Amref Health Africa v Obadha (Civil Appeal E158 of 2023)
[2024] KEHC 14210 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14210 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E158 OF 2023

RE ABURILI, J

NOVEMBER 11, 2024

BETWEEN

AMREF HEALTH AFRICA ..... APPELLANT

AND

EVANS ONYANGO OBADHA ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable G.C. Serem in the Small Claim's Court in Kisumu delivered on the 26th July 2023 in Kisumu SCC No. E095 of 2023)

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a statement of claim dated April 28, 2023 for injuries sustained following an alleged accident that occurred on or about the 22nd February 2023 and sought judgment in the sum of Kshs. 350,000.

2. It was the respondent's case that on the material day at around 1700hrs, being a pillion passenger on a motorcycle along Kisumu Nairobi road at Nyamasaria area, the appellant's motor vehicle registration number KBV 218R Toyota Land Cruiser was so carelessly and/or negligently driven and/or manages by the appellant and/or his agents that it knocked the motorcycle from behind as a result of which the respondent allegedly suffered severe injuries.

3. The appellant filed a response on the 25.5.2023 denying that the accident occurred and that if at all the accident occurred, it was contributed to by the respondent. The appellant prayed that the respondent's claim be dismissed with costs.

4. In her judgement, the adjudicator found the appellant 100% liable for causing the accident and proceeded to award the respondent general damages of Kshs. 200,000.

5. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 21st September 2023 raising the following grounds of appeal:

    a. The learned trial magistrate erred in fact and in law in failing to appreciate the evidence of the defendant thereby leading to miscarriage of justice.

    b. The award on general damages for pain and suffering is exaggerated, inordinately high, erroneous, oppressive and punitive and amounts to miscarriage of justice.

    c. The learned trial magistrate greatly misdirected herself by ignoring and treating the submissions of the defendant on quantum and liability superficially thereby arriving at the wrong conclusion on both quantum and liability.

    d. The learned trial magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages, namely that like cases attract similar awards, and ignoring completely the defendant's submissions thereon.

    e. The honourable magistrate's decision is plainly wrong and is against the weight of evidence.

6. The parties agreed to canvass the appeal by way of written submissions and this appeal being one of the matters in the series matters arising from the same accident, it was agreed that the decision in this appeal will apply to Civil Appeal E159 of 2023.

The Appellant's Submissions

7. The appellant submitted that the finding on liability was based on misapprehension and failure to take into account the totality of the evidence disregarding the evidence tendered during the defence hearing thus erring in holding him 100% liable. It was submitted that the appellant's liability was not proved as required in the case of *East Produce (K) Limited v Christopher Astiado Osiro (Civil Appeal No. 43 of 2001*).

8. The appellant submitted that there being two conflicting statements of two witnesses one on each side, the best decision to make on liability was that both parties were equally liable for the accident as was held in the case of Hussein Omar Farah v Lento Agencies (2006) eKLR.

9. On quantum, it was submitted that an award of Kshs. 100,000 to 150,000 would be a fair requital as the award by the trial court was inordinately high to warrant interference by this court. Reliance was placed on the cases of:

    a. HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & Another (2021) eKLR where the plaintiff suffered blunt injury to the head, injury to the neck, injury to the thorax, blunt injury to the abdomen and limbs and general damages for pain and suffering and loss of amenities accessed at Kshs. 60,000.

    b. *Ndungu Dennis v Ann Wangari Ndirangu & Another being Kiambu HCCA No. 54 of 2016* where Joel Ngugi J. reduced the award of Kshs. 300,000 to 100,000 where the plaintiff had suffered; blunt injury to the chest, blunt injury head concussions and blunt injury to both hands.

The Respondent's Submissions

10. The respondent submitted that the appellant sought to apportion liability on a 50:50 ratio on account of two conflicting versions of the circumstances of how the said accident occurred whereas the trial

court rightly held that the appellant failed to enjoin the rider of the motorcycle as a party to the suit and as such, the trial court could not apportion liability to someone not enjoined in the suit.

11. It was further submitted by the respondent that he was a passenger and no blame has been attributed to him whatsoever by the Appellant as he had no control of the suit motor vehicle that knocked them from behind neither did he have control of the motorcycle on which he was a passenger.

12. The respondent thus submitted that the upshot of this is that the trial court's decision on liability should be upheld and the Appellants be held 100% liable.

13. On quantum the respondent submitted that based on the injuries he sustained, he proposed an award of Kshs. 100,000 -150,000 and that the award of Kshs. 200,000 by the trial court was not inordinately high to warrant this honorable court to disturb the same owing to the nature of the injuries being classified as second-degree soft tissue injuries.

Analysis and Determination

14. This being a first appeal, the role of this court is as espoused in section 78 of the *Civil procedure Act* and as interpreted in Selle and Another v Associated Motor Boat Company Ltd & others [1968] 1EA 123 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 allowance in this respect. In particular, this 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 into account of particular circumstances or probabilities materially to estimate the evidence."

15. I have carefully considered the grounds of appeal, the evidence adduced before the learned adjudicator as well as the parties' rival written submissions. I have also read the Judgment of the trial court. I find that the issues for determination are:

    1. Liability

    2. Quantum/Damages

16. On liability, the trial court found the appellant wholly to blame for the accident wherein the respondent was injured as a pillion passenger. The adjudicator stated that though the appellant blamed the motorcycle rider for the accident, he failed to enjoin him in the proceedings.

17. In Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681 Lord Reid reasoned that:

> "To determine what cause 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 fact of each particular case. One may find that a matte of history, several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally."

18. The provisions under section 107,109 and 112 of the *Evidence Act* on the burden and incidence of proof were extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

19. The appellant contends that the respondent failed to prove that it was liable for causing the accident. The appellant who was the respondent in the Small Claims Court called a witness who was its driver Paul Mwangi Njoka who adopted his statement dated 23.5.2023 as his evidence in chief. It was his testimony that the motorcycle on which the respondent was a passenger hit the appellant's vehicle from behind when the driver of the appellant's motor vehicle was stationary as he waited for traffic to come. He further testified that the motorcycle rider ran away.

20. The respondent who was the claimant in the trial court adopted his statement dated 28.4.2023 as his evidence in chief. It was his testimony that he was a pillion passenger on board a motorcycle along Kisumu – Nairobi road when at Nyamasaria area, the appellant's vehicle hit them from behind. In cross-examination the respondent admitted that they were 3 people on the motorcycle. He further reiterated that he was injured on the neck, elbows, knees and chest.

21. In Treadsetter Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR Ibrahim J (as he was then) in allowing an appeal, quoted Charles Worth & Percy On Negligence, 9th Edition at P. 387 on the question of proof, and burden thereof where it is stated: -

> " In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence maybe reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

22. Similarly, in Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J quoted Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 where it is stated that:

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."

23. However, In the case of Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another, Kisii HCC.A 29/2016 Majanja J cited with approval the Court of Appeal decision in the case of Berkly Steward Limited v Waiyaki [1982-1988] KAR where it cited with approval the decision in Baker

v Market Harborough Industrial Co-operative Society Ltd (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that-

> " Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them."

24. Justice Majanja stated that where the court is unable to determine who is to blame, it has apportioned liability equally as illustrated by 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. The learned Judge then held that –

> " I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party."

26. In the instant case, it is clear that an accident occurred on the 22.2.2023 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent hit his car from behind while the respondent avers that the appellant's car hit him from behind.

27. Ideally, based on the authorities above and the varying accounts of how the accident occurred, this would be a scenario where liability ought to be apportioned equally between both parties. However, it is not lost to this court that the respondent was a pillion passenger on the motorcycle and thus had no control over either the motorcycle he was on or the appellant's motor vehicle.

28. That being said, it was not disputed that the Respondent and another person were pillion passengers on the said motor cycle. The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law, the Respondent exposed himself to danger. Such conduct cannot go un-condemned and it should not be rewarded. Accordingly, the Respondent ought to shoulder some blame for such reckless conduct. I thus find that the Appellant ought not to have been found 100% liable. I set aside that finding and substitute therefore 70% liability for the driver of the motor vehicle and find the Respondent 30% liable.

29. Turning to the issue of quantum, it is trite that the assessment of damages is a matter of discretion by the trial court and an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome.

30. In Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal held that:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, considered an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)."

31. Additionally, in Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

> "...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

32. With the foregoing principles in mind, I have examined the evidence of the respondent as to the exact injuries sustained in the material accident which were also pleaded as follows:

    a. Tenderness on the neck with stiffness

    b. Tenderness on the chest

    c. Minor bruises on the upper limb

    d. Swollen right elbow with tenderness

    e. Tenderness on the lower limbs

33. The said injuries are contained in the P3 report form produced by the respondent as well as the treatment notes from Kisumu County Referral Hospital. The respondent in his own testimony in cross-examination submitted that he had healed and was using pain killers. In essence the respondent sustained soft tissue injuries to the neck, chest, upper and lower limbs.

34. I have found the following cases quite helpful in terms of comparison:

    a. In Daniel Gatana Ndungu & another v Harrison Angore Katana (2020) eKLR the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000 on general damages and substituted it with an award of Kshs 140,000.

    b. In Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa (2020) eKLR, the respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was awarded Kshs 300,000 On appeal Nyakundi J. set aside that amount and awarded Kshs 150,000.

    c. In John Wambua v Mathew Makau Mwololo & another (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000 and this was affirmed by the High Court.

    d. In Charles Gichuki v Emily Kawira Mbuba & another (2018) eKLR, the respondent suffered a blunt injury (tender) on the right side of the face, a blunt injury (tender) on the shoulders, a blunt injury (tender) on the chest and a blunt injury (tender) to the left thigh. Sergon J. substituted the trial court's award of Kshs 400,000 with Kshs 300,000.

35. From the review of the decisions on the comparable injuries, although no two injuries can be exactly the same, I find that the trial court did not fall into any error in the manner it assessed general damages

for the injuries sustained. The trend demonstrated above is to award general damages in the range of Kshs 150,000 to Kshs. 300, 000. Taking into account inflation and time lapse since the earlier awards were made, it is my view that an award of Kshs. 200,000 was not inordinately high and therefore I find no justification to interfere with the trial court's award.

36. Consequently, the appeal herein against quantum of damages fails.

37. In the end, I find that this appeal is partially successful in so far as the apportionment of liability is concerned. I therefore set aside the trial court's finding on liability at 100% against the appellant and substitute it with an apportionment of 70% against the appellant and 30% against the respondent.

38. Accordingly, the award of Kshs. 200,000 is hereby reduced taking into account the respondent's contribution leaving a balance of Kshs 140,000. This amount will earn interest at court rates from the date of judgment in the lower court until payment in full.

39. This judgment and award apply to HCCA E159 of 2023 where the respondent was similarly a pillion passenger with the respondent herein and sustained similar soft tissue injuries and had liability similarly apportioned and the same quantum awarded.

40. The judgement herein thus applies to HCCA E159 of 2023 AMREF Health Africa V Bishop Owira Andaya.

41. As the award has been considerably reduced by the apportionment of liability, I order that each party bear their own costs of the appeal.

42. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF NOVEMBER, 2024.

R.E. ABURILI

JUDGE