Ayoti Distributors Ltd v Auma (Civil Appeal E093 of 2021) [2024] KEHC 3881 (KLR) (22 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3881 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E093 OF 2021

RE ABURILI, J

APRIL 22, 2024

BETWEEN

AYOTI DISTRIBUTORS LTD .... APPELLANT

AND

FLORENCE AUMA .... RESPONDENT

(An appeal arising out of the Judgement of the Honourable W.K. Onkunya in the Chief Magistrate's Court at Kisumu delivered on the 27{{^th}} July 2020 in Kisumu CMCC No. 288 of 2014)

JUDGMENT

Introduction

1. The appellant herein was sued by the respondent, claiming for general and special damages for injuries sustained by the respondent following a road traffic accident that occurred on the 21st June 2014.The respondent averred that she was a lawful passenger aboard motor vehicle registration no. KTWA 853C, a tuk-tuk, that was travelling along the Kisumu – Nairobi road when at Sai area, the appellant's motor vehicle registration number KAK 473X, an Isuzu Lorry was carelessly and recklessly driven causing it to lose control and hitting the tuk-tuk causing the said accident.

2. The appellant filed its defence dated 10th March 2016 denying negligence on its part and attributing the occurrence of the accident to the respondent's own negligence and or the negligence of motor cycle registration number KTWA 853C.

3. The trial court in its judgement found that the appellant failed to adduce evidence to controvert the respondent's case and thus found the appellant 100% liable for the accident. The trial court also awarded the respondent Kshs. 700,000 as general damages.

4. Aggrieved by the said judgment and decree, the appellant filed this appeal vide a memorandum of appeal dated 3rd August 2021 raising the following grounds of appeal:

    a. The learned magistrate erred in fact and law when he made a finding that the accident was caused by the negligence on the part of the appellant in the absence of evidence.

    b. The learned magistrate erred in law and fact when he failed to appreciate that there can never be liability without fault and proceeded to apply wrong principles and found th appellant 100% liable without considering and evaluating evidence presented before him.

    c. The learned magistrate erred in both law and fact when he failed to find that the respondent had failed to prove any particulars of negligence pleaded under the circumstances.

    d. That the learned magistrate erred in fact and law when he failed in his duty as trial court to evaluate the oral evidence, documentary evidence, consider the pleadings and to make specific findings in his judgement based on evidence led at the trial and to note the material discrepancies and departure in pleadings from the evidence which the respondents led at the trial.

    e. The learned trial magistrate erred in law and fact when in his judgement he relied on documentary evidence which were never produced as exhibits at the trial contrary to the provisions of the *Evidence Act*.

    f. The learned magistrate erred in Law and fact in awarding the sum of Kshs. 700,000 as general damages, which amount is inordinately high and thus constitutes an erroneous estimate of the alleged damages suffered.

    g. The learned magistrate thereby used his discretion wrongly in awarding excessive damages in the circumstances and in failing to consider the facts that no evidence was led before him on the basis of which such an award could be found.

    h. The learned trial magistrate misdirected himself in ignoring the law and or the applicable principles in the circumstances thereby wrongly applying.

5. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

6. The appellant's counsel submitted that the contents of the police abstract did not avail conclusive evidence as was held in the case of *Peter Kanithi Kimunya v Aden Guyo Haro* [2014] eKLR. It was submitted that even though the appellant never called any witness to testify, it did not imply that it never opposed the respondent's case at the trial court and that neither did this preclude the trial court from finding the respondent liable for the accident. Reliance was placed on the case of *Milka Akinyi Ouma v Kenya Power Lighting Co. Ltd & Another* [2020] eKLR.

7. It was further submitted on liability that the law did not create a presumption of negligence wherever a person was injured and that in the instant case, the respondent failed to prove any act or omission for liability to attach.

8. On quantum of damages, the appellant submitted, urging this Court to substitute the award of Kshs. 700,000 with one of Kshs. 100,000. The appellant relied on the following cases:

    a. *FM (Minor suing through mother and next friend MWN) v JDK & Another* [2020] eKLR where the learned judge awarded Kshs. 100,000 as general damages as compensation for blunt soft tissue injuries to the head, neck, thorax, abdomen and limbs.

    b. *Ndungu Dennis v Ann Wangari & Another*, Kiambu HCCA 54/2016 decided in February 2018 where the High Court awarded Kshs. 100,000 general damages to the plaintiff who sustained injuries involving a blunt head injury, head concussion (brief consciousness), blunt injuries to the chest and both hands and the medical report stated that he experienced back pains and chest pains on exertion.

    c. *Godwin Ireri v Francline Gitonga Meru* [2018] eKLR where the plaintiff was awarded Kshs. 90,000 for injuries involving two cuts on the forehead, cuts on the scalp to the occipital region, bruises on the left ankle and bruises on the right knee.

The Respondent's Submissions

9. On behalf of the respondent, it was submitted that the trial magistrate evaluated the pleadings, materials and evidence which was placed before him by both parties hence arriving at the proper determination and/or findings and that as such, the appellate court should not interfere with the decision of the lower court but alternately find that the trial court properly interpreted the evidence before him.

Analysis and Determination

10. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and reach its own conclusions. It must, however, bear 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."

11. 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] eK 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."

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

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

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

13. This court therefore dealt with the issues under the separate heads shown herein below.

Liability

14. 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."

15. 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 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.

16. In law, he who alleges must proof. 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 wherein the plaintiff minor was allegedly injured.

17. The respondent testified as PW1 stating that on the material date, she boarded a tuk-tuk which was then hit by a lorry. It was her testimony that she blamed the driver of the lorry for the accident as he entered the road on the wrong lane. In cross-examination, she stated that the tuk-tuk was hooting loudly at the lorry but the lorry kept on coming towards them. She further testified that they were on the left-hand side of the road.

18. PW3 No. 83516, P.C. Nyoka testified that the appellant's driver failed to give way to the tuk-tuk at the Ahero junction & hit the tuk-tuk thus resulting in the accident. In cross-examination, he admitted that he did not take part in the investigations of the matter and that ordinarily, the tuk-tuk driver ought to have been charged.

19. The appellant did not call any witness in support of its case. It has severally been held that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

20. Thus, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. In the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR the court stated:

> " I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.
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> (See *Kirugi and Another v Kabiya and Others* [1983] e KLR).

21. The respondent, despite the absence of evidence from the appellant, was legally obligated to prove her case on a balance of probabilities.

22. The respondent's testimony on how the accident occurred was not controverted . The information contained in the Police Abstract Form produced by PW3 who was nonetheless not the investigating officer in the material accident was however not fool proof of who was to blame for the accident but that the occurrence of the material accident was reported to the Police station and the reportee must have narrated of how the accident took place hence the details therein which cannot be said to be corroborating the respondent's testimony on how the accident occurred or who was to blame for the accident. Indeed, I stand by my most quoted holding in the Peter Kanithi Kimunya supra case that a police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station is correct and I stand by it at all times. This holding has been followed by superior courts in many cases that I have reviewed.

23. Thus, while such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, as was in this case, by the uncontroverted testimony of the respondent on oath, which testimony was not discredited in any way, it is my finding that the plaintiff proved his case on a balance of probabilities that the defendant/ appellant herein was to blame for the occurrence of the accident. Thus, unlike in my most cited case of Peter Kanithi Kimunya (albeit majority of those who cite the case do not acknowledge me as the author of that simple but important rule), where the plaintiff testified that he was running across the road when he was hit by the defendant's case, this case is different. the respondent plaintiff testified of how the appellant's driver drove into the tuk tuk which was on its left side of the road thereby hitting it despite the tuk tuk driver hooting severally to warn the appellant's driver. The appellant pleaded contributory negligence on the part of the respondent and or on the part of the tuk tuk driver but it never adduced any evidence to prove any of the acts of negligence pleaded. The question is, on what basis would the trial court, and this court, for that matter, find the respondent partly to blame for the material accident? I have stated not once but severally that being found on the road and in harm's way does not make you liable for the accident. Your acts that contribute to the accident must be proved. Roads are meant for all road users. It was not the appellant herein who had the absolute right to use the road where the respondent was to be found. A court of law must not be swayed by submissions or pleadings which are not supported as if that is evidence. It must resist the temptation of accepting pleadings and submissions to substitute evidence.

24. Additionally, the respondent having been a passenger in the TUK TUK, had no control over it and therefore for her to be held liable, there must be evidence so obvious of how she was to blame or contributed to the material accident, for the court to apportion liability between her and the appellant. No such evidence of contributory negligence was adduced by the appellant against the respondent.

25. It is therefore my finding that if the appellant wanted to cite the tuk-tuk driver for negligence, it had all the opportunity in the trial court to commence third party proceedings which it failed to do.

26. Accordingly, the respondent cannot shoulder blame for the accident.

27. In the end, I find this appeal on liability to be devoid of any merit. I find no reason to interfere with the findings of the trial court which finding and holding I hereby uphold and dismiss the grounds of appeal challenging the finding and holding of the trial court on liability.

Quantum

28. The appellant challenges the quantum of general damages awarded to the respondent by the trial court urging this court to substitute the Kshs 700,000 with Kshs 100,000, claiming that award was manifestly excessive.

29. The circumstances under which an appellate court will disturb a lower court's assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows:

> " 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 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."

30. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:

> " The principles to be observed by this appellate court, in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are, that it must be satisfied that either, the judge is 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 wholly erroneous estimate of the damages"

31. In *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR the rendered itself on the matter of assessment of quantum as follows:

> " ... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter."

32. The respondent pleaded and testified that she sustained the following injuries in the material accident:

    i. Chest injury

    ii. Injuries to the waist/back

    iii. Lacerations on the forearm

    iv. Injuries on the forehead

    v. Bruises on the left knee

vi. Injuries to the neck

vii. Injury to the shoulder

33. PW2, George Mwita a clinical officer at Ahero sub-county Hospital where the respondent was treated detailed the injuries sustained by the respondent as contained in the P3 form (PEx2) which injuries involved: a cut wound on the right ear which was stitched, neck, back and chest pains as well as lacerations on the right hand and a swollen right neck joint. He testified that the respondent was treated and she went home.

34. It is evident that the respondent sustained soft tissue injuries to the neck, right hand, ear, chest and back, whose extent is contained in the P3 form.

35. I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards and must be commensurate with the injuries suffered, albeit no two injuries can exactly the same. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held that:

> " Having so said, 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."

36. The trial court awarded the respondent general damages of Kshs. 700,000 while the appellant in his submissions proposed that an award of Kshs. 100,000 would be sufficient.

37. I have considered comparable awards for the same injury. In the case of in the case of *Ephraim Wagura Muthui & 2 others V Toyota Kenya Limited & 2 others* [2019] eKLR where the court assessed damages at Kshs. 100,000 for soft tissue injuries.

38. In *Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others* [2019] eKLR Majanja J set aside the lower court award of Kshs. 55,000 for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000.

39. Accordingly, it is my finding that the award of Kshs. 700,000 is is excessive as it does not compare with awards made in similar cases where the claimants suffered similar injuries. This calls for interference of the award by this Court.

40. On the other hand, I find that the proposal by the appellant that an award of Kshs. 100,000 is sufficient compensation, is on the lower side and would in my view amount to an erroneous estimate of the damage. The award in the case of Ephraim Wagura (supra) was made five years ago and as this court must take passage of time and inflation into account, I find that an award of Kshs. 200,000 would suffice. In the premises the award of Kshs. 700,000 is set aside and substituted with one for Kshs. 200,000. Interest on this award shall accrue from the date of judgment in the lower court until payment in full.

41. In the end, I find the instant appeal to be partially successful and on quantum alone. The appeal against liability is dismissed.

42. As the appeal is only partially successful, I order that each party bear their own costs of this appeal.

43. This file is closed and the lower court file to be returned forthwith together with copy of this judgment.

44. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF APRIL, 2024

R.E. ABURILI

JUDGE