Gisa v Mutai (Civil Appeal E048 of 2022)
[2023] KEHC 22486 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E048 OF 2022

FROO OLEL, J

SEPTEMBER 22, 2023

BETWEEN

VICTOR KIMANYAL GISA .... APPELLANT

AND

JAMES GICHARA MUTAI .... RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON E. CHEROP (R.M.) IN NAIVASHA CMCC NO. 173 OF 2012 DATED 7 TH JUNE 2022)

JUDGMENT

1. The Appellant was the defendant in the primary suit, where he was sued as the registered owner and/or driver of Motor vehicle KAR 193Q Toyota (hereinafter referred to as the suit motor vehicle). It was alleged that on 10th July 2010 the plaintiff was lawfully standing off the road along the Nakuru-Naivasha Highway opposite Gilgil Town junction on the left side of the road as one faces Nakuru direction when the appellant so negligently drove, controlled and or managed motor vehicle causing the same to lose control and veer off the road as it headed to Nakuru direction and as a result of which it hit the respondent and thus caused the plaintiff sustained severe injuries.
2. After hearing of the suit, the learned magistrate in her judgment delivered on 7th June 2022 apportioned Liability at the ratio of 50:50 and proceeded to award general damages totaling to Ksh.1,800,000/= special damages were also proved to the tune of Ksh.4,500/= plus costs and interest.
3. The Appellant being dissatisfied by both quantum awarded and liability as apportioned did file their memorandum of Appeal on 15th August, 2018 and raised several grounds of appeal namely:-
    a. That the learned trial Magistrate erred in law in awarding the respondent Kshs. 1,800,000 as general damages for pain and suffering which award was too excessive in the circumstances.

b. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum and liability thereby arriving at erroneous figure on both quantum and liability.

c. That the learned trial magistrate erred in law and in fact by failing to consider the conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is high.

d. That the learned trial magistrate erred in law and in fact when she failed to take into account the contents of the Medical Report by Dr. Malik dated 4.6.2014 which confirmed that the plaintiff had fully healed and had no permanent disability thereby arriving at an erroneous figure on quantum.

e. That the learned trial magistrate proceeded on wrong principles when assessing liability to be apportioned to the respondent; whereby she proceeded to apportion liability to the ratio of 50:50 when there was no evidence on record to blame the appellant.

f. That the learned trial magistrate erred in law and in fact when she shifted the burden of proof on the issue of liability by stating that the appellant equally had to prove who was to blame for the accident; which was against the provision of the law of *evidence Act* which provides that whoever alleges must prove.

Facts of the case

4. PW1 PC Paul Komen testified that the accident was reported to have occurred on 10.07.2010 at Gilgil junction along Nakuru Highway. He informed the court that the Respondent was a pedestrian and was knocked down by motor vehicle registration. KAR 193Q Toyota Saloon which was owned by the defendant. He further testified that he was not the investigating officer and noted that the police abstract indicated that the accident occurred in 2011, which was an error as the accident occurred in 2010. PW1 could not confirm the point of impact and was not aware if the appellant was ever charged in court. He produced the Police abstract as exhibit 1. On cross examination he informed the court that he did not know the person who reported the accident and he did not know if the Respondent ever recorded a statement nor was he aware if investigations were complete.

5. PW2 the Respondent herein, adopted his witness statement dated 08.08.2011 as his evidence in chief. He testified that on 10.07.2010 while standing off the road on Nakuru- Naivasha Highway Opposite Gilgil Town junction on the left side facing Nakuru, he was knocked by the suit motor vehicle which was over speeding and as a result he sustained a fracture on his left leg, fracture on the right leg and fracture on the left hand at the shoulder and had not healed from the injuries sustained.

6. PW2 further stated that he was not crossing the road as alleged and denied that he pushed himself towards the car. He also denied that he was drunk at the fateful date. On cross examination, he stated that the accident occurred around 7.00 am as he was heading to work and the impact of the accident caused him to be pushed into the road. He also confirmed that he did not know which side of the suit motor vehicle hit him and that he has never been called to testify in any traffic case.

7. DW1 Victor Kinyamal Gisa, the appellant herein adopted his witness statement dated 06.04.2022 as his evidence in chief. He confirmed that indeed the accident did occur and the point of impact in his motor vehicle was at the right side/ body of the suit motor vehicle. As a result of the accident the respondent was injured on his legs and right arm. He further testified that the police officers arrived at the scene within 3 to 5 minutes and eventually after investigations were conducted, he was not charged as he was not to blame for the said accident. He blamed the respondent for the accident on ground

that he crossed the road without properly looking out to see if the road was clear and safe to cross as a result of which he knocked the suit motor vehicle which was being driven at approximately 50km/hr.

8. In cross examination DW1 stated that he saw the plaintiff running into the road from the right side and did not contemplate that he would cross the road. He has been a driver from the year 2007 and at the point of the accident he had slowed down since there was a Matatu stage nearby. He also confirmed that he did not have an inspection report to ascertain that his vehicle was hit from the right side. He maintained that the plaintiff was intoxicated because he smelled of alcohol but did not have any evidence to confirm the level of intoxication. In re-examination, he affirmed that he was driving at a speed between 30-50 km/hr and had slowed down significantly by the time the accident occurred. He maintained that the plaintiff sustained fractures having thrown himself upon his vehicle.

Parties Submissions

Appellants Submissions

9. The appellant submitted that this court had a duty to consider the evidence at the trial and evaluate it afresh before coming to its own independent conclusions irrespective of the determination by the trial court, subject to the understanding that it is only the trial court that had the advantage of seeing and hearing the witnesses. Further section 78(2) of the *civil procedure Act* also allowed the court to assume its original jurisdiction and re assess damages. Reliance was placed on the case of Kiruga v Kiruga & Another [1988] KLR348.

10. On the issue of Liability, it was submitted that PW1 the police officer testified and confirmed that he was not the investigating officer and that apart from merely relying on the police abstract, he did not know who reported the case, he did not have the police file, was unable to tell the circumstances under which the accident occurred, nor was he aware of the outcome of the investigation. He further confirmed on cross examination that the appellant had never been arraigned in court to face any traffic related charges ancillary to the said accident.

11. It was also submitted that PW2 in his witness statement stated that he was off the road when he was hit, however in his evidence in chief he did not indicate that the suit motor vehicle veered off the road and hit him. The respondent also did not produce the police file, sketch map or investigation report to give an account of how the accident occurred. The trial magistrate was thus wrong to award liability at 50:50 as it was the respondent to blame for the said accident.

12. On Quantum, the appellant submitted that the trial magistrate observed that the respondent sustained injuries such as dislocation of the left shoulder joint, fracture of the left medical epicondyle of the left humerus, fracture of the left femur and fracture of the right tibia and proceeded to award the respondent a sum of Ksh.1, 800,000/=. It was submitted that the general damages awarded were excessive in the circumstances and an award of Ksh.350,000/= would have been appropriate. Reliance was placed in the case of Joseph Musee mua v Julius Mbogo Mugi & 3 others [2013] eklr, Eldoret steel mills limited vs Elphas Victor Espila Eld HCCA no 72 of 2006 (2013) eKLR. brahim kalema lewa vrs Esteel company ltd , Nairobi HCCA no 475 of 2012 & Kenyatta University vrs Isaac karumba Nyuthe Nrb HCCA no 193 of 2012 (2014) eKLR.

Respondents Submissions

13. The respondent did file their submissions on 17.01. 2023 opposing this appeal. On the issue of liability, it was submitted that the appellant did confirm the occurrence of the accident stating that the plaintiff was running across the road then he allegedly threw himself and knocked the driver's side mirror, door and window, fell down and sustained injuries. The appellant had further admitted that the accident

had occurred as one approached the Bus stage at Gilgil junction and he was the one who took the respondent to hospital after the said accident. The appellant further had no cogent evidence to prove his allegations that the respondent was intoxicated at the time of the accident.

14. The respondent also submitted that the appellant was to blame having been the driver of the suit motor vehicle, he had a higher duty of care, and should have kept adequate look out for other road users, while driving next to the main junction from Gilgil joining the main Nakuru – Nairobi road, which junction was close to a bus stop and/or a road side trading center. The appellant ought to have slowed down as he approached the junction, but did not do so and took no measures of slowing down or swerving before he knocked down the respondent. Reliance was placed in the case of Savannah Hardware v EOO [2019]eKLR, Lilian Gakethi Mworia vs Stanley Mwithumbi (2010) eKLR, Jona Nguko & Ano Vs John Mwaka Amisi & Ano, Mumbi M'Nabea Vs David M Wachira (2016) eKLR

15. On quantum, the respondent submitted that the injuries he sustained were not disputed and were confirmed as pleaded. Reliance was placed on the case of Denshire Muteti Wambua vs. Kenya Power& Lighting Co. Ltd[2013] eKLR where it was held that the general method of approach for assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct awards in similar cases.

16. The respondent submitted that he suffered multiple fractures of the left humerus, right tibia and left femur, he cannot raise his left arm up neither can he use it to lift heavy objects, he still uses a walking stick due to the deformity. He urged the court to find an award of Kshs.1,800,000/= as proper to compensate him for his grave injuries her suffered. The court was urged to uphold the trial Court's award on both liability and quantum.

Determination

17. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

18. As held in Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals 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 conclusion 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. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270

19. In Coghlan V Cumberland (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must

then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

20. Also it has been held by the court of appeal in Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278 that;

> " A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstance's or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

21. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

22. From the Evidence adduced both parties do admit that an accident did occur on 10th July 2010 at Gilgil Junction, when the suit motor vehicle knocked down the Respondent and he sustained serious fracture injuries on both legs, dislocation of the shoulder and soft tissue injuries. After the accident it is the appellant who rushed the respondent to hospital for treatment and though investigations were carried out, the appellant was never charged with any traffic offence.

23. The appellant alleged that on the said date he was standing off the road along Nakuru – Naivasha Highway opposite Gilgil town Junction on the left side as one faces Nakuru, when he was hit by the suit Motor vehicle which was over speeding and as a result, he sustained severe injuries. He denied that he was crossing the road nor did he in any manner contribute to the said accident occurring. The respondent on the other hand lead evidence to the effect that the Respondent was to blame as he crossed the road, when it was not safe to do so and did not look out for other road users. Further the respondent was to blame as he was intoxicated.

24. When the court is faced with two sets of circumstances it is still duty bound to make a determination thereon however difficult the circumstances are. This was appreciated by Madan , J (as he was then) in Welch Vs Standard Bank Limited (1970) EA 115 where he expressed himself as hereunder;

> " When there is no material to generate actual persuasion in the courts mind, still the court cannot un-concernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability.

> Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court has nothing by which to draw and distinction between them. So, also, if they are both dead and cannot give evidence enabling the court to draw a distinction between them, they must both be held to blame, and equally to blame.....justice must not be denied because the proceedings before the court failed to conform to conventional rules provided, in it judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion.......There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does so in this case.

25. Similarly, in Lakhamshi Vs Attorney General(1971) EA 118 it was held that:

> " A judge is under a duty when confronted with conflicting evidence to reach a decision on it and inmost traffic accidents, it is possible on a balance of probability to conclude that one or other party was guilty, or both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the Centre of the road, the other must be negligent in failing to take evasive action. It is usually possible, although extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them.

26. The issue of apportionment of liability was also discussed in Khambi and another Vs Mahithi and another (1968) E.A 70 where it was held that;

> " It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge." Similar decisions have been reached in Mahendra M Malde Vs George M Angira Civil Appeal.

27. The Respondent in his evidence testified that as a result of the impact of the accident he was pushed to the road and did not know which side of the vehicle hit him. PW1 the police office also confirmed that no proper investigation was carried out. The appellant alleged that he was driving at a speed 30-50km/hr and the Respondent knock himself as against the right side of the said suit motor vehicle. The Respondent indeed proved that an accident but failed to prove that the appellant was wholly to blame for the same. Similarly, the respondent had the burden shifted to him by virtue of section 108 of the *Evidence Act* to show that he was not to blame for the accident.

28. His evidence that he was driving at an average speed of 30 – 50 km/hr and the appellant knocked himself against the side of the suit motor vehicle is not plausible, given the serious nature of the injuries the appellant sustained, which is indicative of the respondent being knocked down by a motor vehicle driven at high speed. The appellant obviously failed in his duty as a driver to keep a reasonable look

out for other road users, the respondent included and to drive at a moderate speed within a trading center/ Bus stage area.

29. Even if it is true that Respondent was crossing the road, court's have severally held that a pedestrian cannot simply be faulted for crossing the road, as roads are used by motorists and pedestrians as well. It was the duty of motorists to drive with due care and attention as well as observe traffic rules and regulations including giving right of way to pedestrians at designated places. A motor vehicle driver also had to anticipate that things, people or animals might stray onto the road and he is bound not to drive at high speed so as to avoid accidences occasioned by such persons/animals.

30. In other words, a reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. See Masembe Vs Sugar Corporation & Another (2002) 2 EA 434, which was cited with approval in the case of Kennedy Muteti Musyoki Vs Abedinego Mbole (2021) EKLR & Osoro & 2 others Vs Msango & Another suing as legal representative of the Estate of Nicholas Brown Mwangemi (deceased) (Civil Appeal 65 of 2019)(2022) KEHC 212(KLR)

31. The Respondent's documentary and oral evidence were consistent and pointed towards negligence of the appellant and/or his driver as the cause of the accident as he was driving at high speed within a township area and could therefore not stop at once on application of the emergency breaks. The trial magistrate adequately considered all the evidence and parties' submissions and rightly apportioned liability. There was no evidence that the learned magistrate based her decision on wrong principles or parameters and therefore there was no basis to interfere with the trial courts discretion.

32. The Appellant also challenged the quantum of damages awarded. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate".

33. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

34. Further in the case of West(H) and Sons Limited vs Shepherd [1964] AC 326 at 345 it was appreciated that; -

> " The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously.

35. It is trite law that when it comes to assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are unusually similar in terms of nature and extent of injuries sustained. The court of appeal in Stanley Maroa Vr Geoffrey Mwenda (2004) eKLR stated as follows ;

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable award keeping in mind the correct level of awards in similar cases."

36. Further in the case of Charles oriwo odeyo Vs Apollo Justus Andabwa & Ano (2017) eKLR the court stated that;

> " The court in making an award for damages must always consider prevailing inflation."

37. The trial Magistrate did consider the several citations including; Nanyuki Civil Appeal No 5 of 2015 Lucy Waruguru Gatundu Vs Francis Kinyanjui Njuku (2017) Eklr , HCCA at Nakuru Civil suit No 189 of 2009 Mwaura Muiruri Vs Suera Flowers Limited & Another (2014) eklr. In all these cases and others cited by the respondent similar injuries attracted awarded that were within the range of Ksh.1,450,000/= to Ksh.1,600,000/=. The citations cited by the appellant; Nairobi HCCA No 265 of 2004 Kinyanjui Wanyoike Vrs Jonathan Muturi Chogo (2004) eKLR & NairobI HCCA No 415 of 2010 Micheal Kariuki Vrs Charles Wachira Kariuki & Ano (2015) eKLR were for injuries not similar to those sustained by the Respondent and hence were inapplicable in the circumstances of this case.

38. The appellant has failed to show that in assessing quantum, the trial magistrate erred in any manner, or took into account irrelevant principles or left out of account relevant ones. The amount awarded was also not inordinately high so as to be said it was a wholly erroneous estimate of the damages as assessed.

Disposition

39. This appeal thus has no merit and the same is dismissed with costs to the Respondent.

40. The costs of this appeal is hereby assessed at Ksh.180,000/= all inclusive.

41. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of September, 2023.

In the presence of;

..................................for Appellant

..................................for Respondent

..................................Court Assistant