Oyugi v Okoro & another (Civil Appeal E009 of 2022)
[2024] KEHC 442 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 442 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E009 OF 2022

PN GICHOHI, J

JANUARY 25, 2024

BETWEEN

GERALD OREMO OYUGI ..... APPELLANT

AND

GEORGE MORARA OKORO ..... 1ST RESPONDENT

KONANA KOILEKEN ..... 2ND RESPONDENT

(Being an Appeal arising out of the judgment and decree of Hon. D.O Mac'andere (Resident Magistrate) in Kisii Chief Magistrate's Court Civil Case No. 746 of 2019 delivered on 4/2/2022)

JUDGMENT

1. The background of this Appeal is that the 1st Respondent sued the Appellant vide a plaint dated 26/9/2019 in Kisii CMCC No. 746 of 2019. He pleaded that on 26/5/2019, he was lawfully travelling as a passenger in the Appellant's motor vehicle registration number KCN 896K along the Kisii- Migori Road when at Itiero Junction area, the driver /agent so negligently drove, managed and/or controlled the said motor vehicle that he permitted the same to collide with motor vehicle registration number KCA 752P and as a result of which the 1st Respondent suffered bodily injuries.

2. He prayed that the Appellant be held vicariously liable for the tortious acts committed on him and therefore prayed for judgement against the Appellant for general damages, special damages of Kshs. 6,650.00, costs and interest.

3. The Appellant filed his defence dated 7th November, 2019 denying the claim and, in the alternative, and without prejudice, he pleaded that if an accident occurred and which was denied, the same was caused by the reckless, negligent and or careless acts or omission on the part of the 1st Respondent and the owner of the, driver, agent , employee and /or servant motor vehicle which the Appellant was at the earliest opportunity seek to enjoin in the suit.

4. He particularised the negligence of the 1st Respondent, driver /owner of motor vehicle registration number KCA 752P and finally prayed that the 1st Respondent's suit against him be dismissed with costs.

5. Both the 1st Respondent and the Appellant called witnesses in support of their respective cases. They also filed submissions and ultimately, the trial court entered judgement in favour of the 1st Respondent as follows: -

    1. Liability 100%
    2. General damages Kshs. 500,000/=
    3. Special damages Kshs. 6,650= together with interest at court rates from the date of this judgment till payment in full.
    4. The Plaintiff to have the costs of the suit.

6. Aggrieved by the said judgment, the Appellant preferred this appeal. In the Memorandum of Appeal dated 7th February 2022, he raises eleven (11) grounds of appeal which are hereby summarised as follows: -

    1. That the learned magistrate erred in law and misdirected himself when he failed to consider the Appellant 's submissions and legal authorities thereof on liability and quantum on both points of law and facts.
    2. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law thus occasioned miscarriage of justice.
    3. That the learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in The *Insurance (Motor Vehicle Third Party Risks) (Amendment) Act* , 2013, Cap 405.
    4. That the learned magistrate erred in law and fact in finding the Appellant 100 % liable in view of the evidence produced before court and failed to find the third party 100%.
    5. That the learned magistrate erred in law and fact in awarding the Plaintiff/ Respondent Kshs.500,000/- as general damages thus arriving at the wrong finding as regards the nature of the injuries sustained by the Plaintiff.
    6. That the learned magistrate erred in law and fact in awarding the Plaintiff a sum that was so excessive and erroneous as to the estimate of general damages suffered by the plaintiff in the circumstances of this case.
    7. That the learned magistrate erred in fact and in law in failing to consider the Appellant's submissions on quantum and liability and legal authorities relied upon.
    8. That the learned magistrate erred in law and in fact by overly relying on the Respondent's submissions which were not relevant and without addressing his mind to the circumstances of this case.

7. The Appellant therefore prayed that:-

1. The appeal be allowed with costs.

2. The judgment delivered on 4th February, 2022 be set aside and judgement of this Court dismissing the suit against the Appellant with costs be entered in its place.

3. Without prejudice to (b) above this court re-assesses the quantum awarded.

4. The costs of this appeal and that of the lower court be awarded to the Appellant.

5. Such further orders as this court may deem fit to grant.

8. The Appeal was disposed of on the basis of the parties' rival written submissions.

Appellant's Submissions

9. In his written submissions dated 15/1/2023 and filed on 25/1/2023, the Appellant reanalysed the evidence on record to submit that the 2nd Respondent Third Party ought to be held 100% liable for causing the accident having carelessly joined the road without looking.

10. Further, he submitted that though served and request for judgment filed, the 2nd Respondent failed to enter appearance to challenge the Appellant's evidence and therefore, the case against the Appellant ought to be dismissed.

11. On the award for general damages, the Appellant submitted that the injuries sustained were soft tissue in nature and therefore, a sum of Kshs. 50,000.00 was sufficient and adequate compensation to the 1st Respondent. In support of that argument, the Appellant cited several authorities including the case of *Eva Karemi & 5 others v Koskei Kieng & another* [2020]eKLR . He urged this court to allow his Appeal and he be awarded costs.

1St Respondent's Submissions

12. The 1st Respondent filed the first set of submissions dated 20/1/2023 and the second ones dated 10/02/2023. He submitted that the trial court's judgment was sound, proper, faultless and bereft of any error. On liability, he submitted that the evidence by the 1st Respondent (PW1) was formed by the Police Officer (DW1) called by the Appellant that the accident occurred on the lane of the Probox KCA 752 P and therefore the Appellant's motor vehicle KCN 896 K was to blame for the accident.

13. Further , he submitted that PW2 also exonerated the Probox KCA 752 P. He submitted that the trial court properly examined and analysed the uncontroverted evidence to arrive at a just conclusion. As such, the finding on liability against the Appellant ought not to be disturbed.

14. On general damages, the 1st Respondent submitted that the submissions and award proposed by the Appellant are glaringly out of touch with the injuries sustained by the 1st Respondent herein. He submitted the award by the trial court was justifiable and comparable to recent awards. He cited several authorities including *John Mwenda Kuit & 2 others v Ibrahim Kanyaga* [2020]eKLR in support . In the upshot, the 1st Respondent urged this court to dismiss the Appeal with costs.

Determination

15. This appeal is both on liability and quantum. This being a first Appeal, and as stated in *Selle & Another v. Associated Motor Boat Co. LTD & Others* (1968) EA 123, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions while bearing in mind that unlike the trail court, this Court neither saw nor heard the witnesses when they testified.

16. On liability, a perusal of the lower court file shows that the Appellant obtained leave of the court and issued a Third -Party Notice against the 2nd Respondent. This matter was related to CMCC No. 790 of 2019 and the trial court ordered that the orders in that case applies to the present case. That means that ultimately, judgment was entered against the Third Party for failure to file a Memorandum of Appearance and Defence.

17. The consequences of default of appearance and defence by a Third Party served with the Third-Party Notice is provided for Order 1 Rule 19 of the *Civil Procedure Rules* that ;

> " Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him:"

18. Therefore, entry of default judgment against the Third Party did not determine liability as between the 1st Respondent (Plaintiff) and the Appellant (Defendant) herein. If judgment is entered against the Appellant (Defendant), then the Appellant is at liberty to claim from the Third- Party to the extent he had claimed in the Third -Party proceedings.

19. Regarding this accident, there is no dispute that the 1st Respondent was just a lawful passenger in the Appellant's motor vehicle registration number KCN 896K. In that capacity, he had no control of how the said vehicle was being driven and hand no contribution to the occurrence of the accident.

20. In her judgment, the trial magistrate held on liability:-

> " This decision on liability in the sister file Kisii CMCC No. 790 of 2019 will apply to this file and I hold the defendant 100 % vicariously liable for the accident. "

21. In the judgment referred to, the same court had held on liability:-

> " PW1 in his pleadings and evidence in court blamed the defendant for the accident stating that he drove the motor vehicle negligently thereby causing the accident. PW2 also blamed the defendant since he told the court that the accident happened on the left side of the road while the matatu which the defendant's driver was driving was supposed to be on the right lane . The defence witness DW2 told the court that the accident happened on the lane of the probox which means that it occurred off its lane. His evidence and that of the PW2 exonerated the driver of the probox from any blame. A look at the abstract produced indicates that the Defendant is the owner of the of the matatu and the particulars of insurance were written on top of the abstract as such I hold him 100% vicariously liable for the said accident."

22. This is a finding of fact by the court that heard the case. So, did she err in this finding? The evidence by the Investigating Officer (PW2) as recorded in CMCC No. 790 of 2019 was applied in the trial.

23. The accident occurred on when the Probox Registration No. KCA 752 P tried to re-join its lane after veering off the road and collided with the Appellant's matatu Registration No. KCN 896K matatu. According to Appellant's witness No. 87122 Cpl Peter Saoke (DW1) the Appellant's driver (DW2) failed to keep to his lane.

24. DW2 testified that the driver of the probox went to the left to avoid an oncoming Nyamira bus which was overtaking and that as the driver tried to go back to the road, it hit the Matatu.

25. On cross examination, he told the court that he did not have a sketch plan but the matatu was slightly on the left side facing Kisii. That without a sketch plan he could not confirm the point of impact. He told the court that no one was charged for the accident but the matter was still pending under investigations.

26. This Court therefore finds that since there was no clear evidence to hold the Appellant 100% liable in the circumstances or to the extent of the contribution by either party to the accident, liability should have been apportioned between the two vehicles (matatu and probox) equally.

27. On quantum, an award of damages is discretionary and the appellate court would not interfere with that discretion unless the award is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on wrong principles or that it misapprehended the evidence in some material respect and therefore arrived at a figure which was either inordinately high or low.

28. Further the trial court should be guided by comparable awards for similar injuries while bearing in mind that that money cannot fully compensate for injuries sustained. The trial should also consider to age of the case cited in support of the award so as to allow for inflation.

29. In this case, it is not disputed that the1st Respondent sustained blunt trauma to the neck, the back, right and left elbow and bruises on the right and left lower limb. In awarding Kshs. 500,000/= as general damages, the trial magistrate was guided by the case *Poa Link Services Co. Ltd & another v Sindani Boaaz Bonzemo* [2021] eKLR cited by the 1st Respondent where the Respondent therein had suffered blunt injury to the chest, bruises on the lower abdomen, right hip joint, and on the knee. He was awarded Kshs. 350,000/=.

30. The trial court also considered the case of *Daniel Odhiambo Ngesa v Daniel Otieno Owino & another*]2022]eKLR cited by the Appellant. In reference to that in regard to the proposal by the Appellant for an award of Kshs. 50,000/= , the trial court stated that the "Court of Appeal awarded a sum of Kshs. 90,000/= for similar injuries."

31. That was not an award by the Court of Appeal but High Court on appeal from the lower court. Further, the injuries therein were blunt chest injury, sprain on the neck at the left side, dislocation right shoulder joint, blunt abdominal injury, friction laceration on the left lower limb, dislocation at the ankle joint.

32. In that case, the lower court dismissed the prayer for award of general damages . On appeal , R.E.Aburili J held that she would have awarded Kshs. 150,000/= as general damages but dismissed the appeal as the injuries were "inconsistent and not proved".

33. In *George Mugo & another v AKM (Minor suing through next friend and mother of AKM* [2018]eKLR also cited by the Appellant before the trial court, the Respondent sustained blunt injury left shoulder, blunt chest injury interior, bruises of left wrist region , blunt injury left arm. High Court substituted the award of Kshs. 300,000/= with Kshs. 90,000/=.

34. In *Blue Horizon Travel Co. Ltd v Kenneth Njoroge* [2020]e KLR , the Plaintiff was awarded Kshs. 400,000/= as general damages for bruises on the scalp, neck, abdomen, lower back and cut wound on the left thumb and left palm and subluxation of the left shoulder joint.

35. While relying on *Poa Link Services Co. Ltd case* (supra) the trial court had this to say:-

> " The case was decided in 2021 and this case is happening one year down the line and given the rising economic trends occasioning the spiralling of the shilling, I find the award prosed by the Plaintiff of Kshs. 500,000 to be sufficient compensation for general damages."

36. This Court is satisfied that the trial court took into account the proper principles and was guided by the more recent judicial decision with close proximity as to the nature of injuries sustained by the 1st Respondent. In the circumstances, this Court sees no reason to interfere with the award on general damages and the award is hereby upheld.

37. On special damages in the sum of Kshs. 6,650/=, this Court finds that the same was proved to the required standard of proof.

38. In conclusion, this Court makes the following final orders:-

    1. The trial magistrate's judgment on liability is set aside and substituted with judgment this Court that liability shall be shared as between the Appellant and the 2nd Respondent in the ratio of 50:50 in favour of the 1st Respondent.

    2. The award of Ksh. 500,000/= as general damages and of Kshs. 6,650/= as special damages are is hereby upheld.

    3. Since the Appeal partially succeeds, each party to bear its own costs of the Appeal.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUAL) THIS 25TH DAY OF JANUARY, 2024.

PATRICIA GICHOHI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

N/A For the Appellant.

N/A for the 1st Respondent.

N/A for the 2nd Respondent.

Laureen Njiru / Aphline , Court Assistant