



Yogo v Kenya Diabetes Management & Inf. Centre Limited & 2 others (Civil Appeal E082 of 2024) [2024] KEHC 15466 (KLR) (4 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E082 OF 2024
RE ABURILI, J
DECEMBER 4, 2024**

BETWEEN

JOSEPHINE ODHIAMBO YOGO APPELLANT

AND

**KENYA DIABETES MANAGEMENT & INF. CENTRE
LIMITED 1ST RESPONDENT
PAUL WAITA KINYANJUI 2ND RESPONDENT
BENARD OWINO OPIYO 3RD RESPONDENT**

(Appeal arising from the judgment and decree of Hon. M.I. Shimenga, SRM delivered on 21st March, 2024 in Kisumu CMCC Cause No. 184 of 2017)

JUDGMENT

Introduction

1. The appellant instituted suit against the respondents vide a plaint dated 25th April 2017 that was amended on the 23rd January 2018 and further amended on 26th April 2023. The appellant sought general and special damages for injuries sustained following a road traffic accident that occurred on the 21st November 2015. It was her case that she was travelling on motor vehicle registration number KAU 031K Toyota Hiace Matatu along the Kisumu – Busia road when at Chulaimbo area, the respondents carelessly, negligently and/or recklessly managed and/or controlled the said motor vehicle along the said road causing it to ram into motor vehicle registration number KBL 768M, a ISUZU Canter that was stationery thus causing the appellant to sustain the injuries.
2. The appellant in her further amended plaint pleaded that she sustained the following injuries:
 - a. Tibia right-fixed with A/K pep lax



- b. Left femur fixed with K-Ncal
3. The 1st respondent filed a statement of defence dated 15th June 2017 denying the allegations in the plaint and further averring that it sold the motor vehicle registration KAU 031K to the 2nd respondent. The 2nd and 3rd respondents never entered appearance and none of the respondents attended the hearing.
4. In her judgement, the trial magistrate held the respondents 100% liable for causing the accident as the appellant's case remained uncontroverted. The trial magistrate assessed general damages at Kshs. 300,000 for the appellant.
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 9th April 2024 raising the following grounds of appeal:
 - a. The learned trial magistrate erred in law and in fact in finding that the plaintiff was entitled to general damages of Kshs. 300,000 which was disproportionately low given the severity of the injuries sustained by the appellant that it presented a miscarriage of justice.
 - b. The learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
 - c. The learned trial magistrate erred in law and in fact by neglecting to take into account conventional awards for general damages in comparable injury cases and by issuing a relatively low award for pain and suffering.
 - d. The learned trial magistrate erred in law and in fact when making her award by failing to consider the passage of time and incidence of inflation.
6. The appeal was canvassed by way of written submissions with only the appellant and the 1st respondent filing written submissions.

The Appellant's Submissions

7. The appellant submitted that an award of Kshs. 5,000,000 as pleaded before the trial court, would be sufficient to compensate her for the severe injuries sustained as a result of the accident. Reliance was placed on the cases filed in the trial court as well as the following cases:
 - a. *Sabina Nyakenya Mwangi v Patrick Kigoro & Another* (2015) eKLR where the respondent was awarded Kshs. 3,000,000 in general damages for pain and suffering and the court equally took into account the disability occasioned to the plaintiff as a result of the accident.
 - b. *Kieri Peter & 2 Others v Martha Njeru Githiomi* (2020) eKLR where the court awarded Kshs. 1,500,000 for arachnoid hemorrhage, compound fracture of tibia and fibula with no permanent disability.
 - c. *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Another* [2015] eKLR where Kshs. 1,500,000 was awarded for fracture of left ulna, fracture of right tibia and fracture of right fibula.
 - d. *Pestony Limited & Another v Samuel Itinye Kagoko* [2022] eKLR where 1,300,000 was awarded for unconsciousness broken out fracture of tibia and fibula bones and soft tissue injury to the head.



The 1st Respondent's Submission

8. It was submitted that the appellant knew the 1st Respondent was not a beneficial owner or the registered owner of the motor vehicle and hence could not be held liable however, due to the unresponsiveness of the liable Respondents, she chose to join the 1st Respondent and hold him accountable as he is the only Respondent that entered appearance and defended the suit.
9. It was submitted that the Appellant also failed to provide proof of search from the Registrar of Motor Vehicles in regards of Proof of Ownership of the said Motor Vehicle and having been put to strict proof the court failed to make a finding on who is the real owner/beneficial owner went into error as the Plaintiff failed to establish by cogent evidence who the owner was among the 3 Respondents.
10. The 1st respondent submitted that the Learned Trial Magistrate failed to consider all facts and balance of probabilities in holding the him liable as the registered and beneficial owner of the motor vehicle.
11. The 1st respondent submitted that that there was no relationship between the it and the 3rd Respondent in regards to the motor vehicle in question and the accident in totally and as such the Judgement entered against the 1st Respondent be set aside and the consequential costs be borne by the Appellant.

Analysis and Determination

12. I have considered the pleadings herein.
13. I do note that the issues raised by the 1st respondent were not pleaded in the Memorandum of Appeal dated 9th April 2024 that was filed by the appellant. Furthermore, no cross appeal was filed by the 1st respondent hence this court cannot turn submissions into a cross appeal and determine unpleaded issues. This Court is bound by pleadings and not to introduce extraneous matters.
14. Had the 1st respondent intended to raise issues against the judgement by the trial magistrate, it ought to have filed a memorandum of appeal or having been served by the instant appeal, he ought to have filed a cross-appeal.
15. Having failed to do so, the 1st respondent was only limited to submitting on the issues raised in the appellant's memorandum of appeal. It is trite that parties cannot rely on submissions to do that which should have been done by pleadings and evidence. See the cases of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR and *Independent Electoral and Boundaries Commission & An. v . Stephen Mutinda Mule & 3 others* (2014) eKLR.
16. I will thus address myself to the issues of quantum that have been raised in the instant appeal.
17. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
18. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“[A]n 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 allowances in this respect”

19. I note that none of the respondents took part in the hearing. The 1st respondent only filed a statement of defence. It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. See the cases of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001, *Motex Knitwear limited v Gopitex Knitwear Mills limited* Nairobi (Milimani) HCCC No., 834 of 2002 and *Autar Singh Babra and another v Raju Govindji, HCCC No. 548* of 1998. That said, the appellant still had to prove her case.
20. Having considered the record memorandum of appeal, the submissions and the authorities relied on by the appellant, I opine that the only issue for determination is whether the quantum for general damages awarded by the trial court was inordinately low to warrant this court’s interference with the same.
21. In the further amended plaint dated 26th November 2023, the appellant pleaded that she sustained the following injuries;
 - a. Tibia right-fixed with A/K pep lax
 - b. Left femur-fixed with K-Ncal
22. The appellant was the only one who testified on the nature of injuries that she sustained. She relied on the medical report dated 31st October 2016, that she produced as P Exh. 3, and that was prepared by Dr. Olima in which it was listed that the appellant sustained the following injuries;
 - a. Bi-malleollar fracture of the tibia – fibula
 - b. Friction burns of the right leg
 - c. Friction burns of the Tendo-Achillis and left ankle joint and foot
23. I have considered the authorities relied on by the appellant and I find that they involve injuries which are more serious than those sustained by the appellant.
24. I have found the following cases helpful in terms of comparison:
25. In *Harun Muyoma boge v Daniel Otieno Agude* [2015] eKLR case in which the plaintiff sustained blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia and fibula and soft tissue injuries, the plaintiff was awarded Kshs. 300,000 in general damages.
26. In the case of *Simon Mutisya Kavii v Simon Kigutu Mwangi* [2013] eKLR where the victim sustained injuries in the nature of comminuted fracture of the left tibia fibula and severe friction burn left thigh and leg and was awarded Kshs 200,000 as general damages.
27. As to whether I should interfere with the award made by the trial court the Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another* (No.2) (1987)) KLR 30 guided that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”



28. Guided by the comparable cases above, it is my finding that the award of Kshs 300,000/= for the injuries sustained by the appellant was not inordinately low. I find no reason to interfere with the trial magistrate's award of the same and proceed to uphold it.
29. The upshot of the above is that I find that this appeal lacks merit and I proceed to dismiss it. Each party to bear their own costs of the appeal.
30. The lower court file to be returned forthwith.
31. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

