Makueni County Government & another v Mwaniki (Civil Appeal 66 of 2019) [2023] KEHC 24236 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24236 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL 66 OF 2019

GMA DULU, J

OCTOBER 9, 2023

BETWEEN

MAKUENI COUNTY GOVERNMENT ..... 1ST APPELLANT

JACKSON MUYA ..... 2ND APPELLANT

AND

STEPHEN MUTUKU MWANIKI ..... RESPONDENT

(From the judgment and decree in Makueni SPMCC 112 of 2017 delivered on 21st March 2019 by Hon. Otieno J. (RM)

JUDGMENT

1. In a judgment delivered on 21st March, 2019 at Makueni the Magistrate's court found the appellant 100% liable in negligence and concluded as follows:-

> 'Final judgment for the plaintiff is now entered against the defendant in the sum of Kshs. 2,709,823/= made up as follows:-
>
> General damages Kshs. 2,000,000.00
>
> Loss of earning capacity Kshs. 600,000.00
>
> Special damages Kshs. 109,000.00
>
> Total Kshs. 2,709,823.00
>
> The plaintiff is also awarded costs and interest at court rates.

2. The appellants, who were the defendants in the trial court were dissatisfied with the trial court's judgment and have now come to this court on appeal on the following grounds:-

1. The learned trial Magistrate erred in law and fact in failing to find that the respondent herein was guilty of contributory negligence.

2. The learned trial Magistrate erred in law and fact in finding the appellants 100% liable and in failing to apportion liability as between the appellant and the respondent herein.

3. The learned Magistrate erred in law and in fact in failing to consider the evidence of the witnesses in totality and thus reached a wrong finding on liability.

4. The learned Magistrate erred in law and fact in making an award on general damages for pain and suffering which was inordinately high.

5. The learned trial Magistrate erred in law and fact in admitting documents in evidence whose makers had not been called to produce the same.

3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mbai Waweru Advocates for the appellants as well as the submissions filed by S. N. Ngare & Company Advocates for the respondent. Both sides relied on decided case authorities.

4. This being a first appeal, I have a duty to evaluate, assess and reconsider all the evidence on record and come to my own independent findings and conclusions. Several decided court cases have highlighted this requirement. I will only cite the case of Kenya Ports Authority =Versus= Kustron (Kenya) Ltd [2002] EA 212 in which the Court of Appeal restated this duty in the following terms:-

> 'On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'

5. During the trial, the respondent who was the plaintiff called four (4) witnesses. He testified as PW4. He called PW1 Dr. Washington Wokabi a Consultant Surgeon, who produced a medical report on the respondent. The doctor did not treat PW4, but relied on earlier treatment notes and his medical examination. It was his evidence that PW4 had suffered 50% permanent disability of his shoulder, as well as major head injuries and had slow physical and mental reaction, with high possibility of epilepsy.

6. He also called PW2 Cpl. Erastus Mwilimo who produced the police abstract report and said that PW4 was hit from behind. He did not know if the driver of the vehicle (2nd appellant) was charged in court. He stated that Stephen (PW4) was riding a bicycle not a motor cycle when the accident occurred.

7. The respondent also called PW3 Boniface Kioko Musyimi a businessman who testified that he witnessed the accident from a distance of 20 metres. It was his evidence that the cyclist, the respondent was hit from behind when the driver of the 14 seater mini bus hit a bump and lost control on the road at Kathonzweni.

8. On their part, the appellants called one witness DW1 Jackson Muia Kanyula a driver of Makueni County Government. He testified that the respondent was riding a bicycle and carrying charcoal and holding his phone on the right hand. That the rider lost control, found himself in the middle of the road and DW1 hooted and braked to avert accident and that he had not been charged in court for a traffic offence.

9. The appellants have raised technical grounds, and substantive grounds of appeal. The technical ground is on the admissibility of the report prepared by Dr. Esther Nzomo who was not called in court to testify, and instead the report was produced by PW4 the respondent.

10. In my view, that medical report was not properly admitted in evidence. In my view that report could only be admitted in evidence firstly, if there was consent between the parties for such production, which there was none. The second way to produce that report was by the maker of that report, who did not attend court. The third way to produce that report was for someone who knew the handwriting and signature of the maker to produce that report under Section 77 of the *Evidence Act*.

11. In the present case, the said report of Dr. Esther Nzomo was hearsay evidence as it did not satisfy the legal requirements under Section 35(1) and (2) of the *Evidence Act* (Cap.80). I am guided by the reasoning in the case of Kenneth Nyaga Mwige =Versus= Austin Kiguta & Others 2015] eKLR where the court stated as follows regarding production of documents:-

> 'Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and unauthenticated account.'

12. In the present case, the respondent not being qualified to produce the medical report of Dr. Esther Nzomo, he could not authenticate the same and produce it as an exhibit. That report is thus hearsay evidence which should not have been taken into account of by the trial court.

13. Turning to the proof of liability, in my view also from the evidence on record, the trial Magistrate erred in finding the appellants 100% to blame for the accident. This is because though the respondent said that his bicycle was hit from behind, nobody else, not even the eye witness PW3 stated that he heard a bang or witnessed the impact. PW3 Boniface Kioko Musyimi merely said that he heard a vehicle hit a bump. The evidence of PW2 Cpl. Erastus Mwilimo also did not refer to any impact between the motor vehicle and the bicycle. This witness (PW3) merely stated that 'there is no proof of impact according to the report.'

14. In my view therefore, the appellants were erroneously found by the trial court to be 100% to blame for the accident. Though I find the version of DW1, the 2nd appellant, about the respondent carrying charcoal and at the same time holding a phone on his right hand not to be truthful, the totality of the evidence is that DW1 was not wholly to blame for the accident, as it was for the respondent to prove that he was hit from behind. The evidence on record is that the injuries suffered by the respondents were as a result of a fall on the tarmac which might or might not have been caused by actual violent impact but by panic because of the vehicle high speed driving in a trading centre area, which was nonetheless caused by the 2nd appellant (DW1). I will thus find the respondent 20% liable in negligence for the accident.

15. I now turn to the quantum of damages. From the medical report of Dr. Wokabi; I have no doubt that the respondent suffered permanent incapacity. There was 50% incapacity to shoulder joint, and serious injuries in the head with high possibility of developing epilepsy.

16. With regard to quantum of damages, I note that the Magistrate relied on the report of Doctor Washington Wokabi in detail in determining the quantum of damages. The trial court only erroneously acknowledged the report of Dr. Esther Nzomo as corroborating the report of Dr. Wokabi. In my view,

the damages assessed by the trial court were consonant with the injuries and permanent incapacity established in the report of Dr. Wokabi, and thus well grounded on medical evidence.

17. The general damages of Kshs. 2million for pain and suffering and loss of amenities with the injuries suffered, in my view was reasonable. The amount awarded for loss of earning capacity is also reasonable. Special damages were what was proved through documents. I will thus uphold the quantum of damages assessed, subject to 20% contributory negligence.

18. Consequently and for the above reasons, I allow the appeal in part and order as follows:-

    i. The medical report of Dr. Esther Nzomo is expunged from the record of proceedings and is not for consideration.

    ii. I find the respondent negligent to the extent of 20% and the appellants are 80% liable for the accident.

    iii. I uphold the awards of quantum of damages, subject to the 20% contributory negligence.

19. The final orders of this court are thus as follows:-

    General damages Kshs. 2,000,000.00

    Loss of earning capacity Kshs. 600,000.00

    Special damages Kshs. 109,823.00

    Sub-total Kshs. 2,709,823.00

    Less 20% Kshs. 541,964.00

    Total Kshs. 2,167,859.00

    Each party will bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Alfred – Court Assistant

Mr. Kirui for appellants

No appearance for respondent