Kanyanjui & another v Mwangi (Civil Appeal 7 of 2017)
[2023] KEHC 3614 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 7 OF 2017

MM KASANGO, J

MAY 2, 2023

BETWEEN

JAMES KARANU KANYANJUI ..... 1ST APPELLANT

KIKUYU TOWN COUNCIL ..... 2ND APPELLANT

AND

JOHN MWANGI ..... RESPONDENT

(Appeal an appeal from the judgment of the Senior Principal Magistrate's Court at Kikuyu (D. Musyoka, SPM) dated 20th December, 2016 in Civil Case No. 235 of 2013)

JUDGMENT

Preliminary

1. Before I commence my consideration of this appeal, I find it necessary to explain what transpired before I heard the parties. This appeal was filed on 20th January, 2017. The appeal was heard by Justice J.N. Mulwa on 13th June, 2018, by way of written submission. Judgment was delivered by the learned judge on 20th September, 2018 whereby the learned judge found that the doctor's report, a vital document was missing from the Record of Appeal. Consequently, the learned judge dismissed the appeal on quantum. By an application dated 29th July, 2019, the appellants sought review of the judgment and also for leave to file a supplementary record of appeal to include the doctor's report.

2. The learned judge reviewed and set aside the judgment of 20th September, 2018 and granted leave for supplementary record of appeal to be filed. The supplementary record of appeal was filed by the appellants on 14th August, 2019. I heard this appeal by written submissions of the parties and reserved my judgment to days date.

The Appeal

3. John Mwangi, the respondent hereof (hereinafter Mwangi) filed a case before the Principal Magistrate's Court Kikuyu seeking damages in special and general damages that resulted from the accident he pleaded was caused by the negligence of James Karanu Kinyanjui, the 1st appellant (hereinafter Karanu) and Kikuyu Town Council (the 2nd appellant). The trial court by its judgment of 20th December, 2016 found on liability 90:10% in favour of Mwangi and awarded Mwangi Kshs.1.3 million in general damages. Karanu and the Town Council were aggrieved by that judgment and have filed the present appeal.

4. This is the first appellate court and it is therefore necessary to reconsider the trial court's evidence, evaluate it for myself and draw my own conclusion though with a caution that I neither saw nor heard the witnesses who testified at the trial court and accordingly, I am expected to make allowances for that: See the case of Selle & Another Vs. Associated Motor Boat Co. Ltd & Aothers (1968) EA 123.

5. Mwangi pleaded by his plaint that on 3rd March, 2013 he was walking along Kikuyu-Wangige road when Karanu with the authority of the Town Council, in the course of his employment, negligently carelessly and recklessly drove/managed motor vehicle registration No. KBJ 751U thereby causing the same to lose control, veering off the rod and violently knocking him down.

6. Karanu and the Town Council denied, through their defence, liability for the accident, by partly pleading that Karanu was not the driver of the subject vehicle; by denying the accident occurred; and by alleging if the accident did occur it occurred due to the negligence of Mwangi. That defence was to the effect that Mwangi suddenly stepped into the road; he failed to keep proper lookout and observance of the vehicle; he crossed or attempted to cross the road when it was not safe to do so; and that he failed to observe the highway code.

7. The Town Council did not deny vicarious liability. That issue therefore was not before the trial court nor is it before this Court.

8. The appellants in their submissions acknowledge that a trial court's finding on facts should not be easily interfered with. Appellants submitted that an appellate court can however interfere with trial court's finding on facts where the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence; or where the impression of demeanor is contrary to the evidence: See the case of *Ephantus Mwangi And Another Vs. Duncan Mwangi Wambugu (1984)* eKLR. The appellants also cited the case *Mwanasokoni Vs. Kenya Bus Services Ltd (1985)* eKLR as follow:-

> "Accordingly only when the finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this Court interfere with it – See Ephantus Mwangi & Another V Wambugu, (1983/84) 2 KCA 100 at page 118."

9. Appellant's submissions were that the trial court's apportionment of 90:10% should be interfered with because the trial court's finding was unjustified from the evidence.

10. Mwangi by his submissions stated that appellants had failed to show that the trial court wrongly exercised its discretion. The case of Mbogo Vs. Shah (1968) EA page 93 was cited thus:

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or

because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

11. I have considered the parties submissions on the issue of liability. The trial court on the issue of liability by its judgment, made the following holding:-

> " Both liability and quantum in this case is contested. The plaintiff testified that he was lawfully walking along Kikuyu Wangige road when on reaching Muthure area, a motor vehicle registration number KBJ 751U which was travelling from Wangige direction headed to Kikuyu township suddenly overlapped on the left side of the road and in the process violently knocked down the plaintiff from behind and as a result, the plaintiff sustained severe injuries.
>
> According to the plaintiff, the cause of accident was due to the careless ness on the part of the driver of the accident motor vehicle registration No. KBJ 751U for overlapping and driving on the pedestrians walk way and thereby knocking the plaintiff.
>
> The defence called one witness the first defendant who testified on the material day he was driving motor vehicle registration number KBJ 751U from Wangige headed to Kikuyu township when on reaching Wangige area, he noticed a crowd of people ahead of him and as he approached the said crowd one person suddenly jumped onto the road. That he tried to swerve to avoid hitting him but in vain.
>
> If the first defendant found a group of people by the roadside, one would have expected him to slow down to the level where he would have managed his vehicle. He should also have braked instead of veering off the road side. As a reasonable driver, one could also have expected him to be more careful having noticed a crowd of people.
>
> For that reason, I would blame the 1st defendant 90% for the accident and give him the benefit of doubt 10%."

12. With that holding juxta positioned with the proceeding, I find the trial court correctly determined liability. Mwangi in his evidence in chief stated:-

> " I was from Wangige heading to Kikuyu. ...
>
> I was walking on my left ... I was with someone who was ahead of me. On the road, there were other vehicles following one another heading Kikuyu. There was a jam and vehicles were moving slowly. ...
>
> Then a vehicle overlapped and came to the side I was walking and hit me and threw me into nappier grass."

13. Mwangi was cross-examined on his evidence in regard to where the vehicle that hit him was coming from and he said: -

> " I was hit from behind and could not see the vehicle."

14. He also confirmed in cross-examination that it was only him alone that was hit by the vehicle. Mwangi denied he was crossing the road when he was hit.

15. The appellant's learned counsel did not cross examine Mwangi on the speed of the car that hit him. It was therefore erroneous for the said learned counsel to argue thus:-

> " ... had the 1st appellant (Kranu) been driving fast and veered off the road at high speed he would have rammed into the crowd and injured many people."

16. The other submissions on behalf of the appellants that the trial court failed to find that Mwangi dashed into the road can be responded to by reminding the appellants that the trial court had the advantage of seeing and hearing the witnesses testify. I also note that Karanu when he testified in chief he stated thus:-

> " ... on 3.3.2013, I was driving KBJ 751U ...
>
> It was a Sunday and was coming from Wangige heading to Kikuyu ... at about 6 pm. I saw a crowd of people. They were on my left and I just came to the people and I tried to swerve to avoid hitting a person. I could not swerve on my right and hit someone on the road."

17. I must admit I am unable to reconcile Karanu's answers when he was cross examined with that of his evidence in chief.

18. He stated in cross examination that the crowd of people was on his left side facing him. That Mwangi jumped on the road from the left side. Then he stated:-

> " When swerving it is when he (Mwangi) was hit. I cannot know whether he was crossing or attempting to cross."

19. The impression of that evidence is that Mwangi was hit because the vehicle swerved. Karanu was also not clear that Mwangi was crossing the road. That would seem to be consistent with Mwangi's evidence.

20. I have closely examined the trial court's proceedings and I am unable to find that the trial court erred in its determination on liability. In any case, Karanu as a driver bore aa greater responsibility to ensure to keep adequate look out for other road users and in particular pedestrians. The Court of Appeal in the case *Equator Distributors Vs. Joel Muriu & 3 Others (2018)* eKLR made a similar holding to what I have stated above that is:-

> " A motorist must exercise ordinary care and drive at a reasonable speed commensurate with the conditions encountered on the road, which will enable him or her to keep the vehicle under control and avoid injury to others using the highway. Failure to bring a vehicle to a halt in the face of any danger may constitute negligence on the part of the driver. We are satisfied that the trial court did not err in finding the drivers of the two motor vehicles negligent."

21. The appeal on liability for the reasons set out above is declined.

22. The appellants are aggrieved by the court's award in general damages of Kshs.1.3 million. They submit that that award was manifestly excessive bearing in mind the injuries suffered by Mwangi. Appellants faulted the trial court for not considering their doctor's report which stated Mwangi was unconscious for two days but submitted rather that the trial court preferred Mwangi's doctor's report which stated Mwangi was unconscious for 3 days.

23. The appellants in my view erred to fault the trial court on relying on that report. I have looked at appellants' doctor's report. I am unable to find where the doctor got the information Mwangi was

unconscious for only two days. Whether or not Mwangi was unconscious for two or three days does not make a difference for in my view, Mwangi suffered very grievous injuries due to Karanu's negligence.

24. Mwangi suffered the following injuries:-Head injury (cerebral concussion)Deep laceration over the left clavicle (collar bone)Fracture between the middle third and distal third of the left lower leg (tibia and fibula bones).

25. Dr. Bhanji on examining Mwangi found:-

> " John Mwangi Wangui sustained severe injuries to the head, to the left shoulder and left leg as well as soft tissue injuries during the accident he was involved in on the 3rd of March, 2013.
>
> The head injury, which he sustained, must have been severe enough to have rendered him unconscious for three days following the accident. The injury which he sustained to the left shoulder girdle caused a fracture of the distal end of the left clavicle (collar bone). The injury which he sustained to the left lower leg caused fracture of the both tibia and fibula bones. He must have undergone a lot of pain and inconveniences. He had to be admitted at the Kenyatta National Hospital for five days and the left leg was immobilised in a plaster of paris cast for four months. He could not walk without support until February, 2014. He could not work until a year later following the accident. Despite all this, he has complaints."

26. The doctor's future prognosis of Mwangi was:-

> " The head injury, which he sustained and which rendered him unconscious, was a cerebral concussion. Such an injury may have caused damage to the underlying brain tissues which usually heal by a process of scarring. Such scars may predispose John Mwangi Wangui to develop epileptic fits in future. The risk of him developing such fits is about 5% (five percent).
>
> He has already developed one of the symptoms of the post-concussional syndrome, namely, headache. It is extremely incapacitating and takes a long time to subside.
>
> He may even develop other symptoms related to post-concussional syndrome, namely, lack of concentration, spells of dizziness, forgetfulness, irritability, insomnia etc. these symptoms are also incapacitating and take a long time to subside.
>
> The physical examination revealed a palpable bony deformity over the distal end of the left collar bone. This was the nonunited fracture. Unfortunately, this was missed out at the Kenyatta National hospital and no treatment was given. Hence, the non-union remains and this will give him problems when using the shoulder joint.
>
> The physical examination also revealed the movement of the left shoulder joint were painful but not restricted. This is due to the nonunited fracture."

27. The above in my view clearly shows that there is justification of the award in general damages by the trial court. The trial court made the award after comparing the authorities relied upon by both parties.

28. The appellants in their submission erred to state Dr. Mwaura did not note fracture of clavicle. Clavicle is a medical term for collar bone. Doctor Mwaura, in his report noted that Mwangi's clavicle was still dislocated and it was causing Mwangi experience pain.

29. There is no merit in the appeal against the award in general damages.

30. The appellant cannot be allowed to attack Dr. Bhanji's assessment of future medical expenses at this appeal when that doctor was not cross examined on those costs nor were different expenses suggested by the appellants at trial. Medical evidence cannot be attacked from the bar: See the case of *Chaabhadiya Enterprises V. David Wambutsi Wmbukoya (2017)* eKLR.

31. The appeal on future medical expenses for the above reasons is also rejected.

Disposition

32. The appeal for the reason set out above is found to be without merit and is dismissed with costs which are assessed at Kshs.160,000.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF MAY, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant:- Mourice/Julia

M.W. Muli & Co. Advocates for the Appellant: - Mr. Muriuki

B.W. Kamunge & Co. Advocates for the Respondents: - Mr. Mwangi

COURT

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE