Waweru v Njagi (Civil Appeal E017 of 2022)
[2024] KEHC 8795 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8795 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E017 OF 2022

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

WILSON KARIUKI WAWERU ..... PLAINTIFF

AND

STEPHEN MWANGI NJAGI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. V.S. Kosgei (RM) in Karatina PMCC No. 42 of 2017, delivered on 22nd March, 2022)

JUDGMENT

1. This is an Appeal and cross Appeal from the Judgment and Decree of the Hon. V. S. Kosgei, Resident Magistrate given on 22/3/2022. The Appellant was the plaintiff in the matter.
2. The Respondent who was the 2nd Defendant filed a Memorandum of cross Appeal on 22/4/2022.
3. The Memorandum of Appeal raises the following grounds;-
    i. That the learned Honourable Magistrate erred and misdirected herself when she failed to appreciate that the appellant had sustained very serious and life threatening injuries which deserved an award of more than the awarded Kshs. 1,500,000.00 in general damages for pain and suffering and loss of amenities.
    ii. That the learned Honourable Magistrate erred when she failed to consider and appreciate that the appellant's earning capacity had been diminished by the fact that he could no longer drive a motor vehicle or travel long distances yet his work involved a lot of travelling and as such reached a wrong conclusion by failing to award damages for diminished earning capacity.
    iii. That the Honourable learned Magistrate erred when she failed to award damages for future medical expenses despite there being overwhelming evidence in support of the claim.

4. The Cross Appeal raised the following grounds:

   i. That the learned trial magistrate erred in law and in fact in failing to take into account issued raised and evidence adduced by the defence and in eventually finding the Respondent 100% liable.

   ii. That the learned trial magistrate erred in law and in fact in failing to take into account relevant factors in evaluating the evidence on record on liability and in effect, failed to find that the Appellant was guilty of contributory negligence.

5. The Beauty with both the Cross Appeal and the Appeal judgment thus is that they are concise and succinct. They each raise one issue;-

   i. Quantum of damages in respect of this Appeal.

   ii. Liability for Cross Appeal.

6. Both were filed within 30 days.

   The Appeal sought judgment therefore that;-

   a. An amount of Kshs. 1, 500,000/= be set aside and an higher figure be substituted.

   b. Perennial damages for Diminished capacity be set aside.

   c. Award of Future Medical expenses.

   d. Costs.

7. The Cross appeal sought apportionment of liability to the Appellant and

   costs.

Pleadings

8. The Appellant filed suit on 20th April, 2014 involving motor vehicle Registration No. KAH 157 and Nissan Sunny which the Appellant was driving while the Respondent was a driver of motor vehicle Registration number KBW 522A.

9. The accident is stated to have occurred along Karatina-Nyeri road at Wariruta area. The insured suffered injuries as follows;-

   (a) Fracture of Upper 1/3 and Lower ½ right femur

   b. Tenderness on the chest.

10. The Appellant claimed the following special damages

    a. Medical expenses - Kshs 1,056,000/= (to be advised at the

       Hearing)

    b. Medical report - Kshs. 1,500/=

    c. P3 form - Kshs. 500/=

    d. Police Abstract - Kshs. 200/=

    e. Search Certificate - Kshs. 940/=

f. Transport - Kshs. 1,170,000/=

Total - Kshs. 2,229,140/=

11. They claimed for future medical expenses. There is no dispute on the Special damages.

12. The court entered judgement as follows;-

General Damages - Kshs. 1,500,000/=

Special Damages - Kshs. 2,211,500/=

Total Kshs. 3,711,500/=

13. The 3rd Defendant filed defence on 20th April, 2016 blaming the Appellant.

The court found as follows;-

a. 100% liability against the 2nd Defendant.

b. General Damages - Kshs. 1,500,000/=

c. Special Damages - Kshs. 2,211,500/=

Total Kshs. 3,711,500/=

Analysis

14. There are 4 issues to determine both in Appeal and Cross Appeal.

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its 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.

16. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

18. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for

themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

19. In the case of Peters v Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others [2019]* eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

21. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

22. The foregoing was settled in the cases of Butter v Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

23. Finally, in deciding whether to disturb quantum given by the lower court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously conclusively in circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

24. The High Court, pronounced itself succinctly on these principles in Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

25. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia

Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

26. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

27. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.

    c. The award is simply not justified from evidence.

28. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

29. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

30. The duty was on the plaintiff to prove liability and the defendant to prove contributory negligence. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

31. In Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

32. It follows that the initial burden of proof lies on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case. Therefore, the burden is not on the plaintiff, or the defendant. It is on the party who alleges.

33. Further, in *Evans Nyakwana v Cleophas Bwana Ongaro [2015]* eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

34. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others [2010]* 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

36. Furthermore in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015]* eKLR, the Judges of Appeal held that:

> " Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

37. The accident can therefore not be said to have occurred by magic. Or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but is better still 50.01:49.99, there can be no better equal chance.

38. There can be no liability without fault. In the case of Caparo Industries PLC v Dickman [1990] 1 ALL ER 568 and Chun Pui v Lee Chuen Tal [1988] RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused...
>
> "What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

39. In the case of Kiema Muthuku v Kenya Cargo Handling Services Ltd [1991] 2 KAR 258, the court of appeal posited as doth:

> " There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence".

40. On liability, the cross appellant is non-suited. Liability was between the defendants in the lower court. There is no appeal against them. In short, they have not served them or indicated to them to be part to the Cross Appeal. Nevertheless, motor vehicle Registration No. KAH 157K was driven by the Appellant. He could be held liable, if the same is found to be negligent.

41. The 1st and 4th defendants did not ever appear. The 2nd defendant, the Respondent was the owner of motor vehicle Registration No. KBW S 22A.

42. The 3rd defendant was a micro finance and was not liable. The decision on the 3rd defendant stands. The court found the ownership of KBW S22A was not necessary as the 2nd defendant was driving. Appellant's car rested on a ditch while the Respondent's car rested in the middle of the road. The court stated, and I agree thus the scene as described that the Respondent was to blame. In the case of MacDrugall App v Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

43. In the comparative jurisprudence in the case of Calvin Grant v David Pareedon et al Civil Appeal 91 of 1987 where Theobalds J enunciated as follows; -

> " Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the

respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."

44. This is the rule in Embu Road Services v Riimi [1968] EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif [1961] EA 201, Menezes Stylianicers Ltd CA No.46 of 1962, in which the courts held inter alia; -

> "Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D)."

45. Consequently, I agree with the analysis by the court on contributory negligence. I do not find any cause to blame related to the Appellant. In the circumstances the Cross Appeal is invaluable. The court was equally right in exonerating the 1st, 2nd and 4th Defendants. The cross Appeal is dismissed with costs of Kshs. 95,000/-.

46. On General damages the court awarded Kshs. 1,500,000/=. The leg was amputated 80%. The court based on comminuted fractures. It is femur with 100% degree of permanent incapacity. The court looked at the incapacity of 80% and awarded Kshs. 1,500,000. In the case of *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA) [2020]* eKLR the Plaintiff aged 5 years at the time of the accident lost his right leg above the knee by amputation and the court awarded Kshs. 3,000,000/= which the High Court reviewed on Appeal to Kshs. 2,500,000/= in 2020.

47. In the case of *Daniel Kosgei Ngelechei v Catholic Trustees Registered Diocese of Eldoret & Another [2016]* eKLR I note the plaintiff suffered amputation of the leg above the knee. The High Court awarded Kshs. 2,100,000/- for pain and suffering and loss of amenities which was upheld by the Court of Appeal.

48. Therefore, the award of Kshs. 1,500,000/- for general damages was in my view not inordinately high. I will not disturb it.

49. Regarding loss of diminished capacity this court dismissed the same. The claim was sought on the prayer section and was not pleaded. Before a claim is sought, it must be pleaded out. It is not enough to throw a claim at the court. I don't second mind in this Appeal. It is consequently dismissed.

50. Future medical expenses were pleaded but the expenses incurred not set out. A report by Dr. Cyprian Okoth Okere did not indicate any future medical expenses. In the case of, Tracom Limited & Another v Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> "We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the

time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."

51. Similarly, as was held in the cases of Gulhamid Mohamedali Jivanji v Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the circumstances. That is to say, the character of the acts producing damage, and the circumstances under which those acts were one.

52. Though it is indicated that the Appellant could not work as a butcher, the same is not part of the prognosis. There is no medical examination that was required. The payment formed part of the Special damages awarded. He prayed for Kshs. 1,000,000. The accident occurred in 2017 and he was treated. No physiotherapy was done. There are no further documents to support this. In this regard, there is no basis for future medical expenses.

Determination

52. In the upshot, I make the following orders:

    i. The Appeal and Cross Appeal are dismissed.

    ii. Each party to bear its costs.

DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 27TH DAY OF JUNE, 2024.

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

Miss. Hellen Njoki for the Respondent

Court Assistant – Jedidah