Mbithi v Maina & 2 others (Civil Appeal 357 of 2022)
[2024] KEHC 6292 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6292 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 357 OF 2022

JN NJAGI, J

MAY 30, 2024

BETWEEN

LUCIA NDUKU MBITHI ..... APPELLANT

AND

JOHN MAINA ..... 1ST RESPONDENT

JOHN KIARIE KIMANI ..... 2ND RESPONDENT

PAUL KARIUKI KAMOTHO ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. C. K. Cheptoo, PM, in Milimani CMCC No. 2667 of 2020 delivered on 25/25/2022)

JUDGMENT

1. The appellant herein was injured while boarding the respondent`s motor vehicle. She filed suit but the trial court found her to have contributed to the occurrence of the accident. The court declined to award her medical costs and awarded her special damages to run from the date of judgment. She was dissatisfied with the finding on liability, on medical costs and on interest and filed the instant appeal.
2. The grounds of appeal are that:
    a. The learned magistrate erred by finding that the plaintiff had contributed to the accident to effect of 40%;
    b. The learned magistrate erred by failing to award medical costs incurred by the appellant;
    c. The learned magistrate erred by awarding interest on special damages from the date of her judgment.

3. The appellant is in this appeal seeking that this court finds the respondent to have been wholly liable for the accident at 100%; be awarded medical costs and order that interest runs from the date of filing suit.

4. The appeal was disposed of by way of written submissions.

Appellant's Submissions

5. The case for the appellant at the lower court was that she was boarding the suit motor vehicle at a stage when the driver drove off before she had safely boarded thereby causing her to fall and sustain injuries.

6. The respondent did not call evidence in the case. Counsel for the appellant submitted that the appellant's evidence was not challenged and therefore that the trial court greatly erred in apportioning liability.

7. Counsel submitted that the appellant had proved all medical costs that had been incurred and it was therefore improper for the court to deny her the same. It was submitted that the appellant had provided bundle of receipts which were ignored by the trial court.

Respondent's submissions

8. In response, the respondent submitted that this court should uphold the decision of the trial court entirely. They relied on the case of *Margaret Kannes Munyanga vs. Jamal Abdulkarim Musa (w020)* eKLR and HCCA No. 3720 of 1995 Farida Kimotho vs. Ermest Maina to submit that the appellant had not met the standard required to warrant this court to set aside an award on liability.

9. On special damages and medical costs, the respondent submitted that any sum paid by the NHIF to the hospital on behalf of the appellant could not be compensated as this would amount to unjust enrichment. Reliance was placed in Section 43 of the NHIF Act and Nyahururu HCCA No. 103 of 2019, John Mwangi Munyiri and Samuel Muriithi vs. Paul Wachira Njuguna.

10. It was urged that the appeal be dismissed with costs.

Analysis and Determination

11. The basis of apportioning liability between two drivers is because the court cannot determine as to who between the drivers is to blame for the accident. This was explained at length in the case of *Platinum Car Hire and Tours Limited –Vs- Samuel Arasa Nyamesa & Another (2019*) eKLR where the court stated that: -

> " Given that there were two versions that the emerged from the testimony of PW1 and PW2 that left open the possibility that either party was to blame, neither the appellant nor 2nd respondent took the opportunity to call any evidence to support its case. No doubt in coming to the conclusion that both parties were to blame the trial magistrate had in mind the decision of the Court of Appeal in Berkley Steward Limited V. Waiyaki [1982-1988] 1 KAR where it cited with approval the decision in Baker V. Market Harborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472, 1476 where Denning LJl, observed inter alia as follows:-
>
> 'Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would

unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them ...'

12. In other cases, 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 Farah – Vs- Lento Agencies CA NAI Civil Appeal 34 of 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."

13. It is then evident that the court sorts to apportioning liability between the parties where there is no evidence to determine as to who is to blame. The question in this case was whether there was no evidence on which the court could determine as to which of the parties was liable for the accident in the failure of which it would consider whether both were equally liable.

14. The respondents in their written statement of defence denied liability to the accident and in the alternative alleged contributory negligence on the part of the appellant. As the respondents did not adduce evidence in the case their pleadings remained mere statements of fact that were not substantiated. See Trust Bank Limited –Vs- Paramount Universal Bank Limited, Nrb (Milimani) HCCC No. 1243 of 2001 as cited in *Shaneebal Limited – Vs- County Government of Machakos (2018)* eKLR. In the premises I hold that the respondent did not show that the appellant contributed to the occurrence of the accident. There was thereby no basis for holding that the appellant contributed to the occurrence of the accident. The evidence of appellant on how the accident occurred does not lead to an inference of negligence on the part of the appellant.

15. It is my finding that the trial magistrate was wrong in apportioning liability between the appellant and the respondent when there was no evidence that the appellant contributed to the occurrence of the accident. The uncontroverted evidence of the appellant led to the conclusion that the respondent's driver was the one who was entirely to blame for occasioning the accident. I find the respondent 100% liable for the accident.

16. In Butt V Khan [1978] eKLR, the court stated 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 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."

17. I agree with respondent's submission that appellant in having the medical expenses for treatment and admission, being paid for by NHIF, the respondent could not be compensated for it again. Section 43 of NHIF Act provides as follows

> " Recovery of compensation or damages where a contributor to the Fund is entitled, whether under the Workmen's Compensation Act (Cap.236) or otherwise, to recover compensation or damages in respect of any injury or illness, he shall not, to the extent to which such compensation or damages are recoverable, be entitled to any benefits in respect of any treatment undergone by him as a result of such injury or illness, and any benefits paid in respect of such treatment, shall to the extent to which such compensation or damages

have been recovered, be repaid to the Board: Provided that the payment of any benefits as aforesaid shall not preclude the right of the contributor to recover any compensation or damages."

18. It follows that if any sums paid by the Fund to the hospital were again paid to the appellant as compensation, then it is recoverable by the Fund. The respondent was therefore not entitled to claim of medical expenses which had been paid to the Hospital by NHIF. It would amount to unjust enrichment to claim it. The appeal on that aspect of special damages is dismissed.

19. The trial court awarded special damages of Ksh.69,260/= but did not indicate as to when the interest was to run from. It is trite that interest on special damages runs from the date of filing suit. In the premises, interest on special damages as awarded by the trial court in this case is to run from the date of filing suit.

20. The upshot is that the appeal herein succeeds on liability and interest. Accordingly, the finding on liability of the trial court is set aside and liability is entered against the respondent at 100%. Interest on special damages awarded by the trial court is to run as from the date of filing suit. The appeal on the award on medical costs is dismissed.

21. As the appeal has partially succeeded, each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH MAY 2024

J. N. NJAGI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr Kaburu for Appellant

Miss Gakii for Respondent

Court Assistant – Amina

30 days Right of Appeal.