Opiyo v Odhiambo (Civil Appeal 52 of 2022)
[2024] KEHC 15552 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL 52 OF 2022

DK KEMEI, J

DECEMBER 6, 2024

BETWEEN

THOMAS OUMA OPIYO ..... APPELLANT

AND

ROSELINE ATIENO ODHIAMBO ..... RESPONDENT

(Being an Appeal from the Judgment of the Hon. Christabel Agutu (SRM) delivered On 21st October 2022 In Ukwala PMCC No. 14 of 2020)

JUDGMENT

1. This appeal arises from the Judgment of Hon. C. Agutu in Civil Case No.14 of 2020 at the Senior Resident Magistrate's Court at Ukwala. The judgement was entered in favor of the Respondent as follows: Liability 100%, general damages Kshs 1000, 000/=. Costs and interest on the award.

2. Being aggrieved by the said judgment, the Appellant has now appealed to this court vide memorandum of appeal dated 14th November 2022 wherein he has raised the following grounds of appeal:

    a) That the learned magistrate erred in law and fact in apportioning 100% liability to the Appellant despite the Respondent being entirely to blame for the accident.

    b) That the learned magistrate erred in law and fact in apportioning 100% liability to the Appellant despite the Respondent admitting that he had not won a safety belt during the accident.

    c) That the learned magistrate erred in law and fact in apportioning 100% liability to the Appellant(defendant) by disregarding the evidence of the defense witness, the driver who entirely blamed the Respondent for the accident.

d) The trial magistrate erred in law and in fact in finding in favor of the Respondent against the Appellant when there was totally no credible evidence or proof of negligence on the part of the Appellant.

e) That the trial magistrate erred in law and in fact in the assessment of quantum by awarding ksh 1 000 000/= for general damages which was excessive and erroneous estimate compared to the injuries sustained by the plaintiff.

f) That the trial magistrate erred in law and in fact in failing to pay regard to authorities in the Appellants submissions that were guiding in the amount of quantum that is applicable and applicable in similar cases.

g) That the trial magistrate erred in law and in fact in in failing to consider the submissions of the Appellant on quantum by completely disregarding the submissions and authorities, thus arriving at unjustified decision on quantum.

3. Based on the foregoing, the Appellant seeks orders that:

a) That the appeal be allowed and the decree of Hon. Christabel Agutu be set aside.

b) That this honorable court does re-evaluate the evidence of the parties and dismiss the plaintiff's case with costs to the Appellant.

c) That in the alternative this honorable court does re-assess the evidence on record of the subordinate court on liability and quantum and award with its own decision.

d) That the Appellant be awarded the costs of the appeal herein and costs of the suit in the trial court.

4. Being a first appeal, the court's duty is well spelt out namely, to re-evaluate the evidence and subject it to an independent analysis and arrive at its own conclusion as to whether or not to uphold the decision of the trial court. In *Selle And Another Vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123 it was held:

> "...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 into account of particular circumstances or probabilities materially to estimate the evidence."

5. PW1 Roseline Atieno Odhiambo testified that she is a farmer from Simenya. She produced her ID as P Exhibit 1. That she wrote her statements on 14/2/2020 which was adopted as her evidence in chief. That she was with her granddaughter Lavin Stacy Akinyi who was also injured. She produced the following documents: police abstract (PMFI 2), P3 form (PMFI 3), discharge summary (PMFI 4), x-ray report (PMFI 5), Demand letter (PEX 6), Motor vehicle search (Exhibit 7). She stated that she has been healed but still in pain; that she blamed the driver and owner of the motor vehicle and that she prayed for compensation.

On cross examination, she stated that she was on her way from Simenya to Kisumu when the driver of the motor vehicle veered off the road and hit a tree and that she sustained injuries. That she was seated near the door together with her granddaughter and another lady and that they had not buckled up.

That she was taken to Jaramogi Odinga hospital where she was admitted for three days and that her sister paid the hospital bills.

On reexamination, she stated that the seat belts were faulty.

PW2 George Mwita stated that he was a Senior Clinical officer at Kisumu hospital. That he had a P3 form for PW1. That she was involved in a road traffic accident on 8/01/2020 and was treated at Jaramogi Oginga Odinga referral hospital between 8/1/2020 and 10th /1/2020. He captured the injuries as follows: swelling on the occipital region of the head, CT Scan –brain hemorrhage; tenderness on chest, swollen left thigh, bruises on both knee joints, Examination was done and an 6 X-rays after accident, put on medication. He formed the opinion that the degree of injury was maim. He stated that on 16/1/2020 P3 form was filled by Philip Kiplimo who is now on leave. He produced the P3 form as P Exhibit 3.

On cross examination, he stated inter alia; that he relied on the discharge summary from Jaramogi Oginga Odinga Referral Hospital; that PMFI 4 was discharge from Jaramogi hospital and that the degree of injury was maim; that there was a CT Scan which showed the veins were fractured and that there was a report on the same.

PW3 PC Barnabas Too of Ugunja traffic base testified that he had police abstract on a road traffic accident that occurred on 8/1/2020 along Kisumu-Busia road at Madeya involving motor vehicle registration KCX 902K Toyota matatu and a passenger. That Roseline Adhiambo a passenger sustained serious injuries. That she was treated and issued with P3 form which was filled by her doctor. He produced the abstract as P exhibit 4. He testified that he was not the investigating officer, but he knew PC Eugine Matisa (the I. O.) who was on leave and that he was representing him. That the vehicle was a PSV. That it was from Busia headed to Kisumu. That it stopped at Madeya. That it took off and Roseline slid from the vehicle and sustained serious injuries.

On cross examination, he stated that he was not an eye witness. That there was no collision. That the passenger Roseline was getting into the vehicle and that she had not sat in the vehicle. That the driver reported the accident and not the plaintiff.

6. At this juncture the Respondent's case closed.

7. DW1 Alex Simiyu Wafula stated that on 8/1/2020 he was driving from Busia to Kisumu. That he picked up a lady who sat at the door. The road had potholes and that the lady fell off. That he recorded his statement which was adopted as his evidence in chief. That he has been a driver for over a decade. He blamed the lady for not buckling up and that the road was also in a bad state.

   On cross examination, he stated that the door was closed. That the lady fell on the door and it opened.

   On re-examination, he stated that the lady should have buckled up.

8. At that point, the Appellant's case closed.

9. The appeal was canvassed by way of written submissions. Both parties duly complied. The Appellant submitted that he ought not to have been held 100% liable since the Respondent admitted that she had not buckled up. On quantum, the Appellant relied on the case of Elizabeth Wambui Gachoni Vs. Joo (minor Suing Thru' Mother And Next Friend) VAA [2019] eKLR where the injuries were almost similar to those in the instant case. The court set aside an award of 350,000/- and substituted it with Kshs 180 000/=.

10. The Appellant likewise relied on the case of *Lilian Otieno Vs Philip Mugoya Ogila* [2022] Eklr; And The Case Of *Osman Mohamed &another Vs. Saluro Bundit Mohamed* Civil Appeal No. 30 OF 1997.

11. The Appellant urged this court to consider the appeal and set aside the trial court's judgment and in its place award an amount Kshs. 100,000/-.

12. The Respondent submitted that it is not in dispute that the said road traffic accident occurred on the 8th January 2020, involving the motor vehicle registration No. KCX 902K wherein the Plaintiff / Respondent was a passenger, along Busia – Kisumu road. Her contention is that the only issue in disputes is whether the general damages awarded by the trial court were extremely high.

    The Respondent relied on the case of *Kemfro Africa Limited T/a Meru Express Services Vs. A.m Lubia & Ano.* (1982-88) 1 KAR 777 AS cited in *Joseph Jumba Egla Vs. Meshack Omurunga Sunday (suing As Legalm Representative Of The Estsate Of Sara Makonjio Sande)* [2015] eKLR.

13. The Respondent submitted that the injuries sustained by the Respondent are not contested and thus urged this court to dismiss the appeal with costs.

14. I have considered the evidence tendered before the trial court as well as the submissions presented. I find the issue for determination is firstly, whether the apportionment of liability was proper and secondly, whether the award of damages was excessive.

15. As regards the apportionment of liability, it is noted that the trial court apportioned the same at 100% against the Appellant.

    In *Stapley –v- Gypsum Mines Limited* (2) (1953) A.C 663 AT P. 681 Lord Reid reasoned that:

> "To determine what causes an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it.... The question must be determined by applying common sense to the fact of each particular case. One may find that a matte of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally."

    The facts here speak for themselves that the Appellant, his driver and or agent was driving the suit motor vehicle registration no. KCX 902K along the Busia-Kisumu road on the 8th January 2020 where the Respondent was a passenger. That the Appellant lost control of the said vehicle, veered off the road and hit a tree, as a consequence, the Respondent suffered injuries. It is clear that the Respondent fell off the vehicle after the same hit a tree after the driver had lost control thereof. Thus the injuries could not have been sustained had the vehicle not veered off the road but then the issue of whether the Respondent had made use of the seat belts is still a factor for consideration as to whether contributory negligence should be attributed to her. The failure by the Respondent to buckle up prior to the accident must be taken as a contributory negligence on her part since the seat belt might have militated against the extent of the injuries sustained in the accident. Even though the Respondent claimed that the seat belts were faulty, she ought not to have boarded the Appellant's vehicle. Having opted to board with the faulty seat belts in place, she must be held to have contributed to the injuries suffered.

16. PW1 testified that after the accident she was rushed to Jaramogi Oginga Odinga hospital where she was admitted for three days. That she had not buckled up because the seat belt was faulty. The Appellant contended that the Respondent should be held 100% liable for not wearing the safety belt.

17. It is my considered view that the Respondent who is an adult ought to have taken reasonable care to mitigate the degree of injuries and that the failure to put on the safety belt contributed to the degree of injuries suffered. Based on this, I that the Respondent contributed to the accident to some extent. Had she been buckled up, she might not have fallen off the vehicle. Of course, the Respondent could still have sustained injuries even while inside the vehicle after it had veered off and hit a tree. I therefore apportion the same to 80:20 in favor of the Respondent /plaintiff. Consequently, the finding on liability by the trial court was in error and must therefore be interfered with.

18. On Quantum of damages, it is trite law that "A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion." (see also Law Ja Kneller & Hancox Ag JJA In *Mkube Vs Nyamuro* [1983] KLR, 403-415, AT 403)

19. The question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant factors or failed to take into account a relevant factor or that the award is so inordinately high that it must be a wholly erroneous estimate of the damages or that it was inordinately low.

    The trial magistrate awarded Kshs. 1,000,000/= as general damages. The Appellant regards the award as inordinately high while emphasizing the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained. The Respondent herein sustained the following injuries:

    i. Swelling in the occipital region of the head

    ii. Brain hemorrhage as per CT-Scan

    iii. Tenderness on the chest

    iv. swollen left thigh

    v. Bruises on both knee joints

    The medical report by PW 2 George Mwita, a senior clinical officer at Kisumu hospital further gave an opinion that the degree of injuries was maim.

20 The Court of Appeal observed in *Simon Taveta Vs Mercy Mutitu Njeru* [2014] EKLR reasoned that: "The context which the compensation for the Respondent must be evaluated, and is determined by the nature and extent of injuries and comparable awards made in the past."

21. In the case of *Moiz Motors Ltd &Another VS Harun Nngethe Wanjiru* (2021) EKLR the Respondent suffered almost similar injuries and the court awarded Kshs 500,000/=. Iam inclined to award a similar sum to the Respondent. Hence, the award of the trial court was inordinately high and must be interfered with.

22. In view of the foregoing observations, it is my finding that the Appellant's appeal partly succeeds. The judgement of the trial court is hereby set aside and substituted with judgement being entered for the Respondent against the Appellant as follows:

    1) Liability is apportioned at 80:20 in favour of the Respondent.

2) The Respondent is awarded Kshs 500,000/- less 20% contributory negligence.

3) The Appellant will have half cost of the appeal while the Respondent will have full costs in the lower court

DATED, SIGNED AND DELIVERED AT SIAYA THIS 6TH DAY DECEMBER, 2024

D. KEMEI

JUDGE

In the presence of: -

M/s Ongonga.....for Appellant

M/s Nyakongo.....for Respondent

Ogendo.....Court Assistant