



**Choda v Kinuthia & 2 others (Civil Appeal E206 of 2019)
[2024] KEHC 11888 (KLR) (Civ) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E206 OF 2019

JM NANG'EA, J

OCTOBER 4, 2024

BETWEEN

RANJEET CHODA APPELLANT

AND

FREDRICK KANG'ETHE KINUTHIA 1ST RESPONDENT

DAVID MBUGUA WAWERU 2ND RESPONDENT

MOSES NJOROGE 3RD RESPONDENT

*(Being an appeal from the judgement and decree of the Chief Magistrate's
court at Nairobi, Milimani Commercial Courts (Hon. Hon. L.L
Gicheha (CM) delivered on 14/3/2019 in CMCC NO. 6098 of 2011)*

JUDGMENT

Grounds of Appeal and reliefs sought.

1. By a Memorandum of Appeal filed on 11/4/2019, the appellant faults the above trial court's judgment on grounds that may be condensed into four as hereunder:
 - a. That Learned Trial Magistrate erred in law and fact in finding that the 1st respondent was a victim of the road traffic accident giving rise to the suit before the lower court and awarding him general damages.
 - b. That the learned trial magistrate erred in law and fact in granting damages to the 3rd respondent without evidentiary basis.
 - c. That the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions on both liability and quantum of damages.



And

- d. That the Learned Trial Magistrate erred in law and fact in making an award of general damages that is excessive in the circumstances.
2. The appellant therefore seeks the following orders:
- a. That the appeal be allowed and the judgement of the trial court set aside.
 - b. That this court does make a finding that the 1st respondent was not a victim of the accident subject of the suit in the lower court.
 - c. That this court does make a finding that the 3rd respondent had not tendered evidence in support of his claim for damages.
 - d. That the court does issue any other orders deemed fit in the circumstances.
 - e. That the costs of the appeal be awarded to the appellant.

The Parties' pleadings in the lower court.

3. The 1st respondent sued the appellant for general damages, special damages of Ksh. 10,250, the costs of the suit and interest following injuries he allegedly sustained after motor vehicle registration number KAW 547 T in which she was travelling collided with the appellant's motor vehicle registration number KAW 161 A. The 1st respondent attributed the collision and his consequent injury to negligent driving of the appellant's vehicle, hence the suit.
4. The appellant filed defence admitting occurrence of the collision. He, however, traversed the allegation of negligence contending that the accident was solely caused and /or substantially contributed to by the 1st respondent's own negligence or the negligence of the driver of motor vehicle registration number KAW 547 T. The appellant also denied the claim that the 1st respondent as a passenger in the said motor vehicle registration number KAW 547 T, putting the latter to strict proof of the claim. For the stated reasons inter alia the court was urged to dismiss the suit with costs.
5. By ex-parte Chamber Summons dated 21/2/2013, the appellant lodged third party claims against the 2nd and 3rd respondents as the owner and driver of motor vehicle registration number KAW 161 A aforesaid seeking indemnity and/or contribution . The two separately entered appearance and filed their respective statements of defence to the third party claim. The 2nd respondent denied occurrence of the said vehicles' collision and /or negligence on his part. Alternatively, he contends that the appellant was to blame for any such collision between the two vehicles that may be proven to have occurred and is not therefore entitled to indemnity and/or contribution.
6. The 3rd respondent admits occurrence of the accident but like the 2nd respondent denies the allegation of negligence attributed to him. He also put up a counterclaim against the appellant alleging that while lawfully driving motor vehicle registration number KAW 547 T , the appellant's motor vehicle veered onto his lane owing to negligent driving thereby causing a collision. He complains of suffering leg fractures and seeks inter alia general damages, special damages , the costs of the suit and interest.

The parties' evidence in the lower court.

7. The 1st respondent reiterated the averments in the suit vide his oral evidence in court. He told the court that the third party vehicle that was moving in the opposite direction suddenly veered onto the lane of the motor vehicle he was travelling in, resulting in the collision. He was sitting behind the vehicle driver and had strapped the seat belt but still sustained injuries for which he was treated at Avenue and



MP Shah Hospitals. His medico-legal reports by Dr Wambugu and Dr C.O Okere dated 18/3/2011 and 8/11/2017 respectively show that he suffered a bilateral fracture of both tibia bones. The fractures were managed by open reduction and internal fixation using metal implants. The fractures successfully re-united. Metal implants inserted in the fracture sites would be removed at a cost of between Ksh. 65,000 and Ksh. 200,000 in the opinion of Dr Wambugu and Dr Okere respectively.

8. The accident was reported to Parklands Police Station according to PW2, a police officer. The witness stated that a list of the victims of the accident compiled by the police in the Occurrence Book did not include the 1st respondent. The witness further stated that if one's name does not appear in the Occurrence Book then he/she was not a victim of an accident in question. Police investigations concluded that Motor vehicle registration number KAW 161 A was to blame for the collision.
9. The appellant did not offer evidence.
10. The 2nd respondent called a doctor (Dr Jennifer Kahuthu) who told the court she is a general medical practitioner. She produced a medical report on the 1st respondent dated 30/5/2013 prepared by Dr Sophia Okinyo who was unavailable to testify. The report confirms the 1st respondent's injuries. Dr Okinyo , however, opined that Ksh. 50,000 would be incurred in future medical costs for removal of the metal implants.
11. The 3rd respondent testified in person. Stating that he was the driver of motor vehicle registration number KAW 161 A at the material time, he confirmed occurrence of the accident. He too stated that the two vehicles were heading in opposite directions and in turn accused the appellant of getting onto his lane. His effort to swerve and avoid the collision was fruitless. The 3rd respondent laments that he too suffered injuries as did other passengers in his vehicle who included the 1st respondent.

Guiding principles

12. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123 }. The Court of Appeal for East Africa in *Peters -vs- Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

Analysis and determination.

13. Learned Counsel for the parties filed submissions which I have perused together with the trial court's record. It is noted from the appellant's submissions that he has decided to abandon Ground (4) of Grounds of Appeal set out supra to wit; the complaint that the damages awarded by the trial court are excessive.
14. In the impugned judgment, the trial magistrate found the appellant wholly liable, noting that the 1st respondent's evidence as to the appellant's responsibility for the accident was corroborated by PW2 .



- The trial court also took into account the fact that the appellant himself didn't testify. The court dismissed the appellant's evidence of the 1st respondent's name missing from the police list of those injured in the mishap observing that the police file should have been produced in court to establish if he had recorded a statement. In the court's view, for the 1st respondent to have been "given a police abstract and P3 form there must be a statement in police file. The burden of proof is on a balance of probabilities and I find the plaintiff (read, the 1st respondent) has proven he was a passenger in the said motor vehicle."
15. The appellant's contention is that since the 1st respondent's name was not listed in the police Occurrence Book as a victim of the accident in question, then he was not liable to compensate him. It is not in dispute that the 1st respondent was otherwise issued with a police abstract report and medical examination form indicating he was injured in the accident as alluded to by the trial magistrate.
 16. Counsel for the appellant place reliance on the case of *Rufinah Kinya V. Atsushi Information Services & Another* (2021)eKLR. In that case, the claimant had produced a police abstract dated 29/1/2016, issued about a year after the reported road accident, showing only her name as a victim of an accident. A police officer, however, testified and tendered an Occurrence Book of 7/2/2015 which did not contain the claimant's name. The court was not told if the claimant had recorded a statement that she was involved in the accident on 7/2/2015. My brother (Justice Chacha Mwita) was not convinced that the claimant was a victim of the accident in the circumstances.
 17. On their part learned Counsel for the 1st respondent submit that the facts and circumstances of the case prove that their client was one of the victims of the accident. The court is referred to the case law of *Sammy Ngugi Mugo V. Mombasa Salt Lakes Ltd & Another* (2014) eKLR where it was observed thus; "in an accident situation, there is likelihood that some people can go to different hospitals and therefore reports can be made on different dates, time and by different passengers . It goes without saying that on such occasions such reports would be handled by different police officers." That case involved similar circumstances as in the instant matter but the claimant's name in the cited case was inserted in the margin of the Occurrence Book after he made the report late explaining that he had been admitted in hospital.
 18. I have re-evaluated the evidence tendered before the lower court. The onus was on the 1st respondent to prove his claim on a balance of probability. The court's duty is to assess evidence proffered by the parties and decide which of the cases is more probable (see the case of *Palace Investments Ltd V. Geoffrey Kariuki Mwenda & Another* (2007)eKLR .
 19. The 1st respondent obtained the police abstract and P3 form on 15/10/2010, around one and half months after the date of occurrence of the accident on 28/8/2010. I have perused his treatment records from Avenue Hospital which indicate that he was admitted in the hospital on the date of the accident and discharged on 13/9/2010. These records have not been discredited. Furthermore, whereas the appellant implies that the 1st respondent's claim was fraudulent, he did not plead and/ or prove the claim. This court in *Chemelil Sugar Company Ltd & Another V. Samson Odhiambo Onyaka* (2018) eKLR deprecated such a defence that does set out particulars of alleged fraud..The appellant did not also offer evidence to rebut that of the 1st respondent. I am thus persuaded by the reasoning in the case of *Sammy Ngugi Mugo supra* and find the case of *Rufinah Kinya* distinguishable in the circumstances.
 20. Looking at the trial court's judgement, it seems that the appellant's submissions on liability were not considered. The trial court, however, referred to the appellant's submissions on quantum of damages. Notwithstanding, it is my opinion that the court's finding on the appellant's liability in the main suit is not to be faulted for the reasons given. Ground 1) of the appeal therefore wholly succeeds while Ground 3) partly succeeds.



21. The appellant contends that the 3rd respondent did not adduce evidence supporting the award of general damages in his favour. In particular, the appellant points out that the learned trial magistrate erroneously assessed damages in favour of the 3rd respondent on the basis of a list of documents filed on 12/4/2013 which documents were neither referred to in the latter's evidence nor formally tendered in evidence. The documents include a medical report on the 3rd respondent dated 21/3/2012 by Dr Wambugu showing that the 3rd respondent suffered a closed fracture of the right femur and payment receipts purporting to evidence medical expenses he incurred. Upon considering the injuries, relevant case law and other applicable factors the trial court awarded the 3rd respondent Ksh. 950, 000 in general damages.
22. I have perused the proceedings before the trial court. Indeed, the 3rd respondent did not tender any documentary exhibits when giving his evidence on oath. It is, however, noted that the appellant did not raise this matter in his submissions before the lower court. In fact his advocates cross-examined the 3rd respondent on his alleged injuries and even proceeded to make submissions on the appropriate quantum of damages while referring to the injuries he sustained.
23. In the premises, the appellant's argument in this regard is invalid. Ground 2) of the appeal as set out accordingly fails.

Determination

24. The appeal on the trial court's assessment of damages has been abandoned and thus will not be considered. The upshot therefore is that the appeal is dismissed with costs to the respondents.
25. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 4TH DAY OF OCTOBER, 2024 IN THE PRESENCE OF :

The appellant's Advocate,

The 1st respondent's Advocate,

The 2nd respondent's Advocate,

The 3rd respondent's Advocate,

The Court Assistant,

J.M NANG'EA

JUDGE

