



REPUBLIC OF KENYA



KENYA LAW
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Tubei & another v Amokala (Civil Appeal 448 of 2018)
[2023] KEHC 17291 (KLR) (Civ) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 17291 (KLR)

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

CIVIL

CIVIL APPEAL 448 OF 2018

DO CHEPKWONY, J

FEBRUARY 16, 2023

BETWEEN

EMMANUEL TUBEI 1ST APPELLANT

JOSEPH ARAP KIPLAGAT 2ND APPELLANT

AND

CHRISPINUS IMBAYA AMOKALA RESPONDENT

(Being an Appeal from the Judgment and decree of the lower court dated 28th August, 2018 in Milimani CMCC No.1599 of 2017 delivered by Hon. E.K Usui (CM))

JUDGMENT

Background

1. By a Complaint dated 25th January, 2017 and filed on 13th March, 2017, the Respondent sought for general damages, special damages, costs and interest.
2. In the Complaint, the Respondent pleaded that on or about 20th December, 2015 he was lawfully and carefully standing off the road along Waiyaki Way at Kangemi stage when a Motor Vehicle Registration No.KBQ xxxL was so negligently and carelessly driven, managed and or controlled that the same lost control, veered off the road and knocked him down and as a result he sustained severe body injuries, suffered loss and damage, which are well pleaded and particularized in the Complaint at Paragraph 6.
3. The Respondent pleaded negligence on the part of the Appellants, as particularized at Paragraph 5 of the Complaint.
4. Also in his Complaint before the trial Court, the Respondent pleaded to have spent Kshs.7,700/= for the medical expenses, medical report and motor vehicle search expenses.



5. The Appellants entered appearance and filed a Statement of defence on 10th May, 2017 denying the contents of the Plaint as pleaded by the Respondent
6. The matter proceeded to full trial and the Respondent called a total of three (3) witness who testified in support of his case. PW1-Dr. Cyprian Okoth Okero confirmed that the Respondent sustained a fracture of left humerus and right fibula tibia and blunt injury to eye, which injuries were classified as grievous harm.
7. PW 2-PC Charles Ondieki stated that the accident occurred on 20th December, 2015 at 2.30pm along Waiyaki Way at Kangemi stage involving Motor Vehicle Registration No.KBQ xxxL Nissan Wingroad which was being driven by Joseph Kiplangat and the Respondent who was seriously injured. He proceeded to state that Police Abstract was issued on 7th April, 2016 and the case was still under investigations. On cross examination, PW2 stated that he was not the Investigating officer and the case was not investigated to conclusion. He also said that he was not aware if any charges were preferred against the driver and whether PC Kakai visited the scene.
8. In his testimony to court, PW3-Chrispinus Imbaya Amakola stated that he does casual jobs and that on 20th December, 2015 he was involved in a Road Traffic accident as stated in his statement, which was adopted as his evidence in-chief. He told court that he was injured in his left eye, left hand, left leg which were all fractured and was rushed to Kenyatta Hospital after the accident where he was treated. According to PW3, his eye had sunk in the socket but they pulled it out. He stated that he was a casual worker but now cannot carry out his duties as he cannot carry objects or walk for long distance and his vision is blurred. He blamed the driver of the motor vehicle for the accident. He filed a list of documents which he asked the court to adopt as exhibits in support of his case. On cross examination, he stated that he had stood at stage. They were many but he was the only one who was hit. He denied that he was crossing. The road and stated that he was waiting for a motor vehicle to go to Uthiru. The Appellants did not call any witness to testify before the Trial court.
9. After hearing the matter, the trial court on 28th August, 2018 delivered its Judgment and found in favour of the Respondent as against the Appellants jointly and severally for liability at 100%, pain, suffering and loss of amenities for Kshs.2,00,000/=, special damages of Kshs.7,700/= plus costs and interest of the suit which award is now the subject of the appeal herein.

The Appeal

10. Being dissatisfied with the Judgment and Decree of the trial court, the Appellants preferred an appeal before this court vide a Memorandum of Appeal dated 27th September 2018 setting forth the following Grounds of Appeal (verbatim):
 - a. That the learned trial Magistrate erred in law and fact in failing to make a finding that the Appellants' defence raise serious triable issues and further did not take considerations the defendants' evidence.
 - b. That the learned trial Magistrate erred in law and fact by awarding Kshs.200,000/= general damages and failed to put in consideration the Defendants' submissions.
 - c. That the learned trial Magistrate erred in law and fact by awarding a high amount of damages which is not commensurate with the injuries the Respondent sustained.
 - d. That the learned trial Magistrate erred in law and fact in failing to appreciate the circumstances of the accident and further not taking into consideration the Appellants' submission and the issues raised by the Appellants in court.



- e. That the learned trial Magistrate erred in law and fact in awarding 100% liability to the Appellants.
 - f. That the learned trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellants.
11. The Appellants have urged this court to allow the appeal with costs and set aside the lower court's Judgment.
 12. This court issued directions that the appeal be disposed of by way of written submissions. The Appellants complied with the directions and in support of their appeal filed written submissions dated 25th April, 2022. There are no submissions on record by the Respondent.

Analysis and Determination

13. It is trite law that this being the first appellate court, it has a duty to re-evaluate, analyse the evidence before the trial court afresh before drawing its own conclusions. This was the position was held in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, where the Court held as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

14. Having considered the grounds of appeal and the written submissions by counsel for the appellants, the following are the issues arising for determination in this appeal are:
 - a. Whether the trial court made an error in finding the appellants 100% liable for the accident; and,
 - b. Whether the award of general damages of Kshs.2,000,000/= to the Respondent was manifestly high.
15. On the issue of whether the trial court made an error in finding the Appellants 100% liable for the accident. It was the testimony of the Respondent that he was knocked by the motor vehicle while standing at the stage in Kangema when it veered off the road. His evidence was supported by the Police officer and the Doctor respectively in various aspects
16. Although the Appellants filed statement of defence and witness statement, they did not call any witness to testify for their evidence to be tested on veracity on cross-examination. In the absence of any evidence from the Appellants to challenge the Respondent's evidence, this court is left with no option but to believe on the evidence adduced in support of the Respondent's case. This was the position (and had been in many other cases) in the case of *Intercheme E.A Ltd v Nakuru Veterinary Centre*, NBI HCC No. 1243 of 2000, where Mbaluto Judge rendered himself as follows;

“Where no witness is called on behalf of the defendant the evidence tendered on behalf of the plaintiff is uncontroverted.”



17. The court took a similar position in the case of *Edward Muringa v Nathaniel D. Schulter* Civil Appeal No.23 of 1997 where it observed as follows:-

“In this matter, apart from filing its statement of defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the first Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains allegations...Sections 107 & 108 of the *Evidence Act* are clear that he who asserts or pleads must support by way of evidence. The liability of an employer towards his employee attaches once an employee is injured in the course of employment as a result of failure to ensure the duty of care expected from the employer. The Plaintiffs evidence has not been controverted by the Defendant. In the premises, I find and hold the Defendant liable at 100%.”

18. In the circumstances, the trial court cannot be faulted for holding the Appellants 100% on liability as it is clear that there is no rebuttal to the claim that the accident was caused by the Appellants and there was no contribution on the part of the Respondent.

19. The Court of Appeal in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that:-

“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...”

20. In analyzing and re-evaluating the material evidence that was submitted before the trial court, this court finds it is clear from the plaint dated 25th January, 2017 as pleaded and the evidence on record that Respondent suffered the following injuries;

- a. Fracture of the left humerous,
- b. Fracture of the left tibia,
- c. Fracture of the left fibula,
- d. Blunt injury to the left eye,
- e. An inability to carry a heavy load with the left hand,
- f. A weakness of the left hand,
- g. An inability to run fast,
- h. Recurrent pains on the left lower leg,
- i. Poor vision on the left eye,
- j. Inability to fully extend the forearm,
- k. The forearm is tender on the distal humerous on a deep palpation,
- l. The flexion of the forearm is limited,
- m. The distal lower leg is defamed and tender on a dep palpation,
- n. Plaintiff walks with a limp,



- o. The degree of permanent incapacity of the humerus is 10%
- p. The degree of permanent incapacity of the left lower leg is 30%.
21. The Appellants have submitted that the trial court did not take into consideration comparable awards for similar injuries thus arriving at the award of Kshs.2,000,000/= which is inordinately high. Through their counsel on record they submitted that an award of Kshs.850,000/= is reasonable and fair. Reliance was put on the case of *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors- Agro Yombe Secondary School* (2018)eKLR, where the Court upheld an award of Kshs.800,000/= where the Plaintiff had suffered femur fracture and fractures of the tibia fibula.
22. They also relied on the case of *Joseph Mwangi Thuita v Joyce Mwole* [2018]eKLR, where the Plaintiff suffered fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs.700,000/= as general damages.
23. The Respondent on the other hand urged the court for an award of Kshs.2,500,000/= and relied on several authorities, including the case of *Michael Njagi vs Gideon Ndungu Nguribu & Another* [2013]eKLR and the case of *Mwaura Muiruri v Suera Flowers ltd & Another* [2014] eKLR, where the Plaintiff with similar injuries was awarded Kshs.1,450,000/=.
24. It is well established that comparable injuries should attract comparable awards. This is the position held by the Court of Appeal in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No.147 of 2002 [2004] eKLR, where it stated that;
- “In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exact.”
25. Having considered all the authorities submitted before the trial court and this court, this Court has compared the injuries sustained by the Respondent with the injuries that the complainants in the cited authorities sustained and the amount awarded as general damages therein and finds that the Appellants are right that the award by the trial court was high and therefore proceed to interfere with the same and award a sum of Kshs.1,500,000/= as general damages.
26. In the resultant, the Appellants’ appeal partially succeeds in terms of :-
- a. Liability at 100% in favour.
- b. The award on general damages be and is hereby substituted from Kshs.2,000,000/= to a sum of Kshs.1,500,000/= in favour of the Respondent.
- c. The rest of the orders to remain as awarded before the trial court.
- d. No orders as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF FEBRUARY, 2023

D. O. CHEPKWONY

JUDGE

In the presence of:



No appearance for and by either party

Court Assistant - Simon

