Kamande v Inyanga & 2 others (Civil Appeal 12 of 2022)
[2025] KEHC 688 (KLR) (27 January 2025) (Judgment)

Neutral citation: [2025] KEHC 688 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL 12 OF 2022

JN KAMAU, J

JANUARY 27, 2025

BETWEEN

DAVID KAMANDE ..... APPELLANT

AND

ELIUD FRANCIS INYANGA ..... 1ST RESPONDENT

JOHN KAMAU KAFARA ..... 2ND RESPONDENT

ANTHONY KALEI ..... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R. Ndombi (SRM) delivered at Vihiga in Principal Magistrate's Court Case No 23 of 2017 on 5th May 2022)

JUDGMENT

Introduction

1. In her decision of 5th May 2022, the Learned Trial Magistrate, Hon R. Ndombi, Senior Resident Magistrate, found the Appellant and the 2nd Respondent on the one part and the 3rd Respondent on the other part to have been each fifty (50%) percent liable for the injuries that the 1st Respondent herein sustained. She entered Judgment in favour of the 1st Respondent herein against them as follows:-

    General Damages Kshs 600,000/=

    Special damages Kshs 4,000/=

    Kshs 604,000/=

    The Appellant and the 2nd Respondent were to bear half of the 1st Respondent's costs while the 3rd Respondent was to bear the other half of the 1st Respondent's costs. Interest on general damages, special damages, and costs was to accrue at court rates.

2. Being aggrieved by the said decision, on 16th May 2022, the Appellant filed a Memorandum of Appeal of even date. He relied on six (6) grounds of appeal. He also filed a Supplementary Record of Appeal dated 17th January 2024 on 22nd January 2024.

3. His Written Submissions were dated 24th April 2024 and filed on 27th May 2024 while those of the 1st Respondent were dated and filed on 24th April 2024. The 2nd and 3rd Respondents did not file any Written Submissions in this matter. The Judgment herein is based on the said Written Submissions which both the Appellant and the 1st Respondent relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

   Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

   a. Whether or not the Learned Trial Magistrate erred in finding the Appellant and the 2nd Respondent fifty (50%) percent liable for the accident;

   b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.

6. The court deemed it prudent to address the issue under the following distinct heads.

I. Liability

7. Grounds of Appeal Nos (1), (2), and (3) were dealt with under this head as they were all related.

8. The Appellant submitted that the evidence of the 1st Respondent and that of No 79323 PC Samson Murura (hereinafter referred to as "PW 3") was that Motor Vehicle Registration No KCA 600L (Isuzu lorry) (hereinafter referred to as "the 1st subject Motor Vehicle") hit Motor Vehicle Registration Number KBK 492V (Matatu) (hereinafter referred to as "the 2nd subject Motor Vehicle").

9. He pointed out that on cross-examination, PW 3 confirmed that the driver of the 1st subject Motor Vehicle was charged with the offence of causing the accident. It was therefore his submission that the Trial Court erred for having found him and the 2nd Respondent herein to have been fifty (50%) liable for the accident herein.

10. On the other hand, the 1st Respondent submitted that PW 3 did not blame either of the two (2) drivers of the 1st and 2nd subject Motor Vehicles but that he only stated that the driver of the 1st subject Motor Vehicle hit the rear of the 2nd subject Motor Vehicle as he tried to overtake it.

11. He relied on the case of Municipal Council of Nakuru vs David Mburi [1993] eKLR and Hussein Omar Farah vs Lento Agencies [2006] eKLR where the common thread of the Court of Appeal

decisions was that where there was no concrete evidence of which of the two (2) drivers had caused an accident, both drivers would be held equally liable for the accident.

12. He argued that since there was no evidence showing which driver was to blame, both the Appellant and the 2nd Respondent on the one hand, and the 2nd Respondent on the other hand were equally to blame for the said accident.

13. According to the Plaint that was dated 24th February 2017 and filed 9th March 2017, on 8th April 2016, the 1st Respondent was a lawful passenger in the 2nd subject Motor Vehicle when the said Motor Vehicle and the 1st subject Motor Vehicle which were being driven along Kima- Chavakali Road were involved in an accident as a result of which he sustained injuries.

14. In his evidence, he told the Trial Court that the 1st subject Motor Vehicle was being driven behind the 2nd subject Motor Vehicle. He clarified that both vehicles were going in the same direction. He said that the driver of the 2nd subject Motor Vehicle stopped to pick up passengers. It was then that the 1st subject Motor Vehicle hit the 2nd subject Motor Vehicle in the rear.

15. PW 3 testified that the Appellant was the one who was driving the 2nd subject Motor Vehicle at the material time. His evidence was that the 1st subject Motor Vehicle tried to overtake the 2nd subject Motor Vehicle and in the process, knocked it in the rear.

16. The Trial Court observed that the driver of the 1st subject Motor Vehicle failed to keep a distance of seventy (70) metres between him and the 2nd subject Motor Vehicle to cater for any emergency halting contrary to the Traffic Rules and the Highway Code. It further concluded that had the 2nd subject Motor Vehicle not stopped abruptly, it could not have been hit by the 1st subject Motor Vehicle.

17. This court did not see any sketch map or photos of the 1st and 2nd subject Motor Vehicles to see which part of the 2nd subject Motor Vehicle was damaged. This would have assisted the court to determine who was to blame by looking at the point of impact. In the absence of the said documentary evidence, this court could only hazard what could have happened at the material time.

18. As both the 1st and 2nd subject Motor Vehicles were being driven in the same direction and the 1st subject Motor Vehicle was being driven behind the 2nd subject Motor Vehicle, for the 2nd subject Motor Vehicle to have been hit in the rear, it must have stopped abruptly to pick or drop passengers on the road. The 1st Respondent's testimony was silent as to whether the 2nd subject Motor Vehicle was hit when it had already stopped by the road or it was in the process of stopping when it was hit by the 1st subject Motor Vehicle. There was also no indication that the 2nd subject Motor Vehicle stopped at a designated bus stop or that the Appellant had indicated that he was stopping. The Appellant and the 2nd Respondent could not therefore have escaped liability.

19. This court agreed with the Trial Court that it was evident that the driver of the 1st subject Motor Vehicle failed to keep a safe distance from the 2nd subject Motor Vehicle to avoid colliding with the 2nd subject Motor Vehicle in the event of abrupt stopping. This was negligent and contrary to the Highway Code which states as follows:-

> " 50 .....Do not drive nose to tail (bumper to bumper); leave enough space between you and the vehicle in front so that you can pull up safely Keep distance and a sharp look-out for the vehicle's brake light, any hand, mechanical or light signals the driver may make to indicate his intention to slow down, stop or turn would allow you plenty of time to act...
>
> 51 Before overtaking you should make sure,

There is a reasonable distance in front of the road user you plan to overtake • Always overtake from the right at a reasonable distance

Always overtake from the right at a reasonable distance."

20. Having said so, from the evidence that was adduced during the trial, it was difficult to determine who was more to blame than the other as both the Appellant and the 3rd Respondent were at fault. This was a borderline case in which case, the equal apportionment between the two (2) drivers as the Trial Court found would also not have been unreasonable. Indeed, a perusal of the Police Abstract Report that the 1st Respondent adduced in evidence showed that the Appellant was never charged with any traffic offence but rather, the case was shown to have been pending under investigations (PUI).

21. Be that as it may, this court took the view that apportionment of liability at 40% against the Appellant and the 2nd Respondent on one hand and 60% on the part of the 3rd Respondent was fairer. This apportionment was informed by the fact that the 3rd Respondent ought to have kept a safe distance and/or room between his vehicle and that of the 2nd subject Motor Vehicle to avoid any eventualities. Indeed, drivers must always anticipate the folly of other road users as there is every likelihood of road users behaving carelessly on the roads.

22. On his part, the Appellant ought not to have stopped at an undesignated area as was likely to endanger other road users. For this reason, he could not escape liability.

23. In the premises foregoing, Grounds of Appeal Nos (1), (2), and (7) were not merited and the same be and are hereby dismissed.

II. Quantum

24. Grounds of Appeal Nos (4), (5), and (6) were dealt with under this head as they were all related.

25. The Appellant submitted that the Trial Magistrate awarded damages that were excessive warranting interference by this court. He relied on several cases amongst them Denshire Muteti Wambua vs Kenya Power & Lighting Co Ltd [2013] eKLR and Godfrey Wamalwa Wamba vs Kyalo Wambua [2018[eKLR where the common thread was that damages that are awarded ought to be comparable with awards for similar injuries.

26. He urged this court to reduce the general damages from Kshs 600,000/= to Kshs 250,000/=. In this regard, he placed reliance on the case of Ndwiga & Another vs Mukimba (Civil Appeal E006 of 2022) [2022] KEHC 11793 (KLR) where the appellate court reduced the general damages from Kshs 1,200,000/= to Kshs 500,000/= where the respondent herein had sustained tenderness and swelling of the left leg and a fracture of the fibula and tibia. He also relied on the case of Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor [2020] eKLR that was quoted in Ndwiga & Another vs Mukimba (Supra) where the respondent therein sustained similar injuries.

27. On his part, the 1st Respondent relied on the case of Malindi Civil Appeal No 39 of 2020 (KLR citation not given) and submitted that the award of general damages was reasonable and did not warrant any interference by this court.

28. It is well settled in law that an appellate court will not disturb an award of general damages unless the same was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR.

29. It must be understood that money can never really compensate a person who had sustained any injuries. No amount of money could remove the pain that a person went through no matter how small an injury appeared to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person had sustained. It was merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who had suffered an injury.

30. However, this assessment was not without limits. A court had to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court therefore had to be guided by precedents.

31. Indeed, in the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated that damages had to be within the limits set out by decided cases and also within the limits the Kenyan economy could afford. This was because high awards would lead to higher insurance premiums which would in turn affect the members of the public.

32. This court also had due regard to the case of Lim vs Camden HA [1980] AC 174 where it was held that even in assessing compensatory damages, the law sought to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury that he had caused.

33. Similar injuries ought to attract comparable awards. However, in the quest for consistency, courts also had to recognise that no case was exactly the same as the other. It must be noted that cases cannot contain exact injuries and they are merely for comparison purposes. Each case therefore had to be decided according to its own peculiar circumstances but keeping in mind that any monies awarded had to be sustainable.

34. Towards this end, an appellate court ought not to interfere with the discretion of a trial court merely because it could have awarded a lower or higher sum than that which was awarded by the trial court. It could only interfere where the award of general damages was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended as was held in the case of Margaret T. Nyaga vs Victoria Wambua Kioko (Supra).

35. The Medical Report of Dr Charles Andai (hereinafter referred to as "PW 2") dated 28th May 2016 showed that the 1st Respondent suffered a cut wound to the left pinna, soft tissue injuries to the chest, and fracture of the left tibia lateral condyle and blunt injury to the back. At the time of the medical examination, the 1st Respondent was still undergoing treatment. His injuries were expected to heal within a year and a half (1½). PW 2 opined that the assessment of any incapacity ought to be deferred until the injuries had healed.

36. This court found and held that the award of Kshs 250,000/= that the Appellant proposed was too low to compensate the 1st Respondent herein for the injuries that he sustained.

37. Remaining faithful to the doctrine of stare decisis and taking the inflationary trends into consideration, it was the considered view of this court that general damages in the sum of Kshs 600,000/= that was awarded by the Trial Court was not unreasonable.

38. In arriving at the said conclusion, this court had due regard to the following cases:-

    1. Akamba Public Road Services vs Abdikadir Adan Galgalo [2016] eKLR This very court awarded general damages in the sum of Kshs 500,000/= where the respondent therein had sustained a fracture of the right tibia leg malleolus and right fibular bone, with a blunt injury to the ankles.

2. Mohammed Younis Quereshi & Another v Chris Maina Mathu [2020] eKLR The respondent therein sustained bruises on the head, on both hands, and left leg and a fracture of the left tibia. The injuries would heal but leave him with disability at 20%. The appellate court reduced the general damages from Kshs 800,000/= to Kshs 400,000/= general damages.

39. In the premises foregoing, Grounds of Appeal Nos (4), (5), and (6) were not merited and the same be and are hereby dismissed.

III. Consideration Of Written Submissions

40. Ground of Appeal No (7) was dealt with under this head.

41. The Appellant submitted that the Trial Court's apportionment of liability and award of general damages was not based on the evidence that was adduced. He added that it did not also refer to its Written Submissions in its decision. It was his contention that its decision was speculative. The 1st Respondent did not address himself to this issue.

42. It was correct as the Appellant stated that the Trial Court did not refer to his Written Submissions in its judgment. It was not clear to this court why this was so as a perusal of the Record of Appeal showed that the Appellant's Written Submissions were dated 5th April 2022 and filed on 7th April 2022. This was before the judgment was delivered on 5th May 2022.

43. While it was not mandatory that a trial court analyse each and every case that had been submitted by a party, it was prudent for the trial court to at least make reference to some of the cases and/or the submissions that all parties had relied upon and not limiting the reference to some parties only so as not to appear to be descending into the arena in favour of some parties.

44. The above notwithstanding, this court did not find the Trial Court to have misapplied itself so as to have come to an erroneous conclusion and/or to have prejudiced the Appellant herein.

45. Without belabouring the point, this court came to the firm conclusion that Ground of Appeal No (7) was not merited and the same be and is hereby dismissed.

Disposition

46. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 16th May 2024 and lodged on even date was partly merited. The effect of this was that the decision of Hon R. Ndombi (SRM) that was delivered at Vihiga in Principal Magistrate's Court Case No 23 of 2017 on 5th May 2022 be and is hereby set aside and/or vacated and replaced with an order that judgment be and is hereby entered jointly and severally against the Appellant and the 2nd Respondent and against the 3rd Respondents in the following terms:-

General Damages Kshs 600,000/=

Special damages Kshs 4,000/=

Kshs 604,000/=

Plus costs and interest at court rates

The Appellant and the 2nd Respondent will bear forty (40%) percent of the general and special damages and costs of the 1st Respondent while the 3rd Respondent will bear sixty (60%) percent of the general and special damages and costs of the 1st Respondent. Interest on special damages will accrue from the

date of filing suit while interest on general damages will accrue from the date of judgment of the lower court.

47. As the Appellant was only partly successful in the Appeal herein, this court deviated from the general principle that costs follow the event and hereby directs that each party will bear its own costs of the Appeal herein.

48. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF JANUARY 2025

J. KAMAU

JUDGE