Sosi v Inchape Kenya Limited & 2 others (Civil Appeal E334 of 2023)
[2024] KEHC 13934 (KLR) (Civ) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E334 OF 2023

BM MUSYOKI, J

NOVEMBER 8, 2024

BETWEEN

NEWUT OMWENGA SOSI ..... APPELLANT

AND

INCHAPE KENYA LIMITED ..... 1ST RESPONDENT

BENSON AHURA ..... 2ND RESPONDENT

AUTO INDUSTRIES LIMITED ..... 3RD RESPONDENT

(Being an appeal from judgment and decree of Honourable Susan G. Gitonga (SRM) at Milimani Small Claims Courts case number E2195 of 2022 dated 14-04-2023)

JUDGMENT

1. This is an appeal arising from judgement of the adjudicator in milimani small claims court case number E2195 of 2022. The appellant had been involved in accident on 14-09-2021 while riding on motor cycle registration number KMEC 626M which collided with the 1st respondent's motor vehicle registration number KBD 253W. The said vehicle was at the material time being driven by the 2nd respondent. The appellant sustained identified injuries as a result of the accident. The appellant sued the 1st and 2nd respondents who in turn joined the 3rd respondent as a third party to the suit.

2. Interlocutory judgment against the 1st and 2nd respondents was entered on 9-09-2022 but the same was set aside on 12-10-2022. Thereafter the 1st and 2nd respondent issued a third party notice against the 3rd respondent who never appeared or filed any response which led to interlocutory judgement being entered against it on 9-11-2022. The trial court heard the matter and in its final judgment found that the 1st and 2nd respondents were 50% liable while the appellant was to shoulder 50% liability. It is against

this judgment that the appellant has filed the appeal herein in which he has raised the following as his grounds;

1. The honourable trial magistrate erred in law and in fact when she apportioned liability at 50:50 as between the claimant and the respondents whereas the claimant was but a pillion passenger in a motor cycle driven by the third party as such did not contribute to the accident in any way.
2. The honourable magistrate erred in law and in fact when she failed to distribute liability as between the respondents and the 3rd party despite interlocutory judgement having been entered against the 3rd party.
3. The honourable trial magistrate erred in law and in fact when she failed to blame the respondents for the accident on the face of overwhelming evidence.
4. The learned magistrate erred in law and fact by permitting the respondents to adduce hearsay evidence and placing reliance on the same when determining lability.
5. The honourable trial magistrate erred in law and in fact by failing to be bound by the doctrine of stare decisis.
6. The learned magistrate erred in law and in fact by awarding inordinately low damages of Kshs 200,000.00 with no legal basis.
7. The learned magistrate erred in law and fact by failing to consider the appellants documents, evidence and written submissions on the issue of liability and quantum

3. Section 38(1) of the *Small Claims Act* provides that appeals from the small claims court shall be on matters of law only. It is against this background that this court will identify the issues of law involved in the appeal and deal with them only although the appellant seems to invite the court to deal with issues of law and facts. Having read the memorandum of appeal, the judgement of the trial court and submissions of the parties, I discern that there are only two issues in this appeal. The first is whether or not the trial court erred in apportioning liability to the appellant when there was interlocutory judgement against the 3rd respondent. The second issue I identify is whether the quantum of damages was too low that it amounted to erroneous estimate. In my view these are matters of law which this court has jurisdiction to determine.

4. I will start with the issue of liability. I have given a summary of the proceedings above. As indicated, interlocutory judgment was entered against the 3rd respondent on 9-11-2022. The interlocutory judgement was never set aside or varied. The appellant has raised a valid point of law, that is, whether or not a third party against whom interlocutory judgment has been entered can be exonerated from liability and his burden loaded on his passenger. Entry of interlocutory judgment leaves the court with the exercise of formal proof. The appellant submits that once interlocutory judgment was entered against the 3rd party, what was left for him as against the third party was assessment of damages and that he had no duty to prove liability. It is my view that even where there is interlocutory judgment, a plaintiff or claimant has a duty of establishing liability or negligence on the part of the tortfeasor. In *Josphat Muthuri Kinyua & 5 Others v Fabiano Kamanga M'etirikia* (2021) eKLR Honourable Justice Muriithi held that;

> 'To this court's mind, failure by the respondent to file defence does not necessarily mean that he admits the claim. In practice, there are instances when a party will file defence and admit part of the claim therein. Admission in law requires a positive indicator, either express or by way of implication. This court finds that the failure by the respondent to file defence

only means that the matter will proceed for hearing as undefended or unopposed but it does not compel the court to find in favour of the plaintiff.'

5. Honourable Justice D.S. Majanja (may his soul rest in peace) held similar view in *Kamau v Matunda (Fruits) Bus Services* (2024) KEHC 4829 (KLR) when he held that;

> 'It is clear therefore that in a formal proof, the plaintiff still bears the burden of proving its case in accordance with the normal rules of evidence.'

6. It is not disputed that the appellant was a pillion passenger on the 3rd respondent's motor cycle aforesaid. In its finding on liability, the trial court held that where the court had no concrete evidence to distinguish the blame between the two sides in an accident, it ought to apportion liability equally. I agree with the magistrate to this extent. The point of departure which I wish to address is whether the apportionment of liability should have been between the appellant and the 1st and 2nd respondents.

7. In her judgment at page 3, the honourable adjudicator was on the right track when she found that;

> 'It is now, therefore, settled that where there is a collision of two vehicles, a vehicle and motor cycle as in the case and there is no means of distinguishing between the two drivers as to who should be blamed, the court should apportion the blame equally. In this case there was mutual duty of care owed between drivers and thus in this case there was a breach by both drivers of that duty.'

8. However, the adjudicator clearly deviated from that track when she held in the paragraph that follow that;

> 'Due to the foregoing, liability is hereby determined equally between the claimant and respondent in the ratio of 50:50.'

9. The two holdings were contradictory in that the former blamed the driver and the rider while the latter apportioned blame on the appellant thus exonerating the 3rd respondent who was the owner of the motor cycle. No evidence was led by the 1st and 2nd respondents to impute any negligence on the part of the appellant and I find that the adjudicator misdirected herself on that aspect. Interlocutory judgment had been entered against the 3rd respondent and in my view the appellant could not be held liable for any negligence.

10. The 1st and 2nd respondents have submitted that the appellant had a duty to ensure that the rider was not negligent. I do not buy that argument as no passenger can possibly have control over a driver or rider. Holding a passenger responsible for acts of the rider will be stretching the evidential duties too much beyond what is humanly expected. It is my view that the magistrate erred in shifting the burden on the appellant instead of the rider of the motor cycle. In that case, I find and hold that the apportionment of liability at 50:50 should have been between the 1st and 2nd respondents on one hand and the 3rd respondent on the other hand.

11. The appellant has claimed that the court ignored the evidence of his witness one Titus Muchiri. I have gone through the trial court's judgment and as much as the court did not make specific reference to Titus, I am not convinced that the court ignored his evidence. The court stated in its judgment that the appellant's version of how the accident occurred varied with the 1st and 2nd respondent's version. Indeed, at paragraph 3 of the judgement, the trial court mentioned that the appellant called three witnesses. This to me, means that the court was alive to the fact and considered that the appellant testified and called a witness who gave similar version as his. There is no provision or principle of law which prescribes the style and manner in which a court must analyse evidence in its judgment. I have

read the evidence of the said Titus and I do not see anything he said that was different from what the appellant said. In any event, the police officer, one of the appellant's witnesses also blamed the rider for the accident which in my view watered down the appellant's own evidence. The adjudicator was therefore right in reaching a conclusion that there was no concrete evidence against either of the parties.

12. The appellant has also faulted the learned adjudicator for allowing the 1st and 2nd respondents to produce a report dated 3-11-2021 made by a private investigator. I do agree that the 2nd respondent was not competent to produce the investigation report without the consent of the appellant. It is also true that the record shows that the appellant objected to the production of the investigation report. The adjudicator in allowing production of the report simply stated that the appellant could cross-examine on it. That was not enough reason for allowing the production of the report. The 1st respondent was not the maker and obviously not privy to the contents therein and cross-examination could not cure the shortfall of evidential requirement. I am alive to the provision of Section 32(1) of the *Small Claims Court Act* which provides that the small claims courts shall not be bound wholly by the rules of evidence. I am also aware that subsection 2 of the same Section gives the court discretion to admit any evidence, record or material which are inadmissible as evidence in any other court under the law of evidence. However, I hold the position that these provisions do not mean that the courts should throw out of the window the principles and provisions of the law where the same touch on the rights of the parties appearing before it. As much as they are special courts, they remain courts of law with mandate and responsibilities of interpreting and applying the law. In the circumstances of this case, the evidence in the report was hearsay and should not have been allowed if the appellant was objecting to the same. However, I have not seen anything in the judgment of the trial court which suggests that the adjudicator gave the contents of the report any weight. The same is not a factor for consideration in this appeal as it had no bearing in the adjudicator's findings.

13. On quantum, it is trite law that an appellate court would not interfere with an award of general damages unless the same are found to have been too high or too low in circumstances which would make them an erroneous estimate. It is also the position of the law that unless it is shown that the trial court applied wrong principles or considered a factor which it should not have considered or left out a factor that it should have considered, an appellate court should be reluctant in disturbing the discretion of the trial court. In the classical case of *Kemfro Africa Limited t/a Meru Express Services (1976) & Another v A.M. Lubia & Another* (1985) eKLR it was held that;

> '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 damages.'

14. In this case the appellant sustained loss of two upper left teeth, a crack on the left lower incisor tooth, deep cut on the upper lip and deep cuts on the right lower leg and knee. The medical report prepared by Dr Okere indicated that the appellant needed Kshs 20,000.00 for replacement of the teeth. It did not ascribe any permanent incapacity suffered. The appellant submits that the court awards him damages of between Kshs 750,000.00 and Kshs 800,000.00. The appellant cited authority of *Antony Nyamweya v Dorcas Gesare Mounde* (2022) eKLR which he did not attach to his submissions for this court's consumption. Nevertheless, I have looked at the authorities of *Mati v NKO* (2023) KEHC 17990 (KLR) where the plaintiff who had sustained loss of two upper incisors teeth, loosening of lower right incisor teeth, deep cut wound on the right frontal area and chin, multiple bruises on the face, contusion on both eyes leading to haematoma, laceration on the right iliac lumbar area, bruises in the

right chest, contusion on the right elbow and bruises on the right ankle literally was awarded a sum of Kshs 350,000.00 and *Patrick Mudaya Kweyu v Pan Africa Chemical Ltd* (2016) KEHC 5667 (KLR) where the appellant was awarded a sum of Kshs 250,000.00 for dislocation of the right elbow joint and loose lower incisors teeth.

15. The above authorities are fairly comparable to the appellant's case although the same involved more serious injuries than the appellant's. I understand that there cannot be cases with exactly similar injuries. Putting these factors into consideration and noting that it is trite law that an appellate court should not set aside a trial court's award on quantum simply because it would have awarded a different sum, it is my opinion that the award by the adjudicator was not too low so as to amount to an erroneous estimate. That line of appeal is therefore declined.

16. The appellant has also claimed loss of earning capacity. In his statement of claim the appellant stated that the injuries affected his career as he was unable to blow musical instruments. He claimed to be a music producer and performer. He stated as much in his witness statement and when cross-examined, he stated that he used to earn Kshs 40,000.00 per month. He maintained that he could not play trumpet or perform as a dancer due to injuries to the mouth and legs. Other than that, the appellant did not adduce any evidence to show that he was not able to do his previous work and even if he could not, he ought to have told the court that he could not get an alternative job as good in the minimum, as his job before the accident.

17. The appellant has claimed that part of his evidence on the issue of earning was not captured. To support this, the appellant has referred me to the portion of submissions of the 1st and 2nd respondents in the lower court which appears at page 252 of the record of appeal. Part of the evidence he claims to have been left out by the adjudicator was the part he told the court that he used to earn Kshs 40,000.00 while working for Kei Tatu. True, the record of appeal prepared by the appellant does not have that part of evidence. The record is obviously missing two pages of the typed proceedings. I resorted to the original trial court record from which I was able to see that pages 8 and 9 of the typed proceedings were intact though they were omitted in the record of appeal. It is clear that the portion the appellant claims not to have been recorded by the trial court is in the typed proceedings in the trial court record. I hope this was an innocent omission and not deliberate attempt by the appellant to disparage the trial court.

18. In *Beatrice Anyango Okoth v Rift Valley Railways (Kenya Limited & Another* (2018) eKLR while addressing the issue of diminished earning capacity, the court held that;

> 'Damages under this heading are awarded where it is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered.'

19. I am not convinced that the appellant led any evidence to show that he suffered diminished earning capacity. The doctor's report does not indicate any such disability. If indeed he was a dancer or performer and musical instrument player, it would have been prudent to lay basis for conclusion that he was not able to do so. A mere statement that he could not do so was not enough.

20. The appellant submits that a sum of Kshs 10,000.00 for doctor's attendance, Kshs 5,000.00 for the police officer's attendance, Kshs 550.00 for copy of records and Kshs 20,000.00 for future medical expences should have been awarded. The statement of claim filed by the appellant pleaded Kshs 5,000.00 as medical expences, Kshs 550,00 for copy of records, Kshs 650.00 for search at the company registry and Kshs 20,000.00 for future medical expences. The honourable adjudicator awarded Kshs 20,000.00 for future medical expences and Kshs 5,000.00 for medical expences. I see no reason to disturb this award as that is what was proved by production of receipts. The doctor's and police officer's

attendances were not proved and, in any event, those were witness expences and not special damages. I therefore dismiss this line of argument.

21. In view of the above analysis, this court finds that the appeal is merited only on the issue of liability and the lower court's judgment is hereby set aside to that extent. To that end the judgement of the trial court is adjusted as follows;

    a. Liability is apportioned between the respondents at 50:50 against the 1st and 2nd respondent on one hand and the 3rd respondent on the other hand.

    b. The other findings of the honourable adjudicator are upheld.

    c. The appellant shall have the costs of this appeal to be met by the 3rd respondent only.

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 Ouma for the appellant; and

Miss Wamuyu for the 1st and 2nd respondents.