Ochieng v Ogwang (Civil Appeal E151 of 2023)
[2024] KEHC 3526 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3526 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E151 OF 2023

RE ABURILI, J

MARCH 21, 2024

BETWEEN

GEORGE OCHIENG ..... APPELLANT

AND

JULIUS AMBA OGWANG ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable G.C. Serem in the Small Claims Court at Kisumu delivered on the 11th August 2023 in Kisumu Small Claims Court Case No. E188 of 2023)

JUDGMENT

Introduction

1. The appellant George Ochieng was sued by the respondent Julius Amba Ogwang for general and special damages for injuries sustained by the respondent following a road traffic accident that occurred on the 2nd June 2023 along the Nairobi – Kisumu road at Rabuor Shopping Centre when the appellant's driver of motor vehicle registration no. KCD 463 Toyota Vitz lost control of the said vehicle, causing it to collide with the respondent.

2. The appellant filed his defence and denied the respondent's statement of claim contending that the claim was bad in law and further registered a counterclaim that his vehicle had been damaged and prayed for an amount of Kshs. 30,000.

3. The trial magistrate found the appellant 100% liable for the accident and proceeded to award the respondent general damages of Kshs. 700,000 as well as costs of the suit with interest and further dismissed the appellant's counterclaim.

4. Aggrieved by the said decision, the appellant filed his memorandum of appeal dated 22nd August 2023 raising the following grounds of appeal:

1. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the appellant.

2. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on liability by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on liability.

3. That the learned trial magistrate erred in law and in fact in awarding general damages of Kshs. 700,000 which award was excessive and not commensurate to the nature of injuries sustained by the plaintiff.

4. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case was deciding.

5. The parties agreed to canvass the appeal by way of written submissions as summarised below.

The Appellants' Submissions

6. The appellant through his counsel submitted that the trial magistrate fell into error when she failed to appreciate that all the evidence before court pointed negligence at the respondent who was wholly to blame for the accident. It was submitted further that the respondent failed to prove his case on a balance of probabilities.

7. The appellant submitted that this court ought to disturb the award of Kshs. 700,000 in general damages as the same was so high as to be an erroneous estimate as the respondent sustained one fracture of the tibia and soft tissue injuries.

8. The appellant proposed a maximum award of Kshs. 300,000. Reliance was placed on the case of; *Triad Coaches Ltd & Another v Mary Mutheu Kakemu* [2020] eKLR where the learned judge reduced the amount awarded by the trial court of Kshs. 300,000 and substituted it with Kshs. 250,000 in favour of the respondent who had sustained a fracture of the tibia, fibula, blunt injury of the right wrist and blunt injury of the right ankle with dislocation

9. He further relied on the case of *DG (Minor suing through her next friend MOR) v Richard Otieno Onyisi* [2021] eKLR where the appellant sustained chest contusions, left tibia fracture, bruises on the left foot and bruises on the left leg and High Court on appeal awarded general damages of Kshs. 400,000.

The Respondent's Submissions

10. It was submitted that the Appellant was negligent in overtaking and making an abrupt stop in front of the Respondent hence causing the accident which negligence was further seen by the act of causing the accident off the road where the Respondent had the right of way and the fact that the Appellant was not charged in court does not negate the Appellant's liability since the decision to charge is based on the police officers own independent investigations whereas the determination of liability is based on the court's analysis of the evidence and circumstances as presented before it as was held in the case of *Titus Kamau Gachanga v Wahogo Edward & another* [2019] eKLR.

11. The respondent submitted that the trial court was therefore justified in holding the Appellant 100% liable for the accident and urged this court to uphold the finding of the trial court on liability arguing that the Respondent duly discharged the legal burden of proof as provided for under Section 107 of the *Evidence Act*.

12. On quantum, it was submitted that in light of the injuries sustained, the award of Kshs. 700,000 was justified and would be adequate compensation for general damages as was held in the case of *Mugecha Eliud v Ndavi Nziu* [2018] eKLR, where the Respondent suffered similar injuries and was awarded Kshs. 1,220,000, in general damages and on appeal, the award was set aside and reviewed to Kshs. 700,000.

Analysis and Determination

13. This being a first appeal, this court is under a duty to re-evaluate and reassess the evidence and reach its own conclusions. It must, however, keep in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " 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."

14. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

15. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, I find the issues for its determination to be:

    a. Whether or not the finding on liability was fair and reasonable in the circumstances of this case.

    b. Whether or not the award of quantum of damages was unjustified in the circumstances of this case so as to warrant interference by this court.

Liability

16. On liability, In *Khambi and Another v 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."

17. That was the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

18. The law is clear that he who alleges must proof. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to *Phipson on the Law of Evidence*, the term 'burden of proof' has two distinct meanings:

> " 1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
>
> 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

19. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

20. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

21. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident leading to the injuries he sustained.

22. The respondent testified that he was cycling on his way home heading towards the same direction as the vehicle behind him when the appellant's vehicle overtook him and suddenly stopped ahead of him forcing him to hit the back side of the motor vehicle. He stated that the vehicle stopped 10 metres ahead of him.

23. In cross-examination, the respondent reiterated that the appellant's vehicle stopped ahead of him without any indication. In re-examination, he testified that the appellant's driver accepted responsibility by giving the respondent's cousin Kshs. 1,000.

24. The appellant's driver testified that on the material day, he was driving along the said road when he indicated and parked by the shoulder of the road and after 2 minutes, he heard a loud bang from behind, which turned out to be the respondent. It was his testimony that the respondent hit him when he had already stopped and that he had indicated his hazards. He denied stopping abruptly.

25. In cross-examination, the appellant's driver testified that he heard the bang before he alighted from the vehicle.

26. The trial magistrate held that by immediately stopping just ahead of the respondent, on the side of the road where the cyclist had a right of way, the appellant's driver set up a situation for the accident to happen and thus the trial court proceeded to hold the appellant 100% liable for the accident.

27. The accident herein involved a motor vehicle and a motorcycle. The parties have given quite varied accounts as to how the accident occurred. How should the court resolve such tension between the account rendered by the Appellant and Respondent on liability?

28. The established judicial method, which rests on the singular dependability of the fact-base, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

29. The respondent bore the onus of proving his case. Notably, important evidence to support this allegation would have been the result of the police investigations, OB extract, statements recorded with the police and the motor vehicle inspection report as well as a sketch plan. None of these pieces of evidence was produced. The respondent however testified that the car stopped some 10 metres ahead of him.

30. In light of such evidence of the word of the respondent against the word of the appellant with no independent eye witness, the court is left with mere possibility that the appellant's driver may or may not have indicated that he was entering the shoulder of the road. The investigations report would have given the court the exact point of impact and the damaged part of the vehicle as was found by the police immediately after the accident.

31. The account by the appellant blamed the cyclist for failing to stop and thus colliding with his car. He insisted that he indicated prior to turning onto the shoulder of the road.

32. The evidence in support of each of the opposing accounts herein is barely sufficient for the court to squarely blame one person against the other. Judicial pronouncements have established that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. In the case of *Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another*, Kisii HCC.A 29/2016 Majanja J cited with approval the Court of Appeal decision in the case of *Berkly Steward Limited v Waiyaki* [1982-1988] KAR where it cited with approval the decision in *Baker v Market Harborough Industrial Co-operative Society Ltd* (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that-

> " Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them."

33. Justice Majanja stated that where the court is unable to determine who is to blame, it has apportioned liability equally as illustrated by the Court of Appeal in *Hussein Omar Farar v Lento Agencies* C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it observed that –

> " In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

34. The learned Judge then held that –

> "I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party."

35. In the instant case, it is clear that an accident occurred on the 2.6.2023 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent collided with him from behind while the respondent claimed that the appellant's driver suddenly stopped in front of him.

36. I reiterate that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong.

37. In this case, I find that the trial magistrate addressing her mind properly to the law and facts in determining the issue of liability would have found that both parties were liable for the accident. The circumstances of, and evidence presented in this case warrant a 50:50 contributory negligence between the appellant and the respondent. I thus find that the trial magistrate erred in finding the appellant herein 100% liable for the material accident and for that reason, this warrants interference by this court. Accordingly, I set aside the finding on liability and substitute it with a finding that both parties were to blame for the accident in equal proportions.

38. I proceed to set the finding on liability and substitute the same with an apportionment of liability at 50% for each of the parties herein.

Quantum

39. The assessment of damages is a matter of discretion by the trial court and an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome.

40. In *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal held that:

> "As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see *Butt vs. Khan* [1981] KLR 349)"

41. Additionally, in *Stanley Maore v Geoffrey Mwenda* [2004] eKLR, the Court of Appeal suggested thus:

> "...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

42. With the foregoing principles in mind, I have examined the evidence of the respondent as to the exact injuries sustained in the material accident which were also pleaded as follows:

a. Sub-condylar tibia fracture

b. Tenderness on the chest

c. Swollen left wrist with tenderness

d. Swollen left knee joint with tenderness

e. Cut wound on the left knee with tenderness

f. Bruises on the right knee with tenderness

43. The said injuries are contained in the P3 report form produced by the respondent and further evident in the treatment notes from JOOTRH and X-ray notes from Ritri Medical Imaging Clinic. In essence, the respondent sustained a sub-condylar tibia fracture and soft tissue injuries to the chest, wrist and knees.

44. In *Naomi Momanyi v G4S Security Services Kenya Limited* [2018] eKLR, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300, 000.00.

45. In *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR, the appellate court declined to disturb an award of Kshs. 500,000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

46. In *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR, the appellant sustained a cut wound on the head with bleeding, loss of consciousness, tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibiofibular and was awarded general damages of Kshs. 300,000 which was upheld by the appellate court.

47. From the review of the decisions on the comparable injuries, although no two injuries can be exactly the same, I find that the trial court did not fall into any error in the manner it assessed general damages for the injuries sustained. The trend demonstrated above is to award general damages in the range of Kshs 300, 000.00 to Kshs. 500, 000. Taking into account inflation and time lapse since the earlier awards were made.

48. I am therefore not persuaded that I should interfere with the award of general damages made by the trial court. As a consequence of the above, the appeal herein against quantum of damages fails.

49. The final orders are as follows:

> Liability 50:50
>
> Award on general damages Kshs. 700,000
>
> Net award to the respondent Kshs. 350,000 plus interest at court rates from the date of judgment until payment in full.

50. As the appeal is only partially successful on liability which has substantially reduced the quantum of damages payable to the respondent, I order that each party shall bear their own costs of this appeal. The respondent shall have the 50% of costs of the suit as awarded in the lower court.

51. The lower court to be returned forthwith.

52. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2024

R.E. ABURILI

JUDGE