Kariuki & 2 others v Kogi (Civil Appeal E002 of 2021)
[2023] KEHC 23260 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23260 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E002 OF 2021

SM MOHOCHI, J

OCTOBER 9, 2023

BETWEEN

JOSEPH KARIUKI ..... 1ST APPELLANT

MICHAEL NJOROGE ..... 2ND APPELLANT

TIMOTHY KARWE ..... 3RD APPELLANT

AND

JOHN WAMUTEGI KOGI ..... RESPONDENT

(Being an Appeal against the Judgement by the Honourable E.Nderitu(Chief Magistrate) in Molo CMCC NO.398 of 2009 delivered on the 15th December,2020)

JUDGMENT

Introduction

1. This appeal arises from the judgement of Honorable E Nderitu CM, in Molo CMCC No. 398 of 2009 delivered on 15th December, 2020. It mainly challenges the trial magistrate's judgment on the twin issues of liability and quantum.

Trial Court Case

2. Before the trial Court was a claim commenced by a Plaint dated 7/11/2009 and amended on 23rd October, 2019 in which the Respondent herein (Plaintiff in the trial Court) sued the Appellant's herein (1st, 2nd and 3rd Defendants) seeking general damages, special Damages, costs of the suit together with interest thereon.

3. The Respondent pleaded that on or around 7th August 2009 he was lawfully travelling as a passenger along the Molo-Nakuru road in motor vehicle registration Number KAV 673G Toyota matatu owned by the 2nd Appellant which was recklessly, and/or carelessly driven without any care, regard and or

attention by the 1st Appellant that it lost control and was involved in an accident occasioning him serious injuries. That consequently he also suffered loss and pain.

4. The Appellants denied the claim through their Defence dated 2nd October, 2020 and amended on 22nd August 2021 and prayed for the Respondent's suit to be dismissed.

5. In the alternative the Appellants averred that the accident occurred without negligence on their part and was due to inevitable accident. The appellants also averred that in the alternative the accident was solely caused and / or substantially contributed to by the plaintiff.

6. After conclusion of the trial, the trial Court found both parties equally to blame for the accident and entered the judgment for the Respondent against the Appellants jointly and severally as follows;

   a. Pain and Suffering Ksh. 3,000,000/=

   b. Cost of future treatment Ksh. 350,000/=

   c. Special damages Ksh. 224,000/=

      Ksh. 3,574,100

      Less 50% contribution Ksh. 1,787,050

The Appeal

7. The Appellants being dissatisfied by the decision of the trial Court lodged this appeal vide a memorandum of Appeal dated 30th December, 2020 and filed on 7th January, 2021.

8. The Appeal is premised on the grounds THAT: -

   a. The learned trial Magistrate erred in law in fact in finding that the Defendant/ Applicants were partially liable for the accident in issue.

   b. The learned trial Magistrate erred in law in fact in failing to accord due regard to the evidence by the Defence witness and the Defendants submission in arriving at its judgment liability.

   c. The learned trial Magistrate erred in law in fact in awarding Ksh. 3,000,000/ = less 50% contribution under general damages for pain and suffering which was inordinately high in the circumstances.

   d. The learned trial Magistrate erred in law in fact in awarding the respondent future medical expense in the sum of Ksh. 350,000/= contrary to the principles applicable in assessment of the same.

   e. The learned trial Magistrate erred in law in fact in fact in failing to accord due regard to the Appellants' submissions on quantum on applicable principles for assessment of special damages.

   f. The learned trial Magistrate erred and misdirected herself in law and in fact in misapplying the principles applicable to assessment of damages.

9. The Appellants therefore seek that the appeal herein be allowed with costs and that the Lower Court's judgment in respect of the liability and quantum be set aside and substituted with a reasonable amount.

10. The Appeal was disposed by way of written submissions.

Appellant's Submissions

11. On Liability, the Appellants submitted that the Respondent did not discharge the burden of proof as envisaged under Section 107 of the *Evidence Act* as the evidence on record shows that on the material date the suit motor vehicle did not overturn since no one else got injured and that the respondent was hanging on the door when the accident happened and as such the driver of the subject Motor Vehicle was not at fault for the injuries sustained by the Respondent.

12. It was also submitted that the testimony of the Respondent was not corroborated by any independent eye witness.

13. It is on the above grounds that the Appellants urged this Court to set aside the judgment of the Lower Court on liability and to hold the Respondent 100% liable for the accident.

14. On quantum, the Appellant argued that the medical documents on record shows that the Respondent sustained soft tissue injuries and fracture of the Pelvic, and in view of these injuries Ksh. 500,000/ = would be sufficient compensation. In support of this position, reliance was placed on the cases of Sylvester Onyango Lire v Isack Ouma Shikuku [2022] eKLR; Civicon Limited V Richard Njomo Omwancha & 2 Others [2019] eKLR; & Peter Gakere Ndiangui v Sarah Wangari Maina [2021] eKLR.

Respondent's Submissions

15. On liability, the Respondent submitted that his evidence that he was a passenger in the subject motor vehicle was corroborated by the police officer in his testimony.

16. He said the report captured in the OB identifying the person injured as a tout was made without his input. He believed that the 1st Appellant framed him by describing him as a tout when he reported the accident.

17. He posited that the 1st Appellant testimony was contradictory and could not be relied upon at 100%, and that on a balance of probability, the Court should have found the Appellant 100% liable for not being careful on the road he was familiar with.

18. On Quantum, the Respondent submitted that based on the severity of the injuries he sustained the trial Court gave a fair assessment in the circumstance.

Analysis & Determination

19. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this Court with reasons for such determination. In other words, a first appeal is by way of retrial and this Court, as the first appellate Court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

20. In Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal stated that;

> "[A]n 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 allowances in this respect"

21. In Peters v Sunday Post Ltd [1958] EA 424, the Court held that;

> " Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide"

22. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the same stated with regard to the duty of the first appellate Court;

> " This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

23. With the above in mind and having gone through the evidence and arguments put forth, I find the following necessary for consideration;

Liability

24. PW1, John Wamutegi Kogi, the respondent herein, told the Court that on the material date he was travelling in the subject motor vehicle seated on the 2nd row behind the driver. He said the vehicle was being driven at a very high speed and as a result it overturned, threw him out and laid on him. He thereafter lost consciousness and could not tell whether other passengers were similarly injured.

25. PW2 was PC David Ngetich stationed at Molo Police Station. He said on 7th August 2009 the accident occurred at Muchorwe along Molo Olenguruone road involving the subject Motor Vehicle and a passenger known as John Wamutegi. He produced a police abstract in evidence.

26. In cross examination, he stated that he was not the investigating officer and that as per the OB, the accident involved the subject motor vehicle and a tout who was hanging on the door, and that the said tout slipped and slightly injured himself when the driver stopped to pick passengers.

27. He also said that the driver was not charged with any traffic offence.

28. DW1 was the 1st Appellant. It was his testimony that on the fateful day, he was driving the aforesaid Motor vehicle from Molo Heading to Olenguruone. He indicated that the motor vehicle was a 14 seater matatu. It was his evidence that he stopped at Muchorwe to allow some passengers to alight and he remained with 8 passengers and a conductor.

29. He stated that all the passengers were seated and had buckled up. According to him, the respondent was not one of the passengers and he believed he was hanging on the motor vehicle's door. He testified that after dropping the passengers, he checked the motor vehicle and confirmed no one was hanging at the door and he proceeded with the journey. He stated that in an attempt to avoid hitting the potholes he swerved and someone fell. It was at this point that he learnt that the respondent was hanging at the door. He said no other passenger was injured and that had the respondent sat inside the motor vehicle he would not have been injured.

30. In cross examination, he stated that the pot holes caused the accident. He confirmed that was not his first time driving on that road. He had driven along the same for a year. He said the vehicle never fell but titled to the left. He said people lifted it. He testified that he could not see the respondent as he

was hanging on the door outside. He confirmed he had a conductor and that the motor vehicle had side mirrors. He said the conductor never told him someone was hanging outside. He confirmed he was the one who reported the accident at the police station.

31. Considering the above evidence, it is patent the only eye witnesses to the accident were the Respondent and the 1st Appellant. The evidence of the Police Officer (PW2) was of no evidential value considering he neither witnessed nor conducted any investigation. The trial Court therefore rightly found that his evidence only confirmed the occurrence of the accident.

32. In the case of John Kiria & 6 Others –vs- Kaunda Musyoka & Anor [2010] e KLR Okwengu J as she then was held as concerning the investigating officer and the police abstract that,

> "In this case Sgnt. John Kamau who produced the police abstract was not the investigating officer .He admitted that he never visited the scene of the accident and merely produced the police file to the Court as a public record.
>
> At best the police abstract was only prima facie evidence that an accident involving motor vehicle KXF 502 and a motor vehicle KAH 685 J was reported to the station. Without evidence regarding how that information was procured the contents of the police abstract report with regard with the persons involved in the accident and ownership of the vehicles alleged to have been involved in the accident is of little evidential value and cannot be relied upon."

33. The Respondent alleged that he was a passenger in the subject Motor vehicle. This position was strongly disputed by the 1st Appellant who maintained that he was a tout hanging on the Motor vehicle. According to the Appellants the respondent was the author of his own misfortune. They also disputed that the motor vehicle overturned as no passenger got injured. It is on this premise that they contend the respondent did not discharge the burden of proof as envisaged under Section 107 of the *Evidence Act* and urged this Court to hold that he was wholly liable for the accident.

34. I have perused the record and there is no concrete evidence that the Respondent was a tout. The evidence on record shows that the 1st appellant reported the accident herein. No investigation was subsequently conducted and the Respondent's input was not captured in the OB. Therefore, the information therein is of no probative value and could not be relied on. Clearly, parties' testimonies were conflicting and I agree with the trial magistrate that it was not possible to pinpoint who exactly was to blame.

35. I am guided by the Court of Appeal's decision when faced with a similar dilemma in the case of Hussein Omar Farah v Lento Agencies [2006] eKLR (Nairobi Civil Appeal No. 34 of 2005) where it was 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... The trial Court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

36. I therefore find both the 1st Appellant and the Respondent to blame for the accident. The trial Court's finding on liability apportionment at 50:50 is upheld.

Quantum

37. It is imperative to note that an appellate Court would not easily interfere with the trial Courts' discretion on this issue unless it found that the trial Court applied wrong principles in arriving at the finding. As stated by the Court of Appeal in the case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:

> " ....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 Court are well settled. The appeal Court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."

38. The Court of Appeal in Odinga Jackton Ouma vs Moureen Achieng Odera [2016] Eklr stated that

> "comparable injuries should attract comparable awards"

39. The Respondent pleaded that he sustained the following injuries:-

    i. Injury to the back of the abdomen

    ii. Bilateral pubic rami fracture with disruption of pelvic brim

    iii. Injuries to the pelvic

    iv. Urethral fracture and subsequent retention of the urine and hematuria

    v. Fractures on both rami

    vi. Raptured mesenteric vessels with resultant haemoperitonium

40. Dr. Wabore who examined the plaintiff indicated that the respondent still uses a catheter and urine bag and attends urology clinic. He opined that the needed to undergo an operation to remove the stricture and reroute the urine to the normal route. He assessed the cost of future operation and follow up treatment at Ksh.500, 000/= and permanent disability at 10%.

41. Dr. Ichamwange who also examined the respondent noted that the catheter was in place and the inability of the Respondent to squat, bend or pass urine on his own. She however, assessed cost of future treatment at Ksh.200,000/=.

42. During hearing, the trial Court observed that the Respondent still had a catheter and a urine bag.

43. The trial Court awarded Ksh.3,000,000/= as general damages.

44. The Appellants wants this Court to review downwards the said award to Ksh.500, 000/=. They have relied on the following cases:

    1. Sylvester Onyango Lire v Isack Ouma Shikuku (supra) - in this case the respondent sustained Fracture to midshaft left femur; Fracture pelvis; Laceration on the right inguinal region; & Laceration of the scrotum. On appeal, the high Court substituted the trial Court award of Ksh.850,000/= as general damages with Ksh.600,000/=

2. Civicon Limited v Richard Njomo Omwancha & 2 others (supra) – the 3rd respondent sustained a single fracture of the right tibia and fibula and fractures of the upper teeth and she was awarded KShs. 500,000/- as general damages.

3. In Peter Gakere Ndiangui v Sarah Wangari Maina(supra) the Court made an award of Kshs 500,000/- for a plaintiff/respondent who had sustained pelvic fracture, soft tissue injury to the right thigh and chest.

45. It is clear the Respondent herein sustained severe injuries compared to the above respondents and as such the above precedents do not offer a proper guide in assessment of damages in the present case.

46. The trial Court in making its award was guided by the case of Penina Waithira Kaburu v LP [2019] eKLR. In this case the plaintiff testified that he suffered bruises on his legs, fractures on the pelvic and injuries on the urethra. He was awarded Ksh.2, 000,000/- as general damages. The High Court on appeal upheld that award and observed as follows:

> " In upholding the trial Court's award of by way of recapitulation, it cannot be denied that the respondent suffered severe injuries and endured a lot of pain in the process. He was admitted in hospital and operated on no less than two occasions. What's more, he is likely to be operated on in future, the two doctors having been agreement that the urethral stricture may recur. His doctor went further to warn that besides the recurrence of the stricture and the need for an operation, the respondent was also exposed to the danger of impotence. Apart from the damage to his body and body organs, the respondent also lost his valuable time while undergoing treatment; he couldn't attend college in his indisposed state. Taking all these factors into account, I am hesitant to disturb the learned magistrate's award of Kshs. 2,000,000/= in general damages."

47. The injuries sustained by the plaintiff in above case are almost similar injuries to the injuries the respondent in this case suffered. The Respondent was similarly admitted and endured a lot of pain in the process.

48. In Peace Kemuma Nyang'era Vs Michael Thuo & Another, Civil Suit No. 209 of 2013 [2014] eKLR, Aburili J, awarded general damages of Kshs.2, 500,000/= to a plaintiff who had sustained a Fracture of the sacrum bone (transforaminal fracture), Fracture of the right superior pubic ramus of the public bone, Fracture of the right ischium/inferior pubic ramus of the pelvic bone, Haematoma on both thighs and Lumbo-sacral haematoma.

49. In Florence Hare Mkaha Vs Pwani Tawakal Mini Coach & Another, Civil Suit 85 of 2010 [2012] eKLR, Mwongo J awarded Ksh. 2,400,000/- as general damages for pain, suffering and loss of amenities to a plaintiff who had sustained fracture of the right superior and inferior ramus of pubis fracture of ischium, fracture of right acetabulum, fracture lateral condyl of femur, dislocation of left knee with torn collateral ligament, skin graft surgery on left leg and shortened left leg by 4 cm.

50. Taking all factors into account, I am of the considered view that the trial Court took into account the inflationary trends in arriving at the award. The award was not excessive or erroneous to warrant this Court to interfere with it.

51. Accordingly, the Appeal fails with costs to the Respondent

52. It is so ordered.

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

Mohochi S.M.

Judge of The High Court