Delle alias Gazi Mvoi v Awadh & another (Civil Appeal E110 of 2021)
[2023] KEHC 2148 (KLR) (17 March 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E110 OF 2021

F WANGARI, J

MARCH 17, 2023

BETWEEN

HAMISI SULEIMAN DELLE ALIAS GAZI MVOI ..... APPELLANT

AND

SALIM AWADH ..... 1ST RESPONDENT

MUTHAMA JUVENALLIS ..... 2ND RESPONDENT

(Being an appeal against the entire undated judgement of the Learned Honourable E.K. Makori, Chief Magistrate in Mombasa Magistrate's Court Civil Suit No. 384 of 2015 between Hamisi Suleiman Delle alias Gazi Mvoi versus Salim Awadh and Muthama Juvenallis)

JUDGMENT

1. This is an appeal against the judgement delivered by honourable E.K Makori, Chief Magistrate (as he then was). The appellant being dissatisfied with the said judgement preferred this appeal.

2. The appellant preferred ten (10) grounds of appeal in urging this court to set aside the judgement among them that the trial magistrate erred in law and in fact by failing to find the defendants liable for the accident that informed the filing of the tortious claims.

3. Directions were taken and the appeal was disposed of by way of written submissions where all parties duly complied and relied on various decisions in support of their rival positions. I have duly considered the said submissions together with the various cited authorities.

4. As the first appellate court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles

in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).

5. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, decree, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise, I will carefully revisit the record.

6. The appellant *vide* a plaint dated March 4, 2015 and filed on even date sought for general and special damages from the respondents for an accident that allegedly occurred on January 17, 2014 along Kinango – Samburu road at Vigurungani area, occasioning the appellant severe injuries and loss. The suit was defended and the same was fully heard.

7. Through a judgement delivered by honourable E.K Makori, Chief Magistrate (as he then was), the same was dismissed with costs. The appellant being aggrieved by the said judgement preferred this appeal. The appeal is both on liability and quantum. The appellant contends that the trial magistrate erred in law and fact in dismissing his case.

8. In dealing with the issue of liability, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanor (see *Selle v Associated Motor Boat Co* (supra).

9. The evidence of the parties was straight forward. Dr Ajoni Adede (PW1) stated that he examined the appellant on January 19, 2015 following a road traffic accident on January 17, 2014. Based on his examination, the appellant had sustained various injuries among them compound fracture of the right humerus bone with paralysis on the right upper limb. He had been admitted at Msambweni district hospital for 68 days. For removal of metal implants, he stated that the same could be done after two (2) years at a cost of Kshs 90,000/= and if done in a private hospital, the same would cost Kshs 180,000/=. As for metal implants, the same would cost Kshs 75,000/=. He assessed permanent disability at 55%. He produced the medical report. On cross examination, he stated that he did not treat the appellant but relied on the treatment notes and the P3 form.

10. PC Rashid Wesonga (PW2) a police officer attached to Kinango police station stated that he was the current investigating officer. He stated that on January 19, 2014, a report was received at the station made by Suleiman about an accident on January 11, 2014. While in the company of his friend Joto Tsuma aboard motor cycle registration number KMCV 209V travelling to Vigurungani from Kinango, upon reaching Murungurunguni, they came across a lorry registration number KBH 903 make Isuzu. The lorry knocked them down. Joto Tsuma who was the pillion passenger did not sustain any injuries. He requested members of the public to take him with the appellant to Kinango hospital where he was examined and later referred to Msambweni sub-county hospital. He was later issued with a P3 on June 30, 2014.

11. Investigations commenced and statements recorded from three (3) witnesses. The driver, one Iddi Salim Awadh was later arrested and charged in Kwale traffic case No 46 of 2014. He stated that the original investigating officer was corporal Harrison Muthusi and it is the same officer who visited the scene. He stated that the police file had the sketch plan which indicated that the motor cycle was knocked while on the left side of the road. It was a hit and run accident. He stated that the driver was arrested on December 3, 2014 almost one year after the accident and by that time, the vehicle had been repaired. He stated that the blame was on the driver of the lorry though no notice of intended prosecution was served upon him.

12. On cross examination, he stated that he visited the scene on June 30, 2014 a day after being handed the file. He confirmed that the initial investigating officer was at Kiganjo police training college undergoing training though he had no proof. He confirmed that it was the appellant that was riding the motor cycle and though there were eye witnesses, it is the appellant who reported the accident. He further stated that it is the lorry that knocked down the motor cycle. The lorry had one (1) headlamp. The motor cycle was inspected on September 27, 2014 but he had no inspection report for the lorry. He confirmed that the point of impact was on the left side of the road and that the driver of the lorry had a driving license. On the contrary, the appellant did not produce a driving license. On re-examination, he confirmed that he was not the original investigating officer.

13. Hamisi Suleiman Dele (PW3) adopted his witness statement. He stated that on January 17, 2014, he was riding a motor cycle whose registration number he could not recall. When he reached Murungurunguni, a motor vehicle came from the opposite direction and he moved to his extreme left but the vehicle came to his side and hit him. It was at 8pm. He found himself at Msambweni three (3) weeks later. He highlighted his injuries among them that he lost his five (5) teeth. He was only able to walk in September having been discharged in April. He stated that he could not continue with his business. He reported the matter at Kinango police station where he was issued a P3 and police abstract. The motor vehicle that his him was registration number KBH 903K. He stated that he could earn between Kshs 18,000/= to Kshs 19,000/= and from the cattle business, he could earn Kshs 32,000 to Kshs 35,000/=.

14. On cross examination, he stated that his business began in 2008 to 2014. He was selling cattle and maize but the business had no name. The accident happened at 8 pm. The motor cycle he was riding belonged to his uncle but he had forgotten the registration number. He did not have a license to ride the motor cycle.

15. Antony Mwangi Mutua (PW4) stated that he was the health information officer at Msambweni referral hospital. He confirmed that in 2014, there was a patient admitted in the hospital who had been involved in a road accident. He stated the nature of the injuries and that the said patient still attends physiotherapy or therapeutic clinic. He produced the original notes. On cross examination, he stated that the book did not bear a stamp from Msambweni but it has the hospital's logo. That marked the close of the appellant's case.

16. Before the defence case commenced, an application dated August 15, 2018 was filed. In the said application, the respondents sought to file supplementary list of witnesses and documents. The same was allowed. Awadh Mohamed Salim (DW1) adopted his witness statement. He stated that his vehicle was not involved in any accident. He was later told that there was an accident at Kinango. He referred to Kwale traffic case No 1046 of 2014 where his driver was acquitted. He prayed that the suit be dismissed. On cross examination, he confirmed that the vehicle was his and it could move to any route.

17. Said Salim (DW2) stated that he was a driver. On the alleged date of the accident, he confirmed that he was the driver and was in control of the vehicle. He stated that he never reached where the accident is alleged to have happened. He confirmed that he had been arrested and charged for causing an accident. However, he was acquitted. On cross examination, he stated that he never hit the appellant and that the vehicle was without any dent. Stanley Muati (DW3), the Kwale executive officer produced the proceedings and judgement in the traffic case. That marked the close of the defence case.

18. The trial court considered the evidence and concluded that the appellant did not prove his case and proceeded to dismiss it. On quantum, the trial court held that had the case been proved, it would have awarded the appellant a sum of Kshs 4,480,000/= under various heads.

Analysis and Determination

19. I have reviewed the evidence on my own and it is not in dispute that the appellant herein sustained serious injuries as a result of a road accident that occurred on January 17, 2014. It is equally not in dispute that the accident happened in the evening at around 8 pm. The point of departure was who was to blame for the accident. The appellant contended that the Respondents were to blame. The trial court concluded that the gaps that existed in Kwale traffic case also existed in the case before him. As such, there was no proof that motor vehicle registration number KBH 903K was involved in any accident.

20. As correctly pointed out by the trial court, the key witness was the investigating officer one corporal Harrison Muthusi. I note that one PC Rashid Wesonga testified before the trial court and produced the police abstract. From the plaint, the accident allegedly occurred on January 17, 2014. The police abstract notes the date as January 19, 2014. Be that as it may, I shall adopt the date of January 17, 2014 as the date of the accident. PW2 confirmed that he only visited the scene on June 30, 2014, over six (6) months from the date of the accident. DW2 was arrested on December 3, 2014 over a period of more than eleven (11) months from the date of the accident. This delay could only have been satisfactorily explained by the investigating officer.

21. It is trite that he who alleges must prove. That is what section 107 of the *Evidence Act* states. On question of proof, and burden thereof, it is stated in *Charlesworth & Percy On Negligence*, 9th edition at P387: - In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred"

22. It was the appellant's duty to prove on a balance of probabilities that the respondents were to blame for the accident. As already noted, the initial investigating officer was never called to testify in this case. The only reason offered was that he had been transferred and that he was on training. I equally note that the police abstract was produced by consent of the parties. However, were the requirements of section 35 of the *Evidence Act* complied with? section 35 (1) of the *Evidence Act* sets out the conditions to be satisfied and I note that the said section is conjunctive and not disjunctive. Therefore, both conditions set out under section 35 (1) have to be complied with. It is not in doubt that the maker of the police abstract was never called and this really diminished a conclusive finding as to who was to blame.

23. I equally note that the appellant in his testimony stated that there were eye witnesses among them Tsuma Mumbo Mangale and Joto Tsuma Chaka whom he was riding with. These witnesses though they testified in the traffic case were not called as witnesses before the trial court. Even if DW2 had been convicted, I take note of section 47A of the *Evidence Act*. In *Robinson v Oluoch* [1971] EA, the Court of Appeal while commenting on section 47A of the *Evidence Act* had this to say: -

> "...The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying, as Mr Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused

the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what section 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident..." (emphasis added)

24. It was the appellant's duty to prove on a balance of probabilities that the respondents were to blame for the accident. Having failed to discharge the burden required of him, I see no reason to upset the trial court's holding on liability. Based on the foregoing, I uphold the finding on liability.

25. I now turn to the quantum of damages. It is settled that in awarding damages, the trial court is exercising discretion. The law is quite clear as to when an appellate court can interfere with the trial court's exercise of discretion in arriving at quantum of damages. The Court of Appeal in *Butt v Khan* (1982 - 88) KAR 1 set the parameters as follows: -

> "...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 arrived at a figure which was either inordinately high or low..."

26. The appellant submitted that the trial court's award of Kshs 4,480,000/= was too low and not adequate compensation. The factors that a court considers in determining the award to give in damages include the nature and extent of the injuries, the awards made for comparable injuries as well as inflation rates. A court must however bear in mind that no two cases are exactly the same. In the case of *Stanley Maore v Geoffrey Mwenda* Nyeri CA No 147 of 2002 the Court of Appeal had the following to say on the assessment of general damages;

> "It has been stated now and again that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases."

27. The appellant sustained the following injuriesLoss of teeth No11, 12, 13, 21 and 43Compound fracture of the right humerus arm bone with paralysis of the right upper limbFracture of the right femur thigh boneFracture of the mandible lower jaw boneFracture of the right clavicle shoulder blade boneCuts on the face (right side and left side of chinLoss of consciousness

28. Did the trial court commit any error in awarding Kshs 4,000,000/= as general damages? Clearly, the appellant had sustained multiple fractures and PW1 had assessed permanent disability at 55%. Technically speaking, the appellant had lost 55% functionality of his body. In *Rebecca Mumbua Musembi v Lucy K Kinyua* [2014] eKLR, the court for almost similar injuries made an award of Kshs 2,700,000/=. Taking into account the passage of time and inflation, I am satisfied that the award of Kshs 4,000,000/= as general damages was merited. Therefore, the trial court cannot be faulted for the award.

29. On loss of earning capacity, the appellant led evidence that as a result of the accident, he could no longer continue with his cattle and maize business. In *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR, the Court of Appeal held as follows: -

> "...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 loses 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..."

30. Having considered the plaint filed, the same was not prayed for as a separate head and as such, it is deemed to have been claimed under the rubric of general damages. In *Cecilia Mwangi & another v Ruth Mwangi* [1997] eKLR, the Court of Appeal held that damages under the head of loss of earning capacity have to be proved on a balance of probability. In the present case, I note that the same was never done and thus the trial court was correct not to award the same. I find that the other awards were never challenged and I thus proceed to hold that the award of Kshs 4,480,000/= as awarded by the trial court would have been sufficient had liability been proved.

31. Lastly, the appellant has poured cold water on the trial court's judgement for being undated. Order 21 rule 3 of the *Civil Procedure Rules* provide that judgements must be dated and signed at the time of pronouncement. The case laws cited by the appellant herein are sound. However, I note that the trial court's handwritten proceedings clearly indicate that the judgement was delivered on April 9, 2021. Therefore, nothing turns on this issue. Similarly, I reject the respondents' invitation to strike out the appeal for the reasons that the same was admitted with no objection. In any event, striking out is a draconian measure and the same should be sparingly resorted to (see *D.T Dobie & Company Ltd v Joseph Mbaria Muchina & another* [1980] eKLR). Based on the foregoing, it is my finding that the trial court's judgement was sound both on quantum and liability and I so hold.

32. On the issue of costs, it is trite that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. However, the court can exercise its discretion as to award of costs. Though the appeal lacks merit, I order that each party shall bear its costs of the appeal.

33. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

    a. The appeal has no merit and it is hereby dismissed.

    b. Each party to bear their costs of the appeal.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

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F. WANGARI

JUDGE

In the presence of;

for the Appellant

for the Respondent

Guyo, Court Assistant