



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 390 OF 2017

MICHAEL MURAGE.....APPELLANT

VERSUS

DORCAS ATIENO NDWALA.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgement of the Chief Magistrate in Milimani CMCC No. 663 of 2013 delivered on the 26th January 2017.
2. The respondent instituted suit against the appellant for compensation for general damages, special damages of Kshs. 236,320/=, costs of the suit and interest as a result of injuries suffered by the respondent in a road traffic accident.
3. The trial court awarded the respondent Kshs. 2,000,000/= for pain and suffering, Kshs. 172,800/= for loss of earnings, Kshs. 90,000/= for future medical treatment and Kshs. 3,600/= for special damages as well as cost of the suit and interest.
4. The appellant's who was the 1st defendant in the lower court suit, appealed on fifteen grounds as indicated in the Memorandum of appeal that can be summarised as follows;

a) That the learned magistrate erred in law and in fact by holding the appellant 80% liable for the accident.

b) That the learned magistrate erred in law and in fact by awarding the respondent exorbitant quantum of damages without considering the medical evidence and nature of injuries sustained by the respondents.

5. The parties consented to dispose of the matter by way of written submissions.

B. Appellant's Submissions

6. The appellant submitted that the respondent's testimony before the trial court did not prove particular of negligence against him as she could not tell which car hit her and further that the respondent failed to tender any evidence to prove the appellant's culpability.
7. He further submitted that the trial court failed to consider his statement which had been adopted as evidence by consent, which statement proved that he was not to blame for the accident.
8. He also submitted that the award of Kshs. 2,000,000/= for general damages was exorbitant and that the trial court did not indicate any legal reasoning for the same and further that the award of Kshs. 172,800/= for loss of earnings was not justified as the respondent failed to prove her occupation and how much she used to earn.

C. Respondent's Submissions

9. The respondent submitted that the appeal was incompetent and must be rejected on the grounds that the appeal had been preferred only against the Respondent whereas there were 3 other co-defendants in the trial court who the appellant wants to be held liable for the accident yet they are not involved in the current appeal.

10. She further submitted that in exercise of powers conferred upon it by section 78 of the civil procedure act this court should find that none of the defendants in the trial court took out a notice to co-defendant as provided under Order 1 Rule 24 of the Civil Procedure Rules and as such the trial court could not apportion liability between the joint *tort feasons*. She relied on the case of **Stephen Kagoivo v Joseph**

Waithaka Kabai & 3 Others HCCC No. 4089 of 1998 (unreported) and that of **Zarina A. Shariff v Noshir P. Sethna [1963] EA 239.**

11. It was further submitted that an appellate court should not interfere with the issue of apportionment of liability unless the magistrate came to a manifestly wrong decision or came to the decision based on wrong principles. She relied on the cases of **Karisa v Solanki (1969) EA 318** and **Vyas Industries v Diocese of Meru [1982] KLR 114.**

12. It was further submitted that the trial court ought to have entered judgement against the defendants jointly and severally as was the case in the case of **A.O. Bayusuf & Sons Ltd v Samuel Njoroge Kamau [2008] eKLR.**

13. In regard to the damages awarded to her, she submitted that this court should be guided by the Court of Appeal decisions in the **Simon Muchemi Atako (supra)** case as well as the cases of **Kimatu Mbuvi v Augustine Munyao Kioko [2006] eKLR**, **H. West & Son Ltd v Shepherd [1964] AC 326, 353** and in **Butt v Khan [1981] KLR 349 at 356**

14. On lost earnings, she submitted that she had produced evidence proving the same and further the evidence of Dr. Wokabi had corroborated this.

D. Analysis & Determination

15. I have considered the written submissions of the appellant's advocates and the submissions of the respondents' advocates. I have also considered the authorities relied on by the respective counsel.

16. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty of the court in a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd.& others [1968] EA 123.** The same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424.** The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

17. These three principles are well settled and are derived from various binding and persuasive authorities including **Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000:** Tunoi, Bosire and Owuor JJA); **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000:** O'Kubasu, Githinji and Waki JJA); **Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002).**

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

19. The respondent's case was founded on the alleged negligence of the Appellant. As such, they were by law required to establish on a balance of probabilities that:

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

b. The Appellant breached that duty, and;

c. The deceased suffered injury as a result of that breach.

20. The respondent's case as it emerged from trial was that she was a pedestrian walking off Juja road when a car belonging to the appellant, KBP 934H collided with another belonging to the 3rd defendant before the trial court, that was being driven by the 4th defendant, who are not part of this appeal.

21. The appellant admitted that the accident occurred but denied that the respondent was a pedestrian on the aforementioned road and that she sustained the injuries alleged in her plaint. The appellant did not call any witness but instead adopted his witness statement as evidence. A perusal of the court record reveals that the appellant did not file any witness statement.

22. A police abstract that was marked exhibit 6 confirmed the accident occurred as alleged by the respondent in her plaint.

23. The respondent suffered the following injuries;

a) Fracture of the right femur fixed with K-nail

b) Compound fracture of left tibia

c) *Compound fracture left fibula*

d) *Massively swollen left leg*

e) *12% permanent disability.*

24. The respondent testified that she saw 2 motor vehicle's colliding, one belonging to the appellant and the other belonging to the 3rd defendant in the trial suit. The 3rd defendant testified that the appellant's motor vehicle was overlapping when the accident occurred and that indeed the respondent was walking off the road when one hit her.

25. The respondent further testified that she was a fish monger who earned between Kshs. 300-500 a day. However, she did not produce any documents to support this.

26. On the issue of liability, it is trite law that he who alleges must prove the same. Section **107, 108 and 109 of the Evidence Act** places the burden of proof of a particular fact on the person who wishes the court to believe in its existence unless it is proved by law that the proof of the fact shall lie on any particular person.

27. The appellants have argued in their written submissions that the respondent did not adduce any evidence to prove negligence on his part. I have perused the respondent's evidence which reveals that the respondent proved negligence against the appellant. Further the testimony of the 3rd defendant was to the effect that the appellant's driver was overlapping when the accident occurred. The court record bears no evidence from the appellant seeking to disprove the allegations raised by the respondent. It is on this basis that the trial court apportioned liability at 80% against the appellant and his driver, the 2nd defendant. I therefore find no reason to disturb the trial court's decision on liability.

28. On dealing with quantum, the court will be guided by the principles enunciated by the Court of Appeal in the case of **Kenfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30**. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.” see also Butt v Khan (1981)KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.”

29. The special damages and future medical expenses are not contested by the appellant. He contests the award on general damages as well as loss of earnings.

30. I take into consideration the nature of the injuries in this case and the global impact on life quality on the respondent as well as the guiding principle that in assessing damages for pain, suffering and loss of amenities, the court ought to take into consideration the prevailing conditions in Kenya while ensuring that uniformity must as much as possible be sought in the award of damages. I have also looked at the nature of injuries suffered by the respondent. In my view, the respondent's quality of life has been negatively affected. Future surgeries have been recommended by the doctor in the medical report.

31. As for the assessment of damages, in addition to the two comparable cases cited by the respondent in her submissions before the lower court, I rely on the case of **Hellen Atieno Oduor v S.S. Mehta & Sons and Another (2015) eKLR** –where the claimant suffered a fracture of the right tibia and fibula, multiple fractures of the right ribs on the right side, chest injuries, abdominal trauma and fracture of the right scapula. The Court awarded Kshs. 1.5 Million as compensation for pain, suffering and loss of amenities.

32. I am of the considered opinion that the award of Kshs. 2,000,000 for pain and suffering is adequate and not inordinately high and it is hereby upheld.

33. On loss of earnings, the appellant submitted that the respondent failed to prove her occupation and how much she used to earn and thus the same should not have been awarded. The magistrate awarded Kshs. 172,800/= in this item.

34. In the case of **Butler vs- Butler (1984) KLR 225**, the issue of awarding damages for loss of earning capacity was substantively considered and it was held inter alia that;

“whilst loss of earning capacity should be included as an item of general damages it is not improper to award it under its own heading. a victim of personal injury who lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as loss of earning capacity.....”

35. The Court of Appeal in **Jacob Ayiga Maruja & Francis Karani versus Simeon Obayo (2005) eKLR** held that documentary evidence is not always necessary to prove loss of earnings. The Court held that;

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to

very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

36. In my view, the magistrate was correct in making the award of loss of earnings of Kshs. 172,800/=.

37. Consequently, I find no reason to interfere with the issue liability and that of assessment of damages. The judgment of the lower court is hereby upheld.

38. I find no merit in this appeal and dismiss it with costs to the respondent. The appellant will also meet the costs of the court below.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE