Wanderi & another v Macharia (Suing as the Administrators of the Estate of Samuel Macharia Mwangi a.k.a Samuel Macharia - Deceased) (Civil Appeal 206 of 2023) [2024] KEHC 15248 (KLR) (2 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15248 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 206 OF 2023

HM NYAGA, J

DECEMBER 2, 2024

BETWEEN

FRANCIS KIBE WANDERI ..... 1ST APPELLANT

SAMUEL MWANGI MAIGWA A.K.A SAMWEL MWANGI MAIGUA ..... 2ND APPELLANT

AND

NANCY NALIAKA MACHARIA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF SAMUEL MACHARIA MWANGI A.K.A SAMUEL MACHARIA - DECEASED) ..... RESPONDENT

(Being an Appeal from the Judgment/Decree of the Honourable K.L Orenge – PM in Nakuru CMCC NO. 672 of 2019 delivered on the 26th July,2023)

JUDGMENT

Introduction

1. This appeal challenges the trial magistrate's judgment on the twin issues of apportionment of liability and quantum of damages.

2. The trial court apportioned liability in the ratio of 50:50 between the appellants and respondent and awarded the Respondent Ksh.200,000/- as general damages, Ksh. 8,950/- as Special damages plus costs and interest.

3. The Appellants being aggrieved by the judgement on the aforesaid issues filed this Appeal and preferred 17 grounds in the Memorandum of Appeal amended on 31st August,2023. The said grounds are prolixious and repetitive. However, they can be summarized as follows: -

i. That the Learned Magistrate erred in Law and in fact by failing to consider the Appellant's submissions which was filed on 30th June,2023 and cited that the Appellants did not file their submissions when indeed the same were on record.

ii. That the Learned Magistrate erred in Law and fact by failing to consider the Appellants' evidence and submissions on points of law and facts thereby apportioning liability at the ratio of 50:50 between the parties with no particular backing or analysis of the same.

iii. That the Learned Magistrate erred in Law and fact by failing to consider the Appellants' evidence and submissions on points of law and facts thus finding that the Respondents were entitled to General Damages of Ksh. 200,000/- which is inordinately high in the circumstances.

iv. That the Learned Magistrate erred in law and fact by over relying on the Respondents' submissions.

v. That the Learned Magistrate erred in law and in fact by relying on erroneous principles of law in arriving at an excessive award on quantum.

vi. That the Learned Magistrate erred in law and in fact in finding that the Respondents had proved their case on a balance of probabilities in view of the evidence on record.

4. By this appeal it is urged that this court do set aside the trial magistrate's findings on liability and quantum and substitute it with a fresh award. It is also proposed that the costs of this appeal and the trial court be awarded to the Appellants.

5. This Court gave directions for parties to file submissions in respect to the instant Appeal, however, as at the time of writing this judgement there was none on record.

Background

6. The Plaintiffs/Respondents vide an amended plaint dated 22nd February,2021 brought the suit in their capacity as the legal representatives of the Estate of Samuel Macharia Mwangi A.K.A Samuel Macharia (the deceased) against the Defendants/Respondents seeking for general damages for pain, suffering and or loss of amenities, Special damages of Ksh. 8,950/=, costs of the suit plus costs and interests and special damages for serious injuries sustained by the deceased in a road accident on the 13th May,2019. It was alleged that the 1st Appellant was the owner of Motor Vehicle Registration Number KCK 205 H Toyota Matatu while the 2nd Appellant was the driver. The plaintiff's case in the lower court was that on the material date the deceased was a lawful rider of Motor Cycle Registration Number KMES 128 E Boxer along Nakuru- Nyahururu Road at Bismark Petrol Station when the 2nd Appellant drove the said Motor Vehicle Registration Number KCK 205 H Toyota Matatu in his lawful duty so carelessly, negligently and or recklessly thereby permitting it and or causing the same to violently hit, collide and or ram into the said deceased.

7. Upon service of summons, the Appellants entered appearance and filed their statement of defence on 27th August,2019 denying the Respondents' claim. They pleaded in the alternative that the accident was caused by the negligence of the deceased.

8. When the trial commenced, the plaintiffs/Respondents called a total of 3 witnesses while the Defendants/Appellants called two witnesses.

9. The trial court after considering the evidence by both parties apportioned liability in the ratio of 50:50 between the parties for reasons that the was no dispute that there was an accident, that the deceased

was a rider and rammed into the Appellants 'motor vehicle from behind and sustained injuries and that the Appellant's driver said the accident happened at the bump.

10. On quantum, the trial court considered the nature of the injuries sustained by the deceased and guided by the cases of Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR & Wahiya Vs. Luchevelelli [2022]eKLR on similar injuries awarded the Respondents Ksh. 200,000/= as general damages. On special damages the court awarded Ksh. 8,950/= that were specifically pleaded and strictly proved. The Respondents were also awarded costs and interests of the suit.

Issues For Determination

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The nature of the said duty was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another versus Associated Motor Boat Company and Others [1968] EA 123. The said judges pronounced themselves as follows:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."
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> [The appellate court] is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

12. With the above principles in mind, I will now proceed to deal with the appeal.

13. Having perused the Memorandum of Appeal and the entire record of appeal, I am of the considered view that the issues that crystalize for determination are: -

    i. Whether the trial court erred by apportioning liability in the ratio of 50:50 between the parties herein.

    ii. Whether the Appellant's submissions were filed and if yes, whether failure to consider them rendered the trial court's judgement defective.

    iii. Whether the quantum awarded by the trial court were manifestly excessive

14. I have perused the typed proceedings and I note that the evidence of PW2 and DW1 is missing. It is not in dispute that the Respondents' case was founded on the alleged negligence of the Appellants. As such, the Respondents by law required to establish on a balance of probabilities that:

    a. The Appellants owed the deceased a duty of care;

    b. The Appellants breached that duty, and;

    c. That the deceased suffered injury as a result of that breach.

15. The Respondent's case, as it emerged from the Respondent's witnesses was that on the material date the deceased was lawfully riding his motor cycle when the Appellant's driver negligently drove or

managed the suit Motor vehicle and as a result it collided with the deceased. The Respondents blamed the Appellant's driver for reversing the motor vehicle without taking account of the surrounding circumstances. PW3 told court that she was a passenger in the suit motor vehicle and she witnessed the accident. She said the same happened at Bismark Petrol station. It was her testimony that the matatu driver reversed at the petrol station to the road and collided with the deceased. On cross examination, she stated that the deceased was heading towards Bahati and that both the suit motor vehicle and motorcycle were facing the same direction. She said the matatu reversed and it was hit at the rear by the deceased. She did not adduce any evidence to prove she was a passenger in the suit Motor Vehicle.

16. The Appellants' case was that the deceased rammed into the suit motor vehicle at the rear and as a result of the impact the rear bumper and wind screen were damaged.

17. DW2 was the police officer. He reiterated the appellant's position that the accident happened along Nakuru- Nyahururu Road near Bismark Petrol station. He further stated that the rider was to blame for the accident as he failed to keep a safe distance. During cross examination, he confirmed he did not visit the scene of the accident and did not have sketch plan of the accident. He also confirmed that the investigations were not concluded and the police abstract produced showed the matter was pending under investigations. He added that the deceased claimed that he had been hit by the reversing motor vehicle. He confirmed the deceased was taken to the hospital by the police.

18. From the testimonies of the witnesses presented by both sides, it is patent the accident occurred and the deceased sustained injuries. However, the circumstances leading to the accident were uncertain. Given that scenario, the trial court was right in holding that liability be assessed at 50:50, based on the principle that where there is evidence of a clash or collision, but it is unclear on who was to blame, both sides have to take equal blame.

19. In Farah V Lento Agencies [2006] 1 KLR 124, 125, the Court of Appeal held that:

> " Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame".

20. On the same issue reference is also made to the cases of Lakhamshi vs. Attorney General [1971] EA 118 (Spry VP, Lutta & Mustafa, JJA), Domitila Wangui Karugu & another vs. Dagu Hidris Haide [2020] eKLR (Majanja, J), Amani Kazungu Karema vs. Jackmash Auto Ltd & another [2021] eKLR (Nyakundi, J) and Ndatho vs. Chebet [2022] KEHC 346 (KLR)(Gitari, J).

21. With Respect to the second issue, the trial court in its judgement stated that the Appellants failed to file their submissions despite undertaking to do so within 7 days. However, the Appellants did file their submissions. The same were stamped and received by the court on 30th June,2023. The trial court therefore erred by finding otherwise.

22. As to whether failure to consider submissions is a ground fatal to the judgement, this Court's answer is in the negative. Submissions do not constitute pleadings or evidence. They are simply arguments that parties use to urge their idea or issue to the Court. They do not take the place of evidence and failure to consider them is not fatal to a decision.

23. The Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR stated that:

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented".

24. Similarly, in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 the court stated as follows:

> " Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case."

25. Therefore, it is the considered view of this Court that the failure by the part of the trial court to consider the submissions of the Appellants did not render its judgement defective.

26. On general damages, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that

> " Comparable injuries should attract comparable awards"

27. Similarly, in Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal observed as follows:

> " 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."

28. In assessing injuries arising from a road traffic accident therefore, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages.

29. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
    2. The award should be commensurable with the injuries sustained.
    3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
    4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
    5. The awards should not be inordinately low or high.

30. In the instant case, it was uncontroverted that the deceased sustained the following injuries;Soft tissue injuries of the right parietal regionSoft tissue injuries of the neck.Deep cut wound on the right side of the forehead.Soft tissue injuries of the shoulder joints.

31. The trial court in awarding Ksh. 200,000/- as general damages were guided by two authorities. i.e. Francis Omari Ogaro v JAO (minor suing through next friend and father GOD (supra) & Wahiya Vs. Luchevelelli (supra).

32. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD, Maina J, on appeal, reduced an award of Kshs 230,000/- to Kshs 180,000 for a claimant who had sustained Multiple cut wounds on the right lower limb, bruises on the right lower limb, bruises on both elbows, bruises on the right iliac region, bruises on the frontal region, bruises on the temporal region, lacerations on the frontal region, Cut wounds on the left iliac region, Cut wounds on the frontal region, Cut wounds on the temporal region & Blunt trauma to the abdomen. These injuries were more than in the present case but were classified as soft tissue injuries.

33. I have also looked at other authorities on comparable injuries. i.e. Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR, Nyakundi J, on appeal, reduced an award of Kshs 350,000/- to Kshs 140,000/ & Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, Aburili J, on appeal, reduced an award of Kshs 300,000/- to Kshs 175,000/-.

34. Using the above decisions as comparable awards, and applying the principles earlier enunciated, I am persuaded that the award by the trial court was within the range of similar injuries and I see no reason to interfere with it.

35. The upshot is that the appeal is devoid of merit and I hereby dismiss it with costs to the respondents.

36. It is so ordered.

SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 2ND DAY OF DECEMBER 2024.

H. M. NYAGA

JUDGE.