Omar v Mathendu (Civil Appeal E609 of 2021)
[2023] KEHC 21033 (KLR) (Civ) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21033 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E609 OF 2021

CW MEOLI, J

JULY 21, 2023

BETWEEN

SADAM JAMAL OMAR ..... APPELLANT

AND

DAVID MWENDWA MATHENDU ..... RESPONDENT

(Arising from the judgment delivered on 20th August, 2021 in Nairobi Milimani CMCC No. 1141 of 2020.)

JUDGMENT

1. This appeal emanates from the judgment delivered on August 20, 2021 in Nairobi Milimani CMCC No. 1141 of 2020. The suit was instituted by the plaint dated February 17, 2020 and filed by David Mwendwa Mathendu being the plaintiff in the lower court (hereafter the Respondent) against Sadam Jamal Omar, the defendant in the lower court (hereafter the Appellant).

2. The suit was for general and special damages and arose from a road traffic accident which occurred on or about October 12, 2019. It was averred in the plaint that the Appellant was at all material times the driver and/or registered owner of the motor vehicle registration no. KCM 371L (hereafter the subject motor vehicle). And that on the material date, the subject motor vehicle was so negligently, and or carelessly driven or controlled that it knocked down the Respondent who was lawfully walking along Muthaiti Road in Nairobi West area, occasioning him serious bodily injuries.

3. The Appellant filed a statement of defence dated July 8, 2020 denying the averments made in the plaint and on the alternative pleaded contributory negligence on the part of the Respondent.

4. The suit proceeded to full hearing during which both parties adduced evidence. In its judgment, the trial court held as follows:

1. Liability 80%:20% in favour of the Respondent

    a. General damages for pain and suffering Kshs. 900,000/-

    b. Future medical expenses Kshs. 200,000/-

    c. Special Damages Kshs. 103,550/-

    Total Kshs. 1,203,550/-

    Less 20% contribution Kshs. 240,710/-

    Net Kshs.962,840/-

5. Aggrieved with the outcome, the Appellant preferred this appeal which is premised on the following grounds:

    1. The learned Magistrate erred in law and fact in apportioning 80% liability against the Appellant despite evidence on record that showed the Respondent's contribution to the accident was significantly higher.

    2. The learned Magistrate erred in law and fact in awarding Kshs. 900,000/- for pain and suffering which was exceedingly high and without any factual or authoritative basis.

    3. The learned Magistrate erred in law and fact in awarding damages of Kshs. 200,000/- for future medical expenses without any factual or authoritative basis. (sic)

6. The appeal was canvassed by way of written submissions. The Appellant's counsel condensed his grounds of appeal into two key issues, namely, the trial court's respective findings on liability and quantum. Concerning liability, counsel anchored his submissions on the decision in *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] EA 123 regarding instances when an appellate court can interfere with the finding of a trial court.

7. Counsel also cited the provisions of sections 107-109 of the *Evidence Act* pertaining to the burden of proof as reaffirmed in the case of *Sanganyi Tea Factory v James Ayiera Magari* [2016] eKLR. He argued that the trial court erred by apportioning liability in the manner it did despite the evidence showing that the Respondent was substantially to blame for the accident by his conduct of hawking goods on the side of the road at the material time. The court was urged to consider the decisions in *Rahab Wanjiru Nderitu v Daniel Muteti & 4 others* [2016] eKLR and *Mutisya Muthangya v Paul Manundu Musili* [2018] eKLR on contributory negligence, and to find the parties equally liable at 50:50.

8. On quantum, counsel asserted that an award of damages was not intended as punishment for the liable defendant; rather, it serves the purpose of compensating an injured party. In that regard, counsel relied on the case of *John Kamore & another v Simon Irungu Ngugi* [2014] eKLR and *Rahima Tayab & others v Anna Mary Kinanu* [1983] KLR 114 on the principles applicable in the exercise of awarding damages. Counsel contended that the award of Kshs. 900,000/- in general damages for pain, suffering and loss of amenities was manifestly excessive and urged that the same be substituted with a more reasonable award in the sum of Kshs. 500,000/-. Citing in support, several cases including, *Kenya Power & Lighting Co. Ltd & another v Kathuo Muthangya* [2018] eKLR where the High Court sitting on appeal revised downwards an award of general damages from Kshs. 900,000/- to Kshs. 600,000/- in respect of a fracture of the left tibia and fracture of left fibula; and *Reamic Investment Limited v Joaz Amenya Samuel* [2021] eKLR where a plaintiff who had sustained a fracture of the femur and soft tissue injuries was awarded the sum of Kshs. 350,000/- on appeal.

9. Counsel further faulted the trial court for making an award in respect of future medical expenses despite the most recent medical report tendered by the Appellant indicating that the Respondent would not require a further procedure to remove the screw which had been inserted at the fracture site. He complained that the trial court solely relied on this issue on the opinion in the medical report tendered on behalf of the Respondent. Finally, counsel faulted the award on special damages, arguing that the receipts tendered to support the claim did not bear the requisite revenue stamps. Consequently, the court was urged to allow the appeal and to interfere with the impugned judgment.

10. The Respondent, who defended the trial court's findings, contended through his counsel that by virtue of being the driver of the accident vehicle, the Appellant owed a greater duty of care and the trial court acted correctly in its apportionment of liability. To support this argument, counsel cited the decision in *George Karanja Mukundi v Mariera Francis & another* [2022] eKLR.

11. On the question of damages, it was contended by counsel that the award made on general damages was reasonable in view of the nature and extent of injuries suffered by the Respondent. It was further asserted that there was professional medical opinion tendered in justification of the award made on future medical expenses. The court was therefore urged to dismiss the appeal, with costs.

12. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co*. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

13. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.

14. Upon review of the memorandum of appeal and the rival submissions, it is the court's view the appeal turns on two issues, namely, whether the finding of the trial court on liability was well founded and whether the award on damages was justified. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is

apposite before dealing with evidentiary matters. In *Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

15. As earlier mentioned, the Respondent pleaded in his plaint that the Appellant was at all material times the driver and/or registered owner of the subject motor vehicle and the person in control of the said motor vehicle on the material date. The following paragraph sets out the pertinent facts and particulars of negligence against the Appellant:

> "
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> "4. On or about the 12/10/2019, the Plaintiff was lawfully walking along Muthaiti Road at Nairobi West herein Nairobi County when the Defendant or his driver, servant, agent and/or employee so negligently drove, managed or controlled motor vehicle registration number KCM 371L that it lost control and knocked down the Plaintiff thereby causing him severe injuries. The said accident was caused solely by the negligence of the Defendant.
>
> Particulars of negligence of the Defendant or his Servant, Employee, Driver or Agent
>
> a. Failing to maintain any or adequate effective control of Motor vehicle Registration No. KCM 371L.
>
> b. Driving Motor Vehicle Registration No. KCM 371L without due regard to the safety of other road users especially the plaintiff.
>
> c. Failing to adhere to the provisions of the *Traffic Act* Cap 403, Laws of Kenya.
>
> d. Driving carelessly and recklessly and without care for the terrain and other road users especially the Plaintiff.
>
> e. Failing to stop and/or manage the said Motor Vehicle so as to avoid the accident.
>
> f. Failing to have any proper lookout." (sic)

16. The Appellant filed a statement of defence denying the key averments in the plaint on liability. Alternatively, the Appellant pleaded contributory negligence against the Respondent by setting out the particulars thereof under paragraph 5 of the statement of defence, as follows:

> "Particulars of Negligence and/or Contribution of the Plaintiff
>
> a. Failing to exercise reasonable care and attention while crossing and/or walking on the road.

b. Jaywalking on the lawful path of motor vehicle KCM 371L.

c. Failing to move aside and or exercise due regard and give way to motor vehicle registration KCM 371L.

d. Failing to heed to the warning signs of motor vehicle registration KCM 371L.

e. Being reckless and disregarding her own safety.

f. Being generally careless and negligent.

g. Volenti non-fit injuria." (sic)

17. In its judgment, the trial court correctly observed that save for the parties herein, no other witnesses were called to testify. Having found that the evidence tendered proved that the accident occurred, as a result of which the Respondent sustained bodily injuries, and that the Appellant admitted to having been the driver of the subject motor vehicle on the material day, the trial court found that the Appellant was negligent. But in addition, that the Respondent ought to have been keen on ensuring his own safety. On that basis, the trial court apportioned liability between the parties in the ratio 80:20 in favour of the Respondent.

18. In his oral evidence before the trial court, the Respondent who testified as PW1 adopted his signed witness statement as his evidence-in-chief and produced his bundle of documents as P. Exhibits 1-12. The Respondent testified that on the material date at about 4.30pm while he was selling his wares along the roadside beside Muthaiti Road, the subject motor vehicle while being negligently driven, knocked him down. The Respondent asserted the presence of bumps on that portion of the road and that he was situated near a shopping centre.

19. In cross-examination, he stated that he was walking along the road engaged in his business when the accident took place. That the Appellant, who rushed him to hospital following the accident, was not charged with any offence in relation to the accident.

20. On his part, the Appellant who was DW1 blamed the Respondent for the accident stating that the Respondent abruptly crossed the road whilst carrying some luggage, and denied that he was speeding at the time. During cross-examination, he confirmed that following the accident, he drove the Respondent to hospital for treatment, and that he also recorded a statement with the police.

21. The applicable law as to the burden of proof is found in section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "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." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

22. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Judges of Appeal held that:

" Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. The duty of proving the averments contained in the plaint lay squarely with the Respondent. It was not in dispute that an accident occurred on the material day, involving the subject motor vehicle being driven by the Appellant and the Respondent who was a pedestrian, leading to the Respondent's injuries. From the grounds of appeal, the Appellant primarily dispute the apportionment of liability.

24. As the trial court observed, neither the Respondent nor the Appellant called any eyewitness to the material accident to corroborate their respective testimonies. The police abstract tendered indicated that the matter was pending under investigations and the investigating police officer was not called to shed light on the outcome of any subsequent investigations into the accident.

25. Nevertheless, the Respondent as a pedestrian had a duty to ensure his own safety at all material times, as acknowledged by the Court of Appeal in *Patrick Mutie Kimau & another v Judy Wambui Ndurumo* [1997] eKLR when it stated as follows:

" ...pedestrians too owe a duty of care to other road users, and they ought to move with due care and follow the Highway Code. They should too take care of their own safety and not to run across the road when it is not safe to do so. If they do so, it is at their own peril and cannot blame an oncoming vehicle which is unable to avoid the accident due to short distance."

26. This explains the trial court's apportionment of liability between the parties. Be that as it may, the Appellant while driving equally owed a duty of care to other road users, pedestrians included. In the court's view, the Appellant being a driver who had in his control a motor vehicle, which by nature

is a mobile machine capable of causing great harm if negligently managed, should carry a greater responsibility in comparison to other road users, such as pedestrians and cyclists.

27. While the Respondent faulted him for the accident, the Appellant did not tender evidence to demonstrate the manner and extent to which the Respondent contributed to the accident in order to justify a finding of a higher or equal apportionment of liability against the Respondent. In view of the foregoing, and as the trial court correctly found, the Appellant was substantially to blame for the accident. The court is therefore satisfied that the apportionment of liability was reasonable.

28. The second limb of the appeal relates to quantum, specifically the damages awarded under the heads of general damages for pain, suffering and loss of amenities; and future medical expenses. In addition, the Appellant purported to challenge the award on special damages through his submissions. This award was not included in the grounds in the memorandum of appeal.

29. On the general damages for pain, suffering and loss of amenities, the Respondent proposed a sum of Kshs. 900,000/- relying on *David Kimathi Kaburu v Dionisius Mburugu Itirai* [2017] eKLR where the court awarded a sum of Kshs. 630,000/- to a plaintiff who had suffered a fragmental fracture mid shaft femur and intertrochanteric fracture. For his part, the Appellant suggested a sum of Kshs. 500,000/- citing the same authorities cited in this appeal. The trial court awarded a sum of Kshs. 900,000/- on the authority of *David Kariuki &another; v Joshua Wambua Muthama* [2017] eKLR in which an award of Kshs.800,000/- for fracture of the left tibia and fibula and a deep abrasion of the right thigh; and the case of *Edward Kamau & another v Hannah Mukui Gichuki & another* [2018] eKLR in which a plaintiff with a fracture of the femur was awarded a sum of Kshs. 850,000/-.

30. The medical evidence which was tendered at the trial confirms the injuries particularized in the plaint, namely, a displaced intertrochanteric left femur fracture and soft tissue injuries on the left thigh. The medical report dated 1st February, 2020 prepared by Dr. Titus Ndeti Nzina, assessed the injuries of the Respondent as grievous harm with permanent incapacity was assessed at 8%. Dr. Joab Bodo subsequently examined the Respondent and prepared the medical report dated August 4, 2020 which was tendered by the Appellant. Therein, he confirmed the injuries sustained and stated that the Respondent walked with a slight limp, and that the fracture had united and with physiotherapy, he would be able to regain his normal gait. The doctor did not assess any permanent incapacity.

31. Reviewing the authorities cited here, the court is of the view that the case *David Kariuki &another v Joshua Wambua Muthama* (*supra*) which was cited by the Respondent is comparable in terms of the injuries sustained although decided a few years ago. Some of the authorities cited by the Appellant relate to fractures of a less severe nature compared to the injuries of the Respondent herein but some reflect comparable injuries, despite permanent incapacity not having been assessed. Out of the authorities relied on by the trial court, the court finds the case of *Edward Kamau & another v Hannah Mukui Gichuki & another* (*supra*) more relevant although in that case too, no permanent incapacity was assessed.

32. Considering the general awards comparable authorities, the court is satisfied that the award made by the trial court is within the range of awards made in respect to comparable injuries, therefore reasonable. There is therefore no justification therefore for interfering with the award in general damages.

33. In supporting the claim for future medical expenses, the Respondent relied on the medical report prepared by Dr. Titus Ndeti Nzina to the effect that the Respondent would require the removal of the implants upon the fracture uniting, a procedure which would cost Kshs. 100,000/- at a low-cost hospital and Kshs. 200,000/- at a high cost hospital. On his part, the Appellant relied on the medical report by Dr. Joab Bodo whose opinion was that the fracture of the hip joint had united and that removal of the screw was not mandatory. The trial court awarded the sum of Kshs. 200,000/-.

34. The award was supported by the medical evidence tendered by the Respondent and the court was entitled to grant it upon a consideration of the apparently conflicting professional opinions. The complaint by the Appellant to the effect that the trial court ignored the medical opinion of Dr. Bodo appears to suggest that the said opinion was somehow binding on the court. It is not unusual for medical practitioners to have different approaches to treatment and medical procedures relating to similar conditions and the court was entitled to draw its own conclusions. Dr. Bodo's opinion, like the opinion of the Respondent's doctor, was only a professional opinion and although the trial court ought to have better explained the basis for its findings on this score, this court cannot, without more, conclude that the award was erroneous and liable for setting aside.

35. In the result, the court is of the considered view that the appeal is without merit. The appeal is hereby dismissed, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Outa

For the Respondent: Mr. Nzavi

C/A: Carol