Nzamu v Malombe (Civil Appeal E571 of 2023)
[2024] KEHC 16721 (KLR) (Civ) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16721 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E571 OF 2023

BM MUSYOKI, J

NOVEMBER 8, 2024

BETWEEN

IRENE MBINYA NZAMU ..... APPELLANT

AND

MUTHENGI MUNYASYA MALOMBE ..... RESPONDENT

(Being an appeal from judgment and decree of Honourable Rawlings Liluma Musiega (SRM) in Chief Magistrate's Court at Milimani Commercial Courts civil case number E12878 of 2021 dated 30-05-2023)

JUDGMENT

1. This is an appeal arising from judgement of the Chief Magistrate's Court at Milimani Commercial Courts civil case number E12878 of 2021. The appellant had been involved in a road accident with motor vehicle registration number KBY 330M on 5-05-2021 while cycling along riara road in Nairobi. The said vehicle was said to belong to the respondent who was at the material time the driver. The appellant was injured as a result of the accident and sustained injuries. After the trial, the magistrate found the appellant 100% liable and awarded Kshs 600,000.00 in general damages and special damages of Kshs 7,330.00.

2. The appellant was aggrieved by the said judgement and appealed to this court against both liability and quantum. In his memorandum of appeal dated 29th June 2023, the appellant raised the following grounds;

    1. The learned magistrate erred in law and fact in holding the appellant 100% liable for the accident and ignoring the set laws and principles of traffic and decided cases.

2. The learned magistrate erred in law and fact in reaching a determination that the appellant's motor vehicle was being driven at a high speed at the time of the accident.

3. The learned magistrate erred in law and in fact in reaching its decision while apportioning liability.

4. The learned magistrate erred in law and in fact in awarding the respondent Kshs 600,000.00 as general damages, which amount is excessive in the circumstances.

5. The learned magistrate erred in law and in fact in failing to consider the appellant's submissions.

6. The learned magistrate erred in law and in fact, in failing to find that the respondent had failed to discharge their burden of proof to the required standard against the appellant.

3. The appeal was heard by way of written submissions. The appellant's submissions are dated 12th June 2024 while the respondent's are dated 30th July 2024. It is clear from the memorandum of appeal and the parties' submissions that the appeal is on both liability and quantum. The accident is not disputed as well as the extent and the nature of injuries suffered by the respondent.

4. According to the appellant, the respondent did not discharge his burden of proof as required under section 109 of the *Evidence Act*. He argues in her submissions that the appellant's witness statement and evidence did not fully disclose how the accident occurred save for general statement that the driver of the motor vehicle was careless and drove at a high speed and was negligent in ramming the respondent's bicycle. It is the position of the appellant that the respondent could not tell the speed at which the appellant's motor vehicle was being driven and could not tell at what distance or moment he saw the vehicle and this should have led to inference that the respondent was not keeping a proper look out on the road as a pedal cyclist. The appellant adds that the respondent had not worn any protective gears when he was riding on the road and in such circumstances, he should be held liable as he exposed himself to danger. The appellant therefore pleads the doctrine of volenti non fit injuria.

5. The appellant argues further that since the police officer who testified in support of the respondent's case conceded that he was not the investigating officer, his evidence should not have influenced the magistrate in her finding on liability since there was no investigation report or police file produced. According to the appellant, the production of police abstract was not enough to prove liability as the same only proves occurrence of accident and cannot be relied upon in proving negligence on a balance of probability. On this point, she cites Catherine Mbithe Ngina vs Silker Agencies Limited (2021) eKLR where it was held that;

> 'I must point out however, that the contents of the police abstract as extracted from records held by the police is merely evidence that a report of an accident was made. It is prima fascie evidence of the occurrence of the accident and the particulars of those involved. It can however be rebutted... proof of negligence, being on a balance of probability, does not solely depend on the evidence of the investigating officer or report of the accident to the police.'

6. In order to rebut the evidence produced by the respondent, the appellant asks the court to take into account her witness statement which she filed in the lower court despite her not having testified. She claims that her failure to testify was caused by denial of adjournment by the court thereby depriving her the right to be heard as guaranteed under Article 50(1) and 159(2)(d) of *the Constitution*. Her submissions on her version of the occurrence of the accident is largely on the said witness statement.

7. On quantum, the appellant submits that the general damages of Kshs 600,000.00 was too high and should be substituted for an award of between Kshs 200,000.00 and Kshs 300,000.00. The appellant argues that the respondent's doctor's medical report dated 7-09-2021 confirmed that the respondent sustained a single degloving injury to the right foot while the second medical report dated 3-03-2023 stated that the injury had healed completely. On special damages, it is the appellant's submissions that there is evidence that a sum Kshs 1,780.00 was paid by the appellant and the same should not have need awarded to the respondent as that amounted to unjust enrichment. The appellant pleads that this court considers the case of Martin Mutuku & Another vs SN (2021) eKLR where the High Court set aside an award of Kshs 600,000.00 and allowed Kshs 300,000.00 for abrasions on the scalp, blunt injury to the abdomen, blunt injury to the chest and degloving injury on the left foot.

8. On his part, the respondent maintains that the trial court was right in making the findings as he did. The respondent takes position that the appellant did not tender any evidence in the lower court and his evidence remained unchallenged and in the circumstances, the court had no other version of how the accident occurred. According to the respondent, the evidence he produced was weighty enough to justify the magistrate's finding on negligence. The respondent adds that the evidence of the police officer was corroborative of his case. On the statement of the appellant and evidence, the respondent takes the position that pleadings are merely averments which do not count as evidence and where a defendant does not adduce evidence, the plaintiff's should be believed as allegations of the defence is not evidence. He supports this position with cases of North End Trading Company Limited vs City Council of Nairobi (2019) eKLR and Michael Matonye Munyao & Another vs JNK (2019) eKLR.

9. On quantum, the respondent has submitted that the damages were reasonable and adequate. He claims that the injury was severe and it was evident that it subjected him to untold pain, emotional anguish and mental distress. He maintains that he had not completely healed at the time of the trial and he could not perform his activities as before. He cited the cases of Easy Coach Limited vs Emily Nyangosi (2017) eKLR where the respondent who had sustained facial injuries, injury to chest, injury to the back, injury to the right hand with cut wound and injury to the leg with cut wounds was awarded Kshs 700,000.00 and Gusii Deluxe Limited & 2 Others vs Janet Atieno (2012) eKLR where the court awarded Kshs 500,00.00 for deep cut wound on the frontal head exposing skull bone, unconsciousness for about 8 hours with brain concussion, bang to the right-upper and lower jaw loosening the right lower incisors teeth, injury to the right shoulder with bruises over it, deep cut wound on the right upper limps below the right elbow, injury to the right big toe with bruises over it and blunt injury to the anterior part of the chest which injuries left the respondent with ugly keloid scars on the head and face.

10. From the memorandum of appeal and the submissions of the parties, it is obvious that in this appeal, I am called upon to decide on only three issues; whether the judgment on liability was justified, whether the quantum of damages was too high as to amount to erroneous estimate and of course, I must decide who should pay the costs of the appeal.

11. This is a first appeal and as such, I have a duty to revisit the evidence adduced in the lower court and re-examine, re-analyse and re-consider the same as if I were doing the trial but bear in mind that I did not take the evidence first hand and I did not observe the demeanour of the witnesses and give due allowance for that. In Mbae vs Kinya (2024) KEHC 2285 (KLR) it was held as in many other authorities that;

> 'It is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions.'

12. I have noted that the typed proceedings of the trial court were not included in the record of appeal. I have had to resort to the lower court file which fortunately has the typed proceedings although it appears to be a skeleton file. The respondent testified as PW2 by adopting his witness statement. In addition, he produced his documents listed in the bundle dated 13-09-2021 as exhibits 1 to 8. According to the adopted statement, the respondent told the court that he was riding a bicycle along riara road when the driver of motor vehicle registration umber KBY 330M so negligently and carelessly drove the motor vehicle and at a very high speed that he lost control allowing the same to collide into the bicycle causing him serious injuries. That is as much as he said about the driving in his evidence in chief.

13. PW1 was one Bobby Okari, a police officer stationed at Kilimani police station. He testified that he was in court to produce an abstract filled at their station for the respondent who was involved in an accident with motor vehicle registration number KBY 330M on 5-05-2021. The respondent's bicycle was damaged to the front and the vehicle on the rear right door. The cyclist was at riara road and kindaruma road junction when he was knocked by the vehicle which was joining the road from kindaruma road. According to the police officer, the vehicle was blamed for failing to give way. According to the proceedings, the police officer produced the police abstract and the OB extract as plaintiff's exhibit number 9.

14. The appellant's quarrel with the testimony of the respondent is that he did not explain the manner the vehicle was driven that would connote or disclose negligence on the part of the driver. He claims that the respondent did not estimate the speed of the vehicle and as such negligence was not proved. In my opinion, agreeing with the position taken by the appellant, the court would be stretching the requirement of proof beyond what is required in law. That would be requiring the respondent to raise the standard of proof above balance of probabilities. I find the argument by the appellant that the respondent could not estimate the speed of the motor vehicle wanting and lacking basis.

15. The appellant stated in cross examination that he tried to avoid the vehicle in vain and that he was on the right lane. He also maintained that he was watchful and that he was not coming from the side. He added that there was no corner and that the driver tried to escape. This, added to the evidence of the police officer that the driver was to blame, sum up to one thing; that the driver was negligence. It is my view therefore that the respondent had by this evidence established a case of negligence against the appellant thereby necessitating the appellant's rebuttal which never came.

16. The appellant claims that the fact that the police officer who testified was not the investigating officer and that no police file or sketch map produced watered down the respondent's evidence on negligence. To support this position, the appellant has urged me to follow his cited authority of Catherine Mbithe Ngina vs Silker Agencies Limited 92021) eKLR and maintains that police abstract merely confirms occurrence of the accident and the persons involved. I have read the said authority and I must say that the appellant is applying the same selectively and wrongly. The issue in dispute in the cited authority which led to the said holding was whether the appellant was involved in the accident in question. That position is different from the instant case where the respondent's involvement in the accident is not disputed. The cited portion of the authority does not mean what the appellant herein wants the court to believe. Even if that was the intention of the court, I would differ with it. A police abstract contains parts for more information than mere occurrence of the accident and the identity of victims or persons involved. For instance, there are areas where police are required to indicate the results of investigations and any court proceedings. Those parts were not put there for cosmetic purposes. The fact that the results of investigations and court proceedings are required shows that, the abstract should contain complete summary of the occurrence of the accident, investigations and results of any court action. In this case the police abstract which appears at page 20 of the record of appeal shows that the results of

investigations were that the motor vehicle was to blame. If the appellant had other evidence contrary to this, she should have adduced the same for the court to weigh the veracity of both versions.

17. I have not been given the benefit of the occurrence book extract which appears to have been produced as exhibit 9 since there is none either in the lower court file or in the record of appeal but I note that the appellant has not complained that the extract had details different from what is in the police abstract which must have been extracted from the occurrence book if not the investigations file. There is no suggestion that the police abstract was a forgery or was in variance with what was in the police record. I therefore have no reason to doubt the contents of the police abstract.

18. The appellant has also argued that since the respondent did not wear protective gear, he should be held liable and pleads that I apply the doctrine of volenti non fit injuria against the respondent. It is not clear which protective gears the appellant would have proposed the respondent should have worn but even if he had worn, how would the same have assisted in avoiding the accident? Unless the appellant is suggesting that bicycle riders are not supposed to be riding on the road, I do not see how this doctrine is applicable in this matter.

19. The appellant has interestingly asked me to consider her written statement yet she did not testify in the lower court. A witness statement which is not adopted by a party on oath cannot be a document for consideration by a court of law. It remains simply that; a statement and not evidence. I decline that invitation.

20. I have also noted that the appellant has complained that her application for adjournment was unfairly declined which locked out her testimony. I have perused the proceedings of 30-03-2023 and seen the reason the court gave for refusing the adjournment. I cannot fault the court for doing that. It appears from the record that the appellant's witness statement was filed a day before the hearing and had not been served on the respondent. The magistrate in my view exercised his discretion correctly in declining to adjourn the matter.

21. I have read the judgement of the magistrate particularly pages 2 and 3 which analyse the evidence of the plaintiff's witnesses and I find no reason to disturb the same. The only evidence before the trial court was that the motor vehicle was to blame and the magistrate was justified to find the appellant 100% liable. The finding of the magistrate on liability is hereby upheld.

22. I have considered the authorities cited to me by the parties on quantum. It is trite law that an appellate court would not disturb an award of damages unless it is shown that the trial court applied wrong principles of law or considered factors which were irrelevant or failed to take into consideration a relevant factor. In addition to that, for the appellate court to interfere with an award of the trial court, the quantum must be too low or too high as to amount to an erroneous estimate. One of the principles for determination of award of damages is application of comparable authorities which borders on the principle of stare decis, inflation and consideration of the nature and extent of injuries.

23. It is not disputed that the respondent sustained a degloving injury to the right foot. Medical report by doctor Cyprianus Okere shows that at the time he was examined on 7-09-2021, the respondent had recurrent pains and itching in the injured foot which the doctor classified as severe harm. I have also looked at the treatment records and I note therefrom that none of them indicate that the respondent was admitted in hospital. The second medical report the appellant referred me to was not produced in the lower court and I will not consider the same. I have noted that the respondent has not been treated elsewhere after the accident and if he was, no records to that effect were produced. In fact, he in cross examination stated that he had healed.

24. I have gone through the authorities cited by the parties. In my assessment, the appellant's authority is more relevant to the case than those cited by the respondent. The respondent's authorities are not comparable to the case before me as they involved more serious injuries and their effects on the victim are also more severe. In Easy Coach Limited vs Emily Nyangosi (2017) eKLR the respondent was admitted to hospital for 2 months while in Gusii Deluxe Limited & 2 Others vs Janet Atieno (2012) eKLR, the respondent had been in hospital for 2 weeks and was left with scars in the head and the face which I consider to have been of cosmetic importance. There is no evidence of scars or any post-accident effect or complication in the present case. The authority cited by the appellant is clear to me more comparable to the respondent's case and I do not hesitate to adopt it.

25. I find that the award by the trial court was way above comparable and recent cases involving similar injuries. In that regard, I am of the view that the award of Kshs 600,000.00 was too high for the single injury suffered by the respondent. I have considered that the appellant's aforesaid authority is about three years old and factoring in the incidence of inflation, I am minded to reduce the award by the trial court to Kshs 350,000.00.

26. The appellant has also attacked the award of special damages to the extent that Kshs 1,780.00 was paid by the appellant. The appellant argues that the respondent admitted that she paid the said amount. The proceedings show that the appellant in cross examination said 'I used 7,330 for special damages. The driver of the said vehicle paid medical expences of Kshs 1,700.00.' I believe this is what the appellant is calling an admission. I have gone through the record and the only receipt produced by the respondent which appear on page 18 of the record of appeal is for Kshs 1,780.00. The other documents claimed to be receipts for special damages are prescriptions and X-ray request which do not translate to prove of payment. The fact that the respondent stated that the driver paid Kshs 1,700.00 does not mean that the said Kshs 1,700.00 was part of what the appellant claimed. Special damages must in law be strictly proved. The respondent only proved Kshs 1,780.00 paid to Kenyatta National Hospital and Kshs 550.00 paid for a copy of records for the motor vehicle. In that case the award of Kshs 7,330.00 on special damages is hereby reduced to Kshs 2,330.00

27. In conclusion, I allow this appeal partly to the extent that the general damages for pain and suffering are reduced to Kshs 350,000.00 and the special damages are reduced to Kshs 2,330.00. Since the appellant has partly succeeded in this appeal, she is awarded half costs of the appeal. For avoidance of doubt the lower court's judgement is adjusted as follows;

    a. The appellant shall bear 100% liability.

    b. General damages for pain and suffering are assessed at Kshs 350,000.00.

    c. Special damages are assessed at Kshs 2,330.00.

    d. The respondent shall have the costs of the suit in the lower court commensurate to the awards above.

    e. The above awards shall attract interest at court rates from the date of the lower court's judgment until payment in full.

    f. The appellant shall have half costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of:

Mr. Ojong'a for the appellant; and

Miss Mumbi for Mr. Waiganjo for the respondent