Transline Galaxy Company Limited & another v Mokaya (Civil Appeal E055 of 2021) [2023] KEHC 20413 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20413 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E055 OF 2021

WA OKWANY, J

JUNE 15, 2023

BETWEEN

TRANSLINE GALAXY COMPANY LIMITED .... 1ST APPELLANT

MAN OGUTA OCHIENG .... 2ND APPELLANT

AND

EUNICE KWAMBOKA MOKAYA .... RESPONDENT

(Being an Appeal from the Judgment of the Hon. S. K. Arome (SRM – Keroka) dated & delivered on the 7th day of July 2021 in the original Keroka Principal Magistrate's Court Civil Case No. 203 of 2017)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court where he sued the Appellants for compensation for damages arising out of a road traffic accident that occurred on 24th July 2016. The Respondent's case was that he was on the material day a lawful passenger travelling aboard the 1st Appellant's motor vehicle registration no. KCF 432R along Keroka-Kisii Road when the said vehicle collided with another motor vehicle registration no. KYG 846.

2. The trial court had the case and in a judgment rendered on 7th July 2021, found the 1st Defendant 100% liable for the accident and awarded the Respondent Kshs. 313,000/= as general and special damages thereby triggering the instant appeal in which the Appellant challenges the trial court's findings on both liability and quantum.

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

4. The duty of a first appellate court was aptly stated by the Court of Appeal for East Africa in Peters vs. Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows: -

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt vs. Thomas (1), [1947] A.C. 484.
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> 'My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." (Emphasis added).

5. I have considered the Record of Appeal and the rival submissions of the parties. The main issues for my determination are whether the trial court arrived at the correct findings on liability and quantum.

6. It is trite that he who alleges must prove. Section 107 of the *Evidence Act* which states thus: -

> 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

7. In Treadsetters Tyres Ltd vs. John Wekesa Wephukhulu {2010} eKLR, it was held thus: -

> "In an action for, negligence as in every action, the burden of proof falls upon the plaintiff alleging to establish.... That the defendant was reasonably negligent or from the circumstances, negligence is in fact inferred."

8. The Respondent testified that the 1st Appellant's driver was driving at a high speed when it collided his vehicle - KCF 432R collided head-on with another motor vehicle KYG 846. On cross-examination that she blamed the 1st Appellant's driver for the accident because he left his lane and drove onto the lane of an oncoming vehicle.

9. The Respondent's testimony was corroborated by the testimony of DW1 Patrick Arekai Amaya, the driver of motor vehicle Reg. No. KYG 846 who stated that the driver of the vehicle KCF 432R was overtaking a trailer when he lost control the vehicle and collided with his vehicle. He also testified that he tried to swerve off the road but was unable to avoid the accident.

10. From the above facts, it is not in doubt that there was an accident involving motor vehicles registration nos. KCF 432R and KYG 846 and that the Respondent was a passenger in KCF 432R. It was also not disputed that the 1st Appellant was the owner of the motor vehicle KCF 432R.

11. In considering who was to blame for the accident, I am guided by the decision in the case of Stapley vs. Gypsum Mines Ltd {1953} AC 663, where the court held as follows:-

> "To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical scientific theory of causation it is quite irrelevant in this connection. In a Court of Law, this question must be decided as a properly instructed and reasonable jury would decide it. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but this does not mean that the accident must be regard as having been caused by the faults of them."

12. In Calvin Grant vs. David Pareedon et al Supreme Court Civil Appeal No. 91 of 1987 {EWCA}, it was held thus: -

> "Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks if any location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical accident may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."

13. From my analysis of the evidence tendered before the trial court, I am of the view that the Respondent proved, on a balance of probabilities, that it was the Appellant's motor vehicle that caused the said accident. The evidence of PW1 and DW1 that the driver of KCF 432R collided with an oncoming vehicle while attempting to overtake a trailer was not challenged.

14. In Dritoo vs. West Nile District Administration [1968] E.A. 428 where it was held thus: -

> "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible."

15. On quantum, it is trite that the appellate court will not interfere with the findings of the trial court unless the same is based

16. In Gicheru vs. Morton and Another (2005) 2 KLR 333 where it was held that: -

> "In order to justify reversing the trial judge on the question 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."

17. Similarly, the Court of Appeal pronounced itself as follows in Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, pronounced itself thus:-

> "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court 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 low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
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> '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 at a figure which was either inordinately high or low."
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> (see also the Court of Appeal decisions in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 5 and Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5)

18. PW2 Dr. Christina Momanyi Morebu examined the Respondent and found that she sustained the following injuries:

    a. Head concussion

    b. Haematoma (bleeding) on the maxillary region

    c. Lacerations on the left leg mid

    d. Cut wounds on the left foot

    e. Blunt injuries/Contusion on the pelvic region

    f. Post-traumatic sinuses.

19. It was the determination of the Court of Appeal in Odinga Jacktone Ouma vs. Moureen Achieng Odera [2016] eKLR that “comparable injuries should attract comparable awards”.

20. In Savanna Saw Mills Ltd vs. Gorge Mwale Mudomo (2005) eKLR) the court held that the assessment of damages is at the discretion of the trial court and that an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have arrived at a different award if it had tried the case at the first instance. (See also the Court of Appeal decision in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730).

21. In making the award of Kshs 300,000/= for general damages, the trial court relied on the case of Charles Gichuki vs. Emily Kawira Mbuba & Ano (2018) eKLR where the court awarded Kshs. 300,000/=. The 1st Appellant cited the decision in South Nyanza Sugar Company Ltd vs. Michael Jitoto (2009) eKLR where the court awarded Kshs. 60,000/=.

22. I have considered comparable cases in which the claimants sustained similar injuries as follows: - Autosol K. Ltd & Another vs. Martin Gitau Kinyanjui, Machakos HCCA 28/2014 [2019] eKLR, Odunga – J. reduced an award of Kshs. 500,000/= to Kshs.300,000/= for the claimant who suffered a cut wound on the head and chin, dislocation on the elbow, bleeding from the brain according to CT scan and a scar on the left side of the head.In Michael Okello vs. Priscilla Atieno H.C.C.A. No. 45 OF 2019, Kshs. 250,000/= was awarded for soft tissue injuries.In Joseph Mwangi Kiarie & Another vs. Isaac Otieno, H.C.C.A No. 30 of 2018, an award of Kshs. 300,000/= was reduced to Kshs. 180,000/ = for soft tissue injuries.In Michael Odiwuor Obonyo vs. Clarice Odera Obunde, H.C.C.A. NO. 01/2020, an award of Kshs. 500,000/= was reduced to Kshs. 200,000/= for soft tissue injuries.

23. The 1st Appellant proposed an award of Kshs. 50,000/=. I have considered the decision Michael Okello vs. Priscilla Atieno (2021) eKLR wherein for injuries similar to those suffered by the Respondent herein, the court set aside the award of Kshs. 500,000/= and substituted it with an award of Kshs. 250,000/=. Similarly, in the case of Blue Horizon Travel Co. Ltd vs. Kenneth Njoroge (2020) eKLR, Ong’udi J. substituted an award of Kshs. 650,000/= with an award of Kshs. 400,000/= where the claimant suffered soft tissue injuries and fractures on the ribs.

24. In view of the foregoing, I find that the awards in comparable cases to the present Appeal range from Kshs. 100,000 – 400,000/= depending on the severity of the injuries. In this case, since there was no fracture, it is my view that the trial magistrate’s assessment of general damages in the sum of Kshs. 300,000/= was on the higher side. At the same time, the amount proposed by the 1st Respondent is very much on the lower side. I therefore substitute the award of Kshs. 300,000/= with an award of Kshs. 200,000/=.

25. The Respondent pleaded the particulars of special damages as follows:-

    a. Medical Report – Kshs. 5,000/=

    b. Treatment and Transport Expenses – Kshs. 2,000/=

    c. Doctor’s Court Attendance charges – Kshs. 6,000/=

    d. Reasonable Expenses to attend anticipated 2nd Medical Examination if need be – Kshs/ 2,000/=

    Total – Kshs. 15,000/=

26. The trial court stated as follows in the judgment:

> "The plaintiff pleaded a sum of Kshs. 15,000/= - special damages in her plaint and attached a receipt worth Kshs. 13,000/=...."

27. I have perused the entire trial Record and noted that the Respondent only produced a receipt for the Medical Report in the sum of Kshs. 4,000/= and another for CT scan in the sum of Kshs. 1,500/=.

28. It is trite that special damages must be specifically pleaded and strictly proven. The Court of Appeal held as follows in Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716:-

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

29. In view of the fact that the Respondent produced only two receipts in support of her claim for special damages, I set aside the award of Kshs. 13,000/= and substitute it with an award of Kshs. 5,500/=.

30. In the end, I find that this appeal is merited and I therefore allow it in the following terms:

    i. General Damages – Kshs. 200,000/=

    ii. Special Damages in the sum of Kshs. 5,500/=

    iii. Interests on the above at court rates from the date of the judgment before the trial court till payment in full.

31. Each party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15TH DAY OF JUNE 2023.

W. A. OKWANY

JUDGE