



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 141 OF 2013

CHRISTOPHER NJOROGE NGUGI.....1ST APPELLANT

STELLA KATHURE.....2ND APPELLANT

VERSUS

COSMAS KITHUSI NZIOKA.....RESPONDENT

(Being an appeal from the whole of the Judgment in Machakos CMCCC No. 35 of 2011

delivered on the 14.06.2013 by the Hon. I. Kahuya Ag. Senior Resident Magistrate)

JUDGMENT

Introduction

1. This is an appeal on both liability and quantum from a judgment of the trial court in a personal injury claim. The 2nd appellant was sued as the registered owner of motor vehicle registration no. KBJ 207K whereas it was alleged that the 1st appellant was her authorized driver, servant or agent. The 2nd appellant, the alleged registered owner was sued as the 3rd defendant and the driver (1st appellant) as the 1st defendant.

2. The respondent in his Complaint averred he was lawfully walking as a pedestrian when he was knocked down by the 2nd appellant's motor vehicle.

3. The matter proceeded to trial and judgment was entered on 14.6.13 whereby the 1st defendant and 3rd defendant were held 100% liable for the accident and were ordered to pay a sum of Ksh 682,960 as general damages for pain and suffering. Being aggrieved by the said judgment they appealed to this court. Their memorandum of appeal dated 9.07.2013 sets out the following specific grounds:

1. The learned magistrate erred in law and in fact in making a finding that the defendant's driver was to blame wholly for the accident.
2. That the learned magistrate erred in law and in fact in finding that the plaintiff/respondent was entitled to general damages Ksh682,960/= that were excessive and manifestly too high in view of the injuries suffered by plaintiff/respondent.
3. That the learned magistrate's award of general damages was so inordinately high as to be a wholly erroneous estimate of general damages and was a miscarriage of justice.
4. The learned magistrate erred in fact and in law in failing to consider the evidence adduced by the insured who witnessed the accident and clearly stated that the pedestrian was to blame for the occurrence of the said accident and was the author of his own misfortunes.
5. The learned magistrate erred in law and in fact in failing to consider the evidence in the police file and the findings of the investigating officer with regard to the speed of the motor vehicle at the time of the accident.
6. The learned magistrate erred in law and in fact in failing to assess the speed at which the defendant motor vehicle was moving in his assessment that the vehicle was over speeding.

7. The learned magistrate erred in law and in fact in making a finding that the evidence that the driver was driving at a moderate speed was given from the bar.
8. The learned magistrate erred in law and in fact in failing to consider the evidence adduced in court by the investigating officer that on inspection of the said motor vehicle after occurrence of the said accident it was established that the said matatu had been fitted with a speed governor that was in good condition.
9. The learned magistrate erred in law and in fact in failing to appreciate that it was the plaintiff to prove this case and the onus is on he who alleges a fact not he who denies a fact.
10. That the learned magistrate erred in fact and in law in failing to consider the defendant's submissions on quantum and liability.

It is proposed to ask the court for the following **Orders that:**

- a. This Appeal be allowed with costs
- b. The judgment of the trial court be set aside
- c. The respondent's suit against the Appellant be dismissed with costs to the Appellants
- d. Any other order that this court may deem fit.

The Plaintiff

4. The respondent's claim against the appellants was on negligence against the driver of the subject motor vehicle based on the doctrine of *res ipsa loquitur* to prove negligence. The plaintiff's injuries were stated at paragraph 7 as follows:

- a. Severe bruising on the right iliac fossa approximately 7cm x 8cm in size
- b. Right knee bruising approximately 2x3cm in size
- c. Deformed and shortened right lower limb
- d. Fractured pelvis (left side)
- e. Comminuted fracture – right femur

Particulars of special damages

1. Medical report.....Ksh.3000
2. Medical expenses.....Ksh.45,270

The Defence

5. The defendants/appellants denied ownership of Motor Vehicle Registration No. KBJ 207K and put the plaintiff to strict proof. The particulars of negligence attributed towards them and the application of the doctrine of *res ipsa loquitur* were also denied.

6. Further, it was averred that if the accident ever happened it was caused solely and substantially contributed by the negligence of the plaintiff.

7. The defendants pleaded *volenti non fit injuria*.

Submissions of the Parties

8. Parties agreed to canvass the appeal by way of written submissions.

Appellants Submissions

9. The appellants urged the appeal on issues of liability and quantum and urged on the evidence that although the respondent had testified to have been knocked from behind while walking by Motor Vehicle Registration No. KBJ 207K, which evidence was corroborated by PW3, PC Kisavi, the appellants' witness PW2 (Stella Kathure) had testified that the respondent was hanging dangerously when he fell and was over run by the vehicle. It was urged that a police abstract could not be issued before a P3 form.

10. The appellant submitted that the respondent had failed to prove negligence against them as required of him by Section 107 of the

Evidence Act which provides as follows:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

They also referred the court to Sections 108 and 109, which provides that burden of proof in a suit or proceeding, or of particular fact lies on that person, respectively, who would fail if no evidence at all was given or who wishes the court to believe in its existence.

11. The appellants cited **Eastern Produce (K) Limited v. Christopher Atiado Osiro**, Eldoret High Court Civil Appeal No. 43 of 2001 where it was held that it is trite law that the onus of proof is on he who alleges and when a plaintiff alleges negligence he has to prove the same, and **Kiema Matuku v. Kenya Cargo Hauling Services Ltd** (1991) 2 KAR 258, where it was held that “*there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.*” The same position was held in **Statpack Industries v. James Mbithi Munyao** [2005] eKLR

12. It was the appellants’ averment that the trial court did not rely on DW1 and DW2 evidence yet DW2 (Esther Kathure) was present at the time of the accident. Therefore, the appellants could not be held 100% liable. The appellant relied on **Valley Bakery Ltd & Fred Ambululi Ogalo v. Mathew Musyoki** [2005] eKLR where liability was apportioned at a ratio of 50:50, where the accident involved a cyclist and a motor vehicle.

13. The appellant further urged that the trial magistrate erred by awarding Ksh.682,960/= which was excessive compared to the injuries suffered by the respondent. The court was urged to rely in **John Ndungu v. Michael W. Ochieng** [2015] eKLR where a sum of Ksh 100,000/= was awarded.

Respondent’s Submissions

14. The respondent through his advocate urged this court being an appeal court it was required to determine the appeal by way of retrial by reconsidering the evidence, evaluating it and drawing its own conclusion as was held in **Selle & Anor v. Associated Motor Boat Co. Ltd & Ors** [1968] EA 123. It was urged that the conclusion by the trial court was after evaluating the evidence on record and since the appellants had failed to avail the driver to testify their evidence remained unchallenged.

15. Dr. James Muoki who through the P3 form and Medical report confirmed that the respondent had sustained a broken pelvic bone and fractured thigh. The respondent had been admitted for 44 days and he still had a metal implant on his leg that needed to be removed.

16. The appellant had in the trial court urged that the respondent had failed to prove negligence and thus asked the court to apportion liability at 60:40 in favor of the respondent as against the appellants, yet in the appeal they were asking for the suit to be dismissed, and contended that this amounted to abuse of court process, as was held in **Luka Musyimi Musau v. United Insurance Co. Limited** [2007] eKLR.

Issues for Determination

17. The court has referred to the Record of Appeal, the submissions and authorities of the parties and has framed the following issues for determination

- a. Whether the appellants were wholly to blame for the accident;
- b. Whether the driver was an employee of the insured; and
- c. Whether the amount awarded by the trial court was excessive.

Determination

Analysis of the Evidence

18. The respondent is shown in the submissions and judgment of the court to have availed two witnesses during trial, a Doctor, Sophia Opiyo and the insured Stella Kathure, the 2nd appellant herein. This is at page 60 of the Record of Appeal. The court has referred to the proceedings of the trial court from pages 18 – 23 and throughout the whole record; there is no evidence of the appellant’s witnesses’ testimony. This is also seen at page 70 of the Record of Appeal that the appellants did not produce any witness to substantiate their claim as referred by the trial court. The original trial court file was not availed in the appeal file, and the second medical report by the appellant’s doctor was not attached in the Record of Appeal.

19. This being a court of first appeal it has a duty to re-evaluate the evidence and make its own independent conclusion. See **Peters v. Sunday Post Ltd** (1958) E.A. 424. The court has relied on the Record of Appeal as presented to it by the appellants who must take the blame for not presenting a complete record of the proceedings in their Record of Appeal.

Proof of negligence

20. The police abstract at page. 25 of the Record of Appeal indicates that the driver was charged with the offence of careless driving contrary to Section 49(1) of the Traffic Act. The respondent testified that he was walking when the vehicle hit him. The respondent had pleaded negligence against the respondent. Section 107 and 108 of Evidence Act provides that the onus of proof is on the one who alleges a fact exists. In **Eastern Produce (K) Limited** (supra) the court described negligence as follows:

“I have in mind the description of negligence as is to be found in Salmond and Heuston on the Law of Torts 19th Edition where it is described as “conduct, not a state of mind-conduct which involves an unreasonably great risk of causing damage. **Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do.**”

The position is laid more clearly as “*in strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.*” (Lord Rwright in *Lochgelly Iron and Coal Co. v. M'Mullan* [1934] A.C.1, 25.)

21. The 1st appellant did not avail his evidence to rebut the respondent’s evidence. The appellants in their Record of Appeal at page 39 have annexed the traffic case proceedings of the Traffic Case no. 46 of 2011. The record shows that the substance of the charges and every element was read to him, and he admitted the facts of the offence as presented by the prosecution and was consequently convicted on his own plea of guilty, as follows:

Count I: facts read as follows:

“It was on 20.2.2011 at 1.30 p.m at Kangundo bus stage. **Accused person was driving Motor Vehicle Registration No. KBJ 207K – Nissan Matatu. He refused to stop for passengers to alight and others to board. In the process, a passenger fell down and was ran over by the same vehicle. He received multiple injuries.**”

Count II and V read as follows:

“It was on 20/2/2011 at around 1.30 p.m at Kangundo bus stage when the accused person was driving motor vehicle registration number KBJ 207K Nissan matatu. **He drove the said matatu upto Kathiami with a high speed whereby he lost control and the said motor vehicle got into a ditch.** He hit another motor vehicle registration number KBB 405R – a Toyota matatu and the two motor vehicles were extensively damaged. **When this matter was reported to the police at Kangundo, the accused person was found not with a driving license.** The accused person was later arrested and charged as herein.”

The accused person confirmed the facts saying -

“The facts are correct” and he was, consequently, convicted on his own plea of guilty.

In these circumstances, it cannot be contested that the 1st appellant had agreed he was driving in a careless manner and this may explain why he did not attend court during civil case trial in the lower court. The court must find that the driver was negligent in the way he was driving the said motor vehicle. In addition, the driver admitted in the criminal trial that he did not have a licence had failed “**to stop for passengers to alight and others to board. In the process, a passenger fell down and was ran over by the same vehicle**”.

22. I respectfully agree with Visram, J. (as he then was) when he held in *Statpack Industries* (supra) as follows:

“Coming now to the more important issue of “causation”, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. **He must prove casual link between someone’s negligence and his injury.** The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. **Not every injury is necessarily a result of someone’s negligence. An injury per se is not sufficient to hold someone liable for the same.**”

This court finds that the driver was negligent and had led to the respondent’s injury when he fell from the vehicle and was run over by the same vehicle. The only question that remains is whether the respondent contributed to the accident leading to his own injury

Apportionment of liability

23. As regards apportionment of liability, as held by the East African Court of Appeal in *Railways Corporation v. E.A. Road Services Ltd.* (1975) EA 120, 130, per Musoke, JA:

“As regards the appeal itself **it is a well settled principle that this court will not interfere with apportionment of liability assessed by a trial judge, except where it can be shown that there is some error in principle, or the apportionment is manifestly erroneous.** See *Khambi and Another v. Mahithi and Another*, [1969] E.A. 70; *Zarima Akbarali Shariff and Another v. Noshir Proshesha Sethna and Others*, [1963] E.A. 239 and *George Willaim Bumba v. Phillip Okech* Civil Appeal No. 53 of 1974(unreported). In the **Bumba** case, this court held that **it may also interfere if in its opinion ‘the assessment is based on a wrong appreciation of the evidence’.**”

24. In determining whether the 1st appellant was wholly to blame for this accident, the court considers that the respondent testified he was a **pedestrian** when he was knocked down on 20.2.2011 at 1.00 p.m by motor vehicle registration No. KBJ 207K Nissan matatu which was being driven at a high speed against the evidence of the appellants that he was a conductor who alighted from the moving vehicle.

25. PW3, Francis Kisavi, supported the respondent's evidence testifying at page 20 of the Record as follows:

“The pedestrian was knocked down by the Motor Vehicle Registration No. KBJ 207K which sped off. I found PW1 at the scene but the motor vehicle was not there. I received a call from members of public that the motor vehicle was heading towards Kathiani. I proceeded there but before I received a call that the same motor vehicle had been involved in another accident with another motor vehicle registration No. KBB 405 Toyota matatu. The driver was arrested by members of public. He was charged before court Tr. No. 46 of 2011 Kangundo Law Courts. He was convicted.”

26. It is clear that the said witness PW3 was not an eye witness of the actual happening of the accident, the evidence of the appellants as captured in the submissions and judgment of the trial court that the respondent was not a pedestrian but a conductor who fell off the vehicle appears to me more consistent with the facts presented and admitted by the 1st appellant driver in the traffic case charge of reckless driving that he had failed to stop. If the respondent had merely been a pedestrian walking off the road who was hit from behind by the motor vehicle, the facts of the criminal charge would have said so and there would have been in the evidence by the plaintiff, whose burden of proof it is to prove the unusual circumstance with cogent evidence, details as to how the vehicle veered off the road to find the pedestrian off road. That the respondent was on the vehicle getting off or trying to get onto the vehicle appears more probable than that he was an innocent bystander walking off road, and that version of events is consistent with the facts of the criminal charge of reckless driving aforesaid.

27. This court finds that the respondent's injury when he fell from the vehicle and was run over by the same vehicle was caused in equal measure by both the driver's negligence in failing to stop and the respondent's own conduct in alighting (or boarding) the vehicle in motion.

28. I find that the case is suitable for interference with the apportionment of liability on the principle in *Bumba* case, supra, that **“the assessment is based on a wrong appreciation of the evidence.**” The Court finds that the respondent's conduct of jumping off the vehicle as negligent to the same extent as the 1st appellant's negligence in failing to stop to allow the passengers to alight or board safely. Liability is determined at 50:50 between the parties.

Proof of ownership of the accident motor vehicle

29. The Police Officer (PW3) produced a police abstract dated 13.06.2011 as Pex No. 2, which is *prima facie* evidence. The abstract showed that the driver was Christopher Njoroge Ngugi and he was charged with the offence of careless driving. The court is guided by the decision in *Wellington Nganga Muthiora v. Akamba Public Road Services and Anor* [2010] eKLR where the Court of Appeal held that:

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases within the standards of probability and not beyond reasonable doubt as in criminal cases. However, where it is challenged by evidence or in cross-examination the plaintiff would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”

The abstract remained unchallenged and, therefore, it was proof of ownership of the motor vehicle by the 2nd appellant as the abstract showed that Stella Kathure was the owner of motor vehicle registration No. KBJ 207K. The appellants' submissions assert that the 2nd appellant had admitted that she was the owner of the motor vehicle, and there is no need to resort to the inference of ownership under the rule in *Wellington Nganga Muthiora*.

Whether the 2nd appellant vicariously liable

30. The 2nd appellant through in the statement of defence denied ownership the same was admitted at the hearing. In fact, in the submissions filed before the trial court, the appellants urged at page 61 that Stella Kathure testified in her evidence in-chief that was the registered owner of motor vehicle registration number KBJ 207 Toyota matatu and that her driver at the time of the accident was Christopher Njoroge, the 1st appellant. Having said so, the court finds that the 1st appellant was driver and or agent of the 2nd appellant.

31. The issue to be determined next is whether the 2nd appellant is vicariously liable for the acts of her driver. The 2nd appellant's assertion that the 1st appellant was his driver created the master – servant relationship. This implied that the driver was driving motor vehicle registration number KBJ 207K on behalf of Stella Kathure at the material time of the accident. As held in *Morgan v. Launchbury* (1972) ALL ER 606:

“To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in it's instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”

Further, in *Kaburu Okello & Partners v. Stella Karimi Kobia & 2 Ors* [2012] eKLR the Court of Appeal held that *“vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority.”*

32. In view of the above, the court having established the 1st appellant was negligent and he was driving in the course of his employment with the 2nd appellant, then the respondent has proved vicarious liability.

33. The appellants had raised ground 5, 6 and 7 of the appeal. The proceedings of the traffic case show the 1st appellant pleaded guilty of the offences read to him and confirmed that the said facts were correct.

What amount of damages was adequate?

34. The respondent alleged to have sustained injuries as a result of the accident:

- a. Severe bruising on the right iliac fossa approximately 7cm x 8cm in size
- b. Right knee bruising approximately 2x3cm in size
- c. Deformed and shortened right lower limb
- d. Fracture pelvic (left side)
- e. Comminuted fracture – right femur.

The respondent testified that he was injured on the right leg. Dr. Muoki (PW2) testified to have prepared a medical report. The respondent had sustained the injuries that the respondent had pleaded. He went further to state that the x-ray confirmed pelvic fracture and fracture of femur. An open reduction and internal fixation was done and that the respondent would continue to use crutches even if the wounds healed and that he had a high risk of arthritis of hip joint.

35. The appellants in the trial court submissions urged that Dr. Sophia Opiyo testified and that she produced a medical report by one Dr. Theuri. The court has perused the entire record of appeal and there is no such report attached. If at all the same was produced and indeed there was such a document, the same does not form part of the record of appeal yet it is their appeal. This was their own medical report, which they wished the court to rely on, but chose not to attach; the court could not therefore take any benefit from it. The medical report document should have been included as part of their Record of Appeal.

36. As it stands, the respondent's evidence on the injuries sustained remains unchallenged and, therefore, the court finds that the respondent had pleaded and proved on a balance of probabilities the injuries sustained.

Quantum of Damages

37. Should the court interfere with the award of Ksh.682,960/= in damages both general and special damages? This principles upon which an appellate court will interfere with the exercise of discretion by a trial court are set out in *Mbogo v. Shah & Anor* (1968) EA 93 per Newbold, P. as follows:

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

38. Similarly, as regards damages, the Court in *Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v. A.M. Lubia & Olive Lubia* [1982 – 85] 1 KAR 727 held that:

“It is trite law that an appellate court can only interfere with an award of damages where it is demonstrated that the trial court in reaching the award based it's decision on **wrong principles or that the award is so inordinately high or low as to be a wholly erroneous estimate of the injury.**”

See also *Shabani v. City Council of Nairobi* (1985) KLR 516, 527, *Bhogal v. Burbidge & Another* (1975) E.A. 285, *Kigaragari v. Aya* (1985) KLR 273 and *Mariga v. Musila* (1984) KLR 251. In *Arkay Industries Limited v. Amani* [1990] KLR 309, 315 the court observed that-

“The assessment of damages is essentially a matter of judicial discretion.”

39. On the facts of this case, the respondent was admitted for 44 days and he still had a metal implant on his leg. In *H. West & Sons Ltd v. Shephard* [1964] AC 326, Lord Morris said:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.”

In the case-law authority of *John Ndungu v. Michael W. Ochieng*, supra, relied upon by the appellants the respondent in this case had suffered blunt trauma to the scalp, neck, chest, spinal column, left arm and lower limb and award of Ksh.100,000/- was made. This was an injury sustained in 2005 and the injuries were minor compared to the respondent's injuries.

40. The appellants have not demonstrated that in awarding of Ksh.550,000/- as general damages for pain and suffering and Ksh.100,000/- for future medical expenses, the trial court had acted on **wrong principles or that the award is so inordinately high or low as to be a wholly erroneous estimate of the injury.** The award of Ksh.32,960 proved as special damages was not contested. Consequently, this court does not interfere with the Quantum of damages awarded by the trial court but the general damages shall be apportioned between the parties on 50:50 basis.

Orders

41. Accordingly, for the reasons set out above, the appellants' Appeal is allowed to the extent and upon terms as follows:

1. The award of general damages in the sum of Ksh.550,000/- for pain and suffering and Ksh.100,000/- for future medical expenses is upheld;
2. The liability is apportioned at 50:50 between the Appellants and the respondent.
3. The 2nd Appellant is vicariously liable for the negligence of her driver, the 1st Appellant.
4. There shall therefore be judgment for the respondent against the appellants jointly and severally in the sum of Ksh. **357,960/-** being the sum of 50% liability on the general damages of Ksh.650,000/- together with the specials damages proved at ksh.32,960/-.
5. There shall be interest at court rate of 14% pa. from **14th June 2013**, the date of the judgment in the trial court until full payment.

42. Each party shall bear the costs of the appeal but the respondent shall have the costs in the trial court.

Order accordingly

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2018.

G.V. ODUNGA

JUDGE

Appearance

M/S Kairu & McCourt Advocates for the Appellants.

M/S Muema & Associates Advocates for the Respondent.