Oyuyo v Kiarie (Civil Case E600 of 2021) [2024] KEMC 62 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEMC 62 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CIVIL CASE E600 OF 2021

PA NDEGE, SPM

MAY 9, 2024

BETWEEN

EVANS OGWAE OYUYO ..... PLAINTIFF

AND

STEPHEN KIGERI KIARIE ..... DEFENDANT

JUDGMENT

1. The plaintiff in this case, Evans Ogwae Oyuyo, is praying for judgment against the Defendant, Stephen Kigeri Kiarie, for special and general damages emanating from a road traffic accident that occurred on or about 01.02.2021, as a consequence of which he sustained severe injuries. He brought this suit vide a Plaint dated 18.05.2021 and filed on 02.07.2021.

2. It is common ground herein that the plaintiff was a pedal cyclist along the Ravine-KFA road when at NTSA offices area, the accident herein occurred. It is the plaintiff's case that the accident was solely caused by the defendant, when he carelessly and/or negligently drove, managed and/or controlled the Motor Vehicle KAU 313E causing it to lose control and knock him down as a consequence whereof he sustained the severe injuries, namely[1]: -

    a. Left mandible fracture

    b. Loss of 1 lower incisor tooth

    c. Soft tissue injuries of the right hand

    d. Soft tissue injuries of the left hand

3. The plaintiff particularized his claim of negligence on the part of the defendant at Paragraph 4 of his plaint as follows: -

    a. Driving without due care and attention

[1] Refer to paragraph 5 of the Plaint

b. Driving without proper look out before proceeding on

c. Driving with an excessive speed in the circumstances

d. Failing to swerve, control the motor vehicle KAU 313E and/or brake in any way to avoid the accident. Encroaching into the lane of the plaintiff

e. Failing to stop after the accident

f. Being generally careless and negligent

g. Driving under the influence of alcohol

h. Driving a defective motor vehicle

i. Driving while sleepy

j. Res ipsa loquitor.

4. The Defendant has thus been sued in his capacity as registered, beneficial and/or insured of the motor vehicle registration number KAU 313E. He entered appearance and filed his defense, respectively vide a Memorandum of Appearance dated 16.08.2021 and filed on 08.11.2021; and a Statement of Defense dated 23.08.2021, filed by the firm of Messrs. Kimondo Gachoka & Co. Advocates, wherein he mainly disavowed the alleged negligence attributed on him and/or his agent while in control of the motor vehicle. Furthermore, the defendant attributed the accident to the negligence of the plaintiff; and particularized the same in Paragraph 6 of his Statement of Defense, as follows:

a. Failing to give way to traffic that had the right of way

b. Cycling in a dangerous and careless manner

c. Failing to keep to the cyclist path

d. Cycling in the middle of the road

e. Causing the accident

5. The plaintiff testified and called a police officer as his witness, while the defendant did not call any witness. Parties then filed and, I believe, exchanged their written submissions. At the close of the hearing and submissions, the accident and injuries have not been challenged. The remaining issues for determination are mainly as captured by the learned counsel for the Defendant's written submissions, as follows: -

a. Who is to blame for the accident?

b. Whether the plaintiff is entitled to the reliefs sought?

Basically, it is a determination on liability and quantum.

6. On liability, the plaintiff testified and adopted his statement that was filed in court on 02.07.2021 that he was riding his bicycle along the KFA – Nakuru Show Ground road, heading towards Nakuru Level 5 Hospital. That on reaching the NTSA area, the defendant's motor vehicle was overlapping and being driven negligently through the pedestrian lane to avoid traffic jam that had built up along the area. That in the process, it lost control and hit him as a result of which he sustained the injuries. He is blaming the driver for carelessly overlapping and driving negligently through the pedestrian lane.

7. In cross-examination, he stated that the road was busy at the time because of the traffic jam and that the vehicles were overtaking each other at the time. That the defendant's vehicle was also overlapping at the time and it met with him while he was also almost joining the road, from a pedestrian lane on the right hand side of the road while facing the direction he was headed to. That the police blamed him for the accident because he was also joining the road at the time of the accident.

8. The police officer, PW2, NO. 66201 CPL Jane Githinji, from Kaptembwa police station's traffic base. She referred to their records and stated that the defendant was careless because of overlapping. She however also confirmed that no one was charged for the accident and that the parties were just referred to their insurer.

9. In a bid to determine and or apportion liability herein, I have gone through the impressive submissions by the two learned counsel for the respective parties herein. I do agree that in an action for negligence, the burden of proof falls on the plaintiff alleging to establish each element of the tort, hence it is for the plaintiff herein to adduce evidence of facts on which he bases his claim. It must be established that there was a duty of care which was breached resulting to loss and damage to the plaintiff. The plaintiff herein therefore has a duty to prove his case on a balance of probabilities that the defendant was so negligent so as to occasion the accident that led to the plaintiff's injuries. However, once the legal burden of proof is discharged by the plaintiff, the evidential burden might shift to the defendant to prove his claim of plaintiff's sole or contributory negligence as pleaded.

10. Learned counsel for the defendant has referred me to the provisions of sections 107 and 108 of the *Evidence Act* which are 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.

    108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

11. In the case of Muruingu Kanoru Jeremiah Vrs Stephen Ungu M'mwarabua [2015] eKLR the superior court held as follows with regard to the burden of proof:

> ....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.

12. I also refer to The Halsbury's Laws Of England, 4Th Edition, Volume 17, at paras 13 and 14: which describes it thus:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the

conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to act; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?

13. In this case, both the plaintiff and the defendant were using the road herein, and more specifically at the time of the accident herein. Both therefore owed a duty of care to each other. The plaintiff was cycling along the pedestrian way and has directly confirmed that he was attempting to join the busy road, on the wrong side (right lane), which was at the same time being used by other vehicles while attempting to overtake other vehicles during the jam. There were no sketch maps or plans presented herein to show the exact point of impact, or that there was overlapping etc. However, from the evidence of the plaintiff, an eye witness, the point of impact was when he was attempting to join the road. This evidence was given on oath and even though there was no evidence tenderd by the defence, I find this evidence to be sufficient to make me find that the plaintiff was to some extent also to be blamed for joining a busy road, on the wrong side, at the same time when the defendant and other vehicles were also using the same road at the same point. Since there is no admissible or conclusive evidence that the defendant was overlapping at the time, I find it normal to overtake at the right side of the road However in this case the plaintiff had joined or was joining the road from wrong the side which the defendant and his colleagues were expected to use.

15. I have already found both parties herein to have held a duty of care against each other. If it is true that the accident happened on the edge of the road, and in the manner as explained by the plaintiff, then I will find both of the parties herein to be blamed. They were both using the road at the time and I do therefore find both of them to be blamed for the accident herein. Both had no proper lookout or any regard for each other; and the plaintiff, for his own safety. I might however still find the plaintiff more to blame because as a victim, he was supposed to take more care of his own safety and take steps before joining the busy road at the wrong side, and so as to avoid the accident.

16. Again, the investigation officer did not help us much. Her evidence herein was basically report-based hence hearsay. She did not produce the sketch map or plan. Production of sketch plans as to the point of impact and resting place of the vehicles after the accident and/or skid marks would no doubt have assisted the court to have a clearer view of the scene. See Caroline Ann Njoki Mwangi Vrs Paul Ndungu Muroki (2004) eKLR.

17. From the evidence it is clear that each party was to some extent to blame. As aforestated, the burden of proof is always on the plaintiff, but such proof may shift to the defendant when circumstances demand, like in this case where both parties blame each other. Each has a duty to prove its case against the other on a balance of probability.

18. In the Court of Appeal decision in Civil Appeal No. 739 Of 2003 Caroline Anne Njoki Mwangi Vrs Paul Ndungu Mwangi, supra, faced with similar circumstances, the Honorable Judges rendered that:

'I would in the absence of an official police sketch map and on knowing who exactly is to blame on this matter and on a balance of probability hold that the parties are indeed equally to blame at the ratio 50% each'.

19. In my considered view, it is not reasonably possible for a court to decide upon the evidence tendered herein as to who was to blame for the accident. The investigating officer, being an independent party would have been of great help to the court only if he could have given a reasonable explanation for the finding, and backed the same with the relevant evidence such as the sketch map etc. I do believe that it could have been different had the defendant's driver testified as I find that the defendant's driver was possibly driving at his side of the road when the plaintiff attempted to join.

20. In the premises, it would be prudent and in line with judicial precedent, to come to the findings and conclusion that where there is no concrete evidence to determine who in a motor vehicle accident is to blame between two parties both should be held equally to blame. See Civil Appeal No. 521 Of 2007 In Commercial Transporters Ltd Vrs Registered Trustees Of The Catholic Archdiocese Of Mombasa (2015) e KLR.

21. Accordingly, I conclude that both parties shall be held equally to blame at 50% basis. Having so decided, it therefore follows that the consequential damages arising from the accident, and the plaintiffs damages from the injuries, but subject to the proof herein, shall likewise be apportioned in the manner stated above, on a 50:50 basis.

22. On quantum, both parties herein agree that the plaintiff was injured in the manner as pleaded. The medical evidence adduced by both sides herein prove so. There is however no one best formula of assessing damages in injures claims. Such assessment is an act of art rather than science. In HCCC NO. 752/1993 Mutinda Matheka Vs Gulam Yusuf that was cited by Warsame, Ag. J (as he then was) in Jenipher Milay O. Okuku Vrs Kenya Bus Services Ltd (Kisumu HC MISC. Civil APPL. 172/2001), it was held that the court will essentially take into account the nature of the injuries suffered, the period of recuperation etc.

23. I am also aware of the other guiding principles in awarding general damages such as: - damages should be within the limits set out by decided cases, within my pecuniary jurisdiction, within the limits that the Kenyan economy can afford and must be commensurate to the kind of injury, and extent of pain and suffering. Justice Ngugi in Ndungu Dennis Vrs Ann Wangari Ndirangu, [2018] eKLR, stated that the policy goal of Courts is to try to compensate comparable injuries as far as possible by comparable awards.

24. I find the authority of Anthony Nyamweya Vrs Dorca Gesare Mounde [2022] eKLR, ironically cited by the learned counsel for the Defendant, to be the more relevant herein. The injuries sustained by the victim therein are almost similar to, if not less serious than, the ones sustained by the plaintiff herein. I therefore rely on the same to find Kshs. 600,000/= proposed by the counsel for the plaintiff to be sufficient compensation for the pain and suffering that the plaintiff underwent.

25. As to special damages, it is trite, and as correctly submitted by the learned counsel for the defence, that the plaintiff is only entitled to special damages pleaded and proved by way of evidence (usually receipts). The plaintiff pleaded the following special damages:

    a. Medical Report receipt: Kshs. 7,000/=

    b. Filing of P3 Form: Kshs. 3,000/=

    c. Police abstract: Kshs. 200/=

    d. Medical expenses: Kshs. 5,900/=

e. Official search: Kshs. 550/=

Total: Kshs. 16,650/=

26. I have gone through the exhibits produced by the plaintiff herein. I do find that only Kshs. 550/- cost of official search, Kshs. 7,000/- costs for the medical report and Kshs. 4,800/= medical expenses, have been proved vide PEXH NOs. 8, 10 and 11, respectively. I do therefore assess the special damages to that extent only, i.e. Kshs 12,350/=, and as conceded to by the learned counsel for the defence.

Conclusion and Disposal Orders

27. Judgment is therefore hereby entered against the defendant herein, and in favour of the plaintiff herein for Kshs. 612,350/00- being general and special damages, less 50% contribution as per the finding on liability entered into herein, thereby giving a net of Kshs. 306,175.00 The plaintiff to also get the costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 09th DAY OF May , 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Obura

Defence counsel:Kemunto

Kemunto: Praying for 45 days stay

Obura: 30 days sufficient

Kemunto: Still praying for 45 days stay.

CT: 30 days stay granted.

Plaintiff:

Defendant