Nyamwaya v Ondera (Civil Appeal E071 of 2021)
[2023] KEHC 20381 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20381 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E071 OF 2021

WA OKWANY, J

JUNE 22, 2023

BETWEEN

ANTHONY NYAMWAYA ..... APPELLANT

AND

PAUL OBWAYA ONDERA ..... RESPONDENT

(Being an Appeal against the Judgment/Decree of Hon. M. O. Wambani (Mrs.) – CM Nyamira dated and delivered at Nyamira on the 17th day of August 2021 in the original Nyamira Chief Magistrate's Court Civil Case No. 206 of 2016)

JUDGMENT

Introduction

1. The appellant herein was the defendant before the lower court where the respondent sued him through the plaint dated November 7, 2016 seeking compensation for damages arising out of a road traffic accident.

2. The respondent's case before the trial court was that he was on August 2, 2016, a lawful passenger travelling aboard the appellant's motor vehicle registration No KAS 981N along Kisii – Nyamira Road when the appellant's driver/agent negligently drove the appellant's said motor vehicle thus allowing it to lose control and collide with motor vehicle registration No UAM 175B as a result of which the respondent sustained serious injuries.

3. The trial court heard the case and at the end, rendered a judgment in favour of the respondent on liability at 100%, for Kshs 300,000/= general damages and Kshs 6,500/= special damages.

4. Aggrieved with the said judgment, the appellant initiated the instant appeal in which he challenges the trial court's findings on both quantum and liability.

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

6. It is trite that the duty of a first appellate court is to re-evaluate and re-analyse the evidence before a trial court and arrive at its own independent findings. This principle was aptly espoused by the Court of Appeal in the case of *Abok James Odera t/a J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* (2013) eKLR, as follows:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

7. The main issue for determination is whether the trial court erred in its findings on liability and quantum.

Liability

8. On liability, the appellant submitted that the trial court erred in finding that the he was 100% liable for the accident when the respondent did not tender evidence of any eye witness to prove that the accident was caused by the negligence of the appellant's driver.

9. The appellant noted that the respondent relied on the evidence of 2 witnesses who did not infer negligence by the appellant as they did not show how the accident happened. For this argument, the appellant cited the decision in the case of *Bwire v Wayo & Sailoki* (civil appeal 032 of 2021) [2022] KEHC 7 (KLR (24 January 2022) where it was held: -

> " Eyewitness testimony is critical in both criminal and civil trials, and is frequently accorded high status in the courtroom. Direct evidence is evidence, that if believed, directly proves a fact in issue. Directly means that a person does not have to make any inferences or presumptions as to proof.[i] Direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts.....The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant."

10. The respondent, on the other hand, submitted that the respondent (PW1) tendered first-hand eye witness account on how the accident occurred.

11. It was submitted that the testimony of PW1 was corroborated by the evidence of PW2 who stated that the principal cause of the accident was the appellant's motor vehicle registration No KAS 981N which left its lane, encroached onto the lane of motor vehicle registration No UAM 175B thus resulting in the collision.

12. A perusal of the lower court proceedings shows that the respondent testified as follows on how the accident happened: -

> " I was travelling from Kisii to Nyamira in motor vehicle KAS 981N. On reaching Ting'a area it was involved in a road traffic accident with another motor vehicle. There was another stationary motor vehicle on the road. As our driver tried to overtake the stationary vehicle

it was involved in a head on collision with a motor vehicle that was moving in the opposite direction."

13. The trial court held as follows on the issue of liability: -

> " This court will further adopt the court's finding on liability in CMCC No 183 of 2016 as the liability in this file, to wit that the defendant will shoulder a 100% liability."

14. I have perused the judgment in Nyamira CMCC No 183 of 2016 which was a related file to this file and I note that the court held as follows on liability: -

> " On the issue of liability, this court, has considered both Pw1 and Pw2's evidence and the contents of the police abstract *vide* P exhibit 3 herein, and the court has found out that the plaintiff has established her claim on the said issue that the driver of motor vehicle registration No KAS 981N should be blamed for the accident. Consequently, this court will proceed to make a finding that the defendant herein be and is hereby found a 100% liable for the accident herein and thus a 100% liable for the plaintiff's injuries."

15. It was not disputed that the respondent was a passenger travelling aboard the appellant's motor vehicle. Courts have held that liability in respect to passengers travelling inside motor vehicle is 100% as there is no way a passenger can contribute to the occurrence of an accident.

16. My finding is that the trial court arrived at the right decision in finding that the appellant was 100% liable for the accident.

Quantum

17. On quantum, the appellant submitted that the award of Kshs 300,000/= general damages made to the respondent is inordinately high considering the injuries that he sustained in the accident.

18. The respondent, on his part, submitted that the trial court considered the nature/severity of the respondent's injuries in arriving at the sum of Kshs 300,000/=. He urged this court to uphold the trial court's award. Reference was made to the decision in *Flint v Lovell* 1935 1KB 354 where the principles that should govern an appellate court in dealing with the trial court's award on quantum were discussed.

19. In the present case, I note that the respondent tendered both oral and documentary evidence, to wit, treatment Chit, (P exhibit 1), P3 form (P exhibit 2) and medical report (P exhibit 3) to show that he sustained the following injuries: -

    i. Deep cut wounds on the left forehead above the eye;

    ii. Bruises on the cheek;

    iii. Cut wound on the left ear;

    iv. Cut wound on the parietal region;

    v. Cut wound on the left arm;

    vi. Cut wound on the wrist;

    vii. Cut wound on the right knee; and

    viii. Cut wound on the left knee.

20. In determining quantum, I find guidance in *Gicheru v Morton and another* (2005) 2 KLR 333 wherein it was held: -

> " In order to justify reversing the trial judge on the of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled."

ix. In *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR the court held as follows: -

> " It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated *H. West & Son Ltd v Shephard* [1964] AC 326 at page 353- 'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

21. The appellant proposed that this court should revise the award on general damages downwards to Kshs 80,000/=. He cited the decision in *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR and *Eva Karemi & 5 others v Koskei Kieng & another* [2020] eKLR where awards ranging from Kshs 100,000/= to 40,000/= were made to various claimants who sustained soft tissue injuries.

22. The respondent, on the other hand relied on several cases including the decision in *Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi* – Nyeri HCCC No 320 of 1998 where an award of Kshs 350,000/= was made to the plaintiff who sustained multiple soft tissue injuries.

23. I have considered the authorities cited by the parties herein in support of their arguments on the award on general damages and I note that the authorities cited by the appellant relate to awards that were very much on the lower side and in respect to less serious injuries.

24. I note that the respondent suffered multiple soft tissue injuries comprising of deep cuts and bruises that have healed with scars.

25. I find that the trial court's award of Kshs 300,000/= general damages is modest and a fair amount bearing in mind the inflationary trends that has wreaked havoc on the economy.

26. In conclusion, I uphold the trial court's award on quantum and liability.

27. Consequently, I find that this appeal is not merited and I therefore dismiss it with costs to the respondent which I hereby assess at Kshs 30,000/=.

28. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 22ND DAY OF JUNE 2023.

W. A. OKWANY

JUDGE