Coast Bus Mombasa Limited & another v Laki & another (Civil Appeal 83 of 2019) [2023] KEHC 17304 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 17304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 83 OF 2019

HM NYAGA, J

MARCH 16, 2023

BETWEEN

COAST BUS MOMBASA LIMITED ..... 1ST APPELLANT

CALEB ODHIAMBO ..... 2ND APPELLANT

AND

OSCAR MWANIA LAKI ..... 1ST RESPONDENT

MURSAL GULEID ..... 2ND RESPONDENT

(Being an appeal against the whole judgment of Honourable K. Kenei delivered on 23rd day of May, 2019 in CMCC No. 383 of 2012 at Machakos)

JUDGMENT

Background

1. Vide a Plaint dated 16th May 2012, was the 1st Respondent filed a suit in the Chief Magistrate's Court at Machakos, seeking general and special damages for injuries he allegedly sustained on 25th December 2011.

2. The Appellants who were the 2nd and 3rd defendant in the said suit entered appearance and filed defence. The 2nd respondent, who was the 1st defendant in the said suit did not enter appearance not file defence and interlocutory judgment was entered against him.

3. The circumstances of the case are that the 1st respondent herein was allegedly travelling as a fare paying passenger aboard motor vehicle registration number KAZ 970L belonging to the 2nd respondent. The said motor got involved in an accident which also involved motor vehicle registration number KBA 662N belonging to the 1st appellant and driven by the 2nd appellant. The 1st respondent blamed the

two (2) drivers of the said motor vehicles for the accident. Interlocutory judgment was entered against the 2nd respondent in default of appearance. The matter then proceeded for hearing.

4. In her judgment delivered on 23rd May 2019, the trial magistrate found the defendants 100% liable for the accident and awarded the 1st respondent Kshs. 700,000/= as general damages and Kshs. 7,650/= as special damages, plus costs and interest.

5. Aggrieved by the finding of the trial magistrate, the Appellants filed a Memorandum of Appeal dated 21st June, 2019. In summary the Appellant's Grounds of Appeal are as follows:-

    1. The Learned Magistrate erred in law and in fact in entering judgment against the Apellants and finding that the Appellants were 100% liable when considering the evidence on record and trial, the same had not been proved.

    2. The Learned Magistrate erred in law and in fact in finding that the Appellants were 100% liable based on the evidence produced in the form of a police abstract when the same cannot be said to be conclusive proof of negligence.

    3. The Learned Magistrate erred in law and in fact in finding that merely because the Respondent's evidence was uncontroverted the Appellants were 100% liable in negligence.

    4. The Learned Magistrate erred in law and in fact in awarding the first respondent a sum of Kshs. 700,000/= general damages which award was inordinately excessive considering the injuries sustained by the first respondent.

    5. The Learned Magistrate erred in law in failing to consider that the injuries sustained by the first respondent were soft tissue injuries which had considerably healed and thereby arrived at an award that it is inordinately excessive.

    6. The Learned Magistrate erred in law and in fact in awarding General Damages of Kshs. 700,000/= which award was an erroneous estimate of damages without due regard being made to comparable legal authorities.

    7. The Learned Magistrate erred in law and in fact by basing the award on extraneous considerations and factors.

6. The Appellants thus seek that the Appeal be allowed and the suit against them be dismissed with costs.

7. In the alternative, the Appellants seek orders that:

    a. The liability against the Appellants by the Surbordinate Court is reduced to the extent that this court deems fit.

    b. The award of general damages by the Subordinate Courts varied to a lower sum to the extent that this Honourable Court deems fit.

    c. That the costs of this appeal be awarded to the Appellants.

8. When the Appeal came up for directions, the parties agreed to canvas it by way of Written Submissions.

Appellants Submissions

9. In their Submissions, the Appellants argue that it was not enough for the Respondent to state that an accident occurred. It was incumbent upon him to prove any fault at liability on the path of the Appellants. That the Respondent had burden to prove the particulars of negligence pleaded in the Plaint.

10. Citing Statpack Industries vs James Mbithi Munyao [2005] eKLR, the Appellant argued that there must be a causal link between someone's negligence and the injuries sustained in other words and injuries sustained must be connected to the negligence.

11. It is also argued that there was no evidence tendered the 1st Respondent to prove that the Appellants were negligent at all to be held liable for the alleged accident.

12. Counsel was critical of the finding by the trial court that the defendants were 100% liable and placing reliance on the police abstract that was produced as Exhibit 4. It is argued that the abstract indicated that the accident was pending under investigation and thus could not be relied upon to determine the issue of liability. I was referred to Mimbula Charles Mwalimu vs Coast Broadway Company Limited [2012] eKLR.

13. The Appellants further argue that the 1st Respondent's testimony was not corroborated by an independent witness such as the investigating officer. That the determination of Makindu Court Traffic Case Number 3 of 2012 with respect to the said accident was never adduced. It follows that the mere fact that the 2nd Appellant was charged in court is not conclusive as to his culpability for the accident. On this issue counsel cited Ngure vs Republic [2003] EA.

14. Counsel for the Appellant further argues that the absence of evidence in rebuttal did not in any way lessen the burden placed upon the 1st Respondent to prove his case. Counsel referred me to Kenya Power & Lighting Company Limited vs Nathan Karanja Gachoka and Another [2016] eKLR and Daniel Toroitich Arap Moi vs Mwangi Stephen Mwithi and Another [2014] eKLR.

15. On the issue of quantum of damages it is argued that the award of Kshs. 700,000/= as general damages was inordinately high as the 1st Respondent's injuries were clearly to the soft tissue only. That the trial court relied on Easy Coach Limited vs Emily Nyangasi [2017] eKLR in which the claimant sustained injuries that were more severe than those sustained by the 1st Respondent.

16. Counsel for the Appellant urged me to be guided by the following authorities, which to him, represent injuries that are more or less similar to the ones suffered by the 1st Respondent.

    (a) Simon Muchemi Atako vs Gordon Osoro [2013] eKLR.

    (b) Duncan Mwenda and 2 Others vs Silas Kinyua Kikela [2018] eKLR.

1st Respondent's Submissions

17. The 1st Respondent opposed the Appeal.

18. Counsel for the 1st Respondent submits that during the trial, the Plaintiff's evidence as to liability was not challenged. That the Plaintiff was categorical that the driver of motor vehicle registration number KBA 062 N (the 2nd appellant) overtook another vehicle and went to the lane which was occupied by the oncoming vehicle in which the Plaintiff was. That this evidence was sufficient to prove liability.

19. Counsel referred me to Peter Ngigi Kwaa and Another (suing as the legal representatives of the Estate of Joan Wambui Ngigi) vs Thomas Onditi Oduol and Another [2019] eKLR.

20. On the issue of the Police Abstract, counsel argued that the trial court did not rely on it alone when it arrived at the determination on liability. That the court also relied on the testimony of the Plaintiff which pointed to the culpability of the Appellants. That in any case the contents of the abstract have not been challenged. I was referred to Obed Mutua Kinyili vs Wells Fargo Limited and Another 2014 eKLR.

21. The 1st Respondent urges the court not to disturb the finding of the trial court on liability.

22. On quantum the 1st Respondent argues that the Appellate court can only interfere with an award of the trial court if it is an erroneous estimate. That the fact that the appellate court would have awarded a different amount if it was hearing the case is not a ground to interfere with the trial court's award. I was referred to the decision is Joseph Mutua Nthia vs Francis Moses M. Katuva [2019] eKLR.

23. Counsel argues that from the evidence in the shape of medical reports though the 1st Respondent was expected to heal, he would have been left with an ugly residual scar. That a de-gloving injury is a severe and painful injury and therefore the award of Kshs. 700,000/= as general damages was not inordinately high. That the injuries in Easy Coach Limited Case (supra) were commensurate to the ones suffered by the 1st Respondent.

Determination

24. This is a first appeal. The court is expected to re-evaluate, re-analyse and reconsider the evidence afresh and draw its own conclusion of course. The appellate court has to bear in mind that it did not did see the witnesses who testified in the trial and has to make due allowance for that.

25. The parties have adequately addressed me on this issue. In Gitobu Imanyara and 2 Others vs Attorney General [2016] eKLR the Court of Appeal held that:

> An Appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its conclusions through it should always bear in mind that it has neither seen not heard the witnesses and should make due allowances in this respect."

26. Similarly in Abok James T/A A. J. Odera and Associates vs John Patrick Machira T/A Machira and Company Advocates it was held that:

> This being a first appeal, we are reminded of our primary role as a first appellate court namely to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the Learned Trial Judge one to stand as not and give reasons either way."

27. The gist of the above principles is that this court is not expected to examine the judgment of the trial court. The appellate court needs to consider the evidence on the court record and arrive at its own independent conclusion. Only then can the appellate court determine whether the trial court erred or not.

28. There are only two issues to be determined in this Appeal. These are:

    (a) Whether the Plaintiff/1st Respondent surmounted his burden of proof in establishing culpability on the part of the appellants; and

    (b) Whether the award of damages was inordinately high to warrant a reduction.

29. As has been correctly pointed out by the 1st Respondent, the Appellants did not tender any evidence during that trial. The only evidence to consider on record is that of the 1st Respondent, who was the Plaintiff in the suit.

30. It is also correct to state that even where there is no evidence by the defendant, the burden of proof on the part of the plaintiff in the suit was not lessened. It was incumbent upon the Plaintiff, to prove culpability on the part of the defendants, albeit in a balance of probability.

31. To address this issue, I will revisit the evidence on the court record. The 1st Respondent testified that he was travelling aboard motor vehicle registration number KAZ 970 L as a fare paying passenger. Along the way motor vehicle registration number KBA 062 N, driver by the 2nd Appellant, attempted to overtake another vehicle and in doing so entered the lane occupied by the motor vehicle registration number KAZ 970 L. As a result, there was a collision between the two (2) vehicles. The plaintiff blamed the 2nd Appellant for the accident and in doing so, held the 1st Appellant vicariously liable for the act of omission of the 2nd Appellant.

32. To support his case, the 1st Respondent tendered a police abstract, produced as an exhibit. The said abstract has been attacked by the Appellants.

33. So what exactly is a police abstract? To me, it is a summary of the information surrounding the accident, as known to the Police Station that the accident was reported. After an accident, it is expected that, the police will investigate it, to determine the probable cause, amongst other issues. In doing so, the police investigations will assess the scene, draw sketches if necessary, prepare legends and measurements, record witness statements, obtain requisite documents like the insurance covers of the vehicle(s), driving licenses of the drivers and so on, and prepare an investigation file. That investigation file will invariably also contain the conclusions drawn by the investigators as to culpability of any party where applicable. All this information is what will be entered in a police abstract. Therefore, a police abstract is a summary of the information and conclusions that the police have drawn. It is not plucked from the air. Of course any conclusion drawn by the police remain as such and can be rebutted.

34. During the trial, the evidence by the plaintiff and the corroboration by the police abstract was not rebutted. It is not disputed that the 2nd Appellant was charged at Makindu Law Courts with the offence of causing death by dangerous driving, contrary to Section 46 of the *Traffic Act* . That in itself it a clear indication that the police investigator formed the opinion that the 2nd Appellant was to blame, and is so stated in the abstract.

35. I agree with the appellants that there was no evidence as to the finding of the court in respect to the traffic case. However, it was not mandatory for the 1st Respondent to have availed it. His was a burden of proof on a balance of probability. To expect findings of the Traffic case, which are also subject to an appeal, is to raise the bar too high for the 1st Respondent. Of course the 2nd Respondent was entitled to hold the driver of the other vehicle culpable as well or solely so. However, this did not happen, as they did not attend court. Therefore the only evidence available for the court is that of the 1st respondent and the documents produced in court.

36. Therefore, having evaluated the evidence on the court record, I am satisfied that the 1st Respondent did prove his case against the appellants in respect to liability. To that extent, I agree with the findings of the trial court. I find that the appeal on this issue is wanting in merit and is disallowed.

37. I will now address the 2nd issue, that of the quantum of damages.

38. An award of damages is a discretionary one. It is well settled law that the mere fact that this court would have arrived at a different figure is not a ground to set aside an award by the trial court. This court can only disturb such an award if it is of the view that it was inordinately or excessively high or low, or that the trial court proceeded on wrong principles.

39. Though a discretionary order, a court ought to be guided by certain principles. These were well set out in Joseph Mutua Nthia vs Fredrick Moses Katuva (supra) cited by the 1st Respondent.

30. In Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal held that –

> ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
>
> 'An appellate court will not disturb an award of 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." (Emphasis my own).

31. Similarly, Court of Appeal in Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 1 held that;

> An appellate Court will not disturb an award of 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"

32. Lastly, in the case of Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR the court stated as follows: -

> It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ..."

33. The Appellants state that the award of Kshs. 700,000/= as general damages was inordinately high and that the court relied on irrelevant authorities or applied the wrong principles.

34. The 1st Respondent is of the view that the award was reasonable and ought not to be disturbed.

35. From the court record, the 1st Respondent sustained the following injuries;De-gloving injuries on the foreheadFriction bruises right parietal regionFriction bruises right elbowFriction brises right lap

36. After the accident, the 1st Respondent was treated at Makindu District Hospital and then at Athi River Shalom Hospital. According to Dr. John Mutunga, who prepared the medical report dated 13th January 2012, just under 3 weeks after the accident, the 1st Respondent had a healed hypertrophic scar on his right forehead, a healed scar on his right leg and right elbow, together with a tender traumatic red right eye. The doctor described the injuries as soft tissue injuries and he expected them to heal, save for an ugly residual scar.

37. The 1st Respondent was treated and discharged from hospital on the same day. He did not require any skin grafting as was the cases in the authorities which the trial relied upon.

38. An award of damages ought to be reasonable and no matter how high they cannot place an injured party to a position he or she was before the accident.

39. I am of the opinion that even after taking account of inflationary factors, the award of Kshs. 700,000/= as general damages was manifestly and inordinately high/excessive, given that these were soft tissue injuries with no residual permanent incapacity, save for scars.

40. The appellants have prayed for reduction of the award of general damages to Kshs. 150,000/=. I am of the view that this amount is inordinately low and is not in sync with comparable cases, even those cited by the Appellants themselves.

41. For the foregoing reasons I find the appeal partly succeeds, on the issue of quantum of damages only. I proceed to reduce the award of general damages to Kshs. 400,000/=.

42. In conclusion, I find that the appeal on liability is wanting in merit and is dismissed. The appeal on quantum succeeds and is allowed as stated above.

43. Since the Appellants were partly successful, I direct that each party will bear its own costs of this Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY FROM NAKURU THIS 16TH DAY OF MARCH, 2023.

HESTON. M. NYAGA

JUDGE

In the presence of;

C/A Immanuel

N/A for Appellant

Ms Mutuku for 1st Respondent