Arika v Wemba (Civil Appeal 39 of 2022)
[2024] KEHC 14602 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 39 OF 2022

TA ODERA, J

NOVEMBER 14, 2024

BETWEEN

JAPHET OCHAMI ARIKA ..... APPELLANT

AND

JARED ONG'ONDI WEMBA ..... RESPONDENT

(Being an appeal from the Judgment delivered by Hon. B. BARASAH (PM) on 8th June, 2022 in KISII CMCC NO. 215 OF 2020)

JUDGMENT

Introduction

1. This Appeal arises from the Judgment delivered on 10th March, 2023 in Kisii CMCC NO. 215 OF 2020 on the following terms.

    a. Liability 100% in favor of the plaintiff.

    b. General damages Kshs. 250,000

    c. Special damages Kshs 7,050

    Total Kshs. 257,050

    d. cost of the suit and interests from the date of this judgment"

2. Being aggrieved by the Judgment of the lower court the Appellant filed the Appeal herein which was based on the following grounds of Appeal that;

    i. The learned magistrate erred in law and in in fact by failing to consider the Appellants submissions on both points of law and facts

ii. The learned trial magistrate's decision was unjust against the weight of the evidence and was based misguided points of facts and wrong principles of law

iii. The learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, CAP 405.

iv. The learned magistrate erred in law and fact in finding the Defendants/Appellants 100% liable in view of the evidence produced before the trial Court and in particular the Plaintiff/ Respondent failed to prove his case on liability against the Defendants.

v. The learned magistrate erred in law and fact in awarding the Plaintiff/Respondent Kshs. 250,000/= for general damages hence arriving at a wrong finding as regards the nature of injuries sustained by the Plaintiff.

vi. The learned trial magistrate erred in law and fact by awarding the Plaintiff an inordinately high quantum as damages in the circumstances of this case.

vii. The learned magistrate erred in law and fact in awarding the Plaintiff a sum that was so excessive as to an amount that is so erroneous as to the estimate of general damages suffered by the plaintiff.

viii. The learned Magistrate erred in fact and law in failing to consider the Appellants' Submissions on Quantum and Liability and legal authorities relied upon in support thereof.

ix. The Learned Magistrate erred in law and fact by overly relying on the Respondents' submissions which were not relevant and without addressing his mind to the circumstance of the case.

x. The Learned Magistrate erred in fact and in Law in failing to consider conventional awards in cases of similar nature.

3. Based on the above ground the appellant sought from this court the following orders:

i. This appeal be allowed

ii. The Judgement delivered on 8th June 2022 by Honourable P.K Mutai; Senior Resident Magistrate be set aside and a judgment of this Court dismissing the suit against the Appellant with costs be entered in its place.

iii. That without prejudice to prayer (ii) above this Honorable court reassesses apportionment of pain and suffering, loss of expectancy of life and loss of dependency and reduce the same.

iv. That the costs of this Appeal and that of the trial court be awarded to the Appellant.

v. That such further orders may be made by this Honourable Court may deem fit to grant.

4. The background of the matter is that the Respondent filed a suit against the Appellant seeking;

a. General damages for pain and suffering and future medical expenses

b. Special damages of Kshs 222, 059

c. Costs of the suit

d. Interests on (a) (b) and (c)

5. To support his claim, the respondent pleaded that on or about the 25/11/2019 he was a lawful pedestrian off the road a long Kisii- Keroka road at Gudka area the driver/agent of the appellant negligently drove, managed and/or controlled motor vehicle Reg. No. KBK 241 K causing the same to lose control and veer off its lane and hit the plaintiff herein and as a result of which he sustained severe bodily injuries to wit:

    a. Blunt trauma to the right hip

    b. Blunt trauma to the left hip

    c. Blunt trauma to the lower back

    d. Blunt trauma to the neck

    e. Bruises on the face

6. In its defense, the Appellant denied allegations against it and pleaded that if an accident had occurred (which they denied) the same was caused solely and/or substantially contributed by respondent's own negligence.

7. The trial court upon hearing the parties the trial court delivered a judgment on 8th June, 2022 wherein the learned trial magistrate held follows;

> On the first issue, it is not in dispute that there was accident on 25/11/2019. Police abstract produced buttressed this fact and the plaintiff evidence in this regard was not dislodged. Did the plaintiff sustain any injuries as a result? According to P3 form and medical report produced there is sufficient evidence to show that plaintiff suffered injuries.
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> Who is to blame? It is evidence of the plaintiff that motor vehicle hit him from behind. This is the same line of evidence taken by Pw2 PC Kenneth Walumbe. Their evidence was not controverted. Clearly the motor vehicle registration number KBK 241K hit the plaintiff from behind. The driver of motor vehicle is wholly to blame Ownership of motor vehicle was not contested. According to police abstract, the Defendant is the owner. I therefore find the Defendant 100% liable.
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> The next issue is quantum. According to the medical report prepared by Dr. Morebu Peter Momanyi dated 4112/2019 the plaintiff suffered blunt trauma to the right hip, left him lower back and the neck. He also sustained bruises on the face. The plaintiff submitted that an award of Kshs. 510,000 would adequately compensate the plaintiff relying on the following cases;
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> (i) Blue Horizon Travel Co. Ltd Vs Kenneth Njoroge (2020) eKLR. In this case, the plaintiff sustained bruises on the neck, abdomen, and lower back and cut wound on the left thumb and left palm. He also suffered subluxation of the left shoulder. General damages were assessed at Kshs. 400,000
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> (ii) Samwel Martin Njoroge Kamunyu Vs Mildred Okweya Barasa (2020) eKLR. The plaintiff sustained two deep cuts wounds on the forehead, bruises and lacerations on the right cheek, blunt injury to the shoulder and chest and blunt injury to the pelvis and deep cut wound on the right and left leg. General damages were assessed at Ksh 300,000
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> (iii) Kenya Power & Lighting Co. Ltd Vs Mary Akinyi (Copy not attached)

The Defendant submitted that an award of Kshs 70,000 will be sufficient to compensate the plaintiff and relied on the following cases;

(i) HB (Minor suing through mother as next friend DKM Vs Jasper Nchonga Magri & Another (2021) eKLR...for soft tissue plaintiff was awarded Kshs 60,000 as General damaged

(ii) Quality Motors Vs F.K Wambua HCCA NO. 16 OF 2016(Copy not attached). The plaintiff suffered minor soft tissue injuries. The cases relied upon by parties are applicable.

I find the cases cited by the plaintiff though relevant were a little bit severe.

On my own I considered the case of Patrick Mwiti M'Imanene & Anor Vs Kevin Mugambi Nkunja (2013) eKLR In this case the plaintiff sustained the following injuries;

(i) Swollen scalp, right side

(ii) Tender, swollen and bruised left shoulder

(iii) Bruised right knee

(iv) Tender neck and back

The injuries according to the Doctor's opinion was soft tissue which had healed with some residual pain. The plaintiff was awarded Kshs. 150,000 as General Damages. This in my view is also relevant and applicable.

Considering injuries suffered, comparable awards and inflations, I award the plaintiff Ksh. 250,000 as General damages. Special damages must be specifically pleaded and strictly proved.

The plaintiff pleaded Kshs. 7,750. The amount proved by way of documentary evidence is Kshs 7,050. I award the plaintiff Kshs 7,050 as special damages The plaintiff shall also have cost of the suit and interests from the date of this judgment"

8. It is against this Judgment that the Appellant has approached this court in the manner hereinabove highlighted.

9. This court directed that the Appeal be disposed of by way of written submissions. Both parties filed their submissions which I have considered in my determination here below.

10. This is a first appellate court and the duty of this court is to reevaluate the evidence own record and come to its own conclusion bearing in mind that it neither saw nor heard the witnesses during their testimony in court as was held in the case of Selle –vs- Associated Motor Boat Co. [1968] EA 123 where the court observed as follows;

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

Determination

11. In this appeal, it is clear that the determination of the appeal revolves around the questions of liability and the quantum of damages.

12. Regarding the issue of liability, the learned counsel for the appellant contended the respondent herein did not prove on a balance of probability that as to how the accident occurred and how the appellant would have been liable for the accident. On the other hand, the learned counsel for the respondent supported the finding of the trial court as a logical reflection based on the probative value of evidence tendered. He submitted that the evidence of the investigating officer as well as that of the evidence was uncontroverted that the accident did occur and that the same was caused by the negligence of the appellant's driver. He submitted that the Appellant did not tender any evidence to demonstrate that the accident did not occur or that if it did occur then it was as a result of contributory negligence on the part of the respondent. He underscored that there was uncontroverted evidence from the police abstract and the testimony of the Respondent that the Appellant's motor vehicle did veer from its lane and encroached on the pedestrian path and hit the respondent.

13. Section 107 (1) of the *Evidence Act*, (Cap 80 Laws of Kenya) provides as follows regarding who bears the burden of prove:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

14. During the plaintiff case's the plaintiff called three witness to testify in support of his case. However, it was only two witness who testified in relation to the issued of liability that, the plaintiff and PC Keneth Watumba.

15. The plaintiff (Pw1) testified as per his witness statement dated 22.4.20 which he adopted that on 25th November, 2020, he was walking off the road along Kisii-Keroka road and on reaching Gudka area the driver of motor vehicle registration no. KBK 241 K who was negligently driving the vehicle permitted the vehicle to veer of the road and it hit him. After the accident, he was taken to hospital and it was established that he sustained multiple soft tissue injuries He stated that he was yet to heal and that he was still experiencing pain on the back, face and leg. He relied on the medical evidence, the treatment notes clinical appointment card a copy of records, police abstract and medical expenses receipts. He went on to pray for compensation. On cross-examination by the learned counsel for the respondent he stated that by the time the accident occurred he was pushing a handcart off the road when the vehicle came and hit from behind. He was taken to hospital; X- ray was carried out and it was established that he did not sustain any fracture and that he only had cuts on the leg in the back; he was not treated and discharged

16. PW2 was PC Kenneth Watumba who testified on behalf of CPL Sawe who was the investigating officer. He produced a police abstract in relation to the accident which indicated that an accident did occur on 25th April, 2020 at 0630 Hours at Gudka along Kisii-Keroka road involving a motor vehicle KBK 241K Toyota Matutu and a handcart pusher being the Respondent herein. The matatu was Keroka

Location. He stated further that the respondent was injured on the back and was rushed to hospital. He pointed out that the abstract indicate that the matter was pending investigation.

17. From the above analysis of the testimonies of the plaintiff it is outright that plaintiff did prove that the accident did occur, that it was the Defendant's motor vehicle that was involved in the accident, that was hit from behind by the motor vehicle that strayed into the pedestrian walkway where he was pushing his hand cart and that he did sustain injuries out of the accident. In as much the Appellant had claimed that the accident was as result of contributory negligence, neither he nor his driver appeared in court to prove such allegations in order to controvert the testimony and evidence of the plaintiff that he did suffer injuries out of an accident that was caused by negligence The testimony of the Respondent that he was hit from behind by the Appellant's motor vehicle that veered of the road was not shaken. Counsel indicated investigations were still pending and that the investigating officer did not appear in court to testify and thus there was no justification for finding of 100% liability against the appellant. It is trite law that a police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station as was held in the case of Techard Steam & Power Limited v Mutio Muli & Mutua Ngao [2019] eKLR Odunga J held as follows in relation to proving negligence.

> " Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In Peter Kanithi Kimunya v. Aden Guyo Haro [2014] eKLR it was held:
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> "A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

18. It is trite law that encroaching on the path of another is prima facie evidence of negligence as each road user is expected to keep to their lane. I am satisfied on a balance of probability that the accident was caused by the negligence of the Appellant's driver. The appellant being the owner of the said vehicle is thus vicariously liable for the negligence of his driver. Having so found, it follows that I have no reason to interfere with the finding of the trial court that the Appellant was 100% liable for the accident.

19. Regarding the issue of quantum the principles under which an appellate court can interfere with an award of damages made by a trial court were set out by the court of Appeal in the case of Kemfro Africa Limited T/A Meru Express Services [1976] and another v Lubia and another (No.2) [1985] eKLR, in which the Court (Kneller, Nyarangi, JJA and Chesoni, Ag JA) stated as follows:

> " 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 that 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. See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."

20. Equally in the case of Shabani v City Council of Nairobi [1985] KLR 516 at page 518, Hancox, JA stated as follows:

> " The test as to when an appellate court may interfere with an award of damages was stated by Law JA in Butt *v Khan, Civil Appeal No. 40 of 1997* (a case referred to in another context by the learned Judge), as follows:
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> 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that, he misapprehended the evidence in some material respect, and so arrived at a figure which was so inordinately high or low.'
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> This discretion has since been followed frequently by this Court."

21. The learned counsel for the Appellant in his submissions argued that the award of 250,000 as a general damages to the appellant for soft tissue injuries suffered by the Appellant was inordinately excessive. The learned counsel thus urged the court to review the award taking into account comparable precedents. In support of his case the learned counsel relied among other cases the cases of;

    a. George Mugo and another vs AKM (Suing as the next friend and mother to AKM (2018) eKLR where the Kemei J award, 100,000 as general damages for soft tissue injuries.

    b. PF (minor suing through next friend and father, SK) VS Victor O Kamadi and another (2018) eKLR where the court awarded 100,000 for soft tissue injuries

    c. George Kinyanjui T/A climax Coaches and another vs husesin Kuyala (2016) eKLR where the high court reduced an award of Kshs. 650,000 to 109,000 upon finding that loss of teeth was unrelated to the soft tissue injuries sustained by the Appellant.

    d. Ndungu Dennis vs Ann Wangari Ndirangu and another (2018). Where the court awarded reduced award of Kshs. 300,000 to 100,000.

22. The learned counsel for the respondent on his part submitted that the award by the trial court was not only commensurate to the injuries sustained by the Appellant but also manifestly consistent with awards made in similar past cases.

23. It is trite law that comparable injuries should attract comparable damages, the Court of Appeal observed in Simon Taveta v 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."

24. In the case of Francis Omari Ogaro v JAO (minor suing through next friend and father God [2021] eKLR, the Court reviewed and set aside the award of Kshs. 230,000/= and substituted it for Kshs. 180,000/= where the respondent had suffered blunt force injuries and soft tissue injuries.

25. In Ndwiga & another v Mukimba (Civil Appeal E006 of 2022), Where the Plaintiff sustained, a chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle, and bruises on the right toes and left knee, the Court reviewed and set aside an award of Kshs 500,000/- on account of general damages and substituted the same with an award of Kshs 150,000/-.

26. In the case of *Tahmeed Transporters Ltd & another v Simiyu (Civil Appeal E017 of 2022*) the Respondent suffered Blunt injury to the head chest, Bruises and Blunt injury to the upper limb; Bruises and Blunt injury to the right hip; Bruises and Blunt injury to the right thigh; and Bruises and Blunt

injury to the right knee. the Court reviewed and set aside an award of Kshs 300,000/- on account of general damages and substituted the same with an award of Kshs 150,000/-.

27. From the above authorities, it is evident that Courts have awarded lower amounts in general damages in similar cases where the victims sustained soft tissue injuries in addition to blunt force injuries and contusions. In the instant case, Patrick Mwiti M'Imanene & Anor Vs Kevin Mugambi Nkunja (2013) eKLR in this case the plaintiff sustained injuries which included Swollen scalp, right side, and was awarded Kshs. 150,000 as General Damages. While the trial court considering the rate of inflation awarded Kshs. 250,000 for soft tissue injuries. I hold the considered view that based on the most recent cases with comparable injuries that I have highlighted above that the said award was manifestly high to warrant interference by this Court.

28. I, therefore, interfere with the same and substitute the award of Kshs 250,000/ with an award of Kshs 150,000/= for general damages.

29. The special damages as assessed by the trial Court remain unaffected.

30. The result of the appeal is that the finding on liability by the trial court is upheld but the award of Ksh.250, 000/= made by the trial court is set aside and substituted with an award of general damages in the sum of Ksh.150, 000/=.

31. As the appeal has partially succeeded, I order each party to bear its own costs to the appeal.

32. It is so ordered

T.A ODERA

JUDGE

14. 11.24.

DELIVERED VIRTUALLY IN THE PRESENCE OF:

Court Assistant - Ogigo

Parties Absent