Mukhwana v Malaba (Civil Appeal E001 of 2023)
[2024] KEHC 1718 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E001 OF 2023

DK KEMEI, J

FEBRUARY 22, 2024

BETWEEN

JOHN SITUMA MUKHWANA ..... APPELLANT

AND

CYPRIAN WEKESA MALABA ..... RESPONDENT

(Being an appeal against the judgement/decree of the Senior Resident Magistrate's Court at Sirisia (Hon. C. M. Wattimah) delivered on 9th November 2022 in Sirisia SRMCC No. E024 of 2021)

JUDGMENT

1. The Appeal arises from the judgement and decree of Hon Wattimah (SRM) in Sirisia PMCC No. E024 of 2021 dated 9.11.20221 wherein she held the Appellant 100% liable in damages to the Respondent and further awarded the Respondent general damages of Kshs 700, 000/, future medical expenses of Kshs 50, 000/ and special damages of Kshs 48, 958/ as well as costs of the suit plus interest from the date of judgement.

2. The Appellant was aggrieved by the said judgement and lodged this Appeal on 15th May 2023 vide a Memorandum of Appeal dated 16th November 2022. He relied on six (6) Grounds of Appeal as follows:

    a. That the trial magistrate erred in law and in fact when she failed to properly evaluate the evidence on record thus reaching an erroneous decision on the issue of liability.

    b. That the trial magistrate erred in law and in fact as she did on evaluation of liability.

    c. That the trial magistrate erred in law and fact as she did by basing her decision on irrelevant matters and failing to base her decision on the facts and evidence on record and thereby arriving at an excessive award on the issue of general damages.

d. That the trial magistrate erred in law on the assessment of quantum of damages.

e. That the trial magistrate erred in law and fact by basing her decision on irrelevant matters and failing to base her decision on the facts and the evidence on record.

f. That the trial magistrate erred in failing to follow and uphold legal parameters and binding precedents on assessment of general damages and liability in similar circumstances.

It was urged that the trial court's judgement be set aside and or quashed and that the court make a finding on the issue of liability and re-assess the quantum of general damages to a reasonable amount and further award costs of the appeal to the Appellant.

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

4. I have given due consideration to the record of the lower court and the submissions tendered. The background of this appeal is that the Respondent herein on 19th February 2021 while riding a motor cycle along Bungoma-Chwele road at Mayanja shopping Centre or thereabouts was knocked by the Respondent, his driver and/or agent who was then driving motor vehicle registration number KBY 783Q negligently thereby occasioning him to sustain serious bodily injuries which he particularized as fracture of the right femur with present complaints of inability to use his lower limbs. The Respondent sought damages for the injuries incurred, medical expenses and future medical expenses.

5. The Appellant entered appearance and filed his defence denying all the Respondent's allegations and blaming the Respondent for the accident, if any occurred.

6. The matter proceeded to hearing with the Respondent (Plaintiff) relying on the evidence of four witnesses to prove his case. The Appellant(defendant) did not call any witnesses. PW1 was Dr. Joseph Sokobe. who presented the medical report of the Respondent dated 12th April 2021. According to him, the injuries sustained were captured in the report and that it was clear the Respondent would require future medical attention, which he assessed the expenses at Kshs. 150,000/=. He told the Court that he charged the Respondent Kshs. 6,000/= for the report. He produced the medical report as PEXH.1 and the receipt as PEXH.2. On cross-examination, he told the Court that if the implants are removed which he is not aware of, the Respondent will heal fully. On re-examination, he told the Court that if the implants are removed he expects the Respondent will be okay.

7. PW2 was Elias Adoka, who told the Court that he works at Bungoma County Referral Hospital as a clinician. He confirmed that he attended to the Respondent and produced in Court his discharge summary. According to him, the Respondent was first put on traction then plaiting was done. He was discharged with follow up on orthopedic clinics. He told the Court that the Respondent was admitted on 19th February 2021 and he produced the discharge summary as PEXH.3. He told the Court that payments of Kshs. 37, 408/= were made and produced four receipts to that effect as PEXH.4. He also produced the Respondent's P3 form signed on 8th April 2021 as PEXH. 5 and the treatment notes as PEXH. 6. On cross-examination, he told the Court that the only injury is the right fracture mid shaft femur and that it is the only injury the Respondent sustained as documented in the discharge summary.

8. PW3 was No. 81576 PC. Jackeline Were, who testified that she is attached to Traffic Department Bungoma and that she had the police abstract in respect to the accident involving the Appellant's motor cycle and KBY 783Q Toyota Harrier that occurred on 19th February 2021. According to her, the Respondent was the rider and that the accident was reported by OB No. 43/19/2/2021. She produced the police abstract in Court as PEXH.7 and blamed the owner of the motor vehicle for the accident. On cross-examination, she told the Court that she was not the investigating officer and that she did not have the police file with her. She told the Court that the investigating officer was transferred but she is

aware that he did visit the scene on 19th February 2021. On re-examination, she told the Court that she got information of the accident as narrated in the OB extract.

9. PW4 was Cyprian Wekesa Malaba, who adopted his statement recorded on 14th April 2021 as his evidence in chief. According to him, he was involved in a road traffic accident on 19th February 2021. He was taken to Bungoma County Hospital where he was admitted. He prayed for the Court to grant him damages and costs of the suit and that he is also paid for future medical expenses. On cross-examination, he told the Court that he is a farmer and he also runs a boda boda business. He further testified that he got a fracture on the right leg and was treated but has not fully healed. On re-examination, he told the Court that his driving license got lost during the accident.

10. At the close of the Respondent's evidence, the Appellant herein testified as DW1. He adopted his recorded statement dated 17th December 2021 as his evidence in chief. He proceeded to produce in Court a medical report by Dr. James Obondi Otieno dated 28th February 2022 as DEXH.1. According to him, the motor cycle rider was the one who caused the accident and that his motor cycle was overloaded and that he was also over speeding. On cross-examination, he told the Court that he is the owner of motor vehicle KBY 783Q and that he was the one driving it on the day of the accident. He told the Court that he was overtaking the motor vehicle ahead of him on the right side of the road and that the motor cyclist was on his lane. On re-examination, he told the Court that the Respondent was 25 metres away when he was overtaking.

11. 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. See Court of Appeal for East Africa decision 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.

12. Following a cursory look at the record of appeal before me, it suffices to see that indeed on a balance of probabilities there was sufficient evidence to prove, at least on a balance of probability, that indeed a road traffic accident involving the said motor vehicle registration number KBY 783Q occurred along Bungoma-Chwele road as pleaded by the Respondent and consequently the same is enough to prove that the Appellant was then its owners/authorized driver and that the Respondent was the rider of the motor cycle. The certificate of official search from the registrar of motor vehicles also conclusively proved the ownership of the particular motor vehicle. There was no evidence called to rebut this assumption and hence there was nothing displayed to the trial Court that the issue of ownership was not a central issue. For this, i am persuaded by the Court of Appeal in the case of Nakuru Civil Appeal No. 210 of 2006 and Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Another. I therefore find that the said accident did occur and that the motor vehicle was indeed the Appellant's.

13. It is clear that the determination of the appeal revolves around the question whether the Respondent proved his case on the balance of probabilities. The provisions of sections 107,109 and 112 of the

Evidence Act, on the burden of proof, were extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

14. The admitted facts are that the Respondent was injured by motor vehicle registration number KBY 783Q which was being driven by the Appellant at the material time. The Respondent was on his lane at the time of the accident. What is in dispute is who between the Appellant and Respondent was to blame for the accident.

15. This is a case where the Respondent's witness (PW4) blamed the Appellant for the accident but she did not visit the scene and that the investigating officer was said to have gone on transfer and therefore their evidence in the Court's opinion was only limited to merely affirming what the investigating officer had recorded in his file. Both the Appellant and the Respondent who were at the accident scene each gave a different recount of what exactly happened.

16. In the case of Lakhamshi Vs Attorney General, (1971) E A 118, 120 Spry VP observed as follows; -

> " It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident."

17. Similarly, in the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Anor (2004) eKLR, the Court of Appeal, (Okubasu Githinji & Waki JJ. A) while apportioning liability equally held;

> " we have considered the submissions of both counsels, the authorities cited before us and we are persuaded by Mr. Mwangi learned counsel for the appellant that we must interfere with the judgment of the superior court. There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50"

18. This Court having analyzed the evidence on record, the rival submissions and having undertaken a fresh scrutiny of the evidence, as required of a first appellate Court, this Court finds that in the circumstances of the case, it was not possible to come up with a conclusion on who occasioned the accident. What is however not in dispute is that an accident occurred involving both the Respondent and the Appellant's motor vehicle on a public road. From the evidence on record, it is clear both or one of the parties were negligent leading to the accident. Both did not exercise the due diligence and skill expected when driving/riding on a public road. In the circumstances, the liability is hereby apportioned at the ratio of 50/50. That being the position, the finding of the trial court on liability was thus in error and must be interfered with by this court.

19. As regards the issue of quantum, the appellant has contested the award of general damages of Kshs. 700,000.00/=. In the counsel's view is my view, the injuries sustained by the Respondent are not serious 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".

20. To begin, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical reports which indicated fracture of the right femur and that his present complaint is that he is unable to use his right lower limb.

21. 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 as far as possible comparable to the other person's injuries, and the after effects.

22. From the evidence adduced by the Respondent, it is clear that the Respondent had suffered bone injuries with no resulting disability and that had implants that had to be removed at a cost.

23. For the issue of quantum, i shall rely on the Court of Appeal's decision in the case of Gitobu Imanyara & 2 Others vs. 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).

24. 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, it is noted that the injuries therein were more severe in nature than in the current case but the gist is that all the

awards ranged between Kshs. 300,000/= to 500,000/=. Most of the cited cases were decided in the year 2019. I am therefore not persuaded by the authorities cited by the Appellant.

25. Further, in dealing with an appeal on quantum, i stand guided by the decision of the Court of Appeal in Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5 where the Court held that;

> " 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"

26. In the case of Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR the Court stated as follows: -

> " It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ..."

27. The other critical point of convergence for the Court is to bear in mind that the award of general damages is an exercise of discretion by the trial Court based on the evidence and impressions on demeanor of witnesses made by the learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. (See Simon Tavera v Mercy Mutitu Njeru {2014} eKLR).

28. In view of the foregoing, i am persuaded that the award made by the learned trial magistrate was proper in comparison to comparable awards and is commensurate with the injuries and hence there is no need to interfere with it.

29. As regards the award of future medical expenses and special damages, the test to be applied in an award of special damages is clearly articulated in the cases of Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990 and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681 which laid down the principle that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages, i find that the Respondent had clearly proven the amount pleaded as special damages and as such i find no reason to vary the learned Magistrate's decision on that.

30. On the issue of future medical expenses, i find that the same are special damages, which have to be pleaded and proved. I find that the need for future medical expenses was also supported by medical evidence and proved accordingly. The medical report was specific with the estimated amount the Respondent would require for the treatments. This simply means that the same could be more or less. I thereby, uphold the holding of the trial Court awarding the Respondent Kshs. 50,000/= for future medical expenses.

31. In view of the foregoing observation, it is my finding that the Appellant's appeal partially succeeds. The trial court's judgement on liability is hereby set aside and substituted with apportionment of 50:50 as between the Appellant and Respondent. The rest of the awards are upheld. As the appeal has partially succeeded, the Appellant is awarded half 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:

Miss Ngome for Appellant

Kweyu for Mukisu for Respondent

Kizito Court Assistant