Otange Group Limited v Mong'are (Civil Appeal E041 of 2021)
[2024] KEHC 3122 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL E041 OF 2021

RL KORIR, J

MARCH 20, 2024

BETWEEN

OTANGE GROUP LIMITED ..... APPELLANT

AND

GIDEON MONG'ARE ..... RESPONDENT

(Being an Appeal from the Judgment of the Senior Resident Magistrate, Omwange J. at the Magistrate's Court at Sotik, Civil Suit Number 129 of 2019)

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for General and Special Damages that arose from a road traffic accident involving Motor Vehicle Registration Number KCR 512A which was alleged to belong to the Appellant.

2. The trial court conducted a hearing where the Respondent produced two witnesses in support of his case and the Appellant did not produce any witness or evidence.

3. In its Judgment delivered on 9th November 2021, the trial court awarded Kshs 353,900/= as General and Special Damages to the Respondent (then Plaintiff).

4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 17th November 2021 and relied on the following grounds:-

    i. That the learned trial Magistrate erred in law and in fact in holding the defendant liable without any sufficient evidence in that regard having been adduced.

    ii. That the learned trial Magistrate erred in law and fact in awarding damages to the Respondent against the weight of the evidence adduced.

iii. That the Honourable trial Magistrate erred in law and fact in failing to find that the initial treatment notes are the primary documents and that the medical report by Dr. Wokabi is secondary.

iv. That the Honourable learned trial Magistrate erred in law and fact in holding that the Respondent sustained the injuries as stipulated by Dr. Wokabi's medical report.

v. That the learned trial Magistrate erred in law and fact in awarding damages that were excessive in the circumstances of the case.

vi. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent sought to prove unpleaded issues and matters.

vii. That the learned trial Magistrate erred in law and fact by finding that the Respondent had adduced evidence and not outlining what evidence the Respondent had adduced.

viii. That the learned trial Magistrate erred in law and fact in failing to give reasons for finding that the Respondent has proved his case.

ix. That the learned trial Magistrate erred in law and fact in failing to dismiss the suit for want of proof.

x. That the learned trial Magistrate's exercise of discretion in assessment of quantum was injudicious.

5. My work as the first appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. See *Peters v Sunday Post Ltd* [1958] EA 424.

The Plaintiff's/Respondent's case.

6. Through his Plaint dated 4th September 2019, the Respondent stated that on 1st December 2018, he was aboard Motor Vehicle Registration Number KCR 512A when the said vehicle was involved in a road traffic accident along Kaplong-Bomet road. It was the Respondent's case that the Appellant was the registered owner of the said motor vehicle.

7. It was the Respondent's case that the Appellant was negligent in the accident. The particulars of the negligence were stated in paragraph 5 of the Plaint.

8. That as a result of the accident the Respondent suffered the following injuries:-

i. Blunt soft tissue injuries to the right shoulder and right arm.

ii. Blunt and soft tissue abrasion injuries on the right leg.

iii. Blunt and soft injuries on the chest and back.

9. The Respondent prayed for Special and General Damages against the Appellant.

The Appellant's/Defendant's Case.

10. Through its Statement of Defence dated 13th November 2019, the Appellant denied the occurrence of the accident on 1st December 2018 and further denied that that the Respondent was aboard Motor Vehicle Registration Number KCR 512A. The Appellant also denied being the registered owner of Motor Vehicle Registration Number KCR 512A.

11. It was the Appellant's case that if the accident occurred then it was caused by the negligence and recklessness of the Respondent. The particulars of negligence were contained in paragraph 6 of the Defence.

12. On 15th March 2023, I directed that this Appeal be canvassed by way of written submissions.

The Appellant's Submissions.

13. The Appellant submitted that the award of Kshs 350,000/= was inordinately high considering the nature of injuries sustained by the Respondent.

14. It was the Appellant's submission that the Respondent did not produce any treatment notes to show that he suffered the injuries indicated on the P3 form. That the lack of treatment notes was prima facie evidence that the accident did not cause the injuries sustained by the Respondent. The Appellant relied on *Fadna Issa Omar vs Malne Sirengo Chipo & 3 others* and *Timsales Limited vs Wilson Libuywa* Nakuru HCCA No. 135 of 2006.

15. The Appellant submitted that this court should dismiss the lower court Judgment because the Respondent had failed to prove that he suffered the injuries he claimed. That in the alternative, this court should substitute the award of Kshs 350,000/= with that of Kshs 80,000/=. They relied on *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR and *Eva Karemi & 5 others v Koskei Kieng & another* [2020] eKLR.

16. It was the Appellant' submission that costs follow the event. That they prayed for the costs of this Appeal based on section 27 (1) of the *Civil Procedure Act*.

The Respondent's Submissions.

17. The Respondent submitted that no evidence was tendered to rebut his evidence and that in the absence of such rebuttal, he had proved liability. That he testified that he was a fare paying passenger and was traveling in Motor Vehicle Registration Number KCR 512A when it was involved in the accident. The Respondent further submitted that he gave evidence in the form a Police Abstract and the Motor Vehicle Search document.

18. Regarding quantum, the Respondent submitted that he had proved that he suffered the injuries pleaded and the same were confirmed by the P3 Form dated 5th December 2018 and the Medical Report dated 27th May 2019. The Respondent further submitted that this court should be slow to interfere with the trial court's findings on his degree of injuries.

19. It was the Respondent's submission that the guiding principle in the assessment of damages was that an award must reflect the trend of previous, recent and comparable awards. He relied on *Regina Mpinda v Reuben Muthiora Johny* [2022] eKLR.

20. The Respondent submitted that this court should uphold the trial court's decision as the amount awarded was sufficient. He relied on *Poa Link Services Co. Ltd & another v Sindani Boaz Bonzemo* [2021] eKLR and *Carolyne Indasi Mwonyonyo v Kenya Bus Service Ltd* [2012] eKLR.

21. I have perused and considered the Memorandum of Appeal dated 17th November 2021, the Appellant's written submissions filed on 15th May 2023 and the Respondent's written submissions dated 12th July 2023. The two issues for my determination are liability and quantum payable.

22. It is trite law that the burden of proof lay on the person who alleges. Section 107 of the *Evidence Act* describes the burden of proof as follows:-

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

23. The standard of proof in civil cases is on the balance of probabilities. In *James Muniu Mucheru v National Bank of Kenya Ltd* [2019] eKLR, the Court of Appeal stated as follows: -

> " Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

24. In terms of production of evidence during the trial, the Court of Appeal in *Mbuthia Macharia v Annah Mutua Ndwiga & Another* [2017] eKLR held:-

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."

Liability

25. The Respondent stated that he got injured when the Motor Vehicle he had boarded i.e. Motor Vehicle Registration Number KCR 512A was involved in a road traffic accident along Kaplong-Bomet road. The Respondent through his witness, No. 107xxx PC Gladwell Kerubo (PW1) produced a Police Abstract marked as P.Exh 1. The said abstract stated that an accident involving the motor vehicle registration Number KCR 512A had occurred on 1st December 2018 at 5 a.m. along Kaplong-Bomet road.

26. The Respondent (PW2) produced a ticket that was marked as P.Exh 2. The ticket indicated that he paid Kshs 1,000/= as his fare. The rest of the details on the ticket are vague and unhelpful as the ticket does not indicate the Motor Vehicle Registration Number and the date of departure.

27. The Respondent further testified that after the accident, he was taken to St. Clare's Mission Hospital in Kaplong and the owner of the subject motor vehicle catered for his medical expenses.

28. The Respondent also produced the Motor Vehicle Search marked as P.Exh 5. The search indicated that at the time of the accident, the subject motor vehicle, registration number KCR 512A was registered in the name of the Appellant.

29. The Appellant did not challenge the veracity of the aforementioned exhibits during cross examination.

30. After the Respondent had closed his case, the Appellant did not call any witness or lead any evidence. In essence, the Respondent's testimony stood uncontroverted and the Appellant's denial of liability was a mere denial without the backing of evidence

31. The Court of Appeal in the case *Charterhouse Bank Limited (under statutory management v Frank N. Kamau* [2016] eKLR stated that:-

> " We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced

some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

32. From my analysis of the evidence and from the testimonies of PW1 and PW2, it is my finding that the Respondent proved the occurrence of the accident and the registered owner of the subject motor vehicle. I am also satisfied that the Respondent proved that at the time of the accident, he was a fare paying passenger in the subject motor vehicle.

33. Flowing from the above, I agree with the trial court's apportioning of 100% liability on the Appellant and I thus uphold.

Quantum

34. The trial court awarded the Respondent Kshs 350,000/= as general damages and Kshs 3,900/= as special damages.

35. It was a ground of the Appeal that the Judgment of the trial court should be set aside because the Respondent failed to produce the treatment notes. That due to their nature of being primary documents, failure to produce them during the trial was fatal as the Respondent could not prove that the injuries he sustained arose from the road traffic accident.

36. The Respondent relied on the cases of *Fadna Issa Omar* (*supra*) and *Timsales Limited* (*supra*) which held that non- production of treatment notes was fatal.

37. On the other hand, there are also authorities which state that non-production of treatment notes is not fatal. In *Comply Industries Limited vs Mburu Simon Mburu*, Civil Appeal No.121 of 2005, Maraga J. (as he then was) observed that:-

> "Where a doctor who examines him (complainant) several days or months later makes reference to the treatment card, unless otherwise proved, that would suffice and the production of the treatment card is not necessary. Failure to produce treatment cards is fatal only when the plaintiff fails to prove by other evidence that he was indeed injured and doubt is cast on his injury claim."

38. Similarly in *Beatrice Nthenya Sila v Ruth Mbithe Kitsisa & 3 others* [2014] eKLR, Kasango J. held:-

> "It is obvious the Learned Magistrate believed the Respondents when they gave evidence on the injuries they suffered. Further the Learned Magistrate received the doctor's evidence about those injuries. And finally the Learned Magistrate must have considered the P3 Form which identified those injured and categorized their injuries. The Learned Magistrate, in view of that cannot be faulted in her judgment."

39. It follows therefore that, each case ought to be determined on its own peculiarity and on its own circumstances. I am persuaded by Aburili J. in *George Morara Masitsa v Texplast Industries Limited* [2015] eKLR where she held that:-

> " .... it has not been alleged by the respondent that there were more than one and conflicting medical reports produced and without calling their makers and neither are there any glaring inconsistencies between the treatment notes produced, medical report and the testimony by the appellant. ... unlike what is being propounded by the respondent that while medical evidence is entitled to the highest possible regard, the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, and such evidence like other expert evidence must not be rejected except on firm ground."

40. I have gone through the evidence touching on the injuries the Respondent sustained. I have noted that the Respondent did not produce the treatment notes or the P3 Form as exhibits but he produced a Medical Report by Dr. Wokabi and the same was marked as P. Exh 5.

41. The Medical Report stated that the Respondent had suffered blunt and abrasion injuries to the right knee and blunt and soft tissue injuries on the right shoulder, right arm, chest and back. The Medical Report stated that it had referred to the Respondent's P3 Form and X-rays. These were the same injuries that the Respondent pleaded in his Plaint.

42. The Appellant did not challenge the production or veracity of the Medical Report and when he cross examined the Respondent, the Respondent stated that he sustained injuries on his right shoulder, right arm, right knee and that he had chest pains.

43. The Appellant had the opportunity to present evidence that would challenge the Respondent's evidence but as I have earlier noted, the Respondent did not produce any witness or lead any evidence.

44. It is my finding that the Respondent discharged his burden of proof when he produced his Medical Report which detailed his injuries. I therefore decline the Appellant's assertion that the Respondent did not prove that the injuries he suffered were caused by the accident.

45. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice. In the case of *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR, the Court of Appeal stated that:-

> " It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated *H. West & Son Ltd vs. Shephard* [1964]AC 326 at page 353- 'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion,

he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

46. On the issue of General Damages, the Appellant submitted that the award of Kshs 350,000/= was inordinately high and they proposed an award of Kshs 80,000/=. On the other hand, the Respondent asked this court to uphold the award of Kshs 350,000/= as it represented a fair award.

47. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. In the case of *Kigaragari v Aya* [1982 - 1988] I KAR 768, it was stated:-

> " Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees."

48. Additionally, in the English Court in the case of *West (H) & Son Ltd v Stephard* [1964] AC 345 it stated as follows:-

> " But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated, by comparable awards when all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

49. The Respondent suffered soft tissue injuries to his chest, back, right knee, right shoulder and arm. I have found the following cases quite helpful in terms of comparison:-

i. In *Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa* [2020] eKLR, the Respondent suffered blunt injuries to the chest, left wrist and lower lip. The award of Kshs 300,000/= was reduced to Kshs 150,000/= on appeal.

ii. In *Ndung'u Dennis v Ann Wangari Ndirangu & another* [2018] eKLR, the Respondent suffered bruises on the neck, tenderness on the right leg, blunt injury to the chest and both hands, back and chest pains. The trial court awarded Kshs. 300,000/= and it was reduced to Kshs. 100,000/= on appeal.

iii. In *Maimuna Kilungwa v Motrex Transporters Ltd* [2019] eKLR, the court awarded Kshs. 125,000/= for injuries to the neck, left ear and left shoulder.

iv. In *Ndung'u Dennis v Ann Wangari Ndirangu & another* [2018] eKLR, the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands, the trial court awarded Kshs. 300,000/= which was reduced to Kshs. 100,000/= on appeal.

v. In *Ogembo & another v Arika* (Civil Appeal 29 of 2021) [2022] KEHC 12219 (KLR) (28 July 2022) (Judgment), the Respondent suffered a chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle, and bruises on the right toes and left knee. The award of Kshs 500,000/= was reduced to Kshs 150,000/= on appeal.

50. I have considered the authorities above and the nature of the injuries suffered by the Respondent and I find that the Kshs 300,000/= awarded as General Damages by the trial court was excessive. Taking my cue from the aforementioned authorities, I hereby set aside the award of Kshs 300,000/= as general damages and substitute it with Kshs 150,000/=.

51. With regards to the Special Damages, the 1st Respondent particularized them as follows:-

Medical Report Kshs 2,500/=

Police Abstract Kshs 200

Medical Expenses Kshs 650/=

Motor Vehicle Search Kshs 500/=

52. The Respondent only produced the copy of the receipt for the motor vehicle search marked as P.Exh 6 and the receipt of the Medical Report marked as P.Exh 9b. There were no receipts to show that he had incurred medical expenses or the Police Abstract as pleaded.

53. Flowing from the above, I hereby set aside the award of Kshs 3900/= as special damages and substitute it with the award of Kshs 3050/=.

54. In the final analysis, the trial court's award of Kshs 353,900/= is substituted with Kshs 153,050/=. The Plaintiff/Respondent shall also have costs of the suit and interest as awarded by the trial court.

55. The Memorandum of Appeal dated 17th November 2021 has partially succeeded as the damages awarded to the Respondent is reduced to Kshs 153,050/=

56. Orders accordingly

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 20TH DAY OF MARCH, 2024

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R. LAGAT-KORIR

JUDGE

Judgement delivered virtually in the presence of Mr. Maina for the Respondent, Mr. Njunguna for the Appellant and Siele (Court Assistant)