Kerecha v Mulati (Civil Appeal E1009 of 2022)
[2024] KEHC 6127 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6127 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1009 OF 2022

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

DOUGLAS ASANYO KERECHA ..... APPELLANT

AND

PATRICK LUMBATSI MULATI ..... RESPONDENT

(Being an appeal from the Judgment of Hon. G. M. Gitonga Principal Magistrate in Nairobi Milimani Chief Magistrate's Court, CMCC No. E8952 of 2021 delivered on 18th November, 2022)

JUDGMENT

1. This Appeal arises from a Judgment and orders issued in Nairobi Milimani Chief Magistrate's Civil Suit No. E8952 of 2021. In the said suit the respondent (who was the plaintiff) sued the appellant (who was the defendant) for general and special damages arising from a traffic road accident. The said accident involved the respondent and the appellant's motor vehicle registration number KBL 845L. After a full hearing judgment was entered in favour of the respondent as follows:

    i. Liability 80:20 in favour of the respondent

    ii. General damages Kshs 350,000/= less 20% contribution.

    iii. Special damages Ksh 8,450/=

    iv. Interest on both (ii) & (iii) at court rates from the date of Judgment until payment in full.

2. The appellant being dissatisfied with the Judgment filed this Appeal dated 13th December, 2022 citing the following grounds:

i. That the learned magistrate erred in law and in fact in apportioning liability between the appellant and respondent herein in the ration 80:20%.

ii. That the Honourable learned magistrate erred in law in applying the wrong principles of law on standard of proof in civil cases.

iii. That the Honourable learned magistrate erred in law and fact in relying on extraneous evidence in arriving at the decision on quantum.

iv. That the Honourable learned magistrate erred in law and fact in failing to consider and properly evaluate the defendant's evidence.

v. That the Honourable learned magistrate erred in law and fact in failing to consider and apply some weight on the evidence tendered by the defendant's evidence.

vi. That the Honourable learned magistrate erred in law and fact in failing to consider the evidence and the submissions by the appellant while arriving at the judgment.

vii. That the Honourable learned magistrate erred in law and fact in awarding costs of the suit to the respondents.

3. In the case before the trial court the respondent (PW1) testified that on or about the 4th day of May, 2021 at about 6.00am he was lawfully walking along Amasyia Cresent Buruburu phase four road Nairobi and on the correct side of the said road. The appellant while driving the motor vehicle KBJ 845 L knocked him and drove off. He limped to a police vehicle stopped next to Mimosa Court Buruburu. He informed them of what had happened. As he was bleeding he was advised to go for first aid first. He produced a bundle of documents as listed in his document dated 10/6/2021.

4. In cross examination he said he had never seen the appellant before. He was knocked while walking on the right side of the road, but he had to jump towards the edge of the road to avoid the accident. He denied charging towards the motor vehicle. He was injured on the head, forehead, knee and right hand. He was treated at Avenue Hospital, Buruburu but was not fully healed.

5. His witness No. 58516 PC Felix Masinde Sitani from Buruburu police station testified as PW2. He received the accident report on 4/5/2021 at around 7.40am. The report was booked vide O.B No 25/4/2021. He stated that investigations were carried out by P.C Martin. He visited the scene. The respondent was issued with a P3 form which was filled by Dr. Mambo who classified the degree of injury as 'harm'. He called the driver of the vehicle and recorded his statement. Charges of careless driving were preferred against him but he never turned up. The witness produced the police abstract as PEXB 8.

6. In cross examination he stated that both parties reported the accident. When he issued the police abstract the matter was still pending investigations.

7. Dr. Tilas Ndetei testified as PW3. He produced the medical report on behalf of Dr. Maundu who was now deceased. The report and receipts were produced as EXB10. Dr. Maundu charged Ksh 10,000/= for court attendance. In cross examination he said the injuries were soft tissue injuries, with no future complications.

8. The appellant denied the respondent's claim through his statement of defence dated 1/07/2021. He testified as DW1. He stated that he was driving at about 20km per hour and the respondent was walking on the road. The respondent then charged towards him and hit his car's windscreen, and the side mirror which fell off.

9. In cross examination he said him and the respondent were going in opposite directions. The respondent stopped in front of his car while carrying a metal bar in his hands. When cross- examined by the court he said the respondent used the metal bar to hit the car's windscreen. Further he confirmed that the respondent fell and was injured as he hit the car. He added that he learnt later that the respondent was husband to his colleague.

10. Stephen Mwangi Muchoki a private investigator testified as DW2. He said he carried out investigations in respect of the accident by visiting the scene and taking photos. According to him the accident happened in the middle of the road. He blamed the respondent for the accident. He produced his report as DEXB 1. The vehicle had already been repaired at the time of the investigations. In cross examination he said he relied on the facts on the ground and on the two reports made at the police station. He also indicated the injuries confirming that the respondent had been injured. The photos he used were given to him by the appellant.

Submissions

Appellant's submissions

11. These were filed by Joe Ngigi and company advocates and are dated 1/12/2023 and the appellant raised three issues for determination. On whether the appellant is liable for the accident and to what extent he referred to the evidence of both parties. He submitted that in making his decision the trial court did not consider the evidence of DW2 whose report and photos showed that the point of impact of the accident was in the middle of the road. Further that the appellant had never been charged despite PW2's allegations. This fact was therefore never proved. He referred to the case of Treadsetters Tyres Ltd V John Wekesa Wepukhulu [2010] eKLR in support.

12. Counsel submitted that PW2 did not explain why he visited the scene on 6/5/2021 yet the accident occurred on 4/5/2021. Further that the witness never produced any sketch maps, investigation report or photos of the scene. No eye witness was called by the respondent. Additionally, counsel pointed out that PW2 stated that both parties had made reports at the station but there was no mention of it in the judgment. He thus submitted that the apportionment of liability at 80:20 was not fair.

13. On the third issue in respect of damages counsel referred to the medical report by Dr. Joseph Maundu dated 25/5/2021. Its his contention that the injuries were soft tissue injuries and the respondent had healed. Relying on the cases of Lilian Anyango Otieno Vs Philip Ogila [2022] eKLR; Francis Omari Ogaro V JAO (minor suing through next friend and father G.O.D) [2021] eKLR and F. M. (minor suing through mother and next friend MWM) V JNM & another [2020] eKLR among others – counsel proposed an award of Ksh 130,000/= to Ksh 150,000/= for general damages.

14. Finally, on special damages he submitted that the Ksh 8,450/= included Ksh 2,900/= for treatment yet the respondent who had a medical cover from CIC general Insurance Ltd did not pay any amount for treatment.

Respondent's submissions

15. These were filed by Nyongesa Nafula & Company advocates and are dated 11/01/2024. Counsel raised six (6) issues for determination. On standard of proof he referred sections 107(1) and 109 of the *Evidence Act* plus the cases of:

    i. Mumbi M'Nabea V David M. Wachira [2016] eKLR

ii. Maria Ciabaitaru M'Mairanyi & others V Blue Shield Insurance Company Ltd – Civil Appeal Bo. 101 of 2000 [2005] 1 EA 280 among others.

16. He thus submitted that the evidence proved the occurrence of the accident, ownership of the vehicle, respondent was a pedestrian on the said road, and the appellant negligently/recklessly managed the vehicle. Further that the police abstract showed that the appellant was to blame for the accident. He cited the case of Karisa & another V Solanki & another (1969) E. A 318 in support. Counsel thus submitted that the appellant's evidence to the effect that the respondent had charged at him and hit his side mirrors and windscreen led to the 20% of the liability being placed on the respondent. Further more the appellant's claims were not supported by any other evidence.

17. On quantum counsel submitted that this court can only interfere with the sum awarded where it is shown that the sum is too high or so low to amount to an outright error or that the court in its assessment took into account irrelevant matter/matters. He referred to the cases of:

i. Gitobu Imanyara & 2 others V Attorney General [2016]eKLR

ii. Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR and

iii. Penina Waithira Kaburu V LP Nyeri HCCA No. 59 of 2016 [2019] eKLR

18. Counsel further submitted that the trial court considered all the evidence on record before arriving at the award he made. He thus urged this court not to interfere with it. He relied on the following cases to support this submission.

i. *Kenya Power & Lighting Company Ltd V Wando: (Suing as the legal administrators of the Estate of Sheila Kagelia Amusavi) & another (Civil Appeal No. 39 of 2019)* [2023] KEHC 2367 (KLR) 23 March 2023 (Judgment)

ii. Charles Oriwo Odeyo Vs Appollo Justus Andabwa & amp: Another [2017] eKLR.

19. Finally, he submitted that the settled legal principle is that costs follow the event and so as the successful party in litigation he is entitled to costs.

Analysis and determination

20. Having considered the grounds of appeal, record of appeal both parties' submissions, cited authorities and the law I find two issues falling for determination namely:

i. Whether the trial court erred in apportioning liability in the ratio he did.

ii. Whether the award of general damages was too high or too low; and whether the special damage was proved.

21. This being a first appeal, this court is called upon to re-consider and re-evaluate the evidence and arrive at its own conclusion. It must bear in mind that unlike the trial court it did not hear nor see the witnesses and so give an allowance for that. This has been held in numerous cases namely:

i. Selle & another V Associated Motor Boat & Others 1968 EA 123

22. In Gitobu Imanyara & 2 othes V Attorney General [2016] eKLR the Court of Appeal states thus:

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect"

See also. Mursal & Another V Manese (suing as the legal administrator of Dalphine Kanini Manesa) Civil Appeal No. E20 of (2021) [2022] REHC 282 KLR (6/4/2022) (Jd)

Issues No (i) Whether the trial court erred in apportioning liability in the ratio he did.

23. From the evidence adduced there is no dispute that there was an accident which occurred involving the appellant's motor vehicle KBJ 845L and the respondent on 4/05/2021 along Amasyia Crescent – Buruburu phase four road – Nairobi. There is no dispute about the ownership of the said vehicle. There is also evidence as per PW2 that two reports were made at Buruburu police station by both the appellant and respondent. What then were these reports? The respondent's report was that he had been knocked by the appellant's motor vehicle registration No. KBJ 845L. The appellant report was that the respondent had charged at his motor vehicle which he hit with a metal bar damaging his windscreen and side mirror.

24. Besides PW2 telling the court that he preferred a charge against the driver of KBL 845L (who is the appellant) there is no evidence adduced to show that indeed he was charged and was prosecuted. There is no evidence showing that the appellant disappeared and is at large. That being the position PW2 ought to have told the court why he did not take the appellant to court. Further more if indeed PW2 visited the scene as claimed he should have availed the evidence to that effect before the court. That was not done.

25. On the other hand, it's the appellant who availed a report, by DW2 on the scene indicating that the point of impact was on the road and not on the side road. I have read through DW2's report and it does not clearly state when he visited the scene. However, at pg 8 paragraph 11 of the said report it is thus noted:

> " We did not find any evidence at the scene a fact we attribute to the lapse of time"

That being the case, how did he conclude that the point of impact was on the road and not off the road when there was no evidence due to the lapse of time?

26. I have also noted that whatever happened on this day is only known to the appellant and the respondent. None of them called a witness to support their side of the story. What is clear is that there was contact between the respondent and the appellant's vehicle resulting in damage to the appellant's vehicle and injuries to the respondent. This fact is not contested.

27. He who pleads a fact has the duty to prove it. This is well set out under sections 107(1) and 109 of the *Evidence Act*. Also see the case of: Maria Ciabaitaru M'Mairanyi & others (supra)

28. In the case of Farah V Lento Agencies [2006] 1KLR the Court of Appeal held thus:

> " ..... Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame".

29. In this case without a report from the police on exactly what happened including the point of impact, it is not an obvious thing to state where the impact took place. DW2's report is of no help on that issue because they went to the scene late and there was nothing obvious at the scene to point to the

impact. It being the appellant's word against that of the respondent I find that the trial court erred in apportioning liability at 80:20. The fairest apportioning is 50:50.

Issue No (ii) Whether the award of general damages was too high or too low; and whether the special damage was proved.

30. There is no dispute that the respondent suffered the injuries complained of, which were assessed as per the PW3's report. There was no evidence adduced to show that the respondent was still nursing the wounds. The trial court while relying on the case of Charles Orino Odeyo V Apollo Justus & another (supra) found an award of Ksh 350,000/= to be appropriate, in the circumstances of this case.

31. Making a comparison of the awards made in the last five (5) years or so including the authorities cited by both counsel in respect to similar injuries I find the award not to be too high or too low to call for interference by this court. See Gitobu Imanyara & 2 others (supra) and Penina Waithira Kaburu (supra)

32. On special damages which must be strictly proved, the respondent produced documents to prove the claims at paragraph 7 of the plaint. I however agree with the appellant that having been insured under a comprehensive cover the respondent's Insurance Company must cater for his treatment bills. He could not therefore make a claim for the same as that would amount to double payment. The two claims for the Medical report (Kshs 5,000/=) and the motor vehicle search (Kshs 550/=) were supported by receipts.

33. The upshot is that the Appeal has some merit and it partially succeeds and following orders shall issue:

    i. Finding of liability is set aside and substituted with a finding of 50:50

    ii. The award of Ksh 350,000/= is upheld less 50% contribution.

    iii. The award on special damages is set aside and substituted with Kshs 5,550/= (Kshs 8,450.00 – 2,900.00)

    iv. Interest on (ii) at court rates from date of Judgment while on (iii) at court rates from date of filing suit.

    v. The respondent will have ½ costs both in the lower court and high court.

34. Orders accordingly

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE