Voreza v Mutuku (Civil Appeal 91 of 2019)
[2024] KEHC 15944 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15944 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 91 OF 2019

FR OLEL, J

DECEMBER 17, 2024

BETWEEN

KENNEDY LUSENO VOREZA ..... APPELLANT

AND

CHARLES MUTUKU ..... RESPONDENT

JUDGMENT

A. Introduction

1. The Respondent filed the primary suit where he deponed that on 8th July 2018, he was lawfully standing off the Nairobi- Mombasa road near Mto Mawe when the appellant, his driver, servant and/ or agent while in the course of his employment drove motor vehicle registration number KCL 531L Toyota Probox, (hereinafter referred to as the suit motor vehicle) so recklessly, carelessly and negligently thereby permitting it to lose control, veer off the road and violently knock him down, when he was completely off the road hence causing him to suffer serious injuries.

2. The appellant filed his statement of defence denying all the facts pleaded by the respondent in the plaint and in the alternative averred that if there was any such occurrence it was solely caused by and/ or substantially contributed to by the plaintiff's negligence, particulars whereof were provided. The Appellant also pleaded that they shall rely on the doctrine of Violenti non fit injuria at trial.

3. During the trial, the respondent testified and called a traffic police officer to corroborate his case. The Appellant also testified and closed his case without calling any witness.

4. The trial Magistrate did consider the evidence presented and found that the Appellant was 100% liable for causing the said accident and awarded the respondent general damages of Kshs.500,000/= Special damages of Kshs.18,050/= plus costs and Interest of the suit.

B. The Appeal

5. The Appellant, being dissatisfied by the whole judgment delivered by the trial court, did file his memorandum of Appeal dated 2nd August 2022 and raised the following grounds of appeal namely: -

    a. That the learned Magistrate erred in fact and in law by assessing liability at 100 % in favour of the respondent despite the fact that there was no evidence whatsoever showing the appellants as being wholly to blame for the accident.

    b. That the learned Magistrate erred in law and in fact in failing to appreciate and consider that the burden of proof lay with the respondent to prove negligence against the appellant thereby leading to erroneous estimate by holding that the appellant was 100% liable.

    c. That the learned Magistrate erred in law and fact in fact by failing to consider and take into account the evidence that was adduced at the hearing by the appellant thereby leading to an erroneous finding and apportionment of liability.

    d. That the learned Magistrate erred in fact in awarding damages of Kshs 500,000/= in total disregard of the appellant's submissions and existing court awards in similar cases.

    e. That the learned Magistrate misdirected herself by failing to consider the appellant's submissions, medical reports, initial treatment notes and summary from both Shalom Hospital and Kitengela West Hospital on the injuries sustained by the respondent thereby arriving at the wrong decision on quantum.

    f. That the learned trial Magistrate erred in law and fact in failing to take into account the relevant facts in the computation of damages thereby arriving at a wrong figure which is manifestly excessive.

    g. That the learned trial magistrate erred in law and fact thus disregarded the appellant's submissions and cited authorities on record thereby arriving at a wrong decision on both liability and quantum which occasioned a miscarriage of justice.

    h. That the learned trial magistrate erred in law and fact in holding that the appellant was negligent and that such negligence resulted in awarding an erroneous 100% liability on the appellant's side.

6. The appellant thus urged this court to allow this Appeal and set aside the award made by the trial court on 21st June 2019.

C. Evidence at Trial.

7. PW1 Charles Mutuku Silas adopted his witness statement dated 12.09.2018 and testified that on 8th July 2018, he was walking from Mavoko headed towards Machakos direction and on reaching the police roadblock near the Steel Plant company main gate, he stopped to look out for oncoming traffic before preparing to cross the road. The suit motor vehicle which was overtaking from Machakos direction suddenly came and knocked him down, while he was still off the road causing him to lose consciousness, which he later regained at Shalom Hospital.

8. Due to the impact of the accident, he had sustained a blunt head injury, deep cut wound on the forehand, bruises on the face, blunt injury to the right shoulder, fractured metacarpal right hand, and fracture of the tarsal bone of the right foot. He produced all his claim supporting documents as Exhibits and blamed the driver of the suit motor vehicle for overtaking when it was not safe to do so

and knocking him down when he was off his rightful lane. He prayed for compensation for injuries sustained and cost of the suit.

9. Upon cross-examination, he confirmed that the accident occurred on 08.07.2018 at 5.00 pm, and he was taken to Shalom Hospital by the driver of the suit motor vehicle and also to Kitengela West Hospital on the same day, where head and CT scans were done. Initially, he did not know that he suffered a fracture and this was discovered later as he continued to attend hospital for treatment at Kitengela County Hospital. He had checked on the right and left as he was about to cross the road, and had not crossed when the suit motor vehicle which was overtaking hit him. He was not at fault nor did he contribute to the occurrence of the accident.

10. PW2, PC Gladys Cheroit based at Athi River Police Station- traffic section confirmed that this accident was recorded under OB51/8/7/2018 as having occurred at about 4.00 pm along Mombasa Nairobi road between Mto Mawe and Mlolongo where the suit motor vehicle driven by Shadrack Mutua is reported to have knocked down a Pedestrian. The motor vehicle was from Mombasa headed to Nairobi direction when it knocked down the plaintiff, who was crossing the road from the right to the left as you face Mombasa direction. The pedestrian was rushed to hospital and the motor vehicle was towed to the station. The police abstract did not indicate who reported the accident.

11. Upon cross-examination, PW2 confirmed that she was not the investigating officer of this incident and did not have any other file regarding the matter. The accident occurred when the pedestrian was crossing the road and the suit motor vehicle driver was not charged for any traffic offence. She was relying on the information noted in the abstract and was not sure if the pedestrian was also to blame for the accident that occurred.

12. DW1 Kennedy Soreza adopted his witness statement dated 18.11.2018 and further testified that on 08.07.2018, he had left the suit motor vehicle under the custody of one Shadrack Nyala and was later in the evening informed that the suit motor vehicle had been involved in an accident. It was towered to the police station, inspection carried out and the said motor vehicle was later released. He could not tell who was at fault between the plaintiff and Shadrack who was driving the suit motor vehicle.

13. Upon cross-examination he confirmed that the suit motor vehicle belonged to him and it caused the accident on the material day. He could not tell the circumstances of the accident.

D. Analysis & Determination

14. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123).

15. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316.

16. The issues that arise for determination are whether the trial court correctly apportioned liability amongst the parties herein and whether the damages as awarded were manifestly excessive considering the circumstances herein.

(i) Liability

17. 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, it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will only interfere when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

18. The issue of apportionment of liability was also discussed in Khambi and another Vs Mahithi and another (1968) E.A. 70 where 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." Similar decisions have been reached in Mahendra M Malde Vs George M Angira Civil Appeal No 12 of 1981."

19. In the decision by the Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows: 'To determine what caused 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 facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one 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 caused the accident. I doubt whether any test can be applied generally...'"

20. In this case, the evidence by the Respondent was that on 8th July 2018, he was walking towards Machakos from Mavoko direction, and on reaching the steel plant area, he decided to cross the road, but before doing so, looked on both sides to look out for incoming traffic. Before making a decision to cross, he was knocked down by the suit motor vehicle, which was overtaking and being driven towards Nairobi direction. He lost consciousness and regained the same at the hospital.

21. PW2 confirmed that the accident indeed occurred and was reported at Athi River police station. In her evidence in chief she stated that the appellant was knocked down as he crossed the road, but in cross-examination retracted and stated that, "I am not sure if the pedestrian was to blame. It was not indicated who reported it. "The Appellant on his part confirmed that his authorized driver had control of the suit motor vehicle but he did not know the circumstances under which the said accident occurred.

22. The respondent's evidence as to what led to the occurrence of the accident was not adequately rebutted by the Appellant, nor did PW2 present any evidence to confirm that the accident occurred as the respondent was crossing the road and was not sure if the pedestrian was to blame for the said accident. The evidential burden shifted to the respondent to bring concrete evidence to rebut the respondent's version of events, but he failed to do so as expected under section 108 of the *Evidence Act*. The trial court therefore cannot be faulted for arriving at her decision to find the Appellant 100% liable for this accident evidence.

(ii) Quantum

23. 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."

24. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 also 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."

25. The respondent sustained a blunt head injury, deep cut wound on the forehead, bruises on the face, blunt injury on the right shoulder, fractured metacarpal bone on the right hand, and fractured tarsal bone right foot which injuries were confirmed by the medical report authored by Dr. Titus Ndeti and treatment notes produced into evidence. The trial court awarded Kshs 500,000/= for general damages an award which I find to be just and proportionate considering the injuries sustained and similar fact precedents. I therefore find no reason to interfere with the said award.

E. Disposition

26. Accordingly, I do find that this Appeal lacks merit and proceed to dismiss the same with costs to the Respondent.

27. The costs of this Appeal are assessed at Kshs 120,000/= all- inclusive.

28. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of December, 2024.

In the presence of: -

Mr. Isolio for Appellant

Mr. Mochoma for Respondent

Susan/Sam - Court Assistant