ENA Investment Limited v Nyakundi (Civil Appeal E091 of 2021)
[2023] KEHC 3312 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3312 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E091 OF 2021

WA OKWANY, J

APRIL 20, 2023

BETWEEN

ENA INVESTMENT LIMITED ..... APPELLANT

AND

LYDIAH KERUBO NYAKUNDI ..... RESPONDENT

(Being an Appeal against the Judgment of Hon. S. K. Arome (Mr.) – RM Keroka dated and delivered at Keroka on the 24th day of November 2021 in the original Keroka Principal Magistrate's Court Civil Case No. 28 of 2020)

JUDGMENT

Introduction

1. The Respondent herein, sued the Appellant before the Lower Court seeking both special and general damages arising out of injuries sustained in a road traffic accident.

2. A summary of the Respondent's case was that on 2nd November 2019, she was travelling along Keroka – Kisii Road as a passenger in motor vehicle Registration No. KCP 839V when due to the negligence of the Appellant's driver/agent, the Appellant's motor vehicle Registration No. KCG 024Z collided with the motor vehicle in which the Respondent was a passenger, thus causing her serious bodily injuries.

3. The Lower Court heard the case and rendered a judgment in favour of the Respondent on 24th November 2021 for Kshs. 200,000/= general damages and Kshs. 10,740/= special damages.

4. The Appellant was aggrieved by the said judgment and filed the instant appeal wherein it mainly challenges the trial court's findings on liability and quantum.

5. The appeal was canvassed by way of written submissions which I have considered.

6. The Appellant submitted that the award of Kshs. 200,000/= general damages is manifestly excessive and not commensurate with the respondent's injuries or in line with the principles governing the award of damages. The Appellant did not make any submissions on liability.

7. The Respondent, on the other hand, supported the trial court's assessment of damages and urged this court not to interfere with the said award.

8. On liability, the Respondent submitted that the trial court made the correct finding in holding that the Appellant was 100% liable for the accident in view of the fact that the Appellant did not tender any evidence to counter the Respondent's case before the trial court.

9. The Respondent submitted that she was a passenger in the motor vehicle that the Appellant's motor vehicle collided with and could not have caused or contributed to the accident in any way. For this argument, the Respondent cited the decision in John Wainaina Kagwe vs Hussein Dairy Ltd [2013] eKLR wherein the Court of Appeal held: -

> " ...the Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the Appellant either wholly or substantially remained just that, mere allegations. The Respondent thus never tendered any evidence to prop up its defence, whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence as it were therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from capability. It was thus substantially to blame for the accident...."

10. I have considered the Record of Appeal and the parties' written submissions. I find that the main issues for determination are whether the Lower Court's award of Kshs. 200,000/= general damages is excessive and whether the court made the right decision on apportionment of liability.

11. As the first appellate court, the duty of this court is to re-evaluate, re-analyze and re-consider the evidence tendered before the trial court and to arrive at its own conclusions while bearing in mind the fact that it did not see witnesses testifying and therefore give due allowance for that.

12. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR, the Court of Appeal stated that: -

> " [A]n appeal to this Court from a trial by the High Court is by way of 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 own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

13. In Peters vs Sunday Post Ltd. [1958] EA 424, the Court held that;

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

Liability

14. It was not disputed that the Respondent was a passenger in the vehicle that collided with the Appellant's motor vehicle. The trial court made the following remarks when determining liability: -

> " ...In apportioning liability am guided by the element of causation and blameworthiness, when a driver steps behind the wheel of a vehicle, he/she assumes certain duties as a motorist. Generally, motorists have an obligation to pay attention, heed all driving laws, and avoid accidents if at all possible even if the other motorist or passenger are negligent.
>
> In the case of Boniface Waiti & another –v- Michael Kariuki Kamau [2007] eKLR the court held,
>
> "It is now trite law that a passenger has no control over the manner driving of vehicle in which they are conveyed and they cannot be penalized for the poor workmanship of the control of vehicle. The explanation on the causation of the accident in such circumstances lay with the driver who was the defendant and the duty of the learned trial magistrate should have been on whether he accepted the defendants version of the skill and efforts he put up in trying to avoid the accident was sufficient to exonerate him of blame or not."
>
> The defendant as a driver was expected to drive prudently and be on the lookout for trouble shooters on the road, be vigilant and most importantly to be able to control the vehicle and bring it to a safe stop in the event of an emergency. He did not do so.
>
> Guided by the above case law I hold that the plaintiff passenger had no control over the manner of driving of a vehicle in which she was conveyed and she cannot be penalized for the poor workmanship of the control of the vehicle. Therefore, the defendant is 100% liable."

15. The Respondent (PW1) testified as follows concerning the sequence of events that led to the accident: -

> " I boarded a vehicle KCP 839V at Kijauri heading to Kisii. The vehicle was involved in an accident at Nyansira. It collided with KCG 024Z Ena Coach. KCG lost control and drove into our lane."

16. The Appellant did not tender any evidence to counter the Respondent's account on how the accident happened.

17. I find that the trial court made the right finding in apportioning liability at 100% in favour of the Respondent who was a passenger in a vehicle that collided with the Appellant's vehicle. It is my finding that there is no way the Respondent could, in the circumstances of the case, be said to have contributed to the accident. The Appellant had the opportunity to include the owner of the motor vehicle Registration No. KCP 839V into the case as a Third Party or Co-Respondent so that the court can distribute liability to it. This is an opportunity that the Appellant did not explore and I therefore find that it cannot shift the blame to the Respondent.

Quantum

18. The principles upon which an appellate court can interfere with an award of damages were stated in Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini vs A.M.M. Lubia & Ano. (1982-88)1 KAR 777 where the Court of Appeal stated as follows:

> '....the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court

of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'

19. The Respondent pleaded and testified that she sustained the following injuries in the accident: -

    a. Laceration on the right leg.

    b. Laceration on the frontal region.

    c. Laceration on the face.

    d. Blunt trauma to the neck.

    e. Blunt trauma to the right thumb.

    f. Bruises on the knees.

    g. Blunt trauma to the neck.

20. The Respondent tendered medical evidence at the hearing, to wit; Medical Report, Treatment Notes and P3 Form which confirm that she sustained the injuries pleaded in the plaint.

21. The Respondent proposed an award of Kshs. 800,000/= general damages before the trial court while the Appellant proposed Kshs. 80,000/=. The trial court considered both proposals and arrived at an award of Kshs. 200,000/= general damages.

22. I have taken into account the authorities that the parties cited in support of their proposals on award of damages and the injuries that the Respondent sustained in the accident. I note that even though the said injuries were soft tissue in nature, they were also severe and covered multiple areas of the body. Dr. Morebu Peter, who examined and prepared the Medical Report was of the opinion that the injuries would heal with large disfiguring ugly scars. This court cannot overlook the negative cosmetic effects of the said ugly scars on the Respondent, a young lady who was reported to be aged 22 years as at January 2020 when the Medical Report was prepared.

23. I find that, in the circumstances of this case, the award of Kshs. 200,000/= general damages cannot be said to be inordinately high or to have been based on a wrong principle. I therefore uphold the trial court's finding on quantum of damages.

24. Having regard to the findings and observations that I have made in this judgment, I find that this appeal is not merited and I therefore dismiss it with costs to the Respondent.

25. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED IN CHAMBERS AT NYAMIRA VIA MICROSOFT TEAMS ON THIS 20TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE