Hezekiah v Mbugua (Civil Appeal E187 of 2021)
[2023] KEHC 1946 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1946 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E187 OF 2021

LN MUGAMBI, J

MARCH 10, 2023

BETWEEN

KIBE HEZEKIAH ..... APPELLANT

AND

MARY NJAMBI MBUGUA ..... RESPONDENT

(Being an appeal from the Judgment of the Honourable J.M. Nang'ea, Chief Magistrate, delivered on the 21st of September, 2021 in Thika Chief Magistrates Court Civil Suit No. 782 of 2017)

JUDGMENT

1. The suit that gave rise to this appeal was initiated in the lower court through a Plaint dated 24th August, 2017 and filed in court on the same day.

2. In the said suit, the plaintiff (now Respondent) alleged that on or about the 26th August, 2014; she was a passenger on board motor-vehicle registration number KAS 503B when the Appellant's (defendant) motor-vehicle KBR 531L was negligently driven and collided with the motor vehicle KAS 503B and she sustained injuries. The injuries were: blunt injuries on the head, chest, right hand and left lower limb, physical and psychological pain.

3. She blamed the Appellant (defendant) for the accident and sought the following prayers for:

    a. General damages

    b. Special damages of Kshs. 3000/-

    c. Costs of the suit

    d. Interest on a, b & c at court rates

4. The Appellant filed his defence on the 5th of July, 2019. He denied that an accident occurred on 26.08.2014 involving his motor vehicle and that if it did occur, then it was caused by the Respondent and or the driver of the motor vehicle KAS 503B. He specified the particulars of negligence attributable to the driver of KAS 503B and Respondent.

5. After a full trial, the trial court delivered judgement on 21st September, 2021 awarding damages as follows:

    a. Kshs. 400,000/- in general damages

    b. Kshs. 3000/- special damages

    c. Cost of the suit and interest at court rates

6. The appellant contests the judgement of the trial court on the following grounds:

    a. That the Learned Magistrate erred in law and in fact in awarding excessive general damages of KShs. 400,000for for soft tissue injuries in favour of the Respondent without any legal and or evidential justification;

    b. That the Learned Magistrate erred in fact in failing to consider and appreciate medical documents and evidence and to award general damages commensurate with the nature of the injuries;

    c. That the Learned Magistrate erred in law and in fact by not considering the written facts, evidence, submissions made and case law filed by the Appellant;

    d. The Learned Magistrate erred by failing to consider and have due regard to the Appellant's case and to the facts and evidence presented in support thereof.

7. The Appellant urged this Court to find merit in his appeal and allow the same with costs and set aside the award or substitute the said award of damages.

8. On the 16th of March, 2022 the appeal was admitted for hearing and the Court directed that the appeal be canvassed by way of written submissions. The Record of Appeal was filed on the 24th of May, 2022.

9. The Appellant filed his submissions on the 16th of June, 2022. He submitted on the following issues:

    a. Whether the trial court erred in law and in fact in finding the Appellant 100% liable for the accident;

    b. Whether the Court erred in admitting as evidence the Plaintiff's medical report dated 18th August, 2017 without calling the maker;

    c. Whether the Court erred in awarding general damages of KShs. 400,000 for soft tissue injuries which had completely healed.

10. On whether the trial erred in finding the Appellant 100% liable for the accident, the Appellant submitted that during the hearing in the trial court, the Respondent called only two witnesses; herself and the Police Officer. The Appellant stated that the Respondent failed to call an eye witnesses to testify on how the accident allegedly occurred especially because the Respondent testified that she lost consciousness when the accident occurred. That the only eye witness was one Calvin Mongare Nyabuto (DW1) who was also the driver of the suit motor vehicle. That the vehicles involved in the accident were KBR 531L, PSV matatu KAS 503 B and fielder KBY 934H. The Appellant argued

that the trial court ignored the uncontroverted DW1's evidence that the matatu was about 70 meters away. That although DW1 had been blamed for the accident in the abstract, he had noy been charged with a traffic offence in relation to the accident. The Appellant submitted that an abstract is not proof of the cause of an accident. The Appellant relied on the cases of Kennedy Nyangoya vs. Bash Hauliers (2016)eKLR, Mwema Musyoka vs. Paulstone Shamwama Sheli (2021)eKLR and Emmanuel K. Lokwei vs. Isaiah K. Kwarikwari & another (2018)eKLR. The Appellant submitted that this Court is bound to disturb the trial court's findings on liability and hold that the Respondent failed to prove any liability whatsoever against the Appellant. That in the alternative, liability should be apportioned 50:50 basis.

11. On the second issue, Whether the Court erred in admitting in evidence the Plaintiff's medical report dated 18th August, 2017 without calling the maker; the Appellant submitted that the trial court rejected his objection to the production of the report dated 18th August, 2017 whose maker, Dr. Roger Hannington Kayo was not called to produce. He relied on the case of Valji Jetha Kerai vs. Julius Ombasa Manono & Another (2019) eKLR where it was held that a party who fails to call the doctor to produce the medical legal report failed to prove their case on a balance of probability.

12. The Appellant also quoted section 35 of the *Evidence Act* and submitted that it was considered in the case of Koran Isaac vs. Mariam Hamed (2014) eKLR where the Judge held as follows:

> " .... unless there is consent of the parties or the existence of the circumstances in the proviso to section 35, a medico-legal report, just like any other expert opinion, must be tendered by its maker. For this reason, I would hold that the Learned Magistrate fell into error when he allowed the Plaintiff to produce the medico-legal report prepared by Dr. Anthony Mubisi...."

13. According to the Appellant, the trial Court's contention that intimation to call the maker ought to have been given during pre-trial is as erroneous position of the law. Moreover, he argued that the Respondent too did not make an application during pre-trial to be exempted from bringing the maker of the medical report. The Appellant urged this Court to set aside the lower court judgement for admitting the medical report and thus find that the Respondent did not prove the injuries sustained for failure to call the maker of the medical report to prove the injuries.

14. Submitting on the last issue, i.e. whether the Court erred in awarding general damages of KShs. 400,000 for soft tissue injuries which had completely healed, the Appellant submitted that the trial court disregarded his submissions on the variance of the injuries allegedly sustained as evidenced in the medical documents relied upon by the Respondent. That the P3 forms and medical receipts from Thika and Kiambu District hospitals were not attached to the medical report that was produced in court. That there was also no evidence that the said injuries occasioned dizziness, headaches and the inability to carry heavy loads due to chest pains. The Appellant asked the court to note that the said report was [prepared three years after the said accident occurred and that some of the injuries in the report were never captured in the P3 FORM that was prepared two weeks after the accident occurred. The Appellant urged this Court to find that the Respondent had failed to prove any injuries sustained due to the inconsistency in the injuries allegedly sustained. That in the event that the Respondent indeed suffered any injuries, the same were not as a result of the accident that was said had occurred on the 26th of August, 2014. That the injuries that she allegedly sustained from the accident were soft tissue injuries which healed soon after the accident and there was no evidence that the Respondent ever received any treatment on the said injuries.

15. While relying on the cases of Kreative Roses Limited vs. Olpher Kerubo Osumo (2014) eKLR; LNK (A minor suing through CNK as next friend) & 2 others vs. Simon Gatuni Njukia (2022) eKLR and the case of Kenya Nut Co. Ltd vs. David Wafula Wechili (2020) eKLR, the Appellant submitted that a sum of KShs. 80,000 would suffice as compensation for the injuries sustained by the Respondent.

16. The Appellant urged this Court to apportion liability in the ratio of 50:50 basis between the Respondent and the Appellant and not make any award on quantum for failure to establish the injuries or in the alternative substitute the trial court's award with an award of KShs. 80,000 subject to the said apportionment of 50:50 liability.

17. The Respondent filed her submissions on the 30th of September, 2022. She submitted on the following issues:

    a. Whether the appellant was to blame for the accident;

    b. Whether the trial court erred in admitting the Plaintiff's medical report as evidence without calling the maker;

    c. Whether the damages awarded were commensurate with the injuries sustained.

18. On the first issue, the Respondent submitted that she fully blamed the Appellant for the accident because among other things he failed to have regard or other road users, driving without due regard for other road users, driving without care and caution and/or attention, excessive speed and failing to stop in time to avoid the accident. That although the Appellant denied that he was responsible for the accident and blamed both the Respondent and the driver of motor vehicle number KAS 503B the police abstract and the OB showed he was to blame for the accident. She discounted the Appellant's allegation that the said abstract and OB should not be relied upon because the police officer who produced them was not the investigating officer. She relied on the case of John Kibicho Thirima vs. Emmanuel Parsmei Mkoitiko (2017) eKLR and section 35(1) (b) of the *Evidence Act* which provides for exception to the author of a document producing it.

19. On the failure by the Respondent to bring an eye witness, she submitted that she was the eye witness herself and that during cross-examination at the trial court, she explained exactly how the accident occurred. That from her testimony, she was well aware of her surroundings and was able to witness the accident before she lost consciousness. She submitted that the trial court properly analysed the evidence and arrived at the correct finding on who was to blame for the accident based it's findings on her own eye-witness account of the accident.

20. On whether the trial court erred in admitting the Plaintiff's medical report as evidence without calling the maker, the Respondent submitted that the Appellant is challenging the medical report merely on the grounds that the maker was not called to testify. She noted that the Appellant raised an objection to the production of the medical report before the trial court and the Court dismissed the objection on the grounds that the defence did not make an indication during pre-trial conference that the makers of those documents would be required to personally produce the documents or appear for cross-examination. That the issue was therefore canvassed before the trial court and a decision made and which was never appealed against.

21. On the issue of the damages awarded during the trial, the Respondent relied on the case of Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-1988) KAR where the Court 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..."

22. The Respondent contended that the award of KShs. 400,000 is commensurate with the injuries sustained. She relied on the case of Simon Taveta vs. Mercy Mutitu Njeru (2014) eKLR where it was observed that:

> "The context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of the injuries and comparable awards in the past."

23. She relied further on the cases of;

    a. Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 eKLR;

    b. Jane Chelagat Bor vs. Andrew Otieno Onduu (1988-92) 2 KAR 288; (1990-1994) EA 47;

    c. Shabani vs. City Council of Nairobi (1985) KLR 516;

    d. Mohamed Mahmoud Jabane vs. High Shine Butty Tongoi CA No. 2 of 1986 KLR Vol 1;

    e. South Engineering Co. Ltd vs. Musinga Muhia (1985) KLR 730; and

    f. Odinga Jacktone Ouma vs. Moureen Achieng Odera (2016) eKLR.

24. The Respondent submitted that the sum of KShs. 80,000 suggested by the Appellant was inordinately low, unreasonable and unfair in light of the injuries suffered.

25. She urged this Court to find that based on the evidence and the submissions made, the Trial Court properly analysed the evidence and properly exercised its discretion in the award of damages and that the appeal lacks merit and should be dismissed with costs.

26. From the pleadings and submissions before this Court it is evident that the following are the issues for determination:

    a. Whether the medical-legal report dated 18th August, 207 was properly admitted into evidence by the trial court;

    b. Whether liability was established and if so, whether it should be apportioned on 50:50 basis as proposed by the Appellant.

    c. Whether the assessment of quantum by the trial court was in consonance with comparable awards

    d. Who pays for the costs of the appeal.

27. The significance of a medical practitioner's report in personal injury claims cannot be overemphasized. In the instant case the Respondent, (Plaintiff in the trial court) produced the medical legal report by Dr. Roger Hannington Kayo dated 18th August, 2017. In his submissions, the Appellant indicates that he contested the production of the medical report when the matter came for trial. but, he was overruled by the Court on the basis that he did not indicate during pre-trial that he would require the maker of the document to be called/availed. By parity of reasoning, he argued that on the contrary, it would have been the Respondent who should have sought to be exempted from calling the maker and not

the vice-versa. Astoundingly, despite the Appellant's robust and copious submissions on this issue, the court proceedings are completely silent about an objection of such nature having been raised during the trial itself. It appears to have been addressed by the Court in its judgement which implies that the objection was raised after the trial was completed at closing submissions.

28. The Respondent admits the issue was raised but says it was dismissed during the trial. He then proceeded to submit that if he was dissatisfied with the court decision on his objection he ought to have appealed. He submitted:

> "...The Appellant raised an objection before the trial court to the production of the medical report in the maker's absence and the trial court rightly dismissed the objection on grounds that the defence did not make an indication during pre-trial conference that makers would be required to personally produce the documents or appear for cross-examination. This issue was therefore canvassed before the trial court and a decision made which was never appealed against..."

29. The fact of the matter is that he could not have appealed prior to the delivery of judgement since he raised it in his closing submissions and not when the trial was going on.

30. Ideally matters of admissibility should be raised during the trial, not after the case has been closed. The Appellant did not object to the production when the documents were tendered in evidence by the Respondent. He did not even bring the issue of the production of the documents during cross-examination. He waited and brought it up in his final submissions and submitted that the medical legal report should be disregarded because the maker was not called to produce the same.

31. Despite the appellant being present in court throughout the trial, he did not raise any objection when those documents were tendered in evidence. By conduct, the Appellant acquiesced on their production and in my view, he is not different from a person that has consented to the production only to change his mind later on. I do not therefore think the decision in Karauri case or Mailanyi case (supra) which he cited can save him from his indolence. His belated objection is just an afterthought.

32. It is true that the law of evidence, in particular the *Evidence Act* section 35 provides that documents must be produced by the maker but the Court of Appeal interpreting this section held that parties who by consent agree to production of such documents are excepted for its application It is trite law that consent can either be express or by conduct. In a case such as this where it is clear the documents were produced in the presence of a party who voiced no objection only to wait for the case to be closed to raise the issue, I deduce this to be passive approval and the belated objection to be just but an afterthought.

33. The documents produced by the Respondent without any objection being voiced by the Appellant were all those that were contained in the Plaintiff's list of documents dated 24th August, 2017 and filed on even date and they were:

    a. Copy of the Plaintiff's national identity card;

    b. Copy of demand letters and notices of intention to sue both dated 15/10/2015 addresses to the Defendants' and Defendants' insurers respectively;

    c. Copy of the P3 form;

    d. Copies of motor vehicle searched dated 25/9/2014;

    e. Copies of treatment notes;

    f. Medical report;

g. Receipts in proof of special damages.

34. In view of my foregoing findings, I must reach the inescapable conclusion that this ground of appeal inevitably collapses.

35. On the issue of liability, the Appellant submitted that the Respondent failed to call an eye witness during trial to confirm that the accident occurred. The Respondent contends that she was the eye witness and was present when the accident occurred and hence this Court should rely on her testimony. In the lower court she testified that she had an opportunity of seeing the accident happen. She was also cross-examined and the suggestion that she did not witness the accident because she was unconscious is not borne out of the evidence. She became unconscious after the impact, not before and was able to recall what she witnessed right before the collision occurred. Her evidence as to how the accident occurred was thus credible and acceptable.

36. Police abstract that was produced by PW 1 noted that the investigations were complete and that vehicle number KBR 531L was to blame for the accident. Although PW 1 was not the Investigating Officer, the police officer who conducted the investigations and made the entry did so as part of performance of his public duty which he was under a legal obligation to perform as a police officer. The entry in the abstract was made in execution of a public duty and its reliability is presumed barring any information to the contrary as it is a public document even when it is not produced by its maker. Part VI under which Section 38 of the *Evidence Act* falls refers to such Evidence as 'statements made under special circumstances' which by their nature are exempted from application of hearsay rule. Section 38 provides:

> " Section 38- Entries in Public records: -
>
> An entry in any public or other official book, register or record stating a fact in issue or a relevant fact, and made by a public servant in discharge of his official duty, or by any other person in performance of duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible..."

37. The abstract is an official record of an investigation even if the Appellant had not been charged. That evidence adds credence and weight to the testimony of the Respondent as who was to blame for the accident. I thus find that on a balance of probability, the Respondent discharged her evidential burden by establishing that the Appellant was to blame for the accident.

38. On the issue of apportionment of liability, the Appellant contended that the said liability should have been apportioned in the ratio of 50:50. However the evidence adduced laid blame squarely on the Appellant. The appellant said she was a passenger in the said matatu which she had no control of. In my view, there was no evidential basis for apportioning liability at 50:50 basis as suggested by the Appellant. Despite the Appellant pleading particulars of negligence against Respondent, he could not establish a single fault that he had pleaded during his evidence in chief or elicit it during cross-examination.

39. As a matter of fact, if the appellant wanted to apportion any blame to the motor vehicle the Respondent was being carried in, then he should have applied to enjoin him in the suit as a third party. That did not happen. In the circumstances, I find no reason to interfere with the trial court's finding on apportionment of liability.

40. On quantum, the Appellant has submitted that the award of KShs. 400,000 for soft tissue injuries was inordinately high and the same should be reduced to KShs. 80,000. This Court as an appellate

court is well aware that it should not tamper with an award of general damages unless it were to be demonstrated that the said award is wholly erroneous in comparison with awards for similar injuries. (see the cases of Jane Chelagat Bor (supra) and Shabani (supra))

41. From the medical evidence by the Respondent, she suffered injuries as follows:

    a. Blunt injuries to the upper gum;

    b. Blunt injuries to right upper limb; and

    c. Blunt injuries to the left lower limb.

42. In the case Jyoti Structures Limited & another v Truphena Chepkoech Too & another [2020] eKLR for a Respondent that had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs. 250,000/=. For the Respondent that had sustained bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand, general damages were assessed at Kshs. 200,000/=. On appeal, the court set aside both awards and substituted them with Kshs. 125,000/= each.

43. In another case of Civil Appeal No. 54 OF 2016: Ndung'u Dennis v Ann Wangari Ndirangu & another (2018) eKLR where the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands, the trial court awarded KShs. 300,000/= which was reduced to KShs. 100,000/= on appeal.

44. In the case of Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa [2020] eKLR, Nyakundi J. held thus:

> " I agree with Counsel for the Appellants' that the award of quantum by the trial magistrate was on the higher side and did not take into consideration the fact that the Respondent sustained soft tissue injuries, which according to the medical evidence had healed without causing any form of disability and did not affect the Respondent's ability to work.
>
> In the premises, this court is inclined to interfere with the discretion of the learned trial magistrate and does so by setting aside the award of Kshs. 300,000/- as general damages and substituting it with one of Kshs. 150,000/-."

45. In light of the foregoing, it is my finding that the award of KShs. 400,000 for the general damages was inordinately high considering the fact that the Respondent suffered soft tissue injuries that healed with no permanent disability. I therefore substitute the award with KShs. 175,000/- for general damages.

46. The appeal therefore partially succeeds as follows:

    a. 100% liability apportioned to the Appellant;

    b. KShs. 175,000/= as general damages;

    c. KShs. 3,000/= as special damages;

    d. Interests on b, and c above at court rates;

    e. Each party to bear their own costs for the appeal as the appeal partially succeeds.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 10TH DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE

In Presence of:=

Coram- (ON-LINE)

Before L.N. Mugambi Judge

Court Assistant- Brian

Appellant-

Respondent-

Appellant Advocate- M/s Kibore advocate for the Appellant

Respondent Advocate- E.M. Muriungi advocate

Ruling delivered digitally to be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

L.N. MUGAMBI

JUDGE