Mukevu v Githinji & 2 others (Civil Appeal E14 & E15 of 2022 (Consolidated)) [2023] KEHC 4129 (KLR) (9 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL E14 & E15 OF 2022 (CONSOLIDATED)

G MUTAI, J

MAY 9, 2023

BETWEEN

TITUS MUNUVE MUKEVU ..... APPELLANT

AND

JOHNSON GITHINJI ..... 1ST RESPONDENT

ANN WARIARA KARUNGO ..... 2ND RESPONDENT

DANIEL MUTYOTWI MAINGI ..... 3RD RESPONDENT

JUDGMENT

1. These 2 Appeals arise from Judgment of Hon. Edwin Mulochi (RM) delivered on 7th February 2022 in Kajiado CMCC No. E025 of 2021. The Appeal in HCCA No. 15 of 2022 is on quantum. The Appellant in that appeal was the Plaintiff and contends the award of damages is too low as to amount to an erroneous estimate of damages.

2. The appeal in E014 of 2022 is on liability. The same was filed by the 1st and 2nd Defendants. The Appellants contend that they should not have been held liable for the accident. In their submissions the 3rd Defendant should be held fully liable for the accident.

3. To enable proper identification of parties, I shall refer to them using the titles that applied to them in the court below. Further to note, the two Appeals were consolidated on 5th July 2022, by the Lady Justice Stella Mutuku. The Court ordered that Kajiado HCCA 15 of 2022 would be the lead file as it was older.

Back ground to the Appeal

4. The 1st Defendant was the driver, while the 2nd Defendant was the registered owner of Tuk Tuk registration number KTWA 120U. The 3rd Defendant was the owner of motor vehicle registration

number KAR 974 Y. The 2nd Defendant did not enter appearance nor filed a Defence. Interlocutory judgment was entered against her.

5. The matter proceeded with three witnesses for the Plaintiff and one witness for the 3rd Defendant. The 1st Defendant did not testify. In his defence the 3rd Defendant blamed the 1st Defendant. The 1st Defendant in turn blamed the 3rd Defendant. However, only the 3rd Defendant accompanied the defence with a testimony.

Duty of the appellate court

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

7. This was aptly stated in the case of Peters vs Sunday Post Limited [1985] EA 424 where the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

8. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated as follows: - :

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

9. The court therefore will defer to the court below on findings or conclusions of fact. However, where jurisdiction is not judiciously exercised, or where the court is plainly wrong, this court is bound to set aside such a finding.

10. In doing so the Court must arrive at its conclusions independently by reviewing the evidence on record. The court must rely on the evidence on record not surmises or conjecture.

11. Where the court relies on demeanor of witnesses it must be apparent from the judgment. In cases where there is a gap in evidence, it is not the duty of the court to fill it. A party with duty to tender such evidence will fail, if the evidence is not tendered.

12. Nevertheless, in cases, the court must be guided by pleadings. A party who files pleadings and does not support the same with evidence is non-suited. Finally, a party is bound by the requirements of Order 2 Rule 4(2) of the Civil Procedure Rules. A party must plead particulars of negligence before tendering evidence on the same.

13. Order 2, rule 4, of Civil Procedure Rules, provides as follows:-

> " Matters which must be specifically pleaded

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."

The Plaintiff's Submissions

14. The Plaintiff, as the Appellant in HCCA No.15 of 2022, filed submissions on quantum. He submitted that the injuries suffered were as follows: -

a. Blunt head injury with transient loss of memory

b. Multiple displaced skull fractures involving: -

i. Anterior and posterior bilateral maxillary bones

ii. Lateral and inferior walls of both orbital bones

iii. Bilateral zygomatic arches

iv. Bilateral nasal bones

v. Bilateral cribriform plates

vi. Nasal septum

vii. Anterior wall of sphenoid bones

c. Bruises on the left shoulder

d. Fractured left femur bones

e. Soft tissue injuries on the left leg

15. Dr. Titus Ndeti classified the injuries as grievous harm. He found the degree of permanent incapacity as being 10%. He estimated the cost of removal of implants as being between Kes.100,000.00 and Kes.150,000.00 depending on the type of hospital.

16. The Plaintiff relied on the authority of Weddy Kendi Kabira & Grace Muthoni Kobia versus VM alias VM (Minor Suing though her next friend and mother IKH) [2021]eKLR. In that decision, the court awarded a sum of Kes.2,500,000.00.

Quantum

17. Dr Ndeti, gave the degree of functional permanent disability at 10% with a risk of developing post traumatic convulsions due to the head injuries sustained.

18. The duty of this court is circumscribed. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini versus A M Lubia and Olive Lubia [1982 – 88] 1 KAR 727 at p. 730 Kneller JA said that: -

> " 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 I must be satisfied that either that 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." (See also Loice Wanjiku Kagunda versus Julius Gachau Mwangi CA 142/2003 and Gitobu Imanyara & 2 Others versus Attorney General [2016] eKLR).

19. The words of Lord Denning in the West (H) & Son Ltd versus Shephard (1964) AC 326, at page 341 on excessive awards is succinct: -

> " I may add, too, that if these sums get too large, we are in damage of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community.
>
> The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than a fair compensation."

20. I therefore need to look at the recent decisions related to similar cases. If the award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so.

21. I note that the court below relied on the authorities of Francis Ndungu Wambui & 2 Others Versus Benson Maina Gatia [2019] eKLR , and Francis Ochieng & another Versus Alice Kajimba (2015) eKLR where Kes.300,000.00 and Kes.350,000.00 were awarded respectively. In those cases, the plaintiffs therein had suffered far less severe injuries than those in this case.

22. I find and hold that the award is inordinately low as to amount to erroneous estimate of damages. I therefore set aside the award of general damages of Kes.400,000.00 and in lieu thereof enter judgment for Kes.1,500,000.00, which amount is appropriate given the nature of the injuries suffered by the Plaintiff.

Loss of earning capacity

23. The Plaintiff submitted that the court below declined to award him damages in respect of this claim on the ground that the Plaintiff did not strike him as someone whose earning capacity had diminished significantly.

24. The finding is contrary to the medical report giving 10% permanent incapacity. The Plaintiff relied on Butler versus ButLer (1984) KLR 225 where the Kneller JA said at the page 233 paragraph 5:

> " It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then or at the date of trial)".

On cross Appeal

25. The 1st Defendant filed HCCA No. E014 of 2020 which was consolidated and made a cross appeal. The 1st Defendant contests the court's finding on liability.

26. It is important to clarify that 1st Defendant was not held 35% liable. He was held 70% liable together with the 2nd Defendant jointly and severally. The 3rd Defendant was held 30% liable. The Plaintiff posits that the 1st Defendant did not testify and as such his Appeal is a nonstarter. He relies on the interlocutory judgment.

3rd Defendant Submissions

27. The 3rd Defendant did a consolidated submission for HCCA E014 of 2022 and HCCA E015 of 2022. He supports the award given by the court.

28. Thus 3rd appellant prays for costs of the Appeal and cross appeal after I dismiss them.

29. For purpose of clarity I will start with the issue of liability as raised in HCCA E014 of 2022.

30. The duty of this court when considering a first Appeal has already been stated and need not be rehashed.

1st and 2nd Defendant's Pleadings

31. The 1st Defendant, who was the driver of the Tuk tuk and the 2nd Defendant, the owner thereof, blamed motor vehicle registration No. KAR 974T. The 3rd Defendant blamed motor vehicle registration number KTWA 120Y.

Liability

32. Having not testified in court, the 1st and 2nd Defendants cannot purport that the court ought to have found the 3rd Defendant liable. In fact, on the basis of the uncontroverted evidence of the 3rd Defendant, the 1st and 2nd Defendant ought to have been found 100% liable.

33. However, the 3rd Defendant was satisfied with 30% liability and did not Appeal. Had he appealed, I would have allowed the Appeal. This is on the basis that without evidence, the Defence of the 1st and 2nd Defendants remains mere surmises. The court cannot find contributory negligence on basis of what is stated in the defence. There must be cogent evidence to support the same.

34. Under Section 112 of the *Evidence Act*, the burden of proof was on the 1st Defendant to dispel the postulations by the 3rd defendant. He was there and knows what happened. The section provides as follows: -

Proof of special knowledge in civil proceedings.

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.".

35. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

36. Further in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2004] eKLR, the Court of Appeal was of the view that:-

> " We have considered the submissions of both counsel, the authorities cited before us and we are persuaded by Mr. Mwangi learned counsel for the appellant that we must interfere with the judgment of the superior court. There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50".

37. This however counts where there is dispute between drivers. In this case only the 3rd defendant testified. The 1st Defendant did not tender evidence in support of the defence. There can be no presumption of 50:50 in his favour.

38. In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR, justice c Kariuki was of the considered view that : -

> 52. But what is the effect of failure by the appellant to tender evidence in rebuttal? The court in Shaneebal Limited vs County Government of Machakos [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.
>
> 53. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

39. Consequently, I do not find a scintilla of evidence to support the appeal on liability. It is bereft of merit and is accordingly dismissed.

Special Damages

40. There's no specific appeal over special damages. Therefore, the same were properly pleaded and proved.

Future Medical Expenses

41. The Plaintiff pleaded Kes.150,000.00. The Doctor testified that an amount between Kes.75,000.00 and Kes.150,000.00 would suffice depending on where the treatment was done.

42. The court below had discretion to award any amount between Kes.75,000.00 and Kes.150,000.00. Therefore, an award of Kes.100,000.00 falls within the discretion of the court. This court cannot substitute the discretion of the trial court with its own unless the discretion was not judicious.

43. I note that the subordinate court exercised its discretion based on available evidence. I find no fault with its decision. The court was perfectly in order to decide as it did. I find no merit in the appeal on future medical expenses.

General damages

44. From the injuries pleaded, the injuries were fairly serious. In award of damages I note the court concentrated on very light injuries such as cut wounds and loss of teeth.

45. The court does not appear to have given due regard to the serious injuries the Plaintiff suffered. He sustained multiple displaced skull fractures covering several area including the maxillary bones, zygomatic arches and nasal septum. This is beside those he sustained on his left femeur bones. The appellant was given 10% disability. The court found that the plaintiff did not have that 10% disability contrary to the Doctor's opinion. Whereas I do not doubt the court's medical background it is advisable that non-medical professionals avoid the temptation to make findings outside their area of professional competence.

46. This is based on our understanding that disability can be organs specific or total body disability for the specific organ. one can have 100% disability on the injured part but retain a functional ability of the entire body or can have 5% disability of the contents of the skull and become totally useless.

47. It is not for us to question without basis. It is not that we trust expert evidence without questioning. Expert evidence should be seen in the context of all the other evidence on record. The evidence on record show sufficiently serious injuries.

48. We do not turn ourselves as the court as experts using our own experts in doubt to overrule other experts without conceptualizing it with other evidence.

49. For example, when the court says it cannot see permanent disability in the femur, is the court saying that it never was or it has fully reunited?

50. I concur with the Plaintiff that the authority used were for serious soft tissue injuries. Even fractures of the femur alone attract between Kes.500,000.00 to Kes.800,000.00.

51. In the case of Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR Justice H P G Waweru gave damages of 2,000,000 for pain, suffering and loss of amenities for extensive compound fractures of the left tibia and fibula and extensive damage to the soft tissues of the left leg and Fractured left collarbone.

52. In the case of Dr. Jackline Kamuyi Kamau= vs= Simon Kiiru Njoki [2018] eKLR, the court awarded a sum of 1,200,000/= for less serious injuries.

53. Doing the best I can I set aside the award of Kes.400,000.00 as general damages and substitute the same with a sum of Kes.1,500,000.00.

Loss of earning capacity

54. The Plaintiff suffered 10% permanent disability. This affects his earning capacity, to that extent.

55. The plaintiff was 31 years old at the time of injury. He suffered a 10% permanent Disability.

56. The Plaintiff will have to mitigate his disability. In Butler versus Butler (1984) KLR 225 the Court said:-

> " once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if the damages are payable?"...
>
> "There was no evidence before the trial judge; that the respondent has before been in salaried employment. There could therefore be no claim for: "Loss of future earnings". However having been injured to the extent of not being able to find a suitable job, the respondent had lost her capacity to earn".

57. Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard [1963]2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.

58. The Plaintiff proposed Kes.500,000.00 as damages. However, this has no scientific basis. Given the minimum earning capacity of Kes.13,912.00 per month the Plaintiff possible earnings will have been adversely affected

59. This works as do Kes.13,912.00 x 12 (months) x 10 (years) x 10/100 (disability) = Kes.166,944.00.

60. Therefore, a rounded off amount of Kes.160,000.00 will suffice as loss of earning capacity.

61. In the end the appeal is allowed in the following terms: -

    a. General damages 1,500,000.00

    b. Diminished earning capacity 160,000.00

    c. Special damages 3750.00

    d. Future medical expenses 100,000.00

    Total Kes.1,763,750.00

62. The foregoing should be paid as per the findings on liability in the lower court.

63. This file is closed.

64. Costs of the Appeal to the Appellant (the Plaintiff, in the lower court) of Kes. 200,000.00.

65. Stay of execution of 30 days is hereby ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

GREGORY MUTAI

JUDGE

In the presence of:

Mr. Mulupi for the Plaintiff

Mr. Nganga for the 1st and 2nd Defendants

Ms. Muhoro for the 3rd Defendant

Court Assistant – Winnie Migot