Gitau v Mathenge & another (Civil Appeal E058 of 2022)
[2023] KEHC 23276 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23276 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E058 OF 2022

SM MOHOCHI, J

OCTOBER 9, 2023

BETWEEN

JAMES MUIRURI GITAU ..... APPELLANT

AND

CHARLES NJUGUNA MATHENGE ..... 1ST RESPONDENT

ELIZABETH WAIRIMU KAMENYA ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. This Appeal stems out from the Judgement in Nakuru CMCC No. 223 of 2019 delivered 24th March, 2022 by Honourable E. K. Usui, Chief Magistrate.

Trial in the Lower Court Case

2. The Plaintiff in the lower Court filed a Plaint dated 18th January, 2018 which he later amended on 8th March, 2019. He claimed that on or around 5th May, 2017 as he was riding his bicycle, he was knocked by motor vehicle registration number KBV 568C along the Nairobi-Nakuru Highway at Barnabas area. The suit vehicle belonged to the 1st Defendant and was being driven by the 2nd Defendant. He claimed special and general damages as well as costs of the suit

3. The 2nd Defendant entered appearance and filed his Defence dated 3rd July, 202. He denied being the owner of the motor vehicle registration number KBV 568C as well as the occurrence of the accident. He also denied the particulars of negligence and blamed the Plaintiff for the accident.

Evidence

4. PW1, Charles Njuguna Mathenge, testified that he was riding his bicycle off the road headed to Barnabas along the Nairobi-Nakuru Highway. He stated that the suit vehicle was driving behind him when it veered off the road and hit him whereby, he sustained injuries on his left ankle.

5. On cross-examination, he testified that he was not drunk, that the police abstract stated that the accident occurred at 8.00 p.m. since he was injured at 6.00 p.m. but the police arrived at the scene at 8.00 pm. That he was riding his bicycle and not pushing it. That he has work clothes which has reflector clothing. He was alone at the scene and there was no officer at the scene.

6. PW1 PC Jairus Okello testified that an accident was reported vide OB 21/05//2018. That a pedestrian was hit by a car registration number KBU 568C and injured on the left leg ankle. On cross-examination, he admitted to not being the investigating officer, he did not visit the accident scene, did not have a sketch plan and the police abstract stated pending under investigations. He further testified that the initial investigation blamed the driver of the suit vehicle. He admitted to not producing a copy of the police abstract.

7. DW1, James Muiruri Gitau, stated that he was the one who was driving the subject vehicle at around 8.15 pm when someone crossed from his right to his left and they went out of the road and hit his backlight. He fell and hit the road. He was never charged with the offence and the pedestrian did not have reflector clothing. He appeared drunk.

8. On cross-examination, the accident occurred at 8.50 pm when the Plaintiff moved from the right to the left while pushing his bicycle, and only saw him in the middle of the road when he hit him. He also stated that the Plaintiff was drunk and that he hit the back tyre from the back and that it was raining. He was unable to stop before impact. He was not to blame.

Appeal

9. The Appellant who was the 2nd Defendant in the lower Court filed a Memorandum of Appeal dated 20th April, 2022 and a Record of Appeal dated 19th August, 2022 and listed 6 grounds on quantum as follows:

    i. That the Learned magistrate erred in law and in fact in awarding an exorbitant sum of Kshs. 1,300,000/= as general damages, which is clearly excessive compared to the weight of evidence adduced before Court and not in tandem with decided cases over similar injuries.

    ii. That the Learned magistrate erred in law and in fact in assessing costs of future medical expenses at Kshs.150,000 which is highly exaggerated and with neither enough evidence nor medical quotation from an independent hospital.

    iii. That the Learned magistrate erred in law and in fact by failing to take account defence evidence on record particularly failing to consider Dr. Malik's Medical Report produced as D.Exh1.

    iv. That the Learned magistrate erred in law and in fact in awarding special damages of Kshs. 229,432/= which were ever specifically proven as per the law.

    v. That the Learned magistrate erred in law and in fact in failing to take into account the evidence and submissions on quantum of damages given on behalf of the Appellant.

vi. That the learned magistrate erred in failing to apply the proper legal principles regarding quantum and thus arriving at a bad decision.

10. The Appellants sought:

a. That the appeal be allowed

b. Judgment on quantum be set aside/ reversed and the trial Court's award be re-assessed and reduced

c. Costs of this Appeal be awarded to the Appellant.

Cross Appeal

11. On the 20th of March 2023, the 1st Respondents who was the Plaintiff in the lower Court case filed a Notice of Cross-Appeal in relation to the judgement delivered on 24th March, 2022. The Cross-Appeal raises 3 grounds of appeal on liability which are;

i. That the Learned Trial Magistrate erred in law and in fact in her apportionment of liability to the Appellant.

ii. The Learned Trial Magistrate and misdirected herself in finding liability at 50:50 against the Appellant

iii. That the Learned Trial Magistrate erred in law and in fact by failing to properly consider and analyse Plaintiff/Appellant's submissions and evidence hence arrived at a wrong determination o the aspect of liability

12. The Appellant sought;

a. That the Judgment/decree of the Honourable Court dated 24th March be reviewed and/or set aside

b. Costs of this Cross-Appeal be borne by the Respondents.

Directions of the Court

13. The Court on 24th March, 2023 directed that the Appeal and the Cross-Appeal would be disposed of by way of written submissions. The Appellant filed submissions dated 31st July, 2023 on 3rd August, 2023. The 1st Respondent filed submissions dated 5th June, 2023 on 8th June, 2023.

Appellant's submissions

14. The Appellant submitted that the award of general damages was exorbitant as the magistrate did not take into account the exact nature of the injuries sustained, she did not take into account comparable injuries as well as considering past authorities, and the award was based on irrelevant consideration and manifestly high.

15. On special damages and future medical expenses, the Appellant contends that the same was not specifically pleaded and proven and that he was entitled to costs of the Appeal.

1st Respondent's submission.

16. The 1st Respondent submitted on liability that DW2 testified and blamed the Appellant and that the Appellant, as a motorist driving in such an environment owed a greater duty of care to all road users at all material times. He urged the Court to apportion liability at 100% as against the Appellant.

17. On quantum, the 1st Respondent submitted that quantum was not inordinately high and urged the Court to uphold the decision of the trial Court.

Analysis and Determination

18. I have carefully considered the grounds of Appeal and the cross-appeal, the evidence adduced before the learned trial magistrate, the parties' rival written submissions as well as the authorities relied on by the parties. I have also read the Judgment of the trial Court. I find that the issues for determination are on liability and quantum.

Liability- Who is to blame for the accident?

19. In determining liability in road traffic accidents, the Court of Appeal proceeded to state in Michael Hubert Kloss & Another –v- David Soreney & 5 Others 2009 eKLR:

> The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or 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 that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

20. Having looked at the trial record, it is enough to say that indeed a road traffic accident involving motor vehicle registration number KBV 568C along the Nairobi-Nakuru Road. The Appellant was driving the vehicle and the 1st Respondent got injured in the accident. Now therefore who is to blame for the accident?

21. The 1st Respondent challenged the lower Court's decision and contended that the Appellant had a higher duty of care. He urged that the testimony and evidence of the 1st Respondent and the Police officer should be sufficient to hold the Appellant 100% liable for the accident.

22. There were two conflicting versions of the accident. The Appellant claimed that the Respondent was crossing the road and was drunk. That it was raining and he had no reflective gear. The 1st Respondent claims that the Appellant left his lane and hit him on the side of the road.

23. The police testified that the abstract stated the accident was pending investigation. He also testified that the police report blamed the Appellant for the accident. He admitted to not being the investigating officer nor witnessing the accident. He also did not produce the sketch plan not the police report nor the police file. The testimony of the police officer cannot be relied on in apportioning liability as it is contradictory does not explain why the Appellant was blamed and it also and does not corroborate the version of the 1st Respondent.

24. The Court of Appeal in Hussein Omar Farar v Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it observed that:-

> " In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

25. Where the Court is unable to determine who is to blame it has apportioned liability equally as illustrated by the above case. In the absence of evidence exonerating either party, each party must share capability.

26. In the circumstances, I find that the apportionment of liability by the trial magistrate was based on valid findings. I hold that the Appellant and the 1st Respondent were equally to blame for the accident.

Quantum

27. In an appeal against assessment of damages an Appellate Court must be careful not to interfere with the trial Court's discretion unless certain conditions are met. These conditions were outlined in the case of Kemfro Africa Limited t/a "Meru Express Services & Another v Lubia & Another Civil Appeal No 21 of 1984 [1985] eKLR thus:

> " The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

General damages

28. In the instant case, the trial magistrate awarded Kshs 1,300,000 damages for pain and suffering, which amount the Appellant regards as inordinately high. The 1st Respondent agrees with the trial magistrate on the award and submitted that it should not be disturbed. The Court of Appeal observed in Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR that:–

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

29. Further, in the case of Power Lighting Comp. Ltd & another v Zakayo Saitoti Naingola & another [2008] eKLR the Court held:

> On quantum the Court in determining whether to interfere with the same or not, the Court has to bear in mind the following principles on assessment of damages: -
>
> 1. Damages should not be inordinately too high or too low.
> 2. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
> 3. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
> 4. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.....
> 5. This Court has taken note of the Court of appeal decisions to the effect that an award of damages is a matter of the Courts discretion and can only be interfered with if among others.

30. The 1st Responded sustained the following injuries:

    a. Comminuted fracture of the left fibula

    b. Displaced fracture of the left medial malleolus

    c. Dislocation of the left ankle

31. The pertinent question in this case is whether the learned magistrate gave an award that was inordinately too high?

32. In the two medical reports, Dr. Kiamba's Medical report dated 13th September, 2017 and Dr. Maliks' medical report dated 6th August, 2021 both agreed on the nature of injuries. However, on the degree of injuries differed.

33. The Appellant relied on the following cases in support of his argument that the award of damages should be set aside and reduced to an amount between Kshs. 300,000 to Kshs. 400,000:-

    a. Daniel Otieno Owino & Another vs Elizabeth Otieno Owuor [2020] eKLR lady Justice E. Aburili reduced an award of Kshs. 600,000 to Kshs. 400,000 for compound fractures of the tibia and fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose, blunt chest injury and soft tissue injury on the lower left leg.

    b. Harun Munyoma Boge vs Daniel Otieno Agulo [2015] eKLR. The Court set aside an award for damaged of Kshs. 1,500,000 where the plaintiff sustained multiple injuries and fracture of right tibia and fibula.

    c. Wakim Sodas Limited vs Sammy Aritos [2017] eKLR, the Respondent was awarded general damages of Kshs. 400,000 where he sustained a fracture of the fourth rib and a compound fracture of the left tibia and fibula.

34. The 1st Respondent in submitting that the general damages awarded were on sound judgment basing the same on comparable injuries; the 1st Respondent relied on the following authorities;

    a. PW vs Peter Muriithi Ngari [2017] eKLR. The Appellant sustained fracture left femur, which was operated on and fixed with a metallic plate. Fractures of the left fibula and tibia which were operated on and fixed with k-wires and plates and blunt injuries to the pelvis causing fractures to the pelvis. The Court awarded general damages of Kshs. 1,500,000.

    b. Joseph Musee Mua vs Julius Mbogo Mugi & 3 Others [2013] eKLR the claimant sustained a fracture of the left tibia and fibula and injuries to the left to the chest and jaw. The Court awarded Kshs. 1,300,000.

35. I am alive to the fact that the award of general damages is an exercise of discretion of the Trial Court based on the evidence adduced in Court. The Trial Court had the advantage of listening to the parties which this Court does not have.

36. It is this Court's duty to re-evaluate the evidence on record and based on the injuries sustained, the healing process, and any future complications if any. The Court therefore should aim to compensate an injured party and not punish the other party.

37. This Court notes that the injuries of the 1st Respondent were less serious as compared to those in PW vs Peter Muriithi Ngari (supra). The authorities relied on by the Appellant represent almost similar injuries.

38. After taking into consideration the injuries sustained by the 1st Respondent and having due regard to the aforesaid cases and the inflation trends as well as the reports by both doctors, the 1st Respondent may undergo another procedure if he so wishes or he can live with the metal plate and screw as his ankle had healed and was not in pain. The only challenge he had was that he could not carry heavy items.

39. I also factored in the awards by Courts on similar injuries and the issue of inflation, I find that the damages awarded by the trial Court were on the higher side. In coming to the conclusion reliance is made on the following cases where the awards given were based on almost similar injuries:

    a. Fairmile School Limited & another v Jacob Imbali Imbenzi [2019] eKLR The Respondent suffered Fracture of left orbit, Fracture of left temporal bone, Fracture of left zygomatic bone, Fracture of left maxilla, Lacerations on the left forearm and Fracture of left tibia. The Court lowered general damages from Kshs. 1,300,000 and awarded him Kshs. 800,000.

    b. Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR the plaintiff suffered injuries involving soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula as well as loss of consciousness and the severity of the fracture was at risk of secondary stress fractures on the same site. Muchemi J awarded Kshs 1 million general damages in November 2019.

    c. Sammy Mugo Kinyanjui & Another v Kairo Thuo (2017) eKLR where the respondent had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula. His conclusion was that the injuries were very severe but had healed the Court lowered the award of general damages from Kshs. 1,000,000 to 600,000.

    d. Tirus Mburu Chege & Another v JKN & Another (2018) eKLR where the respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken

upper right second front tooth, nose bleeding and consistent loss of consciousness the Court lowered the award for general damages from Kshs. 800,000 to Kshs. 500,000.

40. It is my considered view that an award of 500,000/- would be reasonable and sufficient in the circumstances.

Costs of future medical treatment

41. In his submissions, the Appellant argued that the learned trial magistrate's award was unreasonable and the Trial Court was not guided by both medical reports. That the Trial Court failed to give proper and sufficient justification for the dismissal of Dr. Malik's Report.

42. It was the 1st Respondent's position that the learned trial magistrate properly exercised her discretion in choosing to apply the amount of Kshs.150,000/= indicated in the medical report by Dr. Kiamba as opposed to the sum of Kshs.50,000/= laid out in the medical report prepared by Dr. Malik.

43. Medical opinions of doctors have no binding effect on the Courts; however, they act as a guide as to the award to be given. The Courts use medical reports as well as awards given by other Courts on comparable injuries in determining awarding future medical expenses.

44. The two doctors differed on how much it would cost for future medical expenses. In 2017, Dr Kiamba was of the opinion that the injuries would cost about Kshs. 150,000 while Dr Malik in 2021 was of the opinion that the cost of treatment would cost about Kshs. 50,000. Looking at the lower Court judgment, I have re-evaluated the medical reports on record, both reports indicate that the respondent sustained multiple fractures which fact was noted by the learned trial magistrate.

45. I note that while both medical reports indicated that the 1st Respondent would require the removal of the metal plate and screws inserted in his ankle, the cost differed from one doctor to another. In my view, while it would have been important for the learned trial magistrate to explain why she chose to rely on the costs of Kshs.150,000/= offered in the first medical report as opposed to the second medical report of Kshs. 50,000.

46. I am satisfied that the learned magistrate drew guidance from both the medical evidence on record and the inflation trends in making such an award. I wish to note that medical procedures are not limited to a particular hospital and each facility has its own schedule of costs.

47. The Appellant also submitted that the costs of future expenses were not specifically pleaded and proved. Future medical expenses are special damages and have to be pleaded and proven albeit by estimates. The 1st Respondent pleaded for future medical costs and Dr. Kiamba confirmed the costs for future treatment in his report, hence the same was properly claimed by the 1st Respondent.

48. The Court of Appeal in the case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR with reference to Kenya bus Services Ltd v Gituma, (2004) EA 91 stated as follows inter alia:

> "And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the Court is to make an award in respect thereof..."

49. I am satisfied that the 1st Respondent appropriately sought for future medical expenses. I am satisfied that the Trial Court correctly applied discretion in awarding the same as she did.

Special damages

50. On the issue of special damages, the question that irises; is whether the special damages awarded to the 1st Respondent were proved to the legally required standards?

51. Firstly, the Appellant submitted that the 1st Respondent attached receipts without a revenue stamp. It is the Appellant's contention that the Court should not consider receipts without revenue stamps affixed on them.

52. The case of Muela Kimono V Daniel Kipkirong Tarus & Another, (2015) eKLR where the Court stated: -

> Under the *Stamp Duty Act*, Chapter 480 Laws of Kenya it is not specifically provided that payment receipts in respect of services rendered must be stamped. Section 88 of the Act, in my opinion, it is the duty of the receiver of monies who has a duty to affix revenue stamps, not the payee – who cannot be penalized for omissions of the receiver. I am guided by the cases Benedetta Wanjiku Kimani -vs- chanaw Cheboi & Another HCCC No 373 of 2008 and Irene Ngombo Mshingo -vs- Miriam Kadogo (2000) KLR where the Learned Judges held that a document does not cease from being admissible for lack of affixation of a revenue stamp.

53. I am persuaded to adopt the same principle. That it is the duty of the receiver of monies who has a duty to affix revenue stamps and not the payee. The 1st Respondent cannot be penalized for what he has no control of.

54. Secondly, proof of special damages: The Appellant submitted that the special damages awarded were not proved, on a closer look at the record, the Receipt dated 6th May, 2017 for the sum of Kshs. 15,000/- "in-patient deposit" has been attached twice. On a closer look, it bears the same receipt number 957. One bears a revenue stamp one does not. It is unlikely inpatient deposit would be paid twice and if the amount was paid in two separate transactions it cannot be paid using the same receipt with the same receipt number. There being no evidence of payment of the extra Ksh.31,192/= of the special damages awarded, the award for special damages is set aside, and the sum of Ksh.198,240/- in respect of special damages is allowed.

55. Accordingly, this Appeal against the quantum of damages, partially succeeds to the extent that:

    a. The award of general damages in the sum of Kshs 1,300,000/- is hereby set aside and substituted with an award of Kshs 500,000/-

    b. The award for special damages is set aside and the sum of Ksh.198,240/- is allowed.

    c. The award for future medical expenses is upheld.

       Less 50% contribution

    d. The 1st Respondent shall have costs of the suit in the Lower Court and interest on the reassessed damages from the date of judgment in the lower Court.

    e. The Cross-Appeal fails and is hereby dismissed.

    f. The Appellant shall have costs of the Appeal and Cross- Appeal

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 9TH DAY OF OCTOBER, 2023.

MOHOCHI S.M

JUDGE OF THE HIGH COURT.