Ibrahim & another v Gachanja (Civil Appeal 603 of 2017)
[2023] KEHC 17515 (KLR) (Civ) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17515 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 603 OF 2017

JN MULWA, J

MAY 18, 2023

BETWEEN

MWANGI IBRAHIM ..... 1ST APPELLANT

JOHN MUGO KAMAU ..... 2ND APPELLANT

AND

STEPHEN KIRUKU GACHANJA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at in Milimani in CMCC No. 7148 of 2013 delivered by Hon. D. O. Mbeja (SRM) on the 6th October 2017)

JUDGMENT

1. Vide a Plaint dated 13/11/2013, the Respondent instituted Milimani CMCC No. 7148 of 2013 against the Appellants herein claiming general and special damages, costs of the suit and interest thereon.

2. The claim arose from a road traffic accident that occurred on 7th March 2013 along Thika Road. It was pleaded that on the said date, the Respondent was travelling as a lawful fare-paying passenger in motor vehicle registration number KBA 812G Isuzu bus owned by the 1st Appellant and being driven by the 2nd Appellant at the material time. When the Respondent was about to alight at Rosters, the 2nd Appellant carelessly and negligently drove, managed and/or controlled the motor vehicle causing him to fall off and get run over by one of the back wheels. As a result, the Respondent sustained serious injuries for which he sought compensation.

3. The Appellants denied the claim through a joint statement of defence dated 14/3/2014.

4. After a full hearing, the trial court found the Appellants jointly and severally wholly liable for the accident and awarded the Respondent damages as follows: Kshs. 500,000/- general damages, Kshs. 399,849/ special damages and Kshs. 80,000/- for future medical expenses. The Respondent was also awarded costs of the suit plus interest.

5. Being dissatisfied with the entire judgment, the Appellant lodged the instant appeal vide a Memorandum of Appeal dated 3/10/2017 in which they raised the following grounds:

    1. The learned magistrate's judgment was unjust, against the weight of evidence and based on the wrong principles of law.

    2. The learned magistrate erred in law and in fact when he failed to consider the facts of the case and evidence adduced during trial as regards liability and held the Appellants 100% liable.

    3. The learned magistrate erred in law and in fact in awarding general damages of Kshs. 500,000/=, an amount that was excessive in the circumstances and not comparable to conventional awards for similar injuries.

    6. The learned magistrate erred in law and in fact when he awarded future medical expenses of Kshs. 80,000/= when the same was not pleaded by the Respondent.

    7. The learned magistrate erred in law and in fact when he awarded special damages of Kshs. 399,849/= when the same was not strictly proved during trial.

    8. The learned trial magistrate erred in law and fact when he failed to consider the Defendants submissions on quantum of damages.

    9. The learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the Appellants and by instead relying on the authorities cited by the Respondent which were unrelated to the actual injuries sustained by the Respondent.

5. The Appellants pray that this Appeal be allowed and the Court do set aside the Decree and Judgment of the Subordinate Court and substitute it with an order dismissing the entire suit with costs. In the alternative, they urge that the Court do re-assess and reduce the general damages awarded; set aside the award for future medical expenses; and, the costs of this Appeal and that of the trial court be awarded to the Appellants.

6. The court has examined the Record of Appeal and the grounds of appeal. It has also given due consideration to the parties' respective submissions and authorities cited. The only issues for determination are whether the learned trial magistrate erred in finding the Appellants jointly and severally wholly liable for the accident and whether the learned magistrate erred in assessing quantum of damages.

Liability

7. The Appellants claimed that the trial court's finding on liability was against the weight of evidence on record. However, they did not tender any submissions on liability. On the other hand, the Respondent urged this court not to interfere with the trial court's finding on liability as the same was anchored on concrete evidence placed before it by the Respondent. The Respondent blamed the Appellants for failing to stop the motor vehicle at the designated point before alerting passengers to alight.

8. The general rule is that a trial court's finding on liability should not be interfered with save in exceptional cases as it is an exercise of discretion. In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held thus:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

9. There is no dispute that an accident occurred on 7th March 2013 along Thika Road at Roasters involving the subject motor vehicle and the Respondent herein.

10. PW3 Stephen Kiruku Gachanja, the Respondent herein adopted his statement dated 13/11/2013 as part of his evidence. He denied ordering the driver to let him get off the vehicle. He stated that there was no bus stage at the accident scene but the conductor advised passengers who were to alight at Roasters to get off at that point. The vehicle stopped and someone alighted before him. He was the second person but the driver drove off before he could put both his feet to the ground, stating that he would not have alighted had the conductor not opened the door.

11. In cross-examination the respondent stated that the vehicle stopped at a bump and that he was not the only passenger that was alighting. and that he could not have alighted when the vehicle was moving. He did not have an eyewitness. On re-examination, he stated that the communication between the driver and the conductor led to the accident.

12. PW2, No. 45866 Cpl Moses Oduol of Kasarani Police Station - Traffic department adduced a copy of the OB extract No. 4/7/3/2013 and a Police abstract dated 11/09/2013 relating to the subject accident as Plaintiff's exhibit 2 and 3. He testified that according to the OB, it was reported that a passenger demanded to alight; that the conductor opened the door while the vehicle was in motion and as a result, the passenger lost balance, fell down, and sustained a fracture on right foot. He stated that it is the duty of the driver and conductor to ensure the safety of the passengers when alighting or boarding a vehicle.

13. In cross-examination, PW2 stated that there is a bus stop after the Roasters roundabout where the accident occurred. He maintained that it was the responsibility of the driver to stop but opined that both the passenger and the conductor are to blame for the accident. However, he admitted that he was not the investigation officer and thus did not know the outcome of the investigations and neither could not tell if anyone was charged with a traffic offence relating to the accident as he did not have the police file. In re-examination, he stated that the accident occurred after passing the bumps after the roundabout.

14. DW1 No. 91660 PC. Milka Lekanda from Kasarani Police Station also testified that the Respondent demanded to alight when the motor vehicle reached Roasters and the conductor opened the door for him before the motor vehicle could stop, that he alighted, lost balance, fell on the tarmac and sustained a fracture on the right foot. She stated that she was not the investigating officer but the OB report was entered by CPL Moses and P.C. Opondo after conducting a preliminary investigation. It was his testimony that in most cases, passengers alight at bumps but he would blame the passenger because a passenger ought to know traffic rules and regulations.

15. On cross-examination, DW1 stated that it is the conductor's duty to open and man the door and he has the mandate to refuse to open. In his view therefore, the conductor and the passenger were to blame for the accident.

16. In the judgment of the trial court, the learned magistrate when determining liability noted that the 2nd Appellant, being the driver of the subject motor vehicle, ought to have taken reasonable measures to avoid the accident by slowing down or acting in a manner that could have helped him to avoid the accident. The court in finding him wholly liable for the accident was of the view that the 2nd Defendant drove the vehicle off without due regard to the safety of the Plaintiff.

17. Whereas this court agrees with the learned magistrate on the fact that the driver- 2nd Respondent- was the person who was in total control of the vehicle, the court holds the considered view that the Respondent must also bear part of the blame for agreeing to alight at a non-designated point which is against road traffic regulations. See *Jasan Nyoike Kariuki v Simon Cheruiyot Ng'eno & another* [2006] eKLR. Indeed, the abstract adduced in evidence by the Plaintiff does not even state who was to blame for the accident. It simply states that the matter was pending under investigation. In addition, the Plaintiff did not call any eyewitness to corroborate his testimony that the driver was wholly at fault.

18. The appellants did not call any evidence to controvert the Respondents' evidence that the vehicle was stopped by the driver and one passenger alighted safely, but when the Respondent was half way to touching ground, the vehicle was driven off, causing him to fall off to the ground. The driver was under a duty to make sure that all passengers alighting did so safely; that is the reason a vehicle has installed side mirrors to enable a driver to see what is happening at the door, in particular. Such safety gadgets are not installed for cosmetic purposes. Further, the opening of the door by the conductor signalled to the passengers that it was safe to alight. The question then arises as why the driver decided to drive off when the vehicle door was open. Had the driver and the conductor not acted so recklessly, without taking into account the passengers safety, the accident would no have happed.

19. The court has considered the evidence of the two police officers. Their evidence boils to nothing as none was the investigating officer, nor was at the scene of accident. The only thing they could prove was the occurrence of the accident by production of the Occurence Book.

20. In the premises, the court finds that both parties to the accident were to blame, but at different proportions. For the above reasons, the court finds reason and basis to interfere with the trial magistrate's finding on liability. The Appellants shall bear 80 % of blame while the Respondent shall bear 20%.

Damages:

a. General Damages

21. The Appellants submitted that the sum of Kshs. 500,000.00 was inordinately high as the Respondent did not sustain any degloving injury or disability as a result of the injuries sustained. They argued that according to the medical report by their Dr. Wainaina dated 30/12/2013, the Respondent only sustained fractures to the 1st and 2nd metatarsal of the right foot which can be classified as soft tissue injuries. Citing three cases namely A*bbyssinia Iron and Steel Limited v Isaack Okoth Ochieng* [2018] eKLR, *Jesca Kajumwa Masela v Razick Aziz Obuba* [2021] eKLR and *Richard Kieti Kathuu v Musee Mutemi* [2018] eKLR, they urged that a sum of Kshs. 300,000/- would be sufficient and adequate compensation in the circumstances of this case.

22. The Respondent on his part submitted that the injuries he suffered were duly confirmed by Dr. Moses Kinuthia and that in assessing the general damages, the trial magistrate considered the serious and extensive nature of the said injuries. The respondent cited the case of *Joash M Nyabicha v Kenya Tea Development Authority & 2 Others* [2013] eKLR where the appellate court awarded the appellant therein Kshs. 1,000,000/- for a fracture on his right leg for which he had to undergo several operations.

The Respondent also cited the case of Bethwel Mutai v China Road and Bridge Corporation Mombasa HCCC No. 200 of 2017 where the Plaintiff sustained fractures to the left clavicle, right humerus and right femur which required surgical operation. The Court awarded Kshs. 800,000/- for pain, suffering and loss of amenities.

23. As a general principal, the assessment of damages is a matter of the exercise of court discretion and as such, an appellate court will normally be slow to interfere with such discretion unless it is very necessary. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR stated as follows in this regard:

> " 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..."

24. Further, an award of damages for personal bodily injuries should be commensurate to the injuries suffered and comparable to those made in past similar cases. In *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR, Majanja J. stated thus:

> " The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries."

25. At paragraph 5 of the Plaint, the Respondent particularized his injuries as crush injury with fractures on 1st and 2nd metatarsals right foot and degloving injuries to the right proximal and distal 1/3 right leg.

26. During trial, PW3, Stephen Kiruku Gachanja, the Respondent herein, testified that he sustained severe injuries on his right leg in the accident. He was first treated at Ruaraka Neema Hospital then referred to Kiambu District Hospital. He was also admitted at St. Francis Hospital for 7 days after skin grafting. He used to see Doctor Nangole Wanjala a specialist with wounds. He has however healed and no longer experiences any pains.

27. PW1, Doctor Moses Kinuthia testified that he examined the Respondent on 20/09/2014. He noted that the Respondent was attended at Kiambu District hospital where essential surgical management of the fracture and the degloving injuries was undertaken. The Respondent had multiple depressed grafted scars on the distal aspect of the right foot and the lateral aspect of the right leg. PW3 examined the x-rays and treatment records from Kiambu District Hospital and St. Francis Hospital and classified the injuries as grievous harm. He noted that the degloving injures had resorted to permanent compromise of the nerves and vessels hence resulting to swelling. He opined that the Respondent would require further surgical management at a costs of Kshs. 80,000/- and the extensive scares were permanent and of immense cosmetic significance. He adduced the report dated 1/10/2013 and receipts for 3,000/- and Kshs. 10,000/- as exhibits 1a - c respectively.

28. On cross-examination, he stated that all the documents required for examination were availed by the Respondent. He also stated that the degloving injury resulted to neurovascular bundle compromise, which is a lifelong condition.

29. From the record, it is evident that the injuries pleaded by the Respondent were duly corroborated by the evidence and medical report of Dr. Kinuthia. The said report was the only one adduced in evidence

during trial and was not challenged by any other. The purported medical Report by Dr. Wainaina dated 30/12/2013 referred to by the Appellants in their submissions is not even in the court's record.

30. In the medical report by Dr. Kinuthia, it was noted that at the time of examination, the Respondent was still complaining of pain and episodic swelling of the right leg and foot. The doctor noticed that there were multiple depressed grafted scars on the dorsal aspect of the right foot and anterolateral aspect of the right leg. He classified the injuries as grievous harm. The scars were extensive, ugly, permanent and of immense cosmetic significance.

31. In making her award on general damages, the learned magistrate considered the injuries sustained by the Respondent, the evidence on record, the parties submissions and authorities cited. Was that award excessive in the circumstances?

32. The court notes that the authorities cited by both parties are not comparable to the injuries sustained by the Respondent. The victims in the authorities relied on by the Appellants sustained less serious injuries while those in the authorities cited by the Respondent were more serious.

33. In the case of *Jesca Kajumwa Masela v Razick Aziz Obuba* [2021] eKLR, the Appellant sustained the following injuries: fracture of the first metatarsal on the left foot, fracture of the proximal phalanx of the left big toe, and massive degloving injury on the left foot. The appellate court set aside the trial court's award of Kshs. 350,000/- and substituted it with Kshs. 500,000/-. In Grace Wamue v Wicks Mwethi Njenga [2020] eKLR the High Court on appeal awarded Kshs. 500,000/- to a victim who had suffered blunt chest injuries, blunt injury - left lower limb, swollen left tender foot and fracture of the left 3rd and 4th metatarsals. In *Njora Samuel v Riachard Nyang'au Orechi* [2018] eKLR, the appellate court upheld an award of Kshs. 500,000/- for a Respondent who had suffered a fracture of one metatarsal with no permanent disability.

34. Bearing the above comparable authorities in mind, the court finds that the trial court's award of Kshs. 500,000/- was not inordinately excessive but a reasonable compensation for the injuries suffered. by the Respondent. The court will therefore not interfere with the trial court's discretion in this regard.

b. Special Damages

35. The Appellants submitted that the trial court's award of Kshs. 399,849/- was not strictly proved. According to the Record of Appeal, the receipts adduced in evidence amount to Kshs. 162,094/- only. It is trite law that special damages must be specifically pleaded and strictly proved. The Plaintiffs pleaded for a sum of Kshs. 399,849/- in this regard but from the receipts on record, the Respondent only proved the sum of Kshs. 263,263/-.

c. Future Medical Expenses

36. As regards future medical expenses, the Appellants submitted that the sum of Kshs. 80,000/- awarded for future medical expenses is without merit and should be dismissed since the Respondent did not suffer any disability as a result of the accident.

37. The Court of Appeal in the case of *Tracom Limited & Another v Hasssan Mohamed Adan* [2009] eKLR stated as follows regarding the claim for future medical expenses: -

> " We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91, this Court, stated: -

> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."
>
> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."

38. In the instant case, it is noteworthy that the Respondent did not plead for future medical expenses anywhere in the Plaint despite the well settled position of the law that the same must be done if such an award is to be made. This only came up in the medical report adduced in evidence by Dr. Kinuthia (PW1). There was therefore no basis for the trial court to award future medical expenses that were not pleaded for and the same must be set aside.

Conclusion

39. For the foregoing, the court finds that the appeal is partially successful as follows:

    a. The trial court's finding on liability is hereby set aside. Liability shall now be apportioned between the Appellants and the Respondent in the ratio 80:20 with the Appellants bearing 80% and the Respondent 20%.

    b. The trial court's award of Kshs. 500,000/- on general damages is upheld.

    c. The special damages award of Kshs. 399,849/- is hereby set aside and substituted with an award of Kshs. 263,263/-

    d. The award of Kshs. 80,000/- for future medical expenses is hereby set aside.

    e. The Respondent is now entitled to the following damages:

        General damages – Kshs. 500,000/-

        Special damages - Kshs. 263,263/-

        Sub-total – Kshs. 763,263/-____

        Less 20% contribution – Kshs. 152,653/-

        Total – Kshs. 610,610/- to the Respondent.

    f. Each party shall bear own costs of the appeal.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 18H DAY OF MAY, 2023.

JANET MULWA

JUDGE.