Orchard Juice Limited & another v Gekera (Civil Appeal 260 of 2017)
[2023] KEHC 898 (KLR) (Civ) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 898 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 260 OF 2017

JN MULWA, J

FEBRUARY 16, 2023

BETWEEN

ORCHARD JUICE LIMITED ..... 1ST APPELLANT

PETER NJOROGE KINUTHIA ..... 2ND APPELLANT

AND

JULIUS JUMA GEKERA ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of the Chief Magistrates Court in Milimani CMCC No. 6164 of 2012 delivered by Hon. E. Wanjala (SRM) on 27th April 2017)

JUDGMENT

1. This appeal arises from the judgment of the trial court delivered on 27/4/2017 in Milimani CMCC No. 6164 of 2012 in which the Respondent had sued the Appellants for general and special damages arising from a road traffic accident. According to the amended plaint dated 27/6/2013 and filed on 6/8/2013, the accident occurred on 9/12/2010 at 11.30am along Keekorok Road near River Road. It involved the Respondent, a pedestrian and motor cycle registration number KMCH 650E, property of the 1st Appellant being driven by the 2nd Appellant. The Respondent pleaded that the 2nd Appellant carelessly, negligently and recklessly rode, managed and controlled the subject motor cycle causing it to knock him down and as a result, he sustained serious injuries. The Respondent relied on the doctrine of res ipsa loquitur.

2. The Appellants denied the Respondent's claim in entirety and averred that the Respondent was entirely responsible for and/or significantly contributed to the accident.

3. After trial, the learned magistrate found the 2nd Appellant wholly liable for the accident and held the 1st Appellant vicariously liable for the negligence of the 2nd Appellant. The court then awarded the

Respondent Kshs. 1,200,000/- for general damages, Kshs. 2,811,024/- for loss of future earnings and Kshs. 2,000/- for special damages.

4. Aggrieved by the award of damages, the Appellants lodged the instant appeal vide a Memorandum of Appeal dated 25/5/2017 citing the following grounds:-

    1. That the Learned Magistrate erred in law and in fact in assessing liability at 100% as against the 2nd Appellant in the circumstances of the accident.

    2. That the Learned Magistrate's award of Kshs. 1,200,000/= to the Respondent by way of general damages for pain and suffering is so excessive in the circumstances as to amount to an erroneous estimate of the damages payable under this head.

    3. That the Learned Magistrate erred in law and in fact in awarding a sum of Kshs. 2,811,024/= to the Plaintiff for loss of future earnings as the same was neither pleaded nor proved.

5. The appeal was canvassed by way of written submissions, which this court has carefully considered.

Liability

Whether the trial court erred in finding the Appellants wholly liable for the accident.

6. The Appellants submitted that in the circumstances of the accident, the finding by the trial magistrate that the 2nd Appellant was 100% liable was erroneous. They faulted the learned magistrate for basing his finding on hearsay evidence that the 2nd Appellant was riding the subject motor cycle at an excessive speed at the material time. They argued that the Respondent testified that he learned of the purported speed from his colleague who was in any event not called to testify on the matter. They also faulted the trial Magistrate for not considering the contradictions in the Respondent's testimony when determining the issue of liability. Further, they urged the court to note that the contention by the Respondent that he was knocked down at a pedestrian crossing was an afterthought as it only came up during cross-examination but was not pleaded in the Amended Plaint or in his statement. It was their submission that the fact that they did not call any witness to testify did not absolve the Respondent from the legal duty placed upon him under Section 107 (1) of The *Evidence Act* to prove his case.

7. The Respondent on the other hand submitted that he discharged his burden of proof through his testimony before the trial court that the 2nd Appellant was riding the motorcycle at a high speed, carelessly, recklessly and on the wrong side of the road. He urged the court to note that the Appellants did not call any witness to controvert his claim or to prove that he contributed to the accident through his own negligence. He submitted that, had the 2nd Appellant acted properly and used the right side of the road, the accident would not have happened. He relied on the case of *Amani Kazungu Karema v Jackmash Auto Ltd & another* [2021] eKLR where the court held:

> "So where a person drives his motor vehicle at a speed in the circumstances which he fails to keep a proper look out and ran into the lane of another vehicle and a collision occurs that kind of behaviour would very unlikely attract contributory negligence. I am of the further view that the Appellant motor cycle did not approach the scene of the accident without due care and attention to possibility call for apportionment on liability."

8. Further, relying on the case of *Stapley v Gypsum Mines Ltd* (2) (1953) A.C, the Respondent submitted that the issue as to whether or not he failed to look at both sides of the road before crossing must be discarded as too remote compared to the 2nd Appellant's fault of driving carelessly on the wrong side of the road.

9. The general rule is that a trial court's finding on apportionment of liability should not be interfered with save in exceptional cases as it is an exercise of discretion. In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held thus:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

10. In the Respondent's witness statement dated 11/10/2012 and adopted as his evidence in chief, the Respondent stated that on the material day, around midday, he was delivering parcels with his colleagues. They offloaded the parcels from the company vehicle on Ngariama Lane adjacent to Keekorok Road, that he carried two parcels to deliver to Tikoo & Company at Keekorok Road close to River Road. On reaching Keekorok road, he checked and confirmed that there were no oncoming traffic on the one-way traffic street. He began crossing the and when he reached the middle of the road, a motorcycle approached from the wrong side and he was unable to see it in good time due to the rider's speed. It knocked him and threw him in the air after which he landed on the tarmac and passed out. He was taken to hospital by a motor vehicle owned by the 2nd Appellant's employer, the 1st Appellant Company.

11. In cross-examination, the Respondent stated that the two packages he was carrying were one large box on his head and a smaller one in his hand and he had a good view of the road. He only checked the right side of the road because traffic was moving to one direction, and determined that it was clear before crossing. He admitted that there was a lorry on the left side that blocked him from seeing what was on the left side hence he did not see the motor cycle prior to being knocked while on a pedestrian crossing. Further, he denied that the motorcyclist hooted three times to warn him not to cross the street. Lastly, he stated that it was his colleague that informed him that he was knocked by a speeding motorcycle.

12. Under Section 107 of the *Evidence Act*, the legal burden of proof lies on the person who calls the law to their aid. The Respondent was the claimant and sought to rely on the doctrine res ipsa loquitur in proving liability. Justice Joel Ngugi explained the doctrine in the case of *Virginia Njeri & another v Joseph Njenga* [2020] eKLR as follows:

> " It is important to recall that the doctrine of Res ipsa loquitur is a legal rule that lets plaintiffs avoid proving specific negligence when they can show that the type of accident speaks of the defendant's negligence. It assesses liability in the absence of clear evidence of what went wrong. The Courts allow Plaintiffs this facility out of realization that some accidents are usually caused by negligence. Consequently, when the Plaintiff brings his case within the doctrine, the Court infers negligence from the accident's very occurrence.
>
> 17. However, for the doctrine to apply, two conditions must be satisfied. First, it must be shown that the accident is one that ordinarily would not occur in the absence of negligence. This is what allows the plausibility of the inference: if the inference is far-fetched, then the doctrine does not apply. Second, the doctrine does not apply unless it can be demonstrated that the Defendant was in exclusive control of the agency that caused the injury. This refers to the extent to which the Defendant participated at the scene of the accident. If the Defendant had exclusive agency that caused the accident, and the accident is one that ordinarily would not occur in the absence

of negligence, then by operation of the doctrine of res ipsa loquitur, the Defendant would be liable for the accident unless he offered an explanation other than negligence." (Emphasis mine)

13. The court has carefully interrogated the evidence adduced by the Respondent before the trial court, in addition to the legal underpinnings in respect thereof. There is no dispute that an accident occurred on the material day involving the Respondent, a pedestrian, and the 1st Appellant's motor cycle, driven at the time by its agent, the 2nd Appellant. However, the Respondent's testimony that he was suddenly hit by the motorcycle which was being driven at a high speed on the wrong side of a one-way traffic road, was not supported by any evidence. No sketch plan of the scene of the accident was tendered in evidence to at least confirm whether the road was one way or two way, and therefore the 2nd appellant was riding on the wrong side of the said road. The court further notes that no independent eye witness was called by either party to testify as to the circumstances under which the accident occurred. The Respondent in fact admitted in his own testimony that he only confirmed whether there was oncoming traffic from the right side of the road. In the court's view, a pedestrian ought to be vigilant and aware of his or her surrounding when attempting to cross the road. Indeed, courts have held in the past that there can be no excuse for a driver's complete failure to see a pedestrian, or for the pedestrian's complete failure to see the car (in this case a motorcycle). See *Beatrice Kavindu Musembi (suing as the legal representatives of the Estate of Peter Muteti Musembi - Deceased) v Patrick Mbithi Kavita* [2019] eKLR. Consequently, the court finds that the trial magistrate erred by holding the 2nd Appellant wholly liable for the accident.

14. The Court of Appeal in *Michael Hubert Koss & Another v David Seroney & 5 Others* (2009) eKLR cited with approval the case of *Stapley v Gypsum Mines Ltd* (*supra*) where Lord Reid stated:

> " 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."

15. The Appellants closed their case without calling any witness to controvert the evidence given by the Respondent and did not submit any document in support of the allegations in their amended statement of defence. In *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR cited with approval in the case of *Mary Njeri Murigi v Peter Macharia & another* [2016] eKLR, Lessit J (as she then was) citing *Autar Singh Bahra & Another v Raju Govindji* HCC 548 of 1998 stated:

> " Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the

defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail."

16. In the instant case, the court holds the considered view that had the 2nd Appellant been riding the motor cycle at a reasonable speed, he would have surely seen the Respondent trying to cross the road in good time and would have managed to prevent the accident all together.

In the premises, the court finds that the 2nd Appellant should bear a greater degree of blame with the consequence that the trial court's finding in liability is set aside, and substituted with one that the Respondent shall shoulder 15 % of blame for the accident.

Quantum Of Damages

17. As a general principal, the assessment of damages is a matter of the exercise of court discretion and as such, an appellate court will normally be slow to interfere with such discretion unless the trial court misdirected itself in arriving at the award in question. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR stated as follows in this regard:

> " 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..."

18. It is trite that an award of damages for personal bodily injuries should be commensurate to the injuries suffered and comparable to those made in past similar cases. In *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR, Majanja J. stated thus:

> " The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries."

Whether the trial court's award of Kshs. 1,200,000/- for general damages was excessively high

19. The Appellants submitted that the award was excessive and not comparable to the injuries sustained by the Respondent or to awards made in comparable cases. They referred the court to the authority cited in their submissions in the trial court namely *Katheri Dairy Co-Op. Society & Another v M'marete M'guatu* [2014] eKLR. They stated that in that case, the Plaintiff was awarded Kshs. 500,000/= as general damages for more serious injuries being: - basal skull fracture, fracture of cervical vertebra 4 and 5, cut wound on the scalp, blunt object injury on the left shoulder and loss of hearing in the left ear. The Appellants reiterated their proposal in the trial court that a sum of Kshs. 600,000/= would suffice as reasonable compensation under this head.

20. The Respondent held a contrary view and submitted that no basis has been laid for this court to interfere with the trial court's award for general damages. He submitted that the sum awarded was reasonable in the circumstances of the case and urged the court to be guided by the cases of *John Maseno and Another v Dan Nyanamba Omare* [2006] eKLR which he cited in the trial court. He stated that in the said case, the court of Appeal at Nakuru affirmed an award of Kshs. 2,000,000/- to a plaintiff who sustained injuries that are nearly identical to the ones he suffered. The Respondent also urged the

court to be guided by the case of *Rahima Tayab and Another v Anna Mary Kinaru* (1987 - 88) 1 KAR 90 where it was stated: -

> "But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Further-more, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

21. At paragraph 7 of the Amended Plaint dated 6th August 2013, it was pleaded that the Respondent sustained the following injuries as a result of the accident:

    a. Severe head injury

    b. Bleeding from the mouth and loss of hearing on the left ear

    c. Left bloody otorrhea moving all times spontaneously

    d. Dizziness and headache.

22. In his testimony, the Respondent stated that he lost consciousness on falling on the tarmac after being knocked by the motorcycle. He was taken to MP Shah Hospital where CT Scans and X-rays were carried out to ascertain the injuries suffered. He was admitted in the ICU for two days then in the normal wards for a further nine days and was discharged on 20/12/2010. On 13/1/2011, an x-ray conducted on his injured right leg a MP Shah hospital revealed that he had Deep Vein Thrombosis. Subsequently, he was admitted at Kenyatta National Hospital for seven days whereupon he was put on anti-coagulation therapy and then given medication to take for six months. It was also his testimony that he still feels dizzy when walking and his left ear cannot hear which causes him to lose balance.

23. According to the Medical Report of Dr. J. L. Amugada dated 9/5/2012 admitted into evidence during trial, the injuries were enumerated as follows:Severe head injury with loss of consciousness for 3 days: Brain CT scan showed:

    i. Right acute subdural haematoma with mass effects raised intercranial pressure

    ii. Left petro mastoid bone fractures with injury of semicircular canal

    Bleeding from the mouth and left ear with CSF leakageLater, development of right deep venous thrombosis (DVT)

24. The doctor noted that the Respondent had received the following treatment: emergency craniotomy and evacuation of haematoma, analgesics, antibiotics and heparin/warfarin for Deep Vein Thrombosis. The said doctor's report was consistent with the injuries noted in the documents he relied on in compiling the report inter alia a medical report by Dr. Gichuru Mwangi of MP Shah, a discharge summary and X-rays from MP Shah Hospital, Case Summary from Kenyatta National Hospital and the Respondent's P3 form. As at the time of examination, the Respondent complained of dizziness and body weakness when walking. He had partial left ear deafness, numbness on both legs and feet on walking for long, loose right incisor tooth and an ugly semi-circular operation scar on the right side of his head.

25. The Respondent also produced a second medical report dated 7/10/2014 prepared by the Appellants' doctor, one Dr. Maina Ruga. The report was similar in almost every sense to that of Dr. Amugada. Dr. Maina formed the opinion that:

> " This man suffered severe harm. He sustained a head injury with skull fracture, loss of consciousness and subdural haematoma. He also got complications of meningitis, left ear otorrhea and DVT in right lower limb. He had surgery to evacuate the subdural haematoma. He was treated for the infections and later for the DVT and he recovered well. He complains of reduced hearing in the left ear and this should be assessed by doing hearing tests (audiometry) to determine if there is any hearing loss and the likely cause of it."

26. A third medical report dated 8/1/2015 by one Dr. R. Sonigra, also tendered in evidence by the Respondent, corroborated the injuries stated in the two previous medical reports. Dr. Sonigra performed a hearing test (Pure Tone Auditory) and noted that the Respondent had a profound degree of sensory neural hearing loss in the left ear. He made the following conclusion:

> " Mr. Gekara sustained brain and inner ear injury following RTA. As a result, he has dizziness on position changes and severe degree of nerve deafness in the left ear.
>
> Objective tests of balance were done on 20/01/2016 which showed that Mr. Gekara has a significant degree of imbalance following the brain and inner ear injury."

27. Dr. Sonigra recommended the use of hearing aids, vestibular rehabilitation and follow up as well as light duties at work that do not involve position changes.

28. In arriving at the decision to award the Respondent general damages in the sum of Kshs. 1,200,000/-, the learned trial magistrate took note of the fact that the Appellants had proposed an award of Kshs. 600,000 while the Respondent proposed Kshs. 2,000,000/- citing authorities from where the court sought guidance. In this court's view, the injuries suffered by the plaintiff in Katheri Dairy Co-Op. Society & Another v M'marete M'guatu [2014] eKLR cited by the Appellants were less comparable to those sustained by the Respondent herein. On the other hand, the injuries in John Maseno and Another v Dan Nyanamba Omare [2006] eKLR relied on by the Respondent were slightly more serious. The victim sustained a fracture at the base of the skull that resulted in some brain damage. He also suffered damage to the roots of left shoulder and left arm nerves in the neck that resulted in complete paralysis and sensory loss of the left shoulder and left arm muscles.

29. In the court's considered view therefore, the trial court's award of Kshs. 1,200,000/- was fair in the circumstances of the case and no basis has been laid for interference with her discretion on the same.

Whether the award of a sum of Kshs. 2,811,024/- for loss of future earnings was erroneous

30. The Appellants contended that the award of Kshs. 2,811,024/- for loss of future earnings should not have been made as it was not specifically pleaded and specifically proved yet this is a special damages claim. The Respondent on his part submitted that he pleaded loss of future earnings at paragraph 7 of his amended plaint and sufficiently proved the claim through various documents tendered in evidence during trial.

31. Loss of future earnings may be awarded for real, actual and assessable loss that can be proved by evidence. See the cases of *SJ v Francesco Di Nello & Another* [2015] eKLR and *Milicent Atieno Ochuonyo v Katola Richard* [2015] eKLR. It entails the inability to earn again.

32. From the court's observation, at paragraph 7 of the Amended Plaint, the Respondent listed loss of future earnings under the particulars of loss suffered as a result of the accident. At paragraph 8 thereof under the particulars of special damages, he pleaded for loss of earnings from the time his employment was terminated until the date when the suit was filed, pegged on a salary of Kshs. 13,014/- per month. To this end, the court finds that the Respondent indeed specifically pleaded for this award.

33. As to whether the claim was specifically proved, it is clear from the three doctors' reports above that the Respondent sustained injuries that made it impossible for him to resume his previous duties at his place of work. In his testimony before the trial court, the Respondent stated that due to that, he was retired from employment on medical grounds and he produced a letter to that effect from his former employer, Bob Morgan Services Limited. In arriving at the award of Kshs. 2,811,024/- for loss of future earnings, the learned magistrate appreciated that the Respondent had shown that he was aged 37 years at the time of the accident. The court adopted a multiplier of 18 years on the basis that, were it not for the accident, the Respondent' Letter of Appointment tendered in evidence, indicated that he would have retired from his position in the Firm at 55 years. Further, although the Respondent produced payslips showing that he was earning a monthly salary of over Kshs. 16,000/- as at the time of the accident, the learned trial magistrate adopted a multiplicand of Kshs. 13,014/- as that was figure pleaded in the amended plaint.

34. The upshot is that the trial court's award of loss of future earnings was based on sound reasoning, the same having been pleaded and proved by the Respondent through documents admitted in evidence. The same was lawfully awarded and thus there is no basis for this court to set it aside.

Disposition

a. The court finds that the appeal succeeds partially to the extent that the trial court's finding on liability is hereby set aside and substituted with a finding that liability is apportioned between the Respondent and the Appellants in the ratio of 15:85 against the Appellants.

b. The court upholds the trial court's award of Kshs. 1,200,000/- in general damages, Kshs. 2,811,024/- for loss of future earnings and Kshs. 2,000/- for the special damages, less the Respondent's 15% contribution.

c. The Respondent is awarded costs of the appeal

Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

J.N. MULWA

JUDGE.