West Kenya Sugar Co. Ltd v Sakari (Civil Appeal 139 of 2018)
[2023] KEHC 17963 (KLR) (2 June 2023) (Judgment)

Neutral citation: [2023] KEHC 17963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 139 OF 2018

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

WEST KENYA SUGAR CO. LTD ..... APPELLANT

AND

SENDANI WANYONYI SAKARI ..... RESPONDENT

(Appeal from judgment and decree of Hon. TK Kwambai, Resident Magistrate, RM, in Butali RMCCC No. 65 of 2017, of 27th September 2018)

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for compensation for personal injury, following a road traffic accident, along Kakamega-Webuye road, on January 3, 2017. The respondent was a pillion passenger on a motorcycle, that was allegedly knocked down by motor vehicle registration mark and number KBK 372X, said to have belonged to the appellant, and liability was attributed to the appellant on account of negligence. The respondent filed a defence, denying the accident, and everything else pleaded in the plaint. It pleaded, in the alternative, that if such accident occurred, then it was authored by the respondent, or he substantially contributed to it.

2. A trial was conducted. 3 witnesses testified for the respondent, and 1 for the appellant. Liability was resolved at 100% against the appellant, Kshs 1, 400, 000.00 was awarded for general damages, Kshs 226, 597.00 for future medical expenses, and Kshs 108, 109.00 for special damages.

3. The appellant was aggrieved, hence the instant appeal. The appeal has faulted the trial court on several grounds: for treating the evidence superficially; ignoring the principles applicable in assessment of damages; finding that the case had been established on a balance of probability; failing to apportion liability; ignoring the pleadings and submissions by the defence; failing to appreciate the evidence tendered by the appellant had controverted and rebutted the evidence tendered by the respondent; and awarding damages that were excessive in the circumstances. The appellant asks that the respondent's

case at the trial court be dismissed, or, in the alternative, judgment be set aside, with respect to liability and quantum.

4. On September 30, 2021, directions were given, for canvassing of the appeal by way of written submissions. Only the appellant filed written submissions. The appellant submits that the respondent had not proved negligence, and the suit should have been dismissed. It cites *M'Iruanji Muchai vs Broadways Bakery & another* [1996] eKLR (Gicheru, Kwach & Omolo, JJA), *Statpack Industries vs James Mbithi Munyao* [2005] eKLR (Visram, J) and Isca Adhiambo Okayo vs Kenya Women's Finance Trust [2016] eKLR (Maraga, Musinga & Kairu, JJA). It is submitted that the circumstances and manner of occurrence of the accident were not explicable, there was no independent eyewitness, liability should have been apportioned, and the respondent did not plead *res ipsa loquitor*. Several authorities are cited to support these contentions. On quantum, it is submitted that the award of damages made did not accord with the injuries sustained, and the principles governing assessment were not applied. Authorities were cited to support the contentions.

5. The issues are who was to blame for the accident, and, if liability attached, what ought to be the quantum.

6. The respondent called 2 witnesses on the aspect of liability. PW2 was a police officer. He produced a police abstract, and gave an account of what was in police records. He stated that the motorcycle was hit from behind. He, however, was not the one who investigated the matter, and he did not indicate whether the officer who investigated the accident visited the scene, and drew a sketch of the scene. PW2 was the respondent. He did not describe what happened, save to say that he was involved in an accident, and he was injured. He said that he did not see the vehicle before the collision. On his part, DW1, the witness for the appellant testified that the motorcycle rider changed direction suddenly, without indicating, he tried to take evasive action, but his vehicle still came into contact with the motorcycle. He said the accident happened at Matete trading centre.

7. So, did the respondent prove negligence? He did not. He only stated that an accident happened, but he did not describe how it happened, and he did not explain why the appellant was to blame. The police evidence did not help. The police witness did not investigate the matter. He did not visit the site. No sketch was drawn of the scene. The value of his evidence was that an accident happened. Of course, that an accident did happen is not contested, what is in contest is how it happened, so that, from that narrative, the court can assess liability. I would agree with the appellant, that the material placed on record by the respondent did not establish fault on the part of the appellant.

8. However, it was the evidence tendered by the appellant, which explained what transpired, and pointed fault in the direction of the appellant. If the appellant had not tendered that evidence, the suit by the respondent would have failed. However, by placing that evidence on record, the appellant strengthened the case for the respondent, for the version of events given by his witness exposed the appellant to liability. He stated that the accident occurred within Matete trading centre. The rider of the motorcycle suddenly turned, without notice, and got into his path, and although he took evasive action, he was still unable to avoid the collision. Drivers are expected to keep a proper lookout, for other road users can act impulsively, and the driver has to be alert to such eventualities. A proper lookout would help the driver take action to avoid collision. By braking suddenly, or swerving in time. The decision not to brake would suggest that it was unsafe to do so, given the speed at which the vehicle was probably being driven at. Swerving but still hitting the other road user would still suggest inappropriate speed, hence the inability to control the vehicle. Since the driver was going through a trading centre, it is expected that he should have slowed down, to a speed that would have allowed him to attend to any eventuality. The collision meant that he had either not kept a proper lookout, or he was driving at a speed that was not appropriate at a trading centre. By this evidence, the appellant joined issues with the respondent,

and demonstrated that there was indeed negligence on the part of the appellant. Rather than controvert or rebut or explain the case by the respondent, it bolstered it, and gave it a shot of life.

9. In view of the above, I find that there was negligence on the part of the appellant. However, from that narrative, it would appear that the driver was not wholly to blame. It was the rider who turned without warning, and got into his way. There was, therefore, contributory negligence from the rider, and liability ought to be apportioned. However, the challenge is, who should take the other portion, between the respondent and the rider. The respondent did not contribute to the collision, whether he was wearing protective gear or not. He was not in control of the motorcycle. Contribution can only be squeezed from the rider of the motorcycle or the owner thereof. Unfortunately, that rider or the owner of the motorcycle was not made a party to the suit. Liability, therefore, has to be absorbed 100% by the party who is in the matter. The appellant should have brought in the rider or his employer as a third party. It did not, hence it should bear full liability.

10. There are 3 elements on the award of damages, as the trial court awarded general damages, an award to cover future medical expenses, and special damages. The appellant has not separated the awards in its grounds of appeal, but its written submissions are only limited to the general damages. I shall, accordingly, presume, that the appeal turns only on the general damages.

11. The trial court mentioned Kshs 1, 400, 000.00 in the judgment, but cited no authority. Although the trial court indicated that the authorities cited by the respondent were more recent, that is not supported by the record. The decisions the respondent relied on were made in 2004, 2010 and 2013. They could not possibly be recent in any sense. The injuries proved, by way of the medico-legal report by Dr JC Sokobe, are head injury with loss of consciousness for 2 days, blunt injury and cut wound on scalp, blunt injury to the back and fracture of right tibia/fibula. The impugned judgment was in 2018, and the authorities placed before me, in the written submissions by the appellant, were made in 2015-2022, and are in the region of Kshs 300, 000.00 to Kshs 500, 000.00, for comparable injuries. I am talking about *Harun Muyoma Boge vs Daniel Otieno Agulo* [2015] eKLR (Majanja, J), *Tabro Transporters Ltd vs Absolom Dova Lumbasi* [2015] eKLR (Aroni, J), *Wakin Sodas Ltd vs Sammy Aritos* [2017] eKLR (J. Ngugi, J), *Tirus Mburu Chege & another vs JKN (minor suing through the next friend and mother DWN & another)* [2018] eKLR (Ong'udi, J) and *Elizaphen Mokaya Bogonko vs Fredrick Omondi Ouna* [2022] eKLR (Aburili, J).

12. I have also considered a number of other decisions, where the claimants had sustained comparable injuries. In *Daniel Otieno Owino & another vs Elizabeth Atieno Owuor* [2020] eKLR (Aburili, J), an award of Kshs 400, 000.00 was made for compound fractures of the tibia and fibula bones of the right leg, a deep cut wound and tissue damage to right leg, blunt chest injury and head injury, with cut wound on the nose. In *Nahson Nyabaro Nyandega vs Peter Nyakweba Omboga* [2021] eKLR (Maina, J), the court awarded Kshs 650, 000.00, for bruises on the face, compound fracture of the right tibia bone and cut wound on the right leg. In *Hussein Sambur Hussein vs Shariff A. Abdalla Hussein & 2 others* [2022] eKLR (Chepkwony, J), an award of Kshs 600, 000.00 was made, for fractures of the right tibia and fibula leg bones, dislocation of right ankle and a bruise on the right leg. In *Juliet Kemunto Ondati vs Gladys Mwende Mwende* [2021] eKLR (Ougo, J), the claimant had suffered a fracture of the right tibia, blunt trauma to the back and chest contusion, and an award of Kshs 350, 000.00 was made, with Kshs 150, 000.00 for future medical expenses.

13. From an examination of the decisions that I have sampled above, and the ones set out in the submissions by the appellant, there can be no doubt, that the award by the trial court was excessive, and clearly, it was not founded on the known principles for assessment of damages. Consequently, upon taking everything into account, the trial court should not have awarded compensation in excess of Kshs 500, 000.00 for general damages.

14. In the end, I find merit in the appeal herein, and I hereby allow it. The final orders made in the judgment of the trial court, on September 27, 2018, in Butali PMCCC No 65 of 2017, with respect to general damages, are hereby set aside, and substituted with orders that general damages are assessed, in favour of the respondent, at Kshs 500,000.00. Each party to bear own costs on appeal. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Olendo, instructed by Olendo Orare & Samba, Advocates for the appellant.

Mr. Alwang'a, instructed by Alwang'a & Company, Advocates for the respondent.