contributory negligence. The law on contributory negligence is to apportion proximate cause and blameworthiness where appropriate. In De Frias v Rodney 1998 BDA LR 15 it was held as follows:

> " Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances, she made an unsuccessful attempt to avoid the collusion."

21. What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by Alderson B in Blyth vs Birmingham Waterworks Co. [1843 – 60] ALL ER 478

> " Negligence is the omission to do something which a reasonable man, guided upon those considerations with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

22. In my view negligence and contributory negligence comes in infinite forms and would therefore depend on a case-to-case basis. Furthermore, once the Plaintiff has established a prima facie case showing the Defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant.

23. In the instant case the Defendant/Appellant pleaded and contended that the claim was denied for the reasons that the Appellant who was inattentively standing off the stage without taking any reasonable steps or measure to ensure her safety. The Appellant also testified stating how the accident occurred and the element of contributory negligence clearly comes out.

24. Pursuant to the foregoing, this court does not find any reason to disturb the finding of the trial court on contributory negligence at 30% against the Appellant and 70% against the Respondents.

Determination on quantum

25. On quantum, the trial Court assessed general damages awardable to the Appellant in the sum of Kshs.800,000/= (less 30% contribution-Kshs.560,000/=) in general damages and Kshs.358,588/= in special damages plus costs and interest.

26. The fact of the matter of assessment of damages is purely at the discretion of the trial court of facts. The idea that an appellate Court would fundamentally differ with the trial Court is neither here nor there. That is the attention of the principle in Loice Kagunda v Julius Gachau Mwangi CA 142 OF 2003 the Court of Appeal held that:-

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence a appellate Court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons make a wholly erroneous estimate of the damages suffered. The question is not what the appellate Court would award but whether the lower Court acted on the wrong principles." (See Mariga v Musila {1984} KLR 257).

27. From the judgment of the trial court, the injuries stated by the learned magistrate appear to be slightly different from those stated in the medical report of Dr. C. O. Okere dated 28/7/2008 which show the injuries suffered as: -Commuted fracture of the right tibia and fibula lower 1/3A fracture of the left femoral condylepermanent incapacity of 30%.

28. The Appellant submits that the award of Kshs.800,000/ in general damages by the trial court was too low and proposed an award of Kshs.1,900,000/= under this head.

29. The Respondents submits that, the learned Magistrate's award in general damages was commensurate with the Appellant's injuries. The Appellant was awarded Kshs. 800,000/= in general damages in 2014, 10 years ago and this amount was settled by the Respondents.

30. That the Appellant was adequately compensated for the injuries and that this Court ought not to interfere with the learned Magistrate's award.

31. It is trite law that similar injuries should attract comparable awards. Although the trial Magistrate stated that in arriving at the quantum of damages, she considered past awards she did not cite any cases in her judgement. On my part I am persuaded that the Appellant sustained injuries almost similar to but less severe to those of the plaintiff in the case of John Mwangi Munyiri & another v Paul Wachira Njuguna [2020] eKLR where the court awarded the sum of Kshs.900,000/= for injuries in the nature of comminuted compound fracture of the right tibia and fibula with permanent incapacity of between 30% and 50%.It should be noted that the judgment I have cited above is more recent having been delivered in 2020 and the one in the instant case in 2014. This court will not therefore disturb the award of Kshs.800,000/= in general damages awarded by the trial court.

32. Special damages were specifically pleaded and strictly proved to be Kshs.358,588/=

33. In the end, this appeal lacks merit and the same is hereby dismissed.

Each party to bear own costs of the appeal.

It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 11TH DAY OF SEPTEMBER 2024

NOEL I. ADAGI

JUDGE