Flashmark (K) Limited v Musyoka (Civil Appeal 280 of 2019)
[2023] KEHC 18281 (KLR) (Civ) (8 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18281 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 280 OF 2019

JN MULWA, J

JUNE 8, 2023

BETWEEN

FLASHMARK (K) LIMITED ..... APPELLANT

AND

JOSHUA NGUTA MUSYOKA ..... RESPONDENT

(An appeal against the Judgment and Decree of the Chief Magistrates Court at Nairobi in CMCC No. 5557 of 2015 delivered by Hon. D. O. Mbeja (SRM) on 26{{^th}} April, 2019)

JUDGMENT

1. Vide a Plaint dated 15/9/2015 the Respondent instituted a case at the lower court, Milimani CMCC No. 5557 of 2015 against the Appellant herein claiming general and special damages, costs of the suit and interest thereon, the claim arising from a road traffic accident that occurred on 15th June 2014 along North Airport Road in Nairobi. It was pleaded that on the material day, the Respondent was walking off the road when the Appellant's authorized servant, agent or driver negligently drove its motor vehicle registration number KBX 774Q causing it to lose control, veer off the road and knock the Respondent down. As a result the Respondent sustained severe injuries for which he held the Appellant liable.

2. In its statement of defense, the Appellant then the defendant averred that the Respondent's claim against it was misdirected as the material accident was solely caused by the driver of motor vehicle registration number KBY 732N.

3. Upon full trial, the lower court held the Appellant wholly liable for the accident and awarded the Respondent Kshs. 230,000/- for general damages, and Kshs. 4,250/- for special damages plus costs

and interest. Aggrieved by the decision, the Appellant lodged the instant appeal by a Memorandum of Appeal dated 24th May 2019 in raising the following grounds:

1. The Learned Magistrate misapprehended the factual evidence on the circumstances of the accident and thereby made an erroneous apportionment of Liability.
2. The Learned Magistrate showed extreme prejudice by totally ignoring the Appellant's submissions.
3. The Learned Magistrate misapprehended the legal principles and guidelines set for the proof of a claim of negligence and thereby made an erroneous apportionment of liability.
4. The learned Magistrate misapprehended the legal principles and guidelines set for the award of damages and thereby made a disproportionately high award of damages.

4. The Appellant prays that this Appeal be allowed with costs and the judgment of the trial court be set aside and be substituted with an Order dismissing the Respondent's Suit.

5. 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 and flags only two issues for determination thus:

   a. Whether the trial magistrate erred in law and fact in holding the Appellant wholly to blame for the accident.

   b. Whether the awards by the trial magistrate are excessively high as to invite the court to interfere with the same.

Liability

6. The Appellant submitted that the Respondent's oral testimony that he was run over by a motor vehicle registration number KBY 732N was completely inconsistent with what was pleaded and his witness statement where he claimed to have been knocked by the Appellant's motor vehicle registration number KBX 774Q. The Appellant noted that the fact that the Respondent was knocked down by motor vehicle registration number KBY 732N and not the Appellant's motor vehicle was confirmed by both PW2 and DW1. It contended that the Respondent did not prove any of the particulars of negligence that he pleaded against the Appellant's driver. Rather, what he pleaded and testified to was the negligence attributable to the driver of motor vehicle registration number KBY 732N that knocked him down.

7. The Appellant contended that parties are bound by their pleadings and noted that at no point did the Respondent seek to amend his pleadings in the trial court to reflect the right position. In the Appellant's view therefore, the trial court's finding that the Plaintiff was knocked down by the Appellant's motor vehicle registration number KBX 774Q was unsupported by the evidence on record. In addition, the Appellant argued that from PW2's evidence, it is also evident that the Appellant's stalled motor vehicle cannot have obstructed the vision of the driver of KBY 732N as to prevent him from seeing the Respondent. Further, the Appellant contended that the Respondent's failure to sue the owner of the motor vehicle that hit him cannot be blamed on the Appellant's failure to enjoin the said person as a third party in the suit before the trial court.

8. The Respondent on his part admitted that his oral testimony before the trial court regarding the motor vehicle that knocked him was a deviation from his witness statement. However, it was his contention that the Appellant cannot purport to free itself from blame because its stalled motor vehicle without any warning signs was the main cause of the accident. Further, the Respondent submitted that in any event, the Appellant in its Statement of Defence dated 11/05/2016 attributed the accident to the negligence of the driver of motor vehicle registration number KBY 732N. In his view therefore, it was the duty of the Appellant to enjoin the said driver as a Third Party as per the provisions of Order I Rule 15 of the CPR. Lastly, the Respondent faulted the Appellant for failing to call the driver of its vehicle KBX 774Q to give his account of the accident despite listing him as one of its witness.

9. The evidence on liability was tendered by PW2, PW3 and DW1. PW3 Joshua Nguta Musyoka, the Respondent herein adopted his Witness Statement dated 15/9/2015 as his evidence in chief. It was his statement that he was crossing the North Airport Road from left to right when motor vehicle registration number KBX 774Q came from the Nairobi direction at a high speed, lost control and hit some people before hitting him. In his oral evidence before the trial court, PW3 stated that a lorry had stalled on the road. When he attempted to cross in front of the stalled lorry, he was knocked down by a motor vehicle registration number KBY 732N. He blamed the driver of the vehicle that stalled on the road for causing the accident by blocking the road.

10. PW2 No. 79106 Corporal Erastus Wanjohi Makenda from Embakasi police station traffic department produced the police abstract in respect of the accident. However, it was his testimony that he was not familiar with the facts of the accident nor aware of the outcome of the investigations as he was not the investigating officer. On cross-examination, PW2 stated that according to the police abstract, three motor vehicles registration numbers KBX 774Q, KAP 521Z and KBY 732N were involved in the accident. He noted that KBX 774Q driven by one Alfred Mwololo had stalled on the road as it had no fuel. KAP 521Z came first and rammed into KBX 774Q. KBY 732N also rammed into KBX 774Q then hit the 1st Respondent herein. In re-examination, PW2 stated that the driver of KBX 774Q was charged with causing death by dangerous driving.

11. The Appellant's witness, DW1 Muthomi Njoka, was a senior clerical officer at Makadara Law courts traffic registry. DW1 produced a court file for Traffic Case Number 3868 of 2014 - Alfred Mwololo versus Republic. DW1 stated that the Appellant's driver of KBX 774Q Tata lorry was charged in court with the offence of causing death by dangerous driving. DW1 testified that according to the particulars of the offence, the said driver had caused obstruction by stalling the vehicle on the road without warning signs. The stalled vehicle was hit by motor vehicle number KAP 521Z and as a result, it caused the death of three pedestrians. However, the traffic case was withdrawn on 17/01/2017 under Section 87(a) of *Criminal Procedure Code*.

12. 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."

13. In the judgment of the trial court, the learned magistrate held as follows:

> " The available evidence suggest that the Plaintiff was knocked by motor vehicle KBX 774Q... Heavy liability lies with the driver of motor vehicle KBX 774Q who was also charged with the offence of causing death by dangerous driving although the charge was later withdrawn. In the opinion of the court, the driver of motor vehicle KBX 774Q is to blame for the accident. He was not careful on the road and did not heed the presence of the Plaintiff on the road as is reasonably expected of any driver behind the wheels and on the road. I will hold the defendant vicariously liable in the circumstances at 100% for the accident all the circumstances of this case considered."

14. From the totality of the evidence on record, this court agrees with the Respondent that the Appellant cannot go without blame for the accident. It matters not that the traffic case against the driver of the Appellant's motor vehicle KBX 774Q was withdrawn before full hearing and determination. The court file in respect of the Traffic Case Number 3868 of 2014 - Alfred Mwololo versus Republic was duly produced in court and this, together with the evidence before the trial court, in the court's opinion suffices as proof on a balance of probabilities which is the standard required in civil cases that the said driver was to blame for the accident.

15. However, whereas there is no doubt that the Appellant's driver bore the bigger blame by causing obstruction on the road without any warning signs thus causing the two vehicles to ram into it, there was obviously some contributory negligence on the part of the driver of motor vehicle registration number KBY 732N. In the court's view, had the said driver been driving at a reasonable speed at the material time, he would have been able to spot and see the obstruction on the road in good time and effectively control and or take any evasive action or slow down so as to avoid the accident. In Bontana Hotel v Issack Mohamed Ibrahim [2019] eKLR, the learned judge rightfully stated that it is not open for any driver to assume that the road is always clear as they must always be on the lookout for any obstruction on the road.

16. Notably however, despite the Appellant blaming the driver of the motor vehicle registration number KBY 732N for the accident and even highlighting particulars of his negligence in its defense, it did not join the said owner and driver to the proceedings by taking out Third Party Notice proceedings against them as provided under Order 1 Rule 15 of the *Civil Procedure Rules*. The said rule provides:-

> "
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> "(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
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> (a) that he is entitled to contribution or indemnity; or
>
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,

he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith."

17. Having failed to join the driver of the motor vehicle registration number KBY 732N as a third party, the trial court could not have apportioned liability between the Appellant and a person who was not a party to the suit. The Court is persuaded by the case of *Benson Charles Ochieng & Anor v Patricia Otieno* HCCA 69 of 2010 (UR) where it was held:-

> 'The trial court could not have apportioned liability between the appellants and a person who was not a party to this suit. This court is unable to agree with the Appellant's argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party into the proceedings.
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> *Mutatis Mutandis*, in the present appeal, it is the Appellants who were to face the consequences for failure to join the motorcyclist to the suit. Having failed to join that party, the argument as to contribution of negligence fail."

18. It would be unjust and illegal to condemn a party who has not been accorded the right to be heard by the court by fault of another party. To that end then, this court finds that the trial magistrate did not err by finding the Appellant wholly liable for the accident. It holds itself to blame for its failure to bring on board of the proceedings before the trial court.

Damages

19. As a general principle, 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..."

20. 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."

21. On quantum, the Appellant is only challenging the award of general damages. The Appellant argued that the actual injuries suffered by the Respondent were those contained in the medical report by Dr. Kimuyu of Westend Medical Solutions and the P3 Form, both of which were prepared months after the occurrence of the accident. In this regard, the Appellant urged that the blunt chest injury included in the latter medical report was probably just a product of the Respondent's own statements and should be disregarded. Citing the case of *FM (Minor suing through Mother and next friend MWM) v JNM & Another* [2020] eKLR and *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR, the Appellant urged that the general damages award of Kshs. 230,000/- be reduced to Kshs. 100,000/-.

22. On the other hand, the Respondent faulted the Appellant for failing to subject him to medical examination by its own doctor or to adduce an alternative medical report to controvert the Report by Dr. Kimuyu. He therefore urged the court to uphold the trial court's award of Kshs. 230,000/- for general damages for pain and suffering.

23. PW3, the Respondent herein testified that he was injured on chest, back, and head. He went to hospital where was treated then his sister paid for his treatment and that he can no longer perform the tasks he used to.

24. PW1, Doctor Titus Ndeti adduced a medical report dated 10/9/2014 prepared by his colleague Dr. Kimuyu. He testified that the Respondent sustained a mild head injury with loss of consciousness, lacerations on left and right knees and a blunt chest injury. He noted that the Respondent was treated as an outpatient and discharged. It was also PW1's testimony that at the time of examination, the Respondent complained of chest pain but no abnormality was noted. Further, PW1 averred that the Respondent's injuries were classified as soft tissue injuries and there was no permanent incapacity.

25. At paragraph 5 of the Plaint, the Respondent pleaded that as a result of the accident, he sustained the following injuries: mild head injury with loss of consciousness, lacerations of left knee, lacerations of right knee and blunt chest injury. These injuries were duly corroborated by the medical report by Dr. Kimuyu. The Appellant cannot purport to dismiss the adduced medical report when it neither objected to its production during trial nor adduced an alternative medical report to challenge the one tendered by the Respondent. In the circumstances, the only issue that this court will concern itself with at this point is whether the trial court's award of general damages is comparable to awards made in recent matters with comparable injuries.

26. In *Elizabeth Wamboi Gichoni v Benard Ouma Owuor* [2019] eKLR, the Respondent sustained the following injuries: mild head injury due to concussion, multiple cut wounds on the scalp, cut wound on the left lateral orbital region, blunt injury to the chest, multiple bruises on the left upper limb, bruises on the gluteal region and blunt injury on both knees. The High court set aside the lower court's award of Kshs. 300,000/- in general damages and substituted with an award of Kshs. 175,000/-. In *Francis Ndungu Wambui & 2 others v Benson Maina Gatia* [2019] eKLR, the respondent suffered a head injury with loss of consciousness, blunt trauma on the right shoulder as well as soft tissue injuries to the right hip joint and recovered fully from the injuries. On appeal, the trial court's award of Kshs. 400,000/- as general damages was set aside and substituted with an award of Kshs. 300,000/-. In *Poa Link Services Co. Ltd & another v Sindani Boaz Bonzemo* [2021] eKLR, the respondent suffered blunt injury to the chest, bruises of the lower abdomen, bruises of the right hip joint, bruises of the thigh and Bruises on the knee. The high court upheld the trial magistrate's award of Kshs. 350,000/= in general damages.

27. Bearing the above authorities in mind, the court finds that the trial court's award of Kshs. 230,000/- for general damage was not excessive in the circumstances of the case and will not be disturbed.

28. In conclusion, the court finds that the appeal lacks merit and is hereby dismissed with costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 8TH DAY OF JUNE 2023.

JANET MULWA

JUDGE