Mt. Elgon Hardware Ltd v Onyango (Civil Appeal 12 of 2020)
[2024] KEHC 15599 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15599 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 12 OF 2020

DK KEMEI, J

DECEMBER 6, 2024

BETWEEN

MT. ELGON HARDWARE LTD ..... APPELLANT

AND

BEATRICE TAWA ONYANGO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Bungoma (Hon. E.N. Mwenda, SRM) delivered on 20th December 2019 in Bungoma CMCC No. 908 of 2010)

JUDGMENT

1. By a Plaint dated 14th December 2010, the Respondent herein sued the Appellant in the Chief Magistrate's Court at Bungoma in Bungoma CMCC No. 908 of 2010, wherein her claim as pleaded was that the Appellant was the registered owner of motor vehicle registration number KAT 056 E Mitsubishi Van; that on or about 12th May 2008, the Respondent was a pillion passenger along Moi Avenue near Khetia Cross Road supermarket within Bungoma Municipality when the Appellant's motor vehicle registration number KAT 056 E Mitsubishi Van was negligently and without due care driven by the Appellant's agent and/or servant that it lost control and caused an accident thereby knocking the Respondent who as a result sustained serious injuries and that the Appellant was vicariously liable for the said accident.

2. The Respondent further averred that as a result of the accident, she sustained the following injuries: fracture of the left tibia and fibula; laceration wound to the right mid/calf circumference measuring 37.5 cm by 36.8 cm and blunt injury to the left leg. Due to the Appellant's negligence and particulars of the said negligence as set forth on the Plaint, the Respondent suffered and continues to suffer loss and damages and thus prayed for:

   " a) General damages.

b) Special damages of Kshs. 4,550/=.

c) Costs of the suit.

d) Interest of (a), (b) & (c) above."

3. In its "Statement of Defence," the Appellant admitted the description of the parties as contained in paragraphs (1) & (2) of the Plaint, but denied each and every allegation as contained in the Plaint placing the Respondent to strict proof. The Appellant denied the occurrence of any accident on or about 12th May 2008, and averred that if indeed an accident occurred then the same was as a result of the negligence of the Respondent. It urged the Court to dismiss the Respondent's suit with costs.

4. In its judgment dated 20th December 2019, the trial Court (Hon. E. N. Mwenda, SRM) allowed the Respondent's claim and entered judgment against the Appellant as: 100% liability against the Appellant; Kshs. 700,000 as general damages; Kshs. 4,080/= as Special damages; costs of the suit and interest on general and special damages at 12 % per annum from the date of judgement until payment in full.

5. Dissatisfied by the decision of the learned Magistrate, the Appellant lodged the present appeal namely HCCA No. 12 of 2020 faulting the learned Magistrate for: holding that the Appellant was 100% liable for negligence; not appreciating the occurrence of miscarriage of justice as the Counsel on record was acting on behalf of both parties; not considering the Appellant's submissions and availed case laws; not considering that the awarded general damages were excessive and not in tandem with the sustained injuries; and for failing to consider the circumstances before the Court when he ordered the Appellant to pay costs.

6. By this appeal, the Appellant urged this Court to set aside the trial magistrate's judgement/decree and in its place dismiss the Respondent's claim and that the Respondent be condemned to pay costs of this appeal and costs in the lower court.

7. The appeal proceeded by way of written submissions. Both parties filed and exchanged their respective submissions.

8. It is clear that this Court is being invited to set aside the trial magistrate's findings on liability and quantum and replace it with its own assessment.

9. The duty of an appellate Court in civil proceedings is well known. In the words of De Lestang V-P in the Court of Appeal for East Africa case of Selle V. Associated. Motor Boat Co. (1968) EA 123, 126:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Shalom (1955), 22, E.A.C.A. 270)."

10. It is trite that the burden of proof lies with the Appellant in accordance with Sections 107, 108 and 109 of the *Evidence Act*, and that no case law authority is necessary for that cardinal principle.

11. As regards the applicable standard of proof to the suit subject of the appeal herein, the learned authors of Phipson On Evidence, 16th ed. (2005) at pp. 154-5, paragraphs *6* – 53 observe as regards the standard of proof in civil cases as follows:

> " The standard of proof in civil cases is generally proof on the balance of probabilities. If, therefore, the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not."

12. Similarly, under Section 3 (2) of the *Evidence Act* -

> " A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists."

13. In cases, however, of serious allegations, the balance of probabilities requires cogent evidence as observed in Phipson on Evidence, ibid. at paragraphs 6-54 as follows:

> "
>
> " (b) serious or criminal allegations
> Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and a breach of warrant, the court might hold that the warranty claim was proven and the fraud claim not proven on the same facts. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, and thus to prove the allegation."

14. The question therefore is whether the Respondent herein discharged the burden of proof that the Appellant was liable in negligence for the occurrence of the accident wherein the Respondent was allegedly injured.

15. First and foremost, there is no doubt that an accident occurred in which the Appellant was injured. Hence, the only question is who caused the said accident?

16. On the issue of liability, this being a first appellate Court, I must consider the evidence in the trial Court so as to arrive at my own independent conclusion while bearing in mind that I did not hear or see the witnesses. The Respondent's evidence, as contained in a statement which was adopted as her evidence and which was inter alia; that the Appellant's driver failed to observe duty of care and attention to other road users, particularly the Respondent; that the driver driving without taking into consideration the nature of the road and the driver failing to adhere to traffic rules failed to indicate or hoot before joining the main road. On cross-examination, the Respondent told the Court that the motor vehicle emerged from the left side of the road and entered the junction hitting her. She further told the Court that prior to the accident, the cyclist was off the side of the road and the driver of the motor vehicle did not indicate his intention to join the road and broadsided the cyclist. In this case, there was evidence that the accident was caused by the negligence of the driver of the motor vehicle registration number KAT 056E. Whereas the Appellant blamed the rider of the bicycle, PW2 in her evidence indicated that indeed an accident occurred on 12th May 2008, but she could not tell from her records who was to blame. The failure by the Appellant to tender any evidence controverting the versions of the Respondent must mean that the Respondent fulfilled her obligation under Sections 109 and 112 of the *Evidence Act*. The testimony of the Respondent remains unchallenged and that

the trial Court believed the version given by the Respondent. Accordingly, this Court cannot interfere with the trial court's decision attributing negligence to the driver of the said vehicle.

17. The issue is however whether the said driver ought to have been found 100% liable. In this case, this Court is being called upon to interfere with the trial court's finding of liability. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

18. That seems to have been the position in Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate Court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

19. It was not disputed that the Respondent was a pillion passenger on the said bicycle. The law does not permit more than one pillion passenger to be carried, and that the Respondent was not breaking the law at the time of the accident. AIt is instructive that the Appellant did not cite the rider of the bicycle as a third party for purposes of indemnity and or contribution to the accident and further failed to tender its defence evidence so as to controvert that of the Respondent. Accordingly, the Respondent ought not to shoulder some blame for such reckless conduct of the Appellant. Accordingly, I find that the Appellant ought to have been found 100% liable. I find no reason to interfere with the finding on liability by the trial Court.

20. As regards quantum, in Woodruff vs. Dupont [1964] EA 404 it was held by the East African Court of Appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

21. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

22. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

23. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

24. In this case, the Respondent sustained soft tissue injuries, fracture to the left leg and psychological trauma as per the report prepared by Dr. Mulianga Ekesa. Clearly, as per PEXH.3 the Respondent suffered fracture of the left tibia and fibula. I have considered the authorities relied upon by the respective parties. The Appellant seems to be emphasizing on the assessment made with guidance from available authorities.

25. Counsel for the Appellant submitted in the lower Court that Kshs. 100,000/= was appropriate considering that the injuries sustained by the Respondent were simply soft bone injuries which had healed. He relied on the decision of Peninah Wangari Murachia vs Cosmos Limited & Anor (2009) EKLR. On the other hand, the Respondent relying on the case of Charles Mwania & Anor vs Betty Hassan (2008) eKLR and requested the trial Court to make an award of Kshs 1,200,000/=.

26. Before this Court, the Appellant argues that the Kshs. 700,0000/= award by the trial Court is excessive and relying on the cases of Veronicah Mkanjala Myapara vs Patrick Nyasinga Amenya (2021) eKLR and Ndigwa & Another vs Mukimba (Civil Appeal E006 of 2022) (2022) KEHC 11793 (KLR) an

award of Kshs. 300,000/= was made and that the injuries are similar to the matter before this Court. Contending the Appellant's submissions, the Respondent argued that the injuries as captured in the case Veronicah Mkanjala Myapara vs Patrick Nyasinga Amenya (2021) eKLR were different and less serious as the ones before this Court. According to Counsel for the Respondent, there was no fracture of the tibia/fibula. In the case of Ndegwa & Another vs Mukimba (Civil Appeal E006 of 2022) (2022) KEHC 11793 (KLR) Counsel for the Appellant misrepresented the facts of the case as the award of Kshs. 1,200,000/= as awarded by the lower Court was reduced to Kshs. 500,000/= on appeal and this was not what the Counsel for the Appellant captured in his submissions.

27. In its judgement, the trial Court cited the decision of Godfrey Wamalwa & Another vs Kyalo Wambua (2018) eKLR wherein the Court made an award of Kshs. 700,000/= for a compound fracture to the right tibia/fibula, cut wound on the scalp, cut wound on the chest and cut wound on the lower lip. He further cited the decision of Samuel Kimani & Another vs Edward Otieno & Another (2017) eKLR wherein High Court upheld the award of Kshs. 700,000/= in general damages for pain and suffering where the Respondent had suffered 8% incapacity and the case of Abdi Haji Gulleid vs Auto Selection (K) Ltd & Another (2015) eKLR where there was permanent incapacity of between 10-25% and that the High Court made an award of Kshs. 750,000/= in general damages.

28. In this case, based on Dr. Mulianga Ekesa's medical report dated 28th October 2010, which was produced in Court as PEXH.3, the Respondent herein sustained soft tissue injuries, fracture of the left leg bones and psychological trauma. I have considered the decisions cited and it is my view that the case that comes closest to the instant one is that of Godfrey Wamalwa & Another vs Kyalo Wambua (2018) eKLR where the Court awarded a sum of Kshs. 700,000/= to a Plaintiff with similar injuries.Accordingly, I do not find any basis for interfering with the award. I do find that the general award in this case was not so inordinately high as to amount to an unreasonable estimate to justify this appellate Court on the principle of Butt v Khan [1982-88] 1 KAR 1 to interfere with the trial Court's award. The amount awarded was reasonable in the circumstances and thus I see no reason to interfere with the same. I therefore uphold it. As regards special damages, the same was proved by production of receipts and further, the Appellant has no qualms with the same. The same will therefore remain undisturbed.

29. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

Order accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

M/s Wanyama..... for Appellant

N/A Mwebi.....for Respondent

Kizito/Ogendo.....Court Assistant