Muyoma v Karuru (Civil Appeal E556 of 2023)
[2024] KEHC 13124 (KLR) (Civ) (14 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13124 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E556 OF 2023

AM MUTETI, J

OCTOBER 14, 2024

BETWEEN

NANCY IMINZI MUYOMA ..... APPELLANT

AND

MUCHEMI CHARLES KARURU ..... RESPONDENT

(Being an appeal from the judgment of Honourable S.A Opande (PM) dated 30th May , 2023 in Milimani Commercial Chief Magistrate Court Civil Case No. 4624 of 2019)

JUDGMENT

Introduction

1. The appeal arises out of the judgment rendered by the learned Honourable S.A Opande P.M in which the Learned magistrate dismissed the suit and awarded costs to the respondent.

2. The matter arose out of a road accident which is said to have occurred in 15th February 2019 along Hospital Road in Nairobi at a pedestrian crossing when motor vehicle KCE 138B hit the appellant as she crossed the road.

3. The appellant suffered injuries as a result of the accident thus leading to the filing the suit giving rise to this appeal.

Analysis

4. The appellant has through her memorandum of appeal raised the following grounds:-

1. That in all the circumstances of the case, the magistrate erred in law and fact in dismissing the appellant's case when there was abundant evidence on record thereby occasioning a miscarriage of justice.

2. The learned Magistrate erred in law and in fact by not fully considering and/or appreciating all the facts presented before him by the appellant and assessed quantum so low as to be erroneous.

3. That the learned Magistrate erred in law and in fact by not fully considering and/or appreciating all the evidence before him together with the parties Submissions and thereby ignoring relevant guiding facts to reach a fair reasoned determination on quantum:

4. That the Learned Magistrate erred in law and in fact in relying on information not in parity with the facts of the instant case before him and finding that the appellant failed to prove her case on a balance of probability.

5. That the trial magistrate erred in law by dismissing the appellant's suit in entirety and against the weight of evidence adduced of the trial.

6. The learned magistrate erred in law and fact by falling to find the respondent liable due to his misdirection's and wrong exercise of discretion on the evidence tabled before him.

7. The learned magistrate erred in law and in fact by considering irrelevant matters not before the Honourable court.

5. The issues that arise in this appeal are:-

   i. Who was responsible for the accident.

   ii. Whether the learned Honourable Magistrate was correct in dismissing the suit.

   iii. Whether the quantum of damages assessed by the magistrate would have been reasonable compensation to the appellant had the suit not been dismissed.

6. As a first appellate Court I am alive to the duty of this Court to analyze and reevaluate the evidence in order to draw my own conclusions on the same. Selle Vs. Associated Motor Boat & Another (1968) EA123 followed.

7. The judgement by the Learned Honourable Magistrate is a master piece of contradictions. It cannot survive this appeal.

8. It is clear from the record that the Honourable Magistrate analyzed the evidence correctly but eventually dismissed the suit for no justifiable cause.

9. The Honourable magistrate had correctly found that the evidence tendered by the appellant was sufficient in establishing that the respondent was liable for the accident. At page 4 of the typed judgement which appears at page 71 of the record of appeal the learned Magistrate found the respondent 100% liable for the accident.

   It therefore baffles me how the Court later turned around and dismissed the plaint yet it had found favorably for the appellant on liability.

10. The appeal therefore succeeds on the issue of liability.

11. The learned Honourable magistrate having found that the respondent was 100% liable, he ought to have proceeded and entered judgment for the appellant.

12. The appellants submissions on this issue are thus in tandem with the evidence on record.

13. The respondent having failed to call any evidence, the case for the plaintiff remained watertight and unchallenged.

14. In this regard the Court is persuaded to follow the decision in Ngángá Kiongo & 3 others Vs. Town Council of Kikuyu [2022] eKLR on the consequences of failing to call evidence whereof the learned Hon. Justice G.V Odunga (as he then was) cited with approval the decision of the Learned Honourable Lessit J (as she then was) in Autar Singh Bahra & Another Vs. RajuGorindji HCC 548 of 1998:-

15. The respondent's defence therefore amounted to nothing but mere statements of facts unsupported by evidence since the respondent did not call any witness.

16. The Court can not rely purely on a statement of defence which is not backed by evidence to controvert the evidence of a witness called by the plaintiff in support of their case.

17. It is important for the Court to mention that the respondent filed a list of witnesses but did not call any of them to testify in defence.

18. Mr Mungai counsel for the respondent informed the Court that he had no witness to call. The Court was thus left with the plaintiff's evidence and his doctor to consider.

19. Turning on to the issue of quantum, the learned Honourable Magistrate assessed the damages at Kshs. 60,000. In his view the figure would have been adequate compensation to the appellant whom he found not to have suffered minor serious injuries.

20. The assessment of damages is a matter for exercise of judicial discretion, the appellate Court is not expected to routinely interfere save for those cases where the appellant is able to demonstrate that the learned Honourable magistrate applied the wrong principles of law in arriving at the decision or took into account irrelevant matters or failed to take into account relevant matters in arriving at his finding. See Mbogo Vs. Shah (1968) EA pg 93.

21. The Court will also intervene if the appellant demonstrates that the figure awarded in inordinately low or inordinately high as to amount to an unreasonable award.

22. The appellate Court is further expected to be guided by comparable awards given by other Courts in cases where parties suffered similar injuries.

23. The appellant in his submissions has made a case based on the medical report by DR. Cyprianus Okere dated 1st April 2019. The medical report indicates that the appellant suffered mild head injury and complained of recurrent headaches. The report was consistent with the injuries noted on the P3 form which classified the injury as harm.

24. In the Lower Court the appellant submitted for an award of Kshs. 380,000 whereas the respondent urged the Court not to award anything above Kshs. 50,000.

25. It was against that background that the learned Honourable magistrate assessed damages at Kshs. 60,000.

26. The appellant has in her submissions filed in this appeal relied on the case of *Poa Link Services Co. Ltd & Another Vs. Sindani Boaz Bonzemo [2021] eKLR Civil Appeal 17 of 2019*. The plaintiff in this matter suffered blunt injury to the chest , bruises of the lower abdomen , bruises of the right hip joint , bruises of the thigh and bruises on the knee and High Court upheld an award of Kshs. 350,000.

27. The appellant has urged the Court to consider decision alongside two others.

28. The respondent on his part submitted that the appellant did not establish his case and that the magistrate was right in dismissing the suit.

29. Counsel for the respondent however does not address the obvious errors apparent on the face of the record such as the finding of 100% liability and the eventual dismissal of the suit. The submission on liability is thus not tenable in the circumstances as stated elsewhere in this judgment.

30. On the issue of quantum the respondent submitted that the appellant's name as captured in the pleadings did not match her correct name and for that reason her claim ought to have failed. The respondent urged the Court to find that parties are bound by their pleadings and since the appellant had not amended the pleadings to reflect her correct name, the claim ought to have failed.

31. I have examined the record and considered the submissions by the appellant on this point.

32. At page 43 of the record of appeal the appellant is shown to have placed her correct names on the record. She gave the name as Nancy Imina Muyoa. The P3 form at page 17 of the record of Appeal bears the name Nancy Iminza and the report by Dr. Okere bears the name Nancy Emiza Muyoma.

33. The respondent has placed reliance on the case of Daniel Otieono Migore Vs. South Nyanza Sugar Co. Ltd [2018] eKLR in which Justice Mrima stated:-

> " Evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."

34. It is the respondents view that the variance in the names of the appellant should result in the appeal being dismissed for it is in variance with the pleadings.

35. I do not agree. The decision by Mrima J though persuasive to this Court, is in my view addressing variances in evidence that would amount to the pleadings being unsupported by evidence in material respects.

36. To my mind a variance in the spelling of a name cannot be said to be material variation with the pleadings to render the evidence of a witness worthless.

37. The Court must remain alive to human frailties in the pronunciation of names and their recording as well. It is a problem Courts cannot ignore and precisely for that reason and taking into account various languages that we speak in this country, one must be extremely cautious not to condemn a party for having their name wrongly written by the author of the document.

38. Pleadings in this country are drawn by counsel where a party is represented. The party and his counsel may not necessarily be speakers of the same native language. In all likelihood mistakes will happen in the recording of names.

39. It is precisely for this reason that Court at times will ask parties or counsel to spell their names to the Court during hearings. I do not therefore agree with the submission by the respondent that the variance in the recording of names is a departure from the pleadings and should result in the dismissal of a suit.

40. I find and hold that the explanation tendered by the appellant during trial of the matter was sufficiently explained thus the anomaly as one of those minor errors that a Court should not attach much weight.

41. The respondent has urged this Court to find that the injuries sustained by the appellant were minor and merited an award of not more than Kshs. 50,000.

42. I have considered the authorities cited by both parties and I have noted from the evidence that the injury to the head was classified as harm. The magistrate assessed damages at Kshs. 60,000 but in my view he took into account an irrelevant consideration. According to him the appellant did not suffer permanent injury or incapacity. That in my view was a far fetched consideration since no party had made reference to there being permanent incapacity suffered by the appellant.

43. The authorities cited by the appellant are with respect to far more serious injuries than those suffered by the appellant.

44. In my considered view a figure of Kshs. 150,000 in damages for the appellant would be a comparable award.

Conclusion

45 In the end the appeal succeeds the appellant is awarded the sum of Kshs. 150,000 in general damages.

The special damages are awarded at Kshs. 4,250.00

The appellant shall have the costs of this appeal.

46. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 14TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

No appearance for the Appellant

Mr. Nyoike for the Respondent