**Eldoret Express Limited v Njoroge (Civil Appeal E182 of 2022)**
**[2024] KEHC 4055 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4055 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL APPEAL E182 OF 2022**

**RN NYAKUNDI, J**

**APRIL 25, 2024**

**BETWEEN**

**ELDORET EXPRESS LIMITED ..... APPELLANT**

**AND**

**PRISCILLAH WAITHERA NJOROGE ..... RESPONDENT**

**JUDGMENT**

**Representation:**

Kimondo Gachoka & Company Advocates

Kimaru Kiplagat & Co. Advocates

1. The appeal is both on quantum and liability. In the trial Court the Respondent had sued the Appellant claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 7/8/2022, wherein it is alleged that the Respondent was lawfully walking pedestrian foot path along Uganda Road at Maili Nne area, when the Appellant's driver and/or agent so negligently drove, managed and/or controlled motor vehicle registration no. KCD 998N Isuzu bus, that it lost control and veered off the road and violently knocked down the Respondent who was lawfully walking and in consequence whereof the Claimant sustained severe personal injuries.

2. In a response to the Statement of Claim dated 7/09/2022, the Appellant denied the occurrence of the accident. Alternatively, he blamed the Respondent for contributing to the accident. The Appellant denied that the respondent suffered injuries and incurred expenses as pleaded.

3. After trial Judgment was delivered on 18/08/2022 and the Appellant was found 100% liable and damages assessed as hereunder: -

    a. General Damages..... Kshs. 400,000/=

b. Special Damages..... Kshs. 14,000/=

c. Total .....Kshs. 414,000/=

d. Plus, costs and interests

4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (12) grounds: -

a. That the learned trial Magistrate/Adjudicator erred in law by failing to dismiss the Respondent's suit whereas negligence against the Appellant was not proved in trial.

b. That the learned trial Magistrate/Adjudicator erred in law by failing to dismiss the Respondent's suit whereas the Respondent failed to discharge the burden of proof so as to warrant a judgment in his favour.

c. That the learned trial Magistrate/Adjudicator erred in law by failing to take into account relevant facts relating to the suit thus arriving at a decision that is wholly erroneous in law and facts.

d. That the learned trial Magistrate/Adjudicator erred in law and in fact by holding the Appellant 100% liable for causing the accident contrary to the evidence on record and or adduced during trial.

e. That the learned trial Magistrate/Adjudicator erred in law and in fact by failing to appreciate the fact that the pleaded injury (fracture of the ribs) was not proven by way of x-ray films and/or radiology request form/finding report.

f. That the learned trial Magistrate/Adjudicator erred in law by awarding the sum of Kshs. 400,000/= as general damages which award is excessive in view of the injuries sustained by the Respondent thereby deviating from the principle of stare decisis requiring comparable awards being made for comparable injuries sustained.

g. That the learned trial Magistrate/Adjudicator erred in law and in fact by failing to consider the appellant's submissions and legal authorities and/or precedents on both liability and quantum thereby arriving at a determination which is wholly erroneous in law.

h. That the learned trial Magistrate/Adjudicator erred in law and in fact by failing to consider the evidence adduced by the appellant thereby arriving at a determination on liability that is wholly erroneous.

i. That the learned trial Magistrate/Adjudicator erred in law and in fact by holding the appellant 100% liable for causing the accident without any justification and or reasons.

j. That the learned trial Magistrate/Adjudicator erred in law and in fact by holding the appellant 100% liable for causing the accident despite conceding in the judgment that there were inconsistencies in the eye witness accounts.

k. That the learned trial Magistrate/Adjudicator erred in law and in fact by holding that the mere occurrence of an accident amounts to being liable on the part of the Appellants without any justification and/or reasons which holding is wholly erroneous.

l. That the learned trial Magistrate/Adjudicator erred in law and in fact by making an award of Kshs. 400,000/= as general damages without giving any justification and/or authority relied on whereas the appellant sustained soft tissue injuries.

5. The appeal was canvassed vide written submissions. The Respondent filed his submissions on 9/01/2024 whereas the Appellant filed none at the time of drafting this judgment.

The Appellant's Submissions

Nil

**The Respondent's Submissions**

6. To start with, the respondent pointed out that this court is an appellate one and therefore it will not normally interfere with the trial court's judgment on a finding of fact unless the same is founded on the wrong principles of fact or law as was set down by the court of appeal in Selle & another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123.

7. On liability, it was submitted for the respondent that from the record, the Respondent herein was lawfully standing at a bus stop. The Respondent at the trial court testified that she was standing at the bus stop at Maili Nne area facing Eldoret direction when the motor vehicle Reg. No. KCD 998N Isuzu Bus coming from Bungoma direction towards Eldoret direction hit her from behind throwing her into the trench and as a result the sustained severe personal injuries.

8. The Respondent called CW3, a police Officer PC Sitty Mohammed the investigating officer from Eldoret Police Station where the accident was reported. The said Police Officer stated that the accident happened at Maili Nne when the Motor vehicle Reg. No. KCD 998N Isuzu Bus heading towards Eldoret from Bungoma knocked down the Respondent who was a pedestrian. The officer pointed out to the court that there was a designated crossing area at the scene. She blamed the driver of the motor vehicle for causing the accident since he knocked the pedestrian while off the tarmac road.

9. It was submitted for the Respondent that in an attempt to shift the blame to the Respondent, the Respondent/Appellant called the driver of the Motor Vehicle on Mugo Njoroge. He testified and stated that it was the pedestrian who was to be blamed for the occurrence of the accident. He further stated that the pedestrian attempted to cross the road; he braked to avoid an accident but the Claimant ended up hitting the left-hand side of the Motor Vehicle. However, on cross examination the driver admitted that he is 70 years old meaning that at the age his vision and judgment is subtle to make impaired judgment. He admitted that the impact was at the left-hand side of the road as one faces Eldoret Town from Bungoma general direction. He further confirmed that after the impact the Claimant /Respondent fell into a trench off the road of the extreme left side of the road as you face Eldoret town from Bungoma.

10. In sum, counsel submitted that it is the Appellant's driver to blame for the accident. That the appellant is vicariously liable for the acts and omissions of his lawful driver.

11. Regarding quantum, the appellant at the trial court submitted for Kshs. 70,000/= as sufficient compensations for injuries suffered by the respondent. The relied on various cases where an award of Kshs. 80,000-Kshs. 100,000/= had been given for injuries similar to the instant case.

12. It was submitted for the Respondent that the award of Kshs. 400,000/= as general damages by the trial court was reasonable and commensurate to the injuries sustained by the Respondent. To support this, reliance was placed on the cases of Blue Horizon Travel Co Lt v Kenneth Njoroge (2020) eKLR and the decision in K.B Sanghani v Lydia Wanjiku Njuguna & 2 others (2016) eKLR.

13. The respondent submitted that basing on the award granted in the above decisions, where the injuries were of a similar nature and further looking at the Respondent/Appellant submissions at the trial court, the award of the Learned magistrate in the trial court was indeed reasonable and proportionate

with the degree of injuries sustained. The court took into consideration of the relevant factors in arriving at its decision and the award was commensurable with the injuries sustained by the Claimant/ Respondent herein.

14. The respondent stated that the appeal is merely meant to deprive the Respondent of her right to enjoy the fruits of her judgment and the same should not be allowed as it would amount to injustice. That the appellant is not entitled to the orders sought in the appeal as it would amount to injustice. She prayed that the appeal be dismissed.

15. With regards to special damages, Counsel submitted that Kshs. 14,000/= was pleaded and strictly proven.

**Analysis & Determination**

16. Being a first appeal, the court is called upon to look into the evidence and factual information presented at the trial court, evaluate the same and make a determination, conscious of the fact that the trial court had the advantage of observing the demeanour of the witnesses. The Court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " ...this Court must 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 this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

17. As stated above the two limbs to this appeal are quantum and liability. I propose to deal with the issue of liability first. The appellant has argued that the trial court erred in apportioning liability against the Appellant at 100% contrary to the evidence on record and/or adduced during trial.

**Liability**

18. A good starting point would be the case of Stapley v Gypsum Mines Limited (2) (1953) A.C 663. As argued, determination of liability in a road traffic case is not a scientific affair. Lord Reid reasoned as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

19. Without a doubt, an accident occurred on 7th August, 2022 the Respondent/Claimant was lawfully walking pedestrian on a foot path along Uganda Road at Maili Nne area, when the Appellant's driver and/or agent so negligently drove, managed and/or controlled motor vehicle Reg. No. KCD 998N Isuzu bus, that lost control and veered off the road and violently knocked down the Respondent/ Claimant and as a consequence sustained severe personal injuries.

20. On one hand the Appellant blames the Respondent for the accident whereas on the other hand the Respondent blames the Appellant for causing the said accident.

21. What then is the extent of the Respondent's liability? To determine this the Court will consider the evidence at the trial Court.

22. According to the Respondent CW1, she testified that she was standing as a pedestrian on the bus stop at Maili Nne area facing Eldoret direction when the motor vehicle registration KCD 998N coming from Bungoma direction heading towards Eldoret hit her from behind throwing her into a ditch as a result of which she sustained severe injuries. She fell unconscious and was admitted at the Moi Teaching & referral Hospital.

23. CW2 PCW Sitty Mohammed told the court that the bus was being driven from Kitale heading towards Eldoret town and on reaching the location of the accident at Maili Nne, it knocked down the said pedestrian who was crossing the road from left to right as one faces Eldoret main general direction. She sustained injuries and was rushed to Moi Teaching & referral Hospital.

24. CW3 Joseph Sokobe, produced the Claimant/Respondent's medical report, P3 discharge summary from MTRH, invoices and receipts for Kshs. 6,000/=.

25. In Chao vs. Dhanjal Brothers Ltd & 4 Others [1990] KLR 482 the court held that:

> " Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred in spite of the defendant having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff's case must fail."

26. Therefore, it is upon the Appellant to prove that indeed there was no negligence on its part. The Appellant's driver testified that when he got to Maili Nne it was raining and when he got close to the bridge there were puddles of water and two women were on the side of the road and before he got there, one of them jumped on the road to avoid a puddle and he applied brakes to avoid hitting her but she hit the motor vehicle. Placing the evidence on a legal scale of probabilities, it is more probable that not that the Appellant's driver did not pay attention to traffic rules.

27. In Khambi and Another vs. 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."

28. Having done an analysis of the evidence at the trial court, I find no reason to interfere with the trial court's apportionment of liability. Nothing at all to disapprove the evidence adduced by the Respondent/Claimant. Accordingly, the trial Court did not err in apportioning liability at 100% against the Appellant.

**Quantum**

29. The issue for determination here is whether the award of general damages of Kshs. 400,000/= 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".

30. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.

31. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] Kneller. J.A, stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango v. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd v. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles."

32. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

33. The injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the medical report by Dr. Joseph Sokobe as:

    a. Head injury with loss of consciousness briefly.

    b. Chest injury with haemothorax

    c. Fracture multiple ribs

    d. Bilateral lung contusion.

    e. Blunt injury to the chest

34. From the evidence adduced by Dr. Joseph Sokobe medical report it is evident that the Respondent herein sustained injuries which she was recovering well. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Respondent is only entitled to what in the

circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.

35. In George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi [2016] eKLR the respondent had two loose teeth, blunt trauma to the neck and chest, fracture to the left clavicle, fractures on the 4th and 5th ribs, blunt trauma to the spinal column and right scapula area, and dislocation of the left shoulder joint the court awarded Kshs. 450,000.

36. In Mwavita Jonathan –vs- Silvia Onunga (2017) eKLR an award of Kshs.400,000/= was made for left hip comminuted intertrochanteric fracture, blunt chest injury dislocation right knee joint, sprain of the cervical spine of the neck and the lumbar sacral spine of the back.

37. In Gabriel Kariuki Kigathi & Anor –vs- Monica Wangui Wangechi (2016) eKLR where the plaintiff suffered a fracture of the neck, bilateral rib fractures, bilateral lung contusion, injuries to both hands, injuries to both legs, fracture C2, fractured cervical spine and fracture of right ankle. An award of Kshs.800,000/= was reduced to Ksh.400,000/= on appeal.

38. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that an award of Kshs. 300,000/= is sufficient.

39. The award of Kshs. 400,000/= is therefore substituted with an award of Kshs. 300,000/=.

40. Turning to special damages, Kshs.14,000/= was pleaded and strictly proved as was held in the case of Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] 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 degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

41. In the end the Court finds no merit in this appeal and therefore proceeds to enter judgment in favour of the Appellant in the following terms;

    i. Liability .....100% against the Appellant

    ii. General Damages..... Kshs. 300,000/=

    iii. Special Damages..... Kshs. 14,000/=

    iv. Total .....Kshs. 314,000/=

    v. Plus, costs and interest

42. It is so ordered.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 25TH DAY OF APRIL 2024.**

In the Presence of:

Ekisa for the Respondent

**.....**

**R. NYAKUNDI**

**JUDGE**