M'big Limited v Wabuke (Civil Appeal 27 of 2019)
[2024] KEHC 1701 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1701 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 27 OF 2019

DK KEMEI, J

FEBRUARY 22, 2024

BETWEEN

M'BIG LIMITED .... APPELLANT

AND

FRED WAFULA WABUKE .... RESPONDENT

(Being an appeal against the judgement/decree of the Chief Magistrate's Court at Bungoma (Hon. Mutai-PM) delivered on 8th March 2019 in Bungoma CMCC No. 428 OF 2018)

JUDGMENT

1. The Appeal herein arises from the judgement and decree of the Hon Mutai (PM) in Bungoma CMCC No. 428 of 2018 wherein he held the Appellant solely liable in damages (100%) to the Respondent arising from injuries sustained in a road traffic accident involving the Appellant's vehicle and the Respondent. The learned trial magistrate awarded the Respondent general damages of Kshs 1, 400, 000/ as general damages plus Kshs 1, 700, 000/ for loss of earning as well as Kshs 8, 430/ as special damages. The Appellant was also ordered to pay the costs of the suit plus interest.

2. Aggrieved by the decision of the trial Court, the Appellant lodged a Memorandum of Appeal dated 27th March, 2019 wherein it raised the following grounds of appeal namely:

    a. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's defence when making his judgement.

    b. That the learned trial magistrate erred in fact and in law in addressing himself on issues not pleaded by the Respondent.

    c. That the learned trial magistrate's award of general damages was not based on the medical documents presented in court.

- d. The learned trial magistrate erred in fact and in law in awarding the Respondent general damages which was excessive and unreasonable.
- e. The learned trial magistrate erred in law and in fact by not considering the facts of the case.

3. The appeal was canvassed by way of written submissions. It is only the Appellant who filed submissions.

4. I have duly considered the record of the trial court and the submissions tendered. It is now settled law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its independent findings and conclusions as to whether to uphold the findings of the trial court. See Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
   - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
   - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
   - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

5. The issue for determination here is whether the award of quantum of Kshs. 3, 108,430.00/= in light of the injuries stated above is inordinately high to persuade this Court to interfere with it. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".

6. To begin with, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical reports which indicated injuries inter alia: soft tissue injuries; crushed terminal phalanx of the left finger; disarticulation of distal phalanx 5th right finger and psychological trauma. Further, the medical report indicated lost terminal phalanx of 5th finger as permanent.

7. I have considered the Appellant's submissions on the quantum of damages, the authorities cited by Counsel in their submissions for this appeal. It must be noted that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that which is as far as possible comparable" to the other person's injuries, and the after effects.

8. From the evidence adduced by the Respondent, it is clear that the Respondent had suffered injuries which resulted in disability that was assessed at 7.5% permanent incapacity.

9. On the issue of liability, the Respondent testified as PW1 where he relied on his recorded statement dated 5th September 2018 as his evidence in chief. According to him, he was involved in an accident with a motor vehicle that belonged to the Appellant herein along Bungoma-Mumias road leading to the injuries sustained. He produced documents in Court to support his case as PEXH I-IX. He blamed the Appellant for the accident as his motor vehicle was driven at a very high speed causing it to swerve to the Respondent's lane in an attempt to avoid knocking another vehicle causing his motor vehicle to knock the Respondent.

10. Neither the Respondent nor the Appellant called a further eyewitness to the accident in question. The Appellant did not cross examine the Respondent nor adduce any evidence to controvert that of

the Respondent. That notwithstanding, the trial court in its judgment held that the Respondent on a balance of probability was lawfully cycling on his side of the road when the Appellant's motor vehicle knocked him down. He further held that on a balance of probability, the Appellant caused the accident due to its driver's negligence. He finally held that there was no contributory negligence on the part of the Respondent.

11. This being the first Appellate Court, there is need to give a fresh look at the evidence adduced before the lower Court bearing in mind that it had no benefit of having seen or heard the witnesses as they testified. This is the principle espoused in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court of Appeal stated the following with regard to the duty of a first appellate Court: -

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority v Kusthon (Kenya) Limited [2009] 2EA 212 wherein the Court of Appeal held, inter alia, that:-
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> "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

12. In Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR the Court of Appeal stated as follows of the role of the first appellate Court:

> "…….The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered."

13. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "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." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

14. The duty of proving the averments contained in the plaint lay squarely with the Respondent.

15. In the present instance, it is not in dispute that an accident occurred on the material day involving the subject motor vehicle being driven by the Appellant's driver while the Respondent was a lawfully pedal cyclist, and as a result of which the latter sustained bodily injuries. Suffice it to say that the mere occurrence of an accident is not proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The Court in that case cited the famous decision of Kiema Mutuku v. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated 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."

16. An assessment of probabilities is not possible without analyzing the facts of the case which are contained in oral and documentary evidence. A Court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced, or which does not follow by reasonable inference from the proved facts. Inference, it was observed by Lord Wright in Caswell v Powell Dufferin Associated Collieries Ltd {1939} 3 All ER 722 (HL) at 733, must be carefully distinguished from speculation:-

" There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

17. In the application of the but-for test in cases involving proof of negligent omissions, the substitution exercise is used in terms of which enquiry is conducted merely by eliminating the unlawful conduct of the Defendant and asking whether, the remaining circumstances being the same, the event causing harm to the Plaintiff would have occurred or not. If it would, then the unlawful conduct of the Defendant was not a cause in fact of this event; but if it would not have so occurred, then it may be taken that the Defendant's unlawful act was such a cause.

18. The Respondent's evidence was that he never controlled the motor vehicle registration number KAX 931 U along the said road which was then driven by the Appellant's driver and which moved to his

side and hit him. The trial Magistrate had to weigh the believability of this allegation against all the evidence tendered. The Appellant had a duty to rebut the said allegations by tendering evidence to the contrary. The Appellant never adduced evidence nor did it attempt to cross-examine the Respondent. Tortuous liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redress-able by an action for un-liquidated damages." (Winfield, Province of the Law of Tort, Page 32).

19. In Halsbury's Laws of England (4th Ed at Para 662 (page 476) it is stated as follows:-

> " The burden of proof in an action for damages for negligence rests primarily on the Plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the Plaintiff, some breach of that duty, and an injury to the Plaintiff between which the breach of duty a causal connection must be established."

20. Thus, it is essential that a Plaintiff proves that a Defendant was negligent or guilty of an omission as a result of which the injury arose. The Respondent (Plaintiff) blamed the Appellant for the accident. This evidence was not rebutted. Learned counsel for the Appellant has contended that the trial magistrate did not consider the Appellant's defence. There was no way that the Appellant could expect to be considered by the trial court when it failed to offer evidence in rebuttal or even cross-examine the Respondent. The respondent's evidence was thus uncontroverted in any way. I find no reason to fault the trial Magistrate for findings on liability. I find that the trial Magistrate did not error or misdirect himself in finding that liability was proved at 100%.

21. On the issue of quantum, i shall rely on the Court of Appeal's decision in the case of Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, where the Court of Appeal held that –

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
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> 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low." (Emphasis my own).

22. Award of damages is an exercise of discretion of the trial Court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous

estimate. The award must also take into account the prevailing economic environment. The Court of Appeal in Kivati -vs- Coastal Bottlers Ltd (Civil Appeal No. 69 of 1984) in the following words:-

> " The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

23. Turning to the grounds of appeal, the Appellant's counsel submitted that the learned Magistrate in awarding the damages proceeded on the wrong principle leading to inordinately high and erroneous estimate of damages.

24. I have reviewed the Appellant's learned counsel's submissions before the trial Court to satisfy myself on the pathway chosen by the learned trial Magistrate to award general damages of Kshs.1, 400,000/=; award of loss of earnings at Kshs.1, 700,000/= and special damages at Kshs. 8, 430/= plus costs of the suit and interest. I went further to establish whether any of the authorities cited stands within the general rules of application on injuries and awards similar with those suffered by the Respondent.

25. Based on the availed medical report dated 11th July 2018, Dr. Mulianga Ekesa gave a prognosis that the injuries as sustained by the Respondent were severe in nature and that there was permanent incapacity which he assessed at 7.5%.

26. The learned counsel for the Appellant relying on the case of A.A.M v Justus Gisairo Ndarera & Another [2010] eKLR submitted before the lower court that the lower Court should make an award of Kshs. 2, 500,000/= for pain and suffering and Kshs. 1,000,000/= for loss of future earnings.

27. In the case of Lim v Camden HA [1980] AC 174 the Court held that:

> " Even in assessing compensatory damages, the Law seeks at most to indemnify the victim for the loss suffered, not to mulch the tortfeasor for the injury he has caused."

28. There is a distinct difference between the pain and suffering experienced by a victim of an accident with serious multiple skeletal injuries in contrast with that of low-level soft tissue injuries. In McGregor on damages 15th Edition 1988 paragraph 153, its observed as follows:

> " pain and suffering is now almost a term of art. In so far as that can be distinguished, pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it.
>
> It thus includes the pain caused by any medical treatment which the plaintiff, might have to undergo. Suffering on the other hand denotes the mental or evidential distress which the plaintiff may feel as a consequence of the injury: anxiety, worry, fear, torment, embarrassment and the like, it is not however, usual for Judges to distinguish between the two elements?
>
> Whereas loss of amenity is deprivation of the Plaintiff of the capacity to do the things which before the accident he was able to enjoy, and due to the injury he is fully or partially prevented from participating in the normal activities of life."

29. In Pietro Canobbio vs Joseph Amani Hinzano [2016] eKLR where the Respondent who had sustained amputation of the left index finger, left right finger and small finger with a permanent disability of 18% was awarded general damages of Kshs.750, 000/=. The Plaintiff in this case sustained more injuries compared to the Respondent herein; he lost three of his fingers while the Appellant herein sustained amputation of one finger and a permanent incapacity assessed at 7.5%. Award of general damages is

discretionary. Kshs.1,400, 000/= as general damages for pain and suffering is not inordinately high taking into consideration the inflation factor as to represent an entirely erroneous estimate.

30. On the award of loss of earnings, the trial Court made an award of Kshs. 1, 700,000/=. The Respondent argued that he lost income as a result of the injuries suffered from the accident. Prior to the accident, he was a bread vendor and he used to earn Kshs. 1000/= per day translating to Kshs. 30,000/= per month. On loss of earning capacity, the Court of Appeal in Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR stated as follows: -

> " ...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the Plaintiff is employed is to compensate the Plaintiff for the risk that the disability has exposed him to either losing his job in the future or in case he loses the job, his diminution of chances of getting an alternative job in the labor market while the justification for the award where the Plaintiff is not employed at the date of trial, is to compensate the Plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing the loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

31. From my re-evaluation of the evidence, i find that the learned trial magistrate referred to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made. Upon studying the cited authorities relied upon by the Appellant, i note that the injuries therein were not severe in nature than in the current case but the gist is that all the awards ranged between Kshs. 400,000/= to 500,000/=. The Appellant submitted that the most appropriate award in his case would be Kshs. 500,000/= based on the injuries suffered. I am therefore not persuaded by the authorities cited by the Appellant.

32. From the record, the Respondent has not adduced evidence to prove that he was earning 30,000 per month but he produced a medical report from Dr. Mulianga Ekesa that indicates that he suffered permanent disability as a result of amputated 5th right finger.It was necessary for the report to indicate period of inability to work. In my view, it would be fair to award a global figure for loss of earning capacity for the period before the amputation and also reduced earning capacity in the remainder of his working period. A sum of Kshs 800,000 will be sufficient in my view.

33. In respect to special damages, the pleaded and proved specials ofKshs.8, 430/= through evidence of receipts showing money was paid or the injury was suffered were properly proved. In Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, the Court of appeal held as follows: -

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

34. In view of the foregoing observations, the appeal partially succeeds to the extent that the award of the trial court on loss of earnings is hereby set aside and substituted with an award of Kshs 800, 000/. All the other items in the judgement are upheld. The resultant judgement is as follows:

1) Liability against the Appellant..................100%

2) Damages assessed as hereunder: -

   i. Pain and Suffering.........................Kshs. 1, 400,000/=

   ii. Loss of earnings.............................Kshs. 800,000/=

   iii. Special damages.............................Kshs. 8,430/=

   Grand Total..............................Kshs. 2, 208,430/=

3) Each party to bear their own costs of the appeal while the Respondent shall have full costs in the lower court.

It is hereby ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D. KEMEI

JUDGE

In the presence of:

No appearance Korongo for Appellant

Bw' Onchiri for Respondent

Kizito Court Assistant