FOO (Minor Suing Through Next Friend and Father GOO) v Omare (Civil Appeal E104 of 2022) [2024] KEHC 7729 (KLR) (28 June 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E104 OF 2022

RE ABURILI, J

JUNE 28, 2024

BETWEEN

FOO (MINOR SUING THROUGH NEXT FRIEND AND FATHER GOO) ..... APPELLANT

AND

NICHOLAS OMARE ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable R.S. Kipng'eno in the Senior Principal Magistrate's Court at Nyando delivered on the 18th October 2022 in Nyando SPMCC No. 23 of 2019)

JUDGMENT

Introduction

1. The appellant, through the next friend and his father, vide his plaint dated 15th February 2019, sued the respondent for general damages as a result of injuries sustained following a road traffic accident that occurred along the Ahero – Katito road at Ayweyo on the 26th December 2018 wherein the appellant was a passenger aboard the respondent's motor vehicle registration No. KBA 031K, a Toyota Hiace Matatu that was so negligently driven as to veer off the road and knock him down

2. The respondent filed his statement of defence dated 31st May 2019 denying all the appellant's averments and putting him to strict proof.

3. From the record, the appellant testified that on the material date he was a pillion passenger on a bicycle that was being cycled by his cousin Bradley Ochieng heading towards Katito from Ahero. He testified that on their way, the respondent's motor vehicle that was trying to overtake them, in an effort to avoid a pothole and oncoming traffic, swerved to the left and hit them leading to their fall. He testified that he sustained injuries to the head, chest and elbow while his cousin passed away on the way to the hospital.

He denied suffering any fractures and that the summons to attend court had no name of driver. He maintained that they were knocked on the side of the road.

4. The respondent called Dr. Jenipher Kahuthui who testified on the nature of the appellant's injuries as soft tissue. The respondent's driver testified as DW3 and stated that he was driving along the road towards Katito when the appellant and another lad who were riding on a bicycle lost control and went and rammed into the motor vehicle after the pillion passenger jumped off the bicycle and that they were in the opposite direction. The cyclist was the younger of the two. That the driver stopped a motor vehicle which took the victim to hospital. That the pillion passenger blamed the cyclist and he escaped fearing arrest then the driver reported the accident to Ahero Police Station. The driver was never charged with any offence. he maintained his testimony in cross examination that although the road was potholed, he was not avoiding the potholes and that he had stopped when the lads came his way and knocked on the driver's side of the motor vehicle.

5. In his judgement the trial magistrate found that the appellant failed to prove causation of the accident and the nexus to his injuries on a balance of probabilities on account of he jumped off the bicycle, fell down and got hurt just in time to avoid the impact which the deceased cyclist was exposed, with the respondent's motor vehicle and that he did not come into contact with the motor vehicle. The trial magistrate went on to dismiss the appellant's case with no orders as to costs.

6. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 12th February 2024 challenging the trial court's award on quantum based on the following grounds;

    a. That the learned magistrate erred in law and fact in failing to appreciate the entire evidence on record.

    b. That the learned magistrate erred in law and fact by failing to appreciate the fact that the deceased herein was a minor and could not be held responsible for the said accident.

    c. That the learned trial magistrate erred in law and fact by considering extraneous factors and relying on the evidence of witnesses were not called to testify as witnesses in arriving at his decision.

    d. That the learned trial magistrate erred in law and fact by failing to assess the general damages that the appellant would have been awarded had he succeeded.

7. The parties filed submissions to canvass the appeal.

The Appellants' Submissions

8. It was submitted that from the evidence on record it was clear that the respondent's driver was responsible and/or liable for causing the said accident which resulted in the appellant's injuries and thus the respondent ought to be held vicariously liable for the same. The appellant submitted blaming the investigating officer of the traffic accident who, despite an advise from the ODPP that he charges the driver of the accident motor vehicle, he went on and opened an inquest file instead. It was therefore submitted that the trial court thus erred in arriving at its decision which was against the overwhelming evidence on record and as such, his judgement ought to be set aside.

The Respondent's Submissions

9. It was submitted that the appellant did not prove his case on a balance of probabilities and that the trial magistrate was right in believing the driver's evidence that the appellant was the one to blame for

the accident. The respondent further submitted that there was no contact between the respondent's motor vehicle and the appellant as the evidence on record confirmed that the appellant jumped off the bicycle before the accident and this is supported by the less impact compared to the impact on the deceased cyclist, an indication that he indeed jumped off the bicycle.

Analysis and Determination

10. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of Selle & Anor. v Associated Motor Boat Co. Ltd (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga v Kiruga & Another (1988) KLR 348).

11. I have read the trial court record giving rise to this appeal as well as the trial court record in HCCA E105 of 2022 which cases are related as the other appeal was in respect of the deceased cyclist. In both cases, the trial magistrate dismissed the plaintiff's cases for want of proof on a balance of probabilities. The record in HCCA E105 of 2022 was brought into these proceedings by way of a supplementary record of appeal. The appellant in this appeal had his testimony in the lower court adopted as evidence of PW2 in the other file Nyando SPM CC NO. 281 of 2019 which was a test suit on liability.

12. The issue for determination is whether the trial court erred in dismissing the appellant's suit. This suit revolves around the issue of liability. The judgement impugned herein arose out of a suit, Nyando SPMCC No. 23 of 2019 that was part of a series including Nyando SPMCC 281 OF 2019 Nerreah Adhiambo Otieno (Suing as the Legal Rep./Adin Ad Litem of the Estate of Brandy Ochieng Mboya) v Nicholas Omare. The parties herein were represented by the same advocates in both suits and in the instant appeal.

13. On the 8.12.2020 when the parties in Nyando SPMCC 281 of 2019 Nerreah Adhiambo Otieno (Suing as the Legal Rep./Adin Ad Litem of the Estate of Brandy Ochieng Mboya) v Nicholas Omare appeared before court, they agreed that Nyando SPMCC 281 OF 2019 be selected as the test suit on liability. The appellant now seeks to have this court consider the issue of liability afresh based on the evidence adduced in the lower court herein in Nyando SPMCC No. 23 of 2019.

14. It is clear that Nyando SPMCC 281 of 2019 was selected as a test suit in all the related matters. In the test suit the deceased cyclist was found 100% liable for the accident. So what is the purpose and effect of selection of a test suit? I will first look at the legal provisions. Order 38 Rules 1 and 2 of the Civil Procedure Rules (CPR) provides as follows;

> Order 38 – Selection of Test Suit1.Staying several suits against the same defendant [Order 38, rule 1.]
>
> Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.
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> 2. Staying similar suits upon application by defendant [Order 38, rule 2.]

> Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several dependants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues.

15. A test suit is thus a convenient mode of treatment of multiple suits between the same parties where similar issues of law and fact arise. In Samwel Kariuki Nyangishi v John Disilberger [2002] eKLR the court explained the reasons for selecting a test suit as follows;

> " The reasons why we have a test suit is because the said case would not be an embarrassment to the court and parties where several courts decide on liability arriving at a different proportion from that of the first court trying the matter."

16. Therefore, having selected Nyando SPMCC 281 of 2019 as the test suit, once liability was determined, the parties were bound by that finding on liability.

17. Consequently, having determined the issue of liability in the test suit, the trial court only needed to adopt the same or if it was to depart from the findings, give reasons for doing so. In Amos Muchiri Ndung'u v Chinga Tea Factory & David Muthumbi Mathenge [2010] eKLR, the court explained the purpose, the process and the result of an outcome of a test suit. It held as follows:

> " A test case is a suit brought specifically for the establishment of an important legal right or principle. It can also be a term that describes a case that tests the validity of a particular law. Test cases are useful because they establish legal rights or principles and thereby serve as precedent for future similar cases. Test cases save the judicial system time and expenses of conducting proceedings for each and every case that involves the same issue or issues.In my view, the learned magistrate was to determine liability in the test case on the basis evidence adduced in the said case because admittedly the accident arose from the same accident, same facts, same evidence and same witnesses were to be used to determine liability and in was not necessary for the plaintiffs in all the suits to testify to determine liability. For this reason, I find that liability having been established in favour of the plaintiff in the test case, the same applied and was binding in the other suits. It was not necessary for each and every plaintiff to testify in the test case.' (Emphasis mine)

18. All the parties affected by the finding on liability in the test suit were before the trial court. If dissatisfied by the said finding they ought to have filed an appeal on the same.

19. In this case, all that the trial court had to do was to adopt the finding on liability in the test suit then proceed to assess the damages if any. The trial magistrate did adopt the liability arrived at in the test suit which was 100% against the deceased cyclist and proceeded to dismiss the suit. Had he found otherwise, he would have given reasons. he nonetheless went further to give reasons why the respondent could not be held liable in this case, noting that there was no contact between the appellant and the accident motor vehicle. the trial court believed the evidence given by the driver of the vehicle and the police officer who adduced evidence and produced traffic file records from Ahero police station which showed that the deceased minor was wholly to blame for the accident and that the appellant herein never had any contact with the motor vehicle, having jumped off the bicycle before impact.

20. In my own assessment of the evidence on record and considering the minor injuries that the appellant sustained, had the cyclist been hit when the appellant was on the bicycle, the appellant would have suffered more serious if not fatal injuries.

21. Having said that, the appellant complains in his grounds of appeal that the trial court did not appreciate the entire evidence on record. I have perused the judgment and however brief, as I stated earlier, the trial magistrate was bound to adopt the finding on liability in the test suit unless there were good reasons to depart from that finding. Nonetheless, the trial magistrate did consider all the evidence by both parties and arrived at the decision that he did. I find no fault on his part.

22. On the ground that the trial court did not appreciate the fact that the deceased was a minor and could not contribute to the accident, I note from the evidence in the test suit that the deceased was a class 8 pupil and he was aged 15 years old. From the testimony of the respondent's driver and traffic police officer who produced the entire court file, the police who investigated the accident and even had an inquest conducted were satisfied that the minor was wholly to blame for the accident for and that in fact, the appellant herein jumped off the bicycle which pushed the deceased cyclist into the side of the road thereby hitting onto the respondent's motor vehicle before falling on the tarmac. The driver of the motor vehicle maintained that when he saw the cyclist ride in a zigzag manner towards him and from the opposite direction, contrary to what the appellant stated that the vehicle was coming from behind, the driver slowed down and stopped on his extreme left and that before the cyclist came and hit the vehicle on the driver's side, the appellant herein jumped off the bicycle

23. The case having been founded on the tort of negligence, the pertinent question to ask would have been, it having been established that there was a collision between the minor cyclist who was aged 15 years old and the respondent's motor vehicle, whether the driver acted in a manner expected of a reasonable and prudent person in his position and circumstances. Lord Reid words in Stapley – Vs – Gypsum Mines Ltd (2) (1953) AC 663 at pg 681 captures this view very eloquently that;-

> " To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of ..... 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 ..."
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> "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 meant that the accident must be regarded as having been caused by the faults of all of items. 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."

24. In this case, it is not in doubt that the appellant was 17 years old and two years older than the deceased cyclist. The appellant allowed himself to be carried on the bicycle by the deceased who was younger than him. The appellant and the deceased were not children of tender years. From the uncontroverted evidence of the respondent's driver, there is no evidence that the driver of the motor vehicle failed to do that which a reasonable driver could have done in the circumstances of the case to avoid the accident. The driver was firm that it was in broad daylight, he saw the cyclist ahead and that when he was hit, he had stopped the motor vehicle on his side.

25. The appellant having jumped off the bicycle and had no impact or contact with the motor vehicle to avoid the impact as the cyclist rode into the motor vehicle, which finding of fact by the trial court I find was not erroneous, I find no reason to interfere with the same. I say so because there was no credible evidence that after the cyclist was hit, the appellant and the cyclist were thrown off the bicycle thereby causing the injuries and or fatal injuries. I proceed to dismiss the ground of appeal.

26. On the ground that extraneous evidence of witnesses who were not called to testify was relied on by the trial court, I find no substance in this argument as there is no such material in the judgment of the trial court that is extraneous and he clearly at page 68 of the record of appeal stated the source of the evidence and material he was relying on to make his decision. This ground is declined.

27. On the alleged failure to assess damages that the appellant would have been awarded had he been successful, the trial court did not assess any damages after dismissing the suit despite referring to the authorities relied on by both parties in urging the court to award damages for the injuries sustained by the appellant. That was manifestly erroneous on the face of the binding decision in Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua [2015] eKLR, where the court held that:

> " Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment."

28. Similarly, in Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, it was observed thus:

> " It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

29. With such trite position of the law, I find that there was an obvious error. I reiterate that a trial court has the duty to assess damages even where the suit fails. I will thus perform the duty of the court on first appeal and assess damages.

30. The appellant sustained superficial injuries on the forehead, tenderness, swelling on the head, chest and right elbow injury. According to PW2 Dr. Kahuthu. The appellant was treated and discharged the same day of the accident. The injuries had healed two months after the accident, when she examined the appellant. All the injuries were soft tissues.The appellant proposed Kshs 500,000 while the respondent proposed Kshs 60,000 general damages. Damages depend on the gravity of the injuries and the effect of those injuries. Courts also rely on comparable awards although no two injuries can be the same. In this case, I find the decision cited by the respondent to be more relevant as opposed to the decisions cited by the appellant which had more serious injuries. An award of kshs 80,000 would have been sufficient considering the time lapse and inflation from the time when Malindi HCCA 14 of 2020 HB v Jasper Nchonga&Another [2021]e KLR was made.

31. The appellant in his submissions asked for kshs 500,000 general damages while the respondent asked the court to award kshs 60,000 should it find the respondent liable.

32. In the end, I find this appeal not merited. I uphold the judgment of the lower court dismissing the suit and dismiss the appeal. Each party to bear their own costs of the appeal.

33. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE