Karau & another v Ndungu & another (Civil Appeal E075 of 2021)
[2023] KEHC 22604 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E075 OF 2021

HM NYAGA, J

SEPTEMBER 20, 2023

BETWEEN

JOHN KARAU ..... 1ST APPELLANT

MBUKINYA SUCCESS K LTD ..... 2ND APPELLANT

AND

DANIEL GICHII NDUNGU ..... 1ST RESPONDENT

SIGINON FREIGHT LIMITED ..... 2ND RESPONDENT

(Being an Appeal against the Judgment by Hon. B. B. Limo (PM) in Nakuru CMCC No. 792 of 2015 delivered on 2nd July, 2021)

JUDGMENT

Introduction

1. The Plaintiff, now the 1st Respondent and Cross-Appellant filed suit against the Defendants, now the Appellants seeking general and special damages for injuries that he sustained in a road traffic accident on 7th December 2013. The Defendants/Appellants joined the 2nd Respondent as a 3rd party to the suit, details of which I will go into later in this Judgment.

2. At the conclusion of the trial the trial magistrate held the Defendant, now Appellant 50% liable and further apportioned 50% contributory negligence on the part of the Plaintiff, now the 1st Respondent/ Cross Appellant. The claim against the 3rd party/2nd Respondent was dismissed with costs. The trial court then made the following awards of damages;

    a. General damages at Kshs. 1,000,000/=

    b. Loss of earnings at Kshs. 3,000,000/=

c. Special damages at Kshs. 141,730/=

3. The Plaintiff was also awarded costs and interest.

4. Aggrieved by the said Judgment the Appellant filed a Memorandum of Appeal 13th July 2021. It set out the following grounds;

    1. That the learned trial magistrate erred in law and in fact in finding that the Defendan/appellants were 50% liable for the accident in issue.

    2. That the learned magistrate erred in law and in fact in failing to accord due regard to the evidence by the Defence witnesses and the Defendant's submission in arriving at its judgment on liability.

    3. That the learned magistrate erred in law and in fact in awarding damages Kshs. 4,000,000/= as damages which were inordinately high in the circumstances.

    4. Thatthe learned magistrate erred in law and in fact in relying on the wrong principles hence arriving at an erroneous decision.

    5. That the learned magistrate erred in law and in failing to accord due regard to the Defendant/Appellant's submissions on quantum on applicable principles for assessment of damages.

    6. That the learned magistrate erred and misdirected himself in law and in fact in misapplying the principles applicable to assessment of damages.

5. The 1st Respondent also filed a Cross-Appeal vide a Memorandum of Cross Appeal dated 29th July, 2021. It set out the following grounds;-

    1. That the learned trial magistrate erred in law and in fact in finding that the Plaintiff/Cross-Appellant was 50% liable for the accident in issue.

    2. That the learned magistrate erred in law and in fact in failing to accord due regard to the evidence by the Plaintiff's witnesses and the Plaintiff's submissions in arriving at its judgment on liability.

    3. That the learned magistrate erred in law and in fact in awarding damages which were inordinately low in the circumstances

    4. That the learned magistrate erred in law and in fact in relying on the wrong principles hence arriving at an erroneous decision.

6. Directions were given that the Appeal be canvassed by way of Written Submissions. I have duly considered these submissions and will incorporate them in this judgment. The 2nd Respondent did not file any Submissions.

7. The 1st Respondent abandoned prayer 3 of the grounds of the Cross Appeal.

Analysis and Determination

8. This being a first Appeal, the duty of the court is to re-evaluate, re-analyse the evidence tendered independently an arrive at its own conclusion.

9. This principle was set out in the well known case of Selle v Associated Motor Boat Co. & others [1968] E.A. 123 where it was stated as follows: -

> " 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 (Abdul Hameed Saif v Ali Mohamed sholan [1955], 22 E.A.C.A. 270)"

10. In Kiruga v Kiruga & Another [1988] KLR 348 the Court of Appeal held that: -

> " an appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."

11. It is at this point that I shall now look at the evidence adduced during the trial.

12. The Plaintiff/1st Respondent stated that on the material day, he was driving motor vehicle registration number KBP 654 V from Nairobi headed to Western Kenya. Along the way he tried to overtake motor vehicle Registration Number KBQ 675 C driven by the 1st Appellant. That as he was doing so, the 1st Appellant accelerated. The 1st Respondent saw an oncoming vehicle and so to avoid a collision, he slowed down. When he got to Gilgil, he spotted the 1st Appellant's bus. He alighted from his bus and went to ask the 1st Appellant why he had accelerated thus endangering him. That as he was talking to the 1st Appellant, he was hanging on the door of the latter's bus. It was at this moment that the 1st Appellant started to drive the bus from the bus stop and onto the road, with the 1st Respondent still hanging on the door. In the process, the 2nd Respondent's truck Registration Number KBS 045 J/ ZE 0327 which was approaching the bus stop hit the 1st Respondent, leaving him with very severe injuries.

13. The 1st Respondent blamed the 1st Appellant for the accident. He denied that he as fighting the 1st Appellant.

14. PW2 was Dr. Kiamba who examined the Plaintiff and produced his medical report.

15. PW3 was PC Paul Komen of Gilgil Police Station. He also appeared in court and testified as a witness for the Appellants. PC Kome's first evidence was that he in court to produce the Police Abstract. On cross-examination, he stated that the Plaintiff/1st Respondent had started beating the 1st Appellant, who drove to the road, and as a result the accident occurred. He further stated that no one was to blame for the accident. He confirmed that he was not the investigating officer.

16. When PC Komen was called as a defence witness (DW1) he stated that the accident occurred when the 1st Respondent went to confront the 1st Appellant. The latter then drove off and in the process, the 1st Respondent was hit by an oncoming truck. He blamed the victim for the accident.

17. DW2 was the 1st Appellant. He testified that the 1st Respondent went to his bus and assaulted him. He admitted that his bus got to the road on its own and he had no time to look at his side mirror.

18. The 3rd party called one witness. One Joshua Katoi. He confirmed that he was the one driving Motor vehicle registration number KBS O45J When he got near the scene of the accident. Motor vehicle No. KBQ 675C suddenly veered into the road. A person who was hanging on the driver's door was sandwiched between his lorry and the said bus. He blamed the driver who joined the road suddenly.

19. The issues for determination are;

    a. Who was to blame for the accident?

    b. What is the quantum of damages awardable for the injuries sustained by the 1st Respondent/Cross Appellan?.

20. As expected, the 1st Appellant and the 1st Respondent blame each other for the accident.

21. What is not in dispute is that the 1st Respondent alighted from his vehicle and went to confront the 1st Appellant, for accelerating when he was overtaking him. What is not clear is whether this was a confrontation of mere words or there was a physical altercation, as averred by the 1st appellant.

22. The police officer who was supposed to clear the air over what transpired spoke from the two ends of his mouth. He seemed to blame the 1st Respondent when he was called as a defence witness whereas by then, when he was testifying for the Plaintiff, he had stated that no one was blamed for the accident. A true gun for hire, this witness!

23. From the evidence it is not in dispute that some sort of argument took place. The 1st Appellant's bus was parked at the bus stop. He then drove on to the road without confirming that it was safe to do so, with the 1st respondent still hanging by the door.

24. The appellant invoked the doctrine of volenti non fit injuria and blamed the 1st respondent for the accident. The appellant cited the case of Catherine Wangechi Wariah vs Meridian Hotel Ltd [2016] eKLR which was cited in the case of Simba Africa Cement Ltd and another v Rose Mutanu Musyoni [2022] eKLR the court held as follows;

    'The general principles applicable to this defence (Volenti Non Fit Injuria), were stated by the judicial committee in Letang vs Ottawa Electric Railway Company in the following terms quoted from the judgment of Wills J in Osborne vs the London and North Western Railway Company;

    If the defendant desires to succeed on the ground that the maxim Volenti Non Fit Injuria is applicable, they must obtain a finding of fact that the Plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it...

    Volenti Non Fit Injuria means that the Claimant voluntarily agrees to undertake the legal risk of harm at his expense. It must be shown that the Claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely and freedom of choice predicates only full knowledge of the circumstances on which the exercise of choice is conditioned do that he may be able to choose wisely but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will..."

25. In United Millers Limited & another v John Mangoro Njogu [2016] eKLR the court held as follows;

    " If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is app1icable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it...Volenti

non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will. This was the holding of Scott L.J. in Bowater v Rowley Regis Corp.....I take the view that a person who asks for a lift like in the present case cannot be said have consented to the risk of an accident or consented to negligence. In my view, the driver owed him a duty of care the moment he agreed to give him the lift and the defence of voluntary assumption of risk cannot apply."

26. In AAA Growers Ltd v Ann Wambui (Suing as the Administratrix in the Estate of Thomas Wahome Wambui) & another [2016] eKLR the court also explained the doctrine of volenti non fit injuria when it held as follows;

> " It has, however, been held that the question is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he should bear the loss in the event of an injury; the consent that is relevant is not consent to the risk of injury but the consent to the lack of reasonable care that may produce that risk (see Kelly v Farrans Ltd [1954] NI 41 at 45 per Lord Macdermott, cited at paragraph 69 of Halsbury's Laws of England (supra)..... It has been held that in order to establish a defence of volenti non-fit injuria the claimant must be shown not only to have perceived the existence of danger but must also have appreciated it fully and voluntarily accepted the risk. (See the cases of Thomas v Quartermaine 1887] 18 QBD 685, CA; Letang v Ottawa Electric Rly Co [1926] AC 725, PC and Williams v Birmingham Battery and Metal Co [1899] 2 QB 338, CA) Further, the question whether the claimant's acceptance of the risk was voluntary is generally one of fact, and the answer to it may be inferred from his conduct in the circumstances. The inference of acceptance is more readily to be drawn in cases where it is proved that the claimant knew of the danger and comprehended it (See Thomas v Quartermaine [1887] 18 QBD 685 at 696, CA, per Bowen LJ), for instance where the danger was apparent or proper warning was given of it and where there is nothing to show that the claimant was obliged to incur it (See Sylvester v Chapman Ltd (1935) 79 Sol Jo 777, where it was held that the plaintiff unnecessarily put his hand near the bars of a leopard's cage)..."

27. The 1st respondent went to where the 1st appellant had stopped his bus. It was stationary then. Climbing on to the door of the stationary bus was not in itself an act of exposing himself to the accident that took place. Had the 1st appellant not moved the bus, the accident would not have occurred. In as much as he may blame the 1st respondent for the accident, he largely contributed to it by driving onto the road without confirming that it was safe to do so, and knowing that the 1st respondent was on his door.

28. I am of the view, just like the trial court found, that the 1st Appellant and the 1st Respondent were equally to blame for the accident. The 1st Respondent did not need to climb onto the 1st Appellants bus. He exposed himself to danger. On his part, the 1st Appellant knew that the 1st Respondent was still hanging on his door. By driving the bus back to the road, he acted negligently and exposed the 1st Respondent to danger.

29. The 1st Appellant claims that he was being attacked. That was his word against that of the 1st Respondent. Even so, he did not have to drive onto the road with the 1st Respondent still hanging by his door. He exposed his own passengers to danger. In fact, were it not that the 3rd party's driver swerved, there would have been a collision.

30. I agree with the learned magistrate when he exonerated the 3rd party. The driver did not contribute to the accident. He was on his lane and he even tried to swerve to avoid hitting the 1st Appellant's bus.

31. This was a classic case of road rage, where one driver felt that the other had endangered him and went to confront him. As expected the other driver did not take that act kindly and he drove onto the road, with almost tragic consequences.

32. I agree that liability was correctly apportioned at 50% - 50% between the 1st Appellant and 1st Respondent.

33. I will now delve into the issue of quantum. The 1st Respondent sustained the following injuries;-

    a. Head injury with intercerebral bleed.

    b. Traumatic amputation of the left upper limb below the elbow joint.

    c. Fracture of the right tibial plateau

    d. Fracture of the left tibia

    e. Left acromioclavicular join injury

    f. Fracture of 3 teeth.

34. The Respondent abandoned his Cross – Appeal on quantum. I am thus left to determine the Appellant's Appeal on the same.

35. I have considered the injuries. By any standard of measure, these were very severe injuries. The 1st Respondent was left with permanent disability assessed by Dr. Kiamba at 80%. The doctor pointed out that the victim would never resume his duties, owing to the amputation of the left upper limb.

36. The appellants did not question the award of damages for the injuries themselves. That would have been vanity as I am of the view that these injuries would have attracted higher award as general damages. The appellants line of argument is that the award of loss of future earning capacity was inordinately high. They proposed an award of Ksh. 600,000/-. They cited the case of Gitau Peris v Gerald Njoroge [2020] eKLR where the court made an award of Ksh. 600,00/-.

37. I have considered the authority and those cited in the lower court during the trial. I am of the view that the proposal by the Appellants is quite low and not commensurate to the award, made in similar cases cited in the trial court. Therefore, I will not disturb the award of general damages.

38. I agree with the principles set out in Mumias Sugar Co. Limited v Francis Wanalo [2007] eKLR when it comes to assessment of loss of earning capacity. The court held as follows;

> " From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative

job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

39. It was alleged that the 1st Respondent did not prove that he was a driver and what his income was and therefore the court arrived at an erroneous award of loss of future earning capacity.

40. From the evidence, the 1st Respondent was driving a bus, just like the 1st Appellant. If that is not sufficient to prove that he was in employment, then I don't know what else is. Further, the 1st Respondent's employer, Ugwe Bus Services Limited did provide a letter that confirmed that he was its employee until he was involved in the accident. I find that the 1st Respondent proved that he was in employment.

41. From the evidence by Dr. Kiamba, the 1st Respondent will never work as a driver again due to the amputated upper limb. It does not take rocket science to know that the 1st Respondent's positon means that he can never drive on public service vehicle again. This was his job and he has lost it. He was entitled to seek loss of earnings capacity. This was the same reasoning by the trial magistrate who went ahead to make a global award, rather than delve into arithmetical calculations.

42. In James Mukatui Mavia v. M. A. Bayusuf & Sons Limited [2013] eKLR the court had this to say on assessment of future earning capacity;

> " The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see McGregor on damages, 18th edition paragraph 35 – 065)."

43. In the instant case the trial magistrate did consider what a driver ought to earn as a minimum wage under the law and the period that the 1st respondent would have worked.

44. I see nothing wrong in the approach taken by the trial magistrate. The calculation of loss of earning capacity is based on presumption that the injured party would still be in employment until retirement. It may not take account of vagaries of nature and other uncertainties of life. If the court was to strictly go by the calculations it made the award would have been higher, in my view. Thus no prejudice is caused to the appellants.

45. I am of the view that the trial magistrate did exercise his discretion correctly. This court cannot fault such exercise of discretion. The award was very reasonable. This was a person who was in his prime. I don't see any grounds to disturb that award either.

46. In conclusion, I find that this Appeal lacks merit and it is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 20th of September, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Njuguna for Appellant

Mr. Ngure for 1st Respondent

N/A for 2nd Respondent