Were v Nganga & another (Civil Appeal E393 of 2022)
[2024] KEHC 6135 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E393 OF 2022

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

HELLEN NDUNGE WERE ..... APPELLANT

AND

SIMON MWAI NGANGA ..... 1ST RESPONDENT

SAFARM COMPANY LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Small Claims Court in Nairobi SCCC NO. E203 OF 2022 by Hon V. M Mochache Resident Magistrate delivered on 13th May 2022)

JUDGMENT

1. The appellant filed before the trial court a statement of claim dated 2nd February 2021 against the 1st and 2nd respondents. She claimed that the 1st respondent was the driver whereas the 2nd respondent is the registered owner of motor vehicle registration number KCM 546W. That on or about the 14th August 2021 while the 1st respondent was driving the said motor vehicle along Landhies Road, Nairobi he carelessly and/or negligently controlled the said motor vehicle causing an accident in which the claimant, who was a pedestrian was knocked down by the 1st respondent and sustained severe bodily injuries.

2. According to the appellant the 1st Respondent drove the motor vehicle at a high excessive speed and in the circumstances failed to stop, break and swerve or in any other way control the said motor vehicle to avoid the accident. She also contested that the 1st respondent failed to adhere to the highway code and ignored road signs. As a result of the accident, the appellant suffered loss and damage including deep-cut wound on the left lower limb, swollen painful and tender upper lip, swollen painful and tender frontal region, occipital hematoma and blunt injuries on the neck and abdomen. The appellant held

the 2nd respondent vicariously liable and relied on the doctrine of res ipsa loquitur. She sought general damages and special damages of Kshs 99,210/= and costs of the suit.

3. In their statement of defence dated 28th March 2022, the respondents stated that the 1st respondent is an employee serving as the operations manager of the 2nd respondent. They attributed negligence to the claimant.

4. During the hearing of the suit, the claimant produced a police abstract which showed that the matter was pending investigation hence there was no conclusion by the police as to who was to blame, for the accident.

5. In his evidence, the 1st respondent testified that while driving, he saw the appellant who had alighted from a matatu suddenly cross the road without checking. Upon realizing that she had miscalculated the distance of the 1st respondent's oncoming motor vehicle, she dashed back causing him to hit her. He also stated that he tried to control the vehicle in vain.

6. In its judgment, the trial court apportioned the liability at 50:50. It awarded Kshs 100,000/= for the injuries suffered while placing reliance on the case of *PF (Suing as next friend and father of SK(Minor) vs. Victor O Kamadi & another* [2018] Eklr. It awarded special damages of Kshs 13,610/= as proved by the receipts produced in evidence from Kenyatta National Hospital. The Court also relied on the cases of *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs. Janevams Limited* [2015] eKLR, and *Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku* [2006] eKLR where the courts held that an invoice is not proof of payment and that only a receipt meets the test.

7. The appellant being dissatisfied with the judgment filed this Appeal dated 27/04/2023 on the following grounds;

    a. The learned magistrate erred in law and facts by finding that the appellant was negligent and contributed to the accident.

    b. That the learned magistrate erred in law and facts by apportioning liability on the part of the appellant.

    c. That the learned magistrate erred in law and in fact by failing to appreciate the evidence tendered with regard to the liability of the respondents.

    d. That the learned trial magistrate misdirected himself in totally disregarding the evidence by the appellant and the evidence on record on the issue of negligence against the respondents.

    e. That the learned magistrate misdirected herself by ignoring the appellant's evidence and the submissions on quantum and consequently coming to a wrong conclusion.

    f. That the learned trial magistrate misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions filed by the appellant.

    g. That the learned trial magistrate proceeded on wrong principles when assessing damages and failed to apply precedents and tents of the law applicable.

h. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately low in the circumstances occasioning a miscarriage of justice.

i. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

8. The appeal was canvassed by way of written submissions.

Appellant's submissions

9. These were filed by C. K. Musyoki and are dated 29th February, 2024. Counsel submitted on two issues, namely, whether there was contributory negligence on the part of the appellant and whether the damages awarded were sufficient in the circumstances.

10. Starting with the issue as to whether there was contributory negligence on the part of the appellant, counsel submitted that the respondents ought to have established that the appellant was partly the author of her injury. He urged that the appellant on her part had established that she adhered to the rules of crossing the road while the 1st respondent was over speeding and drove recklessly. He also pointed out that the 1st respondent confirmed in his evidence that the accident occurred at a designated pedestrian crossing and that he was supposed to slow down in the circumstances, thus the duty to avoid the accident lay with the 1st respondent. To buttress this submission, counsel referred to Rule 21(1) of the Traffic Signs Rules and submitted that the same imposed a mandatory duty of care upon the 1st Respondent to give way to the appellant. Counsel contested the finding that the appellant ought to have used the footbridge arguing that it was unfathomable since it would defeat the very purpose of having pedestrian crossings on roads and highways. Still on the issue of contributory negligence, counsel relied on the case of *Masembe vs. Sugar Corporation & Another* [2002] 2EA 434, as cited in *Kennedy Muteti Musyoka vs. Abedinego Mbole* [2021] eKLR and *Mary Njeri Murigi vs. Peter Macharia & Another* [2006] eKLR which settled the issue of contributory negligence at a designated crossing area.

11. Turning to the issue of quantum, counsel reiterated that the award should be commensurable with the injuries sustained and that factors such as inflation should be considered. He relied on the cases of Peter Njuguna vs. Francis Njuguna Njoroge [2015] eKLR and Francis Ochieng & another vs. Alice Kajimba [2015] eKLR to urge that an award of between Kshs 230,000/= and Kshs 280,000/= for injuries similar or comparable to those sustained herein should be made. The appellant prayed that this court finds the respondents jointly liable for the accident and assess the general damages in the sum of Kshs 300,000/= on account of inflation.

12. The respondents did not file any submissions.

13. This being a first appeal, it is imperative to start by stating the elementary principle of law that a first appellate court is mandated to analyze and re-examine the evidence adduced in the trial and reach its own independent conclusions. However, in doing so, the court must be alive to the fact that unlike the trial court, it did not have the benefit of hearing and seeing the witnesses testify. For this statement of the law, the decision of the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR is apt. Also see *Selle & another V Associated Motor Boat & others* [1968] EA.

14. Having considered the grounds of appeal, the appellant's submissions and the entire record, it is my opinion that the two issues for determination are who was liable for the accident and whether the damages awarded by the trial court are sufficient.

15. Regarding the question of liability, the trial court apportioned it on a 50:50 basis as both parties owed each other a duty of care. From the evidence on record, there is no doubt that the appellant was knocked down at a pedestrian crossing. The respondents did not challenge this fact. However, from the evidence of the 1st respondent, the pedestrian crossing was located near a foot bridge. It was therefore the 1st respondent's claim that the appellant ought to have used the footbridge upon alighting from the matatu.

16. In addressing the question of liability in the context of the prevailing circumstances of this case, two authorities come to mind. First, is the case of *Joseph Muturi Koimburi vs. Mercy Wahaki Mugo* (2006) eKLR where the court held that:

> "Having found that the respondent was hit while crossing the road, the lower court then was wrong in apportioning liability and finding the appellant 70% to blame. In my view, the respondent was fully to blame for her reckless behavior in attempting to cross a busy dual carriageway at that time of the night. When infact the foot bridge was available for that purpose, in fairly close proximity. Any driver of ordinary prudence is not expected to find pedestrians on that part of the road, at that hour of the night, and the appellant could not possibly be blamed for that accident. I adopt the reasons for the court in a similar situation in the case of Waindi Vs Pharmaceutical Manufacturing Company Ltd [1986] KLR 506."

17. The other authority is the case of *Mary Njeri Murigi vs. Peter Macharia & another* [2016] eKLR where the Court distinguished Joseph Muturi Koimburi (Supra) and held thus:

> "Secondly, the case of Joseph Muturi Koimburi (supra) can be explicitly distinguished from this case because in the Joseph Koimburi case, the court was dealing with a situation where the deceased was found to have been crossing the road at a place not designated for pedestrians and that infact there was a footbridge at close proximity hence a prudent driver could not be expected to find pedestrians on that part of the road.
>
> 38. Pedestrian crossings are usually marked areas for pedestrians to cross and therefore it is expected that motor vehicles would, when approaching a pedestrian crossing slow down to allow pedestrians to cross before proceeding. In this case, the defence did not adduce any evidence which was in its possession, as to whether the 2nd defendant ever slowed down on approaching the pedestrian crossing or took any avoiding act to avoid crushing the pedestrian and ramming into motor vehicle KAY 069X."

18. There is also the case of *Martine Apiyo Waindi vs. Pharmaceutical Manufacturing Co Ltd & another* [1986] eKLR where it was held that:

> "I accept the evidence of the 2nd defendant that beyond the stone kerb on his near side there was a barbed wire fence with flowers growing there. Further evidence was produced on behalf of the defence to prove that on May 28, 1975 a foot bridge going over Haile Selassie Avenue had been opened for the use of pedestrians. At the time of the accident the footbridge had been in use for over 2 1/2 years. To my mind in these circumstances a driver

of ordinary common sense, reason or prudence would not expect pedestrians normally to be on this road crossing it."

19. From the foregoing authorities, I note that even though there existed a pedestrian crossing in the area, there was also a footbridge which the appellant could have utilized to cross the road. Landhies Road is a busy road hence the reason for the erection of the footbridge in the area by the concerned authorities. Additionally, while the 1st respondent was obliged to drive with due care, it is clear that the appellant, upon alighting from another matatu attempted to cross the road. It also came out clear from the evidence on record that the appellant attempted to cross the road and then suddenly dashed backwards and that is when she was knocked down. The ensuing circumstances, on a balance of probability, portray a scenario where both the appellant and the 1st respondent jointly authored the misfortunes of the day. Considering the injuries suffered by the appellant, the 1st respondent cannot be said to have been speeding but rather any care he had was vitiated by the existence of a footbridge which would create a false impression in his mind that pedestrians at the place would ordinarily utilize the said footbridge to cross the road. I therefore concur with the trial court's finding that both parties were to be blamed hence the apportionment of liability. However, considering the time of the accident (6.30am) and the fact that many people at that time were rushing to work one would have expected the 1st respondent to be extra careful even with the existence of the footbridge. He was expected to drive at moderate speed which he did not. I will therefore apportion liability in the ratio of 60:40 in favour of the appellant.

20. Turning to the question of quantum, it is necessary to appreciate that an appellate court can only interfere with the damages awarded by the trial court where the appellant has demonstrated that the trial court acted on the wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the injury suffered. On this principle, I rely on the holding by the Court of Appeal in *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR where the court state that:

> " Further, it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

21. Starting with the award of special damages, the rule is that special damages must not only be specifically pleaded but must be strictly proven. This principle was aptly captured in Ratcliffe vs. Evans [1832] 2 QB 524 as applied in *Kampala City Council vs. Nakaye* [1972] EA 446, and *Hahn vs. Singh* [1987] KLR 716.

22. In the instant case the appellant pleaded for special damages amounting to Kshs99, 210/=. However, she only tendered receipts amounting to Kshs 13, 610/=. As rightly pointed out by the trial court, invoices are not proof that the appellant made the additional Kshs84, 610 as claimed to have been paid to Kenyatta National Hospital. She was rightly awarded what was proved as special damages being Kshs 13, 610/=.

23. Turning to the issue of general damages, it is a general rule that in assessing damages, the court so doing should ensure that the injured person receives fair compensation commensurate to the injuries. The

same views were held by the court in *Nancy Oseko vs. Board of Governors Maasai Girls' High School* [2011] eKLR where the court stated thus:-

> " In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant."

24. Again, as rightly submitted by counsel for the appellant, in issuing awards, Courts are enjoined to take into account various factors including inflation. Suffice to mention the holding in *Telkom Orange Kenya Limited vs. S O (minor suing through his next friend and mother* [2018] eKLR where Majanja, J. stated that:

> " In addition, the current value of the shilling and the economy has to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see Ugenya Bus Service Vs Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] KLR 661)."

25. The trial court gave an award of Kshs 100,000/=. In my view, considering the recent awards made by the courts including the cases cited by the appellant, the award by the trial Court is not reasonable. It failed to consider the current currency valuation and inflation from 2018 when the case relied upon by the learned Magistrate was determined. Taking into account the comparative decisions cited by the appellant, I find that an award of Kshs 250,000 would be reasonable.

26. In light of the foregoing, this appeal succeeds in the following terms;

    a. The appeal against liability is allowed and the apportionment of 50:50 set aside. It is substituted with an apportionment of 60:40 in favour of the appellant.

    b. The trial Court's award of special damages of Ksh 13,610/= is hereby upheld.

    c. The trial Court's award of Kshs 100,000/= as general damages is hereby set aside and substituted with an award of Kshs 250,000/= as general damages LESS 40% contribution.

    d. Costs to the appellant in both lower court and high court.

27. Orders accordingly.

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

H.I. ONG'UDI

JUDGE