China Henan International Co-operation v Nyaboro (Civil Appeal E041 of 2021) [2023] KEHC 842 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E041 OF 2021

REA OUGO, J

FEBRUARY 10, 2023

BETWEEN

CHINA HENAN INTERNATIONAL CO-OPERATION ..... APPELLANT

AND

NAOM KEMUMA NYABORO ..... RESPONDENT

(Being an appeal from the judgment and the decision of Hon. S.N Lutta (P.M) in the Kisii CMCC No 146 of 2019 delivered o 30/3/2021)

JUDGMENT

1. This appeal is against the decision of the Hon. S.N. Lutta delivered on 30th March 2021. The respondent sued the appellant on allegation that the appellant's Tuktuk, Registration No KTWB 917, was driven in a reckless manner that it collided with motor cycle registration mark KMEJ 155W in which the respondent was a pillion passenger. The accident occurred on 9th December 2018 and as a result, the respondent sustained the following injuries: degloving injury on the frontal region; blunt trauma to the left elbow; blunt inta-abdominal injury with ruptured spleen; deep cut wound on the leg and left knee dislocation.

2. The appellant, in response to the suit filed its written statement of defence denying liability. It denied any negligence on its part and averred that the doctrine of res ipsa loquitor had no applicability to the facts before the subordinate court. It averred that if the respondent was injured then it as a result of his outright negligence for which the appellant cannot be blamed.

3. At the hearing Naom Kemuma Nyaboro testified as Pw1 while the appellant did not call any witnesses. By consent, the appellant to produce into evidence Dex1, 2 and 3 in support of its case.

4. The trial magistrate at the close of the hearing arrived at the following finding in favour of the respondent:

a) Liability against the appellant was set at 100%

b) General damages for pain, suffering and loss of amenities set at 800,000/-

c) An award of Kshs 200,000/- was made for loss of amenities

d) Respondent was awarded Kshs 500,000/- for loss of future earning capacity.

e) The respondent was further awarded Kshs 5,000/- as special damages.

5. The appellant dissatisfied with the finding of the subordinate court has preferred this instant appeal on the following grounds:

> 1. That the learned trial magistrate erred in law and in fact by apportioning liability at 100% as against the appellant despite the existence of contrary evidence.
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> 2. Thatthe trial magistrate erred in law and in fact by failing to appreciate the testimony of the defence witness that the deceased respondent was at the time of the accident carrying two pillion passengers.
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> 3. Thatthe learned trial magistrate erred in law and in fact by awarding general damages that were inordinately high.
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> 4. Thatlearned trial magistrate erred in law and in fact by awarding damages for loss of amenities and loss of future earning capacity yet the same were not prayed for.
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> 5. Thatthe trial magistrate erred in law and in fact by failing to appreciate the appellant's submissions and the authorities quoted therein.
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> 6. Thatthe judgment herein was against the weight of the evidence offered before the court.

6. When the appeal came up for hearing, I directed the parties to file written submissions for and against the appeal and both parties have complied.

7. The appeal is challenging both liability and quantum. This being the first Appellate Court there is need to look at the evidence adduced before the lower court afresh bearing in mind that I had no benefit of seeing or hearing the witnesses as they testified. (See *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126).

8. The appellant in its submissions argued that the respondent herein was a pillion passenger together with Doris Kemunto Ogari on the motor cycle registration number KMEJ 155W. A motor cycle is allowed to only carry one passenger at a time and therefore the respondent contributed to the accident as she knowingly boarded an overloaded motorcycle. It cited the case of *Rosemary Kaari Murithi v Benson Njeru Muthitu & 3 others* [2020] eKLR where the court stated:

> This court finds that while the accident was caused by the Appellant, the rider substantially also contributed to the attendant liability for which the Appellant was ordered to shoulder. The question, I ask myself is whether it is proper to let boda bodas in general get away with impunity of illegality carrying excess pillion passengers. My answer to the question is in the negative. A rider who knowingly and deliberately breaks the law bycarrying more pillion passengers than permitted by the law should be held accountable for his actions. In this

instance, Kenneth Mwiti Mbuba was not held accountable for carrying excess passengers and should have shouldered more liability than 10% attributed to him by the trial court. I am also inclined to find that a person who voluntarily gets on a boda boda when he/she finds that there are more than one should equally be held accountable and hence culpable. To that end this court finds that the trial court apparently misdirected himself on that score and had he done so certainly he would have attributed more liability to the Respondent. I find that the Appellant should have been found 60% liable and I hereby do find that the Appellant was 60% liable while the Respondents were 40% liable for either carrying excess pillion passengers or being excess pillion passengers and hence causing more liability to the Appellant after the accident occurred.

9. The respondent in her submissions argued that the issue of liability was determined in the sister file which had been constituted as test suit on liability in KISII CMCC No 487 OF 2019. In the test suit, liability against the appellant was determined at 100%.

10. The question of liability in road traffic cases was discussed by the Court of Appeal in the case of *Michael Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR thus;

> The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* [1953] A.C. 663 at p. 681 as follows:
>
> > " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...
> >
> > "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

11. Looking at the proceedings before the trial court, on 15th September 2020, the respondent's counsel informed court that there was a test suit that was pending for judgment and the appellant's counsel confirmed the position. Although the proceedings did not capture the finding of the test suit, the appellant in its submissions before the subordinate court recognized that liability was already determined in the test suit, KISII CMCC NO 487 OF 2019, where the appellant was held 100% liable. Therefore the trial magistrate in his judgment found that the only issue for determination was on quantum as liability had been settled in the test suit.

12. The appellant now argues that the respondent was liable for reasons that the motor cycle carried excess passengers [see Rosemary Kaari Murithi v Benson Njeru Muthitu (supra)]. In my view, I agree with the decision of *Viviane Anyango Onyango & another v Charity Wanjiku* [2017] eKLR that held that passengers cannot be held liable for accidents. The court stated:

> " 12. It is my very strong view, and supported in numerous court decisions, that a passenger cannot be held liable when a vehicle he is travelling in is involved in

an accident. See *Rosemary Wanjiru Kungu v Francis Mutua Mbuvi & Another* [2014]. Unlike in the Court of Appeal decision in Civil Appeal No. 11 of 2014. T*he Chairman St. Teresa's Nyangusu Girls Secondary School v Jackline Monari*, the deceased cannot be said to have had a hand in the occurrence of the accident."

13. I have also considered the evidence adduced before the trial court. Pw1 testified that she was a pillion passenger when she saw the appellant's Tuktuk registration No KTWB 917 lose control and collided with the motor cycle. In her witness statement, it is clear that the motor cycle had two pillion passengers. However, there was no evidence led to show how the two pillion passengers on the motorcycle would have contributed to the occurrence of the accident. As a pillion passenger, the respondent had no control of the motor cycle and could not have done anything to cause or avoid the accident.

14. Although the appellant in his submissions has urged this court to consider the appeal against the test suit, Kisii Civil Appeal No 66/12 of2020 it was not brought to the attention of this court to have the matters consolidated. The court in the case of *Kubai Kithinji Kaiga (Suing as the legal representative of the estate of John Kaiga (Deceased) v Kenya Wildlife Service* [2021] eKLR observed that;

> " This Court is of the view that it is possible to independently lodge an appeal irrespective of the status of the test suit i.e regardless of whether or not the same has been challenged. In bringing his claim, the Appellant will however have to rely on the proceedings of the file and/or Court that dealt with the test suit, as has been done herein."

15. The appellant was therefore required to include the proceedings from the test suit in its record of appeal as without the same it would not possible to re-appraise the evidence arising from the test suit. The evidence before the court is the acknowledgment that liability of 100% was applied against the appellant and the evidence of Pw1 who testified that the Tuktuk was driven in a reckless manner causing it to lose control and cause the accident. In my view therefore, the trial magistrate correctly held that the appellant was 100% liable for the accident and I find no reason to disturb the finding of the trial magistrate.

16. I now turn to the damages awarded by the trial court and whether the damages awarded was inordinately high. The parameters under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in B*ashir Ahmed Butt vs. Uwais Ahmed Khan* [1982-88] KAR as follows:

'An appellate court will not disturb an award for general 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...'

17. The appellant argued that the trial magistrate ought to have awarded the respondent Kshs 500,000/- for general damages. It relied on the case of *Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others* [2004] eKLR where the plaintiff suffered a ruptured spleen and was awarded Kshs 500,000/-. The respondent on the other hand argued that Kshs 500,000/- proposed by the appellant was way too low as the decision in the Arrow Car Limited case (supra) was made in 2004 and considering the rate of inflation, Kshs 800,000/- was sufficient.

18. I am inclined to agree with the arguments put forth by the respondent that the Arrow Car Limited case (supra) which the appellant placed reliance on is outdated.Although the injuries are similar, the decision in Arrow Car Limited case (supra) caseis over 10 years. According to the medical report by

Dr. Morebu, because of spleenectomy, the respondent would be immunized against pneumococcal meningococcal and haemophilus influenza. He was of the opinion that recovery was to take a long time and permanent disability was anticipated. The medical report by the appellant's doctor, Dr James Obondi Otieno, gave a prognosis that the respondent would require lifelong vaccination having lost her spleen and assessed permanent disability at 50%. Having considered the rate of inflation and the serious injuries sustained by the respondent, Kshs 800,000/- awarded by the trial magistrate cannot be said to be excessive.

19. In regard to the award of loss of amenities, the appellant argued that there was no evidence showing that the respondent was employed and that as a result of the accident she will be prevented from getting a job. It cited the case of Nakuru High Court Suit No 189 of 2009 *Muriri v Suera Flowers Ltd*.

20. The court in *HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another* [2021] eKLR held that loss of amenities is awarded to compensate the claimant for the loss of quality or reduced enjoyment of life. The court stated:

> " On the other hand, its incumbent upon the trial court to award damages on the same cluster for loss of amenities. The phrase loss of amenities arises from the reasoning of the court in Angeleta Brown v Petroleum Co. of Jamaica Ltd CA No. 2004 HCV 1661 "to mean an award for loss of amenity to compensate the claimant for the loss of quality or reduced enjoyment of life."

21. It is not in dispute that respondent's permanent disability was assessed at 50%. Her quality of life was therefore reduced as she now requires lifelong vaccination for capsule forming bacteria. The award of Kshs 200,000/- is not massively excessive.

22. On loss of future earning capacity, the appellant submitted that there was no proof of the respondent's job or how much she earned and the award ought to be set aside. The respondent on the other hand submitted that the respondent was a nurse and following the accident her performance would be diminished as she cannot compete at equal levels with fellow nurses in a competitive job market. According to the record, Pw1 testified before the subordinate court that she is a nurse and the same was not challenged on cross examination.The reasoning behind award of loss of earning capacity while the respondent is employed is to compensate her for the risk that the disability has exposed her to, which includes the possibility of losing her job in the future or, in the event that she loses her job, the reduction of her chances of finding an alternative job on the job market. This was echoed by the Court of Appeal in the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007]eKLR where it stated that:

> " .....the award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he losses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take

the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability." Emphasis mine"

23. It is not clear how much the respondent earned as a nurse; however, there isno formula for assessing loss of earning capacity. The trial magistrate Kshs.500,000/- as a global sum under this head, the said award is not excessive.

24. The upshot of this is that this appeal is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT KISII THIS 10TH DAY OF FEBRUARY 2023

R.E. OUGO

JUDGE

In the presence of:

Miss Anyangoforthe Appellant

Miss Kusa forthe Respondent

Orwasa C/A