Simatwa v Samich (Civil Appeal E051 of 2021)
[2024] KEHC 13664 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13664 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E051 OF 2021

JRA WANANDA, J

NOVEMBER 6, 2024

BETWEEN

DAVID SIMATWA ..... APPELLANT

AND

SAMMY KIPKORIR SAMICH ..... RESPONDENT

JUDGMENT

1. This Appeal is against a finding on liability and also the quantum of damages awarded to the Respondent in Eldoret Chief Magistrate's Civil Case No. 412 of 2019 as compensation for injuries sustained by an adult male that occurred as a result of a road accident. In the trial Court, the Appellant was the Defendant while the Respondent was the Plaintiff. The Appellant now seeks a reconsideration of the finding on liability and also reduction of the amount of compensation awarded claiming that the same was inordinately high and excessive.

2. The background of the case is that by the Plaint filed on 24/05/2019 through Messrs Keter, Nyolei & Co. Advocates, the Respondent sued the Appellant seeking general damages, special damages at Kshs 6,150/-, costs and interest.

3. The Respondent pleaded that the Appellant was, at all material times, the owner of the motor vehicle registration number KBZ 735L matatu (public service vehicle), that on 03/05/2019, the Respondent was lawfully travelling aboard the said motor vehicle along the Eldoret-Nakuru road when at Rupa area, the Appellant's vehicle was so negligently, carelessly and/or recklessly driven, managed and/or controlled that it rammed into a Scania bus occasioning bodily injuries to the Respondent.

4. The Appellant filed his Defence on 31/07/2019 through Messrs Kairu & McCourt Advocates denying the claim and the particulars alleged.

5. After close of the pleadings, the suit proceeded to trial. The Respondent called 1 witness while the Appellant did not call any.

6. In his evidence-in-chief, the Respondent (PW1) adopted his Witness Statement and reiterated the matters stated in the Plaint. He testified that he was travelling from Nairobi to Eldoret in the Appellant's said matatu when the accident occurred and that he sustained injuries and was taken to Uasin Gishu County Hospital. He testified further that he was examined by Dr. Sokobe whom he paid Kshs 6,000/-. He then produced medical and treatment notes, medical report, P3 Form, Police Abstract and Receipts. He stated that the matatu hit the bus from behind, that the matatu was on the wrong and that he has healed.

7. By the 1½ page Judgement delivered on 04/05/2021, which with due respect, leaves a lot to be desired, the trial Court entered Judgment in favour of the Respondent. Liability was found at 100% against the Appellant, general damages awarded at Kshs 250,000/- and special damages at Kshs 6,150/-. Costs and interest was also awarded.

8. Dissatisfied with the Judgment, the Appellant filed this Appeal on 18/05/2021. In the Memorandum of Appeal, the following lengthy grounds were listed;

    i. That the learned magistrate's decision was unjust, against fee weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    ii. That 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.

    iii. The Learned magistrate erred in law and in fact in awarding quantum of damages inconsistent with injuries pleaded and proved to have been sustained by the Plaintiff.

    iv. The Learned magistrate erred in law and in fact in holding the defendant 100% liable for the accident and failing to take into account contributory negligence by the Plaintiff hence resulting in miscarriage of justice.

    v. The Learned magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and fact in relying on authorities which were irrelevant and thus arrived at an award that, is so manifestly high as to be erroneous.

    vi. The Learned magistrate erred in assessing an award, hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by Plaintiff.

    vii. The Learned magistrate erred in assessing an award, hereunder, which was wholly erroneous estimate of the loss and damages suffered by Plaintiff.

    viii. The Learned magistrate erred in assessing an award, hereunder, which was a wholly erroneous estimate of the loss, and damages suffered by Plaintiff;

    .....

    ix. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

Hearing of the Appeal

9. It was then directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Respondent filed his Submissions on 20/03//2024. As for the Appellant, up to the time of concluding this Judgment, I had not come across any Submissions filed by him or on his behalf.

Respondent's Submissions

10. Counsel for the Respondent cited the case of Catholic Diocese of Kisumu vs Sophia Achieng, Civil Appeal No. 284 of 2001 [2004] KLR SS, to the effect that an appellate Court will not easily interfere with the trial Court's exercise of discretion in assessing quantum of damages. In respect to liability, he submitted that the Respondent discharged his burden of proof on a balance of probabilities. He invited the Court to re-evaluate the evidence of PW1 who blamed the Appellant for the accident as they hit another motor vehicle from behind and who produced all documents by consent, including those addressing occurrence of the accident and ownership of the matatu. He submitted further that it is important that traffic laws are adhered to while driving behind another motor vehicle and that the Appellant ought to have kept a safe distance. He pointed out that the Respondent was a mere passenger in the matatu and thus cannot be held liable for commissions or omissions of the Appellant's driver as he was not in control of the matatu and that no evidence was tendered to controvert that position. He urged further that the Appellant's Advocates indicated that they would enjoin a 3rd party but they never did, that all the glaring inconsistencies by the Appellant points to the fact that they were engaging in theatrics to try to absolve themselves from blame, and that they failed to file Witness Statements or call their driver to rebut the Respondent's version of events. He therefore submitted that the Respondent's case was unchallenged. He cited the case of Machakos HCCA No. 101 Of 2018, Catherine Mbithe Ngena Vs Sucker Agencies Ltd.

11. On quantum, Counsel contested the allegation that the damages awarded was inordinately high. He cited the Court of Appeal case of Odinga Jacktone Auma Vs Maureen Achieng Odera [2016] eKLR to the effect that "comparable injuries should attract comparable awards" and urged that the trial Court had the benefit of hearing the Respondent, and observing him and his injuries as well as his demeanour. He submitted further that the trial Court thus correctly assessed the injuries and in awarding damages, the trial Magistrate correctly exercised her discretion. According to him therefore, the appeal is devoid of merits and ought to be dismissed with costs. He submitted that an award of damages is always guided by the extent, nature and severity of the injuries sustained from the pleadings, and the documentary and oral evidence and that the injuries herein were not contested.

12. Counsel submitted further that the Appellant opted not to adduce any medical evidence nor call any witness to testify on quantum of damages nor to contest the injuries alleged, that the Appellant therefore did not put forth any fact that this Court would deem as considered by the trial Court and which ought not to have been considered and that no justifiable reason has been raised that tends to fault the trial Court finding on the award of damages. According to him, the sum of Kshs 250,000/- awarded n general damages cannot be said to be inordinately high to warrant interference by this Court, that the Respondent further produced a receipt of Kshs 150/- being treatment expenses at Uasin Gishu District Hospital and another one of Kshs 6,000/- being Dr. Sokobe's professional fees for preparing the medical report. He then cited several authorities which he termed as comparable awards for comparable injuries.

Determination

13. As aforesaid, the Judgment of the trial Court leaves a lot to be desired. It is a 1 ½ page write-up with no analysis or evaluation on how the trial Court arrived at its decision. All the Judgment states is that the particulars of negligence alleged by the Appellant were not demonstrated. It is a study on how not to write a Judgment and clearly fails to meet the threshold set out under Order 21 Rule 4 of the Civil Procedure Rules which guides as follows:

> "Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision"

14. Fortunately, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence presented before the trial Court afresh and draw its own conclusions. This principle has been reiterated in a plethora of cases, including Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, where it was pronounced in the following terms:

> "On a first Appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

15. The issues that evidently arise for determination in this Appeal are the following;

    i. Whether the trial Court erred in its determination of liability.

    ii. Whether the trial Court's award in damages was inordinately high or excessive.

16. I now proceed to determine the said issues

i. Whether the Court erred in its determination of liability

17. I have considered the testimony of the Respondent who was the only witness before the trial Court. He stated that he was a passenger in the matatu and this fact was corroborated by the Police Abstract produced in evidence. He then testified that the matatu hit a bus from the rear. According to him, the accident occurred because the Appellant's driver failed to keep or maintain a safe distance between the matatu and the bus that was being driven in front. The Appellant did not call any witnesses to rebut the Respondent's testimony and as such, there is no material upon which a finding can be made that the Respondent did not prove his case on a balance of probabilities. As aforesaid, the Appellant did not also file Submissions in this Appeal as directed by the Court. With this omission, the Appellant missed out on the only chance upon which he could have demonstrated to this Court the gist of his grounds of Appeal.

18. In the circumstances, and although as aforesaid, the trial Court's decision fell way short of what a proper Judgment is required to contain, at the end of the day, I too, find that the accident occurred as a result of the Appellant's negligence and I uphold the trial Court's 100% finding of liability against him.

ii. Whether the trial Court's award of damages was inordinately high or excessive

19. In Kemfro Africa Limited t/a "Meru Express Services" [1976]'& Another V. Lubia & Another (No. 2) [1987] KLR, the Court of Appeal held that:

> .... The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held 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."

20. This said principle was reiterated in Dilip Asal v Herma Muge & another [2001] eKLR [2001] KLR as follows:

> ..... Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

21. An appellate Court will not therefore disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. For the appellate Court to interfere, it must be shown that the trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was unsupported.

22. In this case, the Medical Report prepared by Dr. Sokobe described the injuries suffered by the Respondent as blunt injury to the head, cut wound on the tongue after blunt injury to the mouth, and blunt injury to both shoulders, chest, lower back and on both legs. The treatment administered was then described as antibiotics and analgesics. According to the Report, the Respondent still experienced pain in the mouth and both legs, he had a cut wound on the tongue, and both legs were swollen and tender with bruises. The doctor categorized the injuries as "multiple soft tissue injuries" from which the Respondent was recovering well.

23. On the mode of assessing damages, the Court of Appeal in the case of Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards". Similarly, in Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal observed 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 this instant case, the grounds of Appeal allude that the award of general damages at the sum of Kshs 250,000/- was excessive and inordinately high. To establish comparable awards, I have perused various relatively recent authorities in which the injuries suffered were similar or close to those suffered herein. I have for instance, picked out the following:

    a. Magare J, in the case of *Ufrah Motors Bazaar & another v Kibe (Civil Appeal 39 of 2021)* [2023] KEHC 1285 (KLR) (27 January 2023) (Judgment), on appeal, upheld an award of Kshs 220,000/-.

    b. Aburili J, in the case of Michael Okello v Priscilla Atieno [2021] eKLR, on appeal, reduced an award of Kshs 500,000/- to Kshs 250,000/-.

c. Nyakundi J, in the case of *Wahinya v Lucheveleli (Civil Appeal E045 of 2021)* [2022] KEHC 13762 (KLR) (12 October 2022) (Judgment), on appeal, upheld an award of Kshs 200,000/-.

d. W. Okwany J, in the case of National Industrial Credit Ltd & 2 others v MNO (Minor Suing Thro' Next of Friend and Mother FNM) (Civil Appeal E035 of 2023) [2024] KEHC 3824 (KLR) (18 April 2024) (Judgment), on appeal, upheld an award of Kshs 300,000/-.

25. Using the above decisions as comparable awards, and applying the principles earlier enunciated, I am not persuaded that the award of Kshs 250,000/- was manifestly excessive or inordinately high. I therefore uphold the same

26. Regarding "special damages", it is trite law that the same must be both pleaded and proved. In the Court of Appeal case of Hahn v. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, this was reiterated as follows:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved .... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

27. Similarly, in the Court of Appeal case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR the same principle was advanced in the following terms:

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of."

28. In this case, in his Plaint, the Respondent pleaded and particularized his claim for special damages as follows:

a)	Medical Report & P3	Kshs 6,000/=
b)	Medical expenses	Kshs 150/=
	Total	Kshs 6,150/=

29. The Plaintiff then at the trial produced Receipts supporting the said expenses and costs. In view thereof, it is clear that the amounts awarded were pleaded and particularized, and sufficiently proved at the trial. I therefore again uphold the award on special damages

Final Orders

30. In the premises, the Judgment entered by the trial Court is upheld and this Appeal is accordingly dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024.

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Songok for Nyolei for Respondent

N/A for Appellant

Court Assistant: Brian Kimathi