Maina & another v Kazoo & another (Civil Appeal E005 of 2021)
[2024] KEHC 14051 (KLR) (12 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14051 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CIVIL APPEAL E005 OF 2021

JR KARANJA, J

NOVEMBER 12, 2024

BETWEEN

SAMUEL MAINA ..... 1ST APPELLANT

SOLOMON KIPKEMBOI ..... 2ND APPELLANT

AND

VIOLET KAZOO ..... 1ST RESPONDENT

JOSEPH EMBEKO OVULULE ..... 2ND RESPONDENT

(Being an appeal from the judgment/ decree of the Honourable P.W. Wachira, [RM] and delivered on 4th May 2021 in Eldoret CMCC No. 204 of 2017)

JUDGMENT

1. This appeal is on both liability and quantum of damages as depicted in grounds 1 to 8 of the memorandum of appeal dated 21st May 2021 filed herein by the two appellants, Samwel Maina and Solomon Kipkemoi Maiyo through Kimondo Gachoka & Company Advocates, against the judgment of the Resident Magistrate in Kapsabet CMCC No. 204 of 2017, delivered on 4th May 2021.

2. The first, Respondent, Violet Kazo, was the Plaintiff in the suit. Her claim against the appellant arose from a road traffic accident which occurred on 4th November 2017 involving the Appellants Motor Vehicle Registration No. KAV 522Y Toyota Hiace Matatu, in which she was lawfully traveling as a fare paying passenger.

3. It was pleaded that on the material date the Appellants Motor Vehicle was driven along the Kapsabet - Chevakali road so negligently that it lost control, veered off the road and/ or its respectful lane and violently collided with a motor vehicle Registration No. KAP 719N Toyota Corolla belonging to the second respondent, Joseph Embeko Ovulule thereby causing bodily injuries to the First Respondent.

4. As a result, the First Respondent/Plaintiff suffered loss and damage and prayed for both special and general damages against the Appellants whose statement of defence was a denial of the occurrence of the accident and the claim in general and a contention that if the accident indeed occurred, then it was caused by the reckless, negligent or careless acts and/or omissions on the part of the driver of the motor vehicle Registration No. KAP 719N Toyota Corolla.

5. In that regard, the Appellants took out a Third Party notice against the Second Respondent as the owner and/or driver of the said Toyota Corolla Vehicle.

   The Second Respondent/ Third Party filed a statement of defence denying the allegation of negligence made against him by the Appellants.

   Whereas the Appellants prayed for the dismissal of the First Respondent's suit, the Third Party/ Second Respondent prayed for the dismissal of the Appellant's claim against him.

6. After a full hearing of the suit, the trial court rendered its judgment in favour of the First Respondent as against the Appellants.

   Being dissatisfied, the Appellants preferred this appeal which was canvassed inter-parties by way of written submissions.

   This court, considered the appeal on the basis of the grounds in support and opposition thereto.

7. The rival submissions were also considered thereby placing a duty on this court to reconsider the evidence with a view to arriving at its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses. [see, Selle Vs. Associated Motor Boat Company Limited [1968] E.A. 123].

   In that regard, it was evident that the occurrence of the accident was a factor not disputed by the parties.

8. Therefore, what emerged as the issues for determination were firstly the question of liability and secondly, the question of quantum of damages.

   Grounds 1 to 3 of the memorandum of appeal dwell on the issue of liability and show that the Appellant's major, complaint was the trial court's apportionment of liability at 50% between the Appellants and the Second Respondent/ Third Party.

9. The Appellants contended that this finding was erroneous and went against the weight of the Appellant's evidence which showed that the Second Respondent was to fully blame for the accident as his vehicle veered off the road and caused a collision of the two vehicles. The Second Respondent on the other hand blamed the Appellants for the accident on similar grounds.

10. In determining liability, the trial court placed reliance on the decision of the superior courts in Micheal Hubert Kloss and Another Vs. David Seroney & Others [2009] eKLR and Lakhamshi Vs. Attorney General [1971] EA 118 and found that the Appellants [defendants] and the Second Respondent [Third Party] were equally to blame for the accident and that is why liability was apportioned between them at 50% each.

11. As borne by the evidence, it was clear to this court that the accident was manifested by the collision of the vehicles, one belonging to the Appellants and the other to the Second Respondent.

    Culpability for the accident pointed towards that direction as the First Respondent being a mere passenger in the Appellants vehicle could not possibly have been blamed for the accident unless it was shown that she engaged the driver of the Appellant's vehicle in endless bunter as to cause him to drive without proper lookout for other road users. This was however, not the case in this matter.

12. A collision between two vehicles travelling in opposite directions would invariably raise an inference that either one of the drivers was to blame wholly for the accident or both were to blame in equal or unequal measure.

    Equal blame would mean appointment of liability in equal measure or unequal measure depending on the contribution of each driver to the occurrence of the accident.

13. The standard of blame would be at a higher degree for the driver who contributed greatly to the occurrence of the accident than for the driver whose contribution was lesser or minimal.

    As there can be no liability without fault, it was incumbent upon the First Respondent [Plaintiff] to prove the allegations of negligence made by herself against the Appellant and for the Appellants (Defendants) to prove allegation made by themselves against the second Respondent.

14. The First Respondent [PW2] attributed the accident to the Appellants in the sense that their vehicle collided with the other vehicle after hitting a pot hole. This implied that the vehicle was forced off road or into the path of the oncoming vehicle on the opposite side thereby causing the collusion. Unless the Appellant's vehicle was being driven recklessly at an excessive speed, the presence of the pot hole on the road could not have forced it to the wrong side of the road no matter the force of the impact.

15. The evidence by the Second Appellant, who was the driver of the Appellant's vehicle suggested that it was the Second Respondent's vehicle which lost control, veered off its lane and collided with that vehicle [see the witness statement filed herein on 30th May 2018]. Be that as it may, both drivers blamed each other for the accident.

    In a similar suit which was used as a test suit i.e Kapsabet Civil Suit No. 203 of 2017, in a series of such suits including the present suit, a consent was recorded on 30th April 2019 to the effect that the question of liability would be decided in the test suit.

16. Accordingly, the evidence on liability in the test suit was adopted herein in particular that of two traffic police officers, PC Christopher Kosgei [PW2] and CPL. Priscilla Chesang [DW1].

    Whereas the First Officer [PW2] suggested that the police records indicated that the third party was to blame for failing to keep to his lane, the Second Officer [DW1] confirmed as much but did not indicate the fact in the occurrence book [OB] even though she was the investigations officer.

17. What could be deduced from the evidence of the two police officers was that the police investigations on the causation of the accident were inconclusive and/or could not make a determination on which of the two drivers was actually responsible for the accident and to what extent.

18. It was no wonder that the Appellants and the Second Respondent blamed each other for the accident but the trial court noted that none of them indicated what evasive action they took to avoid the accident despite the two vehicles coming from opposite directions and both were in a position to see each other's vehicle well.

19. In the English case of Stapley Vs. Gypsum Mines Limited [2] [1953] A.C. 663, it was stated that:-

    > "in determining liability the court must consider the facts of the case and come to a conclusion as to what mostly contributed to the cause of the accident. The court will consider the manner of driving, identify the person who was at fault and place blame on him."

20. The trial court found both drivers of the two vehicles herein to be at fault and placed equal blame on them.

This court is in agreement with the trial court in that regard and finds that both the Appellants and the Second Respondent contributed to the accident in equal measure. Therefore, the apportionment of liability between themselves at the ratio of 50% to 50% by the trial court was proper and is hereby affirmed.

21. On the question of quantum of damages, it must be noted as was stated in the case of Tayas Vs. Kinanu [1983] KLR 114, that money cannot renew a physical frame that has been battered and shattered and all that the courts can do is to award a sum which must be regarded as giving reasonable compensation.

22. In Sosphine Company Limited Vs. Daniel Nganga Kenji [2006] eKLR, it was stated that assessment of damages for personal injuries is a difficult task, but the courts are required to give a reasonable award which is neither extravagant nor oppressive.

    In awarding general damages, a trial court exercises discretionary powers and in principle, an appellate court would not interfere with the exercise of such discretion unless a trial court misdirected itself in that regard and ended up in applying wrong principles or awarding inordinately high or low amounts as t o be a wholly erroneous estimate of the injury, [see, Mbogo Vs. Shah & Aother [1968] EA 93].

23. Assessment of general damages involves taking into account the particular circumstances of the injuries sustained by the claimant, the extent and duration of pain and suffering and the residual effects of the injury [if any]. In doing so, guidelines are sought from comparable cases, but each case must ultimately depend on its own special circumstances.

24. Herein, the medical report by Dr. Joseph C. Sokobe [PW1], dated 13th November 2017 showed that the First Respondent suffered blunt injuries to the scalp, right shoulder, chest, back, right thigh, right knee joint and pelvis. These were classified as soft tissue injuries from which the First Respondent recovered without any permanent residual effect and for which the Appellants had proposed a sum of Kshs. 50,000/- while the First Respondent proposed a sum of Kshs. 400,000/-.

25. The trial court considered the injuries suffered by the First Respondent and the authorities cited by herself and the Appellants in support of their respective proposal and awarded a sum of Kshs. 250,000/- general damages for pain, suffering and loss of amenities. The amount, in the opinion of this court was reasonable and adequate compensation in terms of general damages and is hereby affirmed.

26. The special damages awarded by the trial court in the sum of Kshs. 6,300/- were duly pleaded and specifically established by the necessary documentary evidence.

    The Appellants were unable to demonstrate that the trial court misdirected itself or applied wrong principles in arriving at the awards.

    In sum this appeal is dismissed in its entirety with costs to the First Respondent.

DELIVERED AND DATED THIS 12TH DAY OF NOVEMBER, 2024.

J. R. KARANJAH,

JUDGE