Shivachi & another v Jaoko (Civil Appeal E106 of 2021)
[2023] KEHC 18502 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18502 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E106 OF 2021

KW KIARIE, J

JUNE 14, 2023

BETWEEN

DENNIS TRANSIFER SHIVACHI ..... 1ST APPELLANT

KALPESHKUMAR VINUBHAI PATEL ..... 2ND APPELLANT

AND

ANTHONY ONYANGO JAOKO ALIAS DANCAN JAOKO ALIAS DANCAN ANTHONY ONYANGO ..... RESPONDENT

(Being an Appeal from the judgment in Homa Bay Chief Magistrate's CMCC No. 98 of 2019 by Hon. J.S Wesonga– Principal Magistrate)

JUDGMENT

1. Dennis Transifer Shvachi and Kalpeshkumar Vinubhai Patel, the appellants herein, were defendants in Homa Bay Chief Magistrate's CMCC No 98 of 2019. This was a claim that arose from a road traffic accident involving motor vehicles registration number KCG 975H Toyota Matatu owned by the appellants and the respondent's motor cycle. AS a result of the said accident, the respondent sustained injuries. In the judgment that was delivered on 8th November 2021, the respondent was awarded Kshs 2,000,000.00 general damages, Kshs 200,000 for loss of earning capacity and Kshs 250, 000.00 cost of future medical expenses before factoring in contributory negligence. The court held both parties equally liable i.e. at 50:50.

2. The appellants were aggrieved by the award in general damages and filed this appeal. They were represented by the firm of Kimondo Gachoka & Company Advocates. They raised grounds of appeal as follows:

    a. That the learned trial magistrate erred in law and misdirected himself when he [sic] failed to consider the appellants' submissions on both points of law and facts.

b. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned miscarriage of justice.

c. That the learned trial magistrate erred in law and misdirected himself [sic] when he [sic] failed to consider the provisions set out in the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013.

d. That the learned magistrate erred in law and fact in finding the appellants 50% liable when the respondent did not prove his case on liability.

e. That the learned magistrate erred in fact and in law in failing to consider the appellants' submissions on liability and legal authorities relied upon in support of thereof.

f. That the learned magistrate erred in law and fact by overly relying on the respondent's submissions which were not relevant and without addressing his [sic] mind to the circumstances of the case.

g. That the learned magistrate erred in law and fact in failing to consider conventional awards in cases of similar nature.

3. The appeal was opposed by the respondent through the firm of Everlyne Kuke & Company Advocates. They contended that the learned trial magistrate arrived at the correct assessment of liability and that the award was not inordinately high.

4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. One of the issues the appellants raised was apportionment of liability. It was contended that the learned magistrate erred in law and fact in finding the appellants 50% liable when the respondent did not prove his case on liability. Liability is an issue of fact. With pages 2, 4, 6, 8, 10, 12 & 14 of proceedings missing, I am unable to evaluate the evidence which was adduced to establish if the trial court arrived at the correct conclusion or otherwise.

6. When the issue of missing pages was pointed out on March 20, 2023 by the respondent's advocate, Mr. Njuguna for the appellants gave a surprising response that they were not responsible for the typing of the record of appeal. In spite of this response, the appellants were given leave to file a supplementary record of appeal. However, when this matter came up for mention on March 27, 2023, the supplementary record had not been filed. I will therefore have no benefit of the entire evidence that was adduced to make a finding whether the trial magistrate arrived at the correct finding.

7. Corporal Nicholas Muthama (DW1) gave contradictory evidence as to who was to blame. At one point he testified that he blamed the rider for failing to keep on his lane while at another he testified that he primarily blamed the driver for failing to keep to his near side. This is doublespeak and did not help the court to make an informed decision on liability. This was the only evidence captured wholly in the record. The evidence of the plaintiff and that of the driver was captured in part.

8. If the evidence of these two, the respondent and the driver, was accurately captured in the judgment, then the trial court arrived at the correction decision on apportionment of liability; each was blaming

the other. When circumstances are such as in this case, the Court of Appeal in *Hussein Omar Farah v Lento Agencies* [2006] eKLR stated:

> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of *Barclay – Steward Limited & Another v Waiyaki* [1982-88] 1 KAR 1118, this Court said:-
>
> > The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it.
>
> The Court said further:-
>
> > The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame.

9. I therefore find that in the circumstances of this case the learned trial magistrate arrived at the correct finding on liability.

10. It is now settled law that an appellate court will only disturb an award of the trial court is the same is inordinately high or low or where wrong principles were applied or that the court misapprehended the evidence in some material respect. This was succinctly put by Law JA in *Butt v Khan* [1981] KLR 349 at page 356 as follows:

> An appellate court will not disturb an award of 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 a figure which was either inordinately high or low.

11. The medical report in the record of appeal is illegible and I will therefore rely on the impugned judgment to establish what injuries the respondent sustained. The onus is on the appellant not only to compile an accurate record of appeal but also to ensure that the copies of documents are legible.

12. From the judgment, it is indicated that the respondent sustained the following injuries:

    a. Crush fracture of the distal ankle joint;

    b. Amputation of the right foot at the ankle joint;

    c. Deep cut wound on the right forehead;

    d. Dislocation of the right knee joint; and

    e. Deep cut wound on the right knee joint.

13. At the trial, the appellant proposed an award of Kshs 1, 000, 000/= in general damages. The following cases were cited and relied upon for the proposal:

    a. In *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] eKLR the plaintiff sustained an injury on the left leg. The left tibia and fibula was broken and infected and had nerve

injuries. He had foot deformity on the same leg. He was given antibiotics and told to come back after 6 weeks for surgery. He went back to where external fixators were removed because they were infected. Plaster of paris was applied to the left leg and he was advised to continue with antibiotics after discharge. He was awarded Kshs 1, 300,000/= in general damages on November 21, 2013.

b. In *Mwaura Muiruri v Suera Flowers Limited & another* [2014] eKLR the plaintiff sustained the following injuries:

i. Multiple lacerations on the face;

ii. Soft tissue injuries on the chest cage (mainly left submaxillary area)

iii. Comminuted fractures of the right humerus upper and lower thirds of the tibia; and

iv. Compound double fractures of the right leg upper and lower 1/3rd tibia fibula.

For these injuries the plaintiff was awarded Kshs 1,450,000 as general damages on 28th day of February, 2014.

14. The respondent submissions were not included in the record of appeal. The learned trial magistrate cited the following cases:

a. *Sofia Yusuf Kanyare v Ali Abdi Sabre & another* [2008] eKLR the plaintiff was awarded Kshs 1,970,000.00 general damages. She had sustained the following injuries:

i. Crushed right hand, multiple cuts due to the accident;

ii. Suffered shock;

iii. Suffered a cut on the fore head;

iv. Nerve damage on the left side of the face; and

v. Lost 2 upper molars and 2 upper incisors.

b. *Joseph Seremani & Julius Otachi v Stella Bosibori Moreka* [2019] eKLR the respondent sustained the following injuries: facial bruises, tenderness on the anterior chest wall, compound fracture on the right tibia/fibula, fracture of the pelvis, fracture of the right ankle joint and amputation of the right leg below the knee. She was awarded Kshs 2,500, 000.00 general damages.

15. It is trite that when courts are assessing general damages, like cases should be treated alike. It is however, not likely to get two cases that are exactly the same. Before awarding damages even where cases are almost similar, the effluxion of time since the decisions relied upon must be factored. In the instant case, the learned trial properly addressed her mind to the correct principles on precedence and the award cannot be said to be inordinately high.

16. The appeal is accordingly dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF JUNE, 2023

KIARIE WAWERU KIARIE

JUDGE