Janery v Ngula (Civil Appeal E185 of 2021)
[2025] KEHC 12075 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 12075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E185 OF 2021

F WANGARI, J

MARCH 27, 2025

BETWEEN

HENRY SILLA OGUR JANERY .... APPELLANT

AND

JANE NDANU NGULA .... RESPONDENT

(Being an appeal from the Judgment of Hon. E. Muchoki, Resident Magistrate delivered on 22/09/2021 Mombasa SRMCC No. 1974 of 2019)

JUDGMENT

1. The Appellant, who was the Plaintiff in the lower court filed this appeal having been dissatisfied with the above stated judgment. In the Memorandum of Appeal dated 18/10/2021, the Appellant faulted the trail magistrate for failing to consider the Plaintiff's testimony and evidence on record, the submissions filed leading to the dismissal of the Plaintiff's suit.

2. The trial magistrate was also faulted for proposing inordinately low award on general damages. It was prayed that the judgment of the lower court be set aside, and substituted with judgment in favour of the Appellant on liability and general damages, and with costs to the Appellant.

3. The Appellant filed the Plaint dated 07/11/2019 and Amended on 27/01/2020 seeking for general and special damages as a result of injuries sustained I an accident that occurred on 22/10/2019 (as per the mended Plaint) involving Motor vehicle registration No. KBG 269A and KAN 913Q. in the Plaint dated 07/11/2019, the Plaintiff was said to have been a passenger in m/v KAN 913Q while the Defendant's vehicle was m/v KBG 269A, both Nissan Matatus.

4. In the Amended Plaint dated 22/10/2019, the Plaintiff was stated to have been a passenger in m/v KBG 269A. I will deal with this issue herein below in the analysis of the evidence. The Plaintiff is said to have suffered blunt trauma on the neck, chest arm and the left hip. He also suffered bruises and

abrasions on the left arm, right knee and right leg. He blamed the Defendant's authorised driver, agent and/ or servant for negligence resulting to the accident.

5. In the Statement of Defence dated 24/02/2020, the Defendant denied the averments by the Plaintiff and put him to strict proof thereof. She blamed the Plaintiff for negligence by engaging the driver of m/v no. KAN 913Q in an animated conversation. She also blamed the driver of the said vehicle for failing to adhere to the traffic rules and driving under the influence of alcohol. She prayed that the suit be dismissed with costs to the Defendant.

6. Only the Plaintiff testified during the hearing. He adopted his witness statement as his evidence in chief. The Defence opted not to tender an evidence. The parties filed their respective submissions. The trial magistrate dismissed the Plaintiff's case with costs on grounds that he failed to proof his case. There were doubts as to whether or not he was a victim of the accident, as it was not clear in which vehicle he was travelling in.

7. On damages awardable, the trial magistrate stated that in the event the Plaintiff was successful in his case, he would have awarded Kshs. 180,000/= as general damages and Kshs. 2,000/= as special damages.

8. The Plaintiff having been aggrieved by the finding of the Trial Court, lodged a Memorandum of Appeal hence this Appeal. Directions were given that the appeal would be disposed off by way of written submissions. Both the Appellant and the Respondent complied by filing their rival submissions and authorities in support of the same.

Analysis

9. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

10. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

11. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

Liability

12. The trial court found the Appellant having failed to proof liability against the Respondent as there was no proof that he was indeed involved in the accident as it was not clear in which vehicle the Appellant was travelling in. As stated herein above, in the Plaint dated 07/11/2019, the Appellant was stated to

have been a passenger in m/v KAN 913Q when the Defendant's motor vehicle no. KBG 269A was negligently driven and went past the red traffic lights hence hitting the Appellant's motor vehicle.

13. In the Amended Plaint, it was stated that he Appellant was a passenger in m/v KBG 269A and that was the basis in which the trial magistrate found that there were doubts as to whether or not the Appellant was involved in the accident. I have perused through the first Plaint and the Amended Plaint. In both their paragraph 4, narrates how the accident occurred. Looking at the last sentence in paragraph 4 of the Amended plaint, it is stated clearly that the Plaintiff was a passenger in m/v no. KAN 913Q which was hit by the Respondent's vehicle no. KBG 269A.

14. In paragraph 4 and 5 of the judgment, the trial court stated that the Appellant was travelling in m/v KAM 913Q. I have perused through the pleadings and witness statement by the Appellant, and there is no single reference to m/v no. KAM 913Q. This was introduced in the judgment by the trial magistrate who appeared to have plucked it from the air, and which was one of the basis of dismissing the Appellant's suit.

15. On which vehicle the Appellant was travelling as a passenger, I find that it must have been an error on the part of the Appellant when it was stated that he was travelling in m/v KBG 269A. This is due to the fact that the last sentence in paragraph 4 states that he was a passenger in m/v KAN 913Q, and the witness statement which was adopted as the evidence-in-chief indicates as such. The Statement of Defence on particulars of negligence on the part of the Appellant states that the Appellant was engaging the driver of m/v KAN 913Q in an animated conversation. Even after the amendment of the Plaint, the Respondent did not amend the Statement of Defence, hence the position remains the same.

16. It is therefore not in dispute that the Appellant was a passenger in m/v KAN 913Q, he was the only eye witness to the accident. The Respondent did not tender any evidence. Even though she blamed the driver of m/v KAN 913Q for the accident, no third party proceedings were taken out despite the intention to do so being stated in the Statement of Defence.

17. The issue is whether this court should interfere with the trial court's findings. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a Trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge"

18. Stemming from the discussion herein above, I find it necessary to interfere with the trial court's finding on liability. The Appellant having been a passenger to m/v KAN 913Q, and third part proceedings having not been taken out but the Respondent, I find the Respondent 100% vicariously liable for the accident.

Quantum

19. The trial court found that it would have awarded Kshs. 180,000 as general damages for the injuries suffered. The Appellant submitted that the award was inordinately low. He urged the court to reassess the damages based on the authorities relied on where general damages were awarded as between Kshs. 200,000/= to Kshs. 350,000/=.

20. On the other hand, the Respondent submitted that the proposed award was reasonable, and if the court was to disturb the same, an award of Kshs. 100,000/= would have been adequate compensation for the injuries suffered.

21. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> "The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages."

22. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.

23. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

24. There is no dispute that the Appellant suffered blunt trauma and soft tissue injuries. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Maureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

25. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

26. Having taken into consideration the cases relied on by the parties, the nature of injuries sustained, I find no reason to significantly interfere with the proposed award of Kshs. 180,000/= in General Damages. Taking into consideration that the judgment was delivered in year 2021, almost 4 years ago, it would in my view that Kshs. 200,000/= would be adequate compensation based comparable authorities cited by the parties. The appeal on General Damages is thus merited.

27. On special damages, Kshs. 2,250/= was pleaded. From the documentary exhibits produced, only a receipt of Kshs. 2,000/= was produced. The same shall be awarded under that head.

28. On costs, I consider that the suit was filed in year 2019. Litigation must come to an end, and no further proceedings need to be entertained. I hereby exercise the discretion of the court and order that each party shall do bear its own costs.

Determination

29. In the upshot, I make the following orders: -

    a. The Appeal has merits and judgment of the lower court is hereby set aside and substituted with a judgment on the following terms;

        i. The Respondent is found to be 100% liable for the accident.

        ii. That General Damages awarded at Kshs. 200,000/=

        iii. That Special Damages awarded at Kshs 2,000/=

    b. Each party to bear its own costs.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 27TH DAY OF MARCH, 2025.

....

F. WANGARI

JUDGE

In the presence of;

M/S Otuya Advocate for the Appellant

N/A by the Respondent

M/S Salwa, Court Assistant