Lohoi v Chege (Civil Appeal E086 of 2022)
[2023] KEHC 23378 (KLR) (2 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23378 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E086 OF 2022

GL NZIOKA, J

OCTOBER 2, 2023

BETWEEN

PAULINE NACHI LOHOI .... APPELLANT

AND

JOSEPH KARANJA CHEGE .... RESPONDENT

(Being an appeal from the Judgment of Hon. E. Kelly, Senior Resident Magistrate vide Naivasha Chief Magistrate Civil Suit No. E55 Of 2021, delivered on 25th October, 2022)

JUDGMENT

1. The plaintiff (herein the "appellant") by a plaint dated 28th January 2021,sued the defendant (herein the "respondent") seeking for general and special damaged arising as a result of bodily injuries she sustained in a road Traffic accident on the 26th day of November 2020.

2. She averred that, while walking lawfully off Moi North Lake road at Kasarani area, within Naivasha Area, she was hit from behind by a motor vehicle registration number KBH 524T driven by the respondent. She attributed the accident to the negligence of the respondent who allegedly drove the motor vehicle at an excessive speed, failed to slow down, stop, brake and/or swerve to avoid hitting her, or drove on the wrong side of the road, or without proper look out and failed to take care of other road users.

3. That, as a result of the accident, she sustained injuries, being a fracture of right humerus, soft tissue injury on the right hand and blunt injury on the lower back. As such she claimed for general damages and special damages in the sum of Kshs 17,120.00 and costs of the suit and interest.

4. However, by a statement of defence dated 14th April 2021, the respondent denied liability for the accident, in particular, the acts of negligence attributed to him. Instead, he laid blame on the plaintiff for having caused the accident and/or substantially contributed the cause thereof. He blamed the appellant for walking on the road, failing to keep proper look out for motor vehicle, having no regard

for her own safety and/or heeding a warning or hooting by the motor vehicle registration No. KBH 524T.

5. However in response, the appellant filed a reply to the defence dated 14th April 2021, reiterating the averments in the plaint.

6. Be that as it were, the case proceeded to full hearing and the trial court found both parties contributed to the accident in the ratio of 80:20% in favour of the plaintiff as against the defendant. The damages were assessed and awarded as follows

   a. General damages Kshs 600,000 less 20% contributory negligence - Kshs 480,000

   b. Special damages Kshs 16,020

      Total Kshs 496,020

      Plus costs and interest from the date of Judgment

7. However, the appellant is aggrieved by the decision of trial court on liability and quantum and vide a memorandum of appeal dated 22nd November 2022 appeals on the following grounds: -

   a. That the trial magistrate erred in law and in fact by find the appellants 20% liable not withstanding that there was overwhelming evidence to blame the respondent and no evidence to controvert the appellant's evidence.

   b. That the learned magistrate erred in law and in fact by apportioning liability to the appellant when there was overwhelming evidence against the defendant/respondent.

   c. That the learned magistrate erred in law and in fact by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellant's case.

   d. That the learned trial magistrate erred in law and in fact by failing to consider the plaintiff/appellant's submissions on quantum payable and therefore awarding general damages which were too low comparable to the injuries suffered by the appellant.

   e. That the learned trial magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.

8. The appellant thus prays that the judgment and decree of the Hon. trial court dated 25th October 2022, be and is hereby set aside and the court finds that the respondent is 100% liable and re-assess damages payable to the appellant

9. The appeal was disposed off vide filing of submissions. The appellant reiterated that, the defendant was fully to blame for the accident and that the trial court failed to consider the plaintiff submissions on liability.

10. On quantum, it was the appellant submissions that the principle upon which the court can interfere with quantum were stated in the case of *Kemfro Africa Ltd t/a Meru Express Services & another -vs- A.M Lubia and Olive Lubia (No. 2)* 1985 eKLR, where Kneller J (as he then was) stated that where the trial court took into account an irrelevant factor or left out a relevant one, or the amount is ordinately low or high that it must be wholly erroneous estimate of damaged. The appellant prayed for Kshs 1,000,000 as special damages.

11. The respondent on its part submitted that, the trial court reasoned that though it did not hear the defendant's evidence, it was convinced that on balance of probability the plaintiff was 20% liable to

blame in the circumstances. That the respondent's failure to call witnesses would be inconsequential in the circumstances as it had sufficiently proved that, the appellant was walking on the wrong side of the road.

12. As regards quantum, the appellant had fully recovered from the injuries except for minor pains and therefore the award of Kshs 600,000 though being on the higher side as general damages is fair in the circumstances.

13. I have considered the appeal in the light of all the materials placed before the court. On the issue of liability I find that the plaintiff was an eye witness to the accident she testified in support of the pleadings and particulars of negligence attributed to the respondent. From her evidence she was hit from behind and that she was off the road. Thus she laid total blame on the respondent. The respondent was the other eye witness to the accident. He did not testify to rebut the appellant's evidence. He did not support his pleadings in particular that the appellant in any way contributed to the accident or even committed any of the acts of negligence attributed to her.

14. In submissions filed by the respondent, in the trial Magistrate Court the learned defence counsel thus stated as follows: -

> " could hear motor vehicle approach. So why did she not avoid the accident? Your honour, this explains one thing, the plaintiff was not keen on the road as she was hit by the rear part of the vehicle while she walked. The defendant having not hit the plaintiff by the front side, only points out to a pedestrian who failed to take safety measure while on a busy road. She was probably distracted by the conversation with the other pedestrian as they were walking."

15. From the afore quote, it is evidence that, the submissions are more of evidence than submissions. The probability the defence submissions alludes to, can only have been in furtherance of the defence. The defendant having failed to offer any evidence in defence left the plaintiff's evidence unrebutted. The defendant did not therefore support the averments in the statement of defence and/or offered the plaintiff an opportunity to cross-examine him. He could not therefore turn the submissions into evidence in support of the defence or rebuttal to the plaintiff's evidence.

16. In deed the court was alive to the same when the learned trial magistrate stated as follows in the judgment that;-

> " The defendant did not tender evidence in this case. The plaintiff's evidence is unchallenged and remains uncontroverted".

17. However, in my considered opinion the trial court fell in error when the court went on to state as follows;-

> " The plaintiff however testified that the said motor vehicle approached from behind her and that she was not able to hear the sound. The accident occurred along the road when the plaintiff was walking with another woman considering that she was hit from behind, it's evident that, she was walking on the wrong side of the road with vehicles approaching from behind her. It's not indicated as to if the accident occurred in a place with much vehicle (sic) and human traffic and hence was noisy as to render it impossible for the plaintiff to hear the lorry approach. For the said reason, I find that the plaintiff failed to keep any or proper look out failed to have regard for her own safety, walked along the road without due care and attention, exposing herself to needless peril and danger. To that extent, I find the plaintiff contributively liable for the accident and the injuries sustained. The plaintiff has otherwise

proved on a balance of probability, proved contributory negligence of the defendant who was in control of a machine that hit the plaintiff who was walking along but off the road. I find it fair to and apportion liability in the ratio of 80:20 in favour of the plaintiff and against the defendant. (Emphasis added)

18. The trial court having found the appellant's evidence uncontroverted, and that she was hit while off the road, cannot on its own, hold that she failed to hear the motor vehicle approach and more so, when the court could not establish whether the accident occurred at a noisy place or not. In my considered opinion, the failure of the respondent to adduce evidence to lay any blame on the appellant left the court with no option but rely on the appellant's evidence especially when there was no adverse evidence from the police abstract that the appellant was in any way to blame for the accident. I am inclined to interfere with the finding on liability and hereby set aside the judgment on liability at 80:20 in favour of appellant as against the respondent and substituted it with a finding of 100% liability as against the respondent.

19. As regards quantum, I have considered the submissions and authorities relied on by the parties. I find the authority *Roy Mackenzi -vs- Car track Ltd & Another* (2012) eKLR relied on by the appellant to seek for Kshs 1,000,000 as general damages involved more severe injuries, to the left shoulder which required major surgery under general anesthesia leaving healed scar about 8cm on the left shoulder, abduction power was reduced to grade 3, extension power reduced to grade 2, and internal and external rotation power to grade 3. The plaintiff therein had impingement and most likely a tear of the rotator cuff tendon which required arthroscopic surgical correction to prevent further deterioration of function and alleviate his pain. The cost of the surgery and rehabilitation was approximately Kshs 550,000.

20. The injuries the appellant suffered herein were mainly a fracture of right humerus, a soft tissue injuries on the right hand and lower back. The evidence Dr. Maina Ruga vide a medical report of 27th July 2021, placed the degree of disability at 10%. Dr. Obed Omuyoma report dated 8th December 2020, did not allude to permanent disability. The report indicated the degree of injury as maim.

21. The respondent relied on two authorities, of *Benard Muinde Kilonzo -vs- Andew Mogi & another* (2021) eKLR and *Nguku Joseph & another -vs- Gerald Kihiu Maina* (2020) eKLR where the plaintiff suffered similar injuries as herein and were awarded Kshs 500,000. In my considered opinion, these two cases are more comparable to the subject matter herein as regards the nature of injuries. Therefore taking into account those two decisions were rendered in the year 2020 and 2021 and the trial court's decision herein on 25th October 2022, I find an award of Kshs 600,000 as fair and reasonable as observed by the respondent.

22. The upshot is that, I enter judgment in favour of the appellant as against the respondent as follows

    a. General damages - Kshs 600,000

    b. Special damages - Kshs 16,020

    Total sum - Kshs 616,020

    Plus costs and interest.

23. In view of the fact that the matter was under appeal and there was no demand for payment of the sum awarded in the trial court and the respondent declined to pay, I direct the costs of the appeal be borne by each party. The interest on the sum awarded shall come from date of judgment in the trial court.

24. It is so ordered

DATED, DELIVERED AND SIGNED THIS 2ND DAY OF OCTOBER 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Awour for the Appellant

Mr. Chege for the Respondent

Ms Ogutu court assistant