Simbe v Nyangau (Civil Appeal E037 of 2012)
[2022] KEHC 3275 (KLR) (19 July 2022) (Judgment)

Neutral citation: [2022] KEHC 3275 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E037 OF 2012

JN KAMAU, J

JULY 19, 2022

BETWEEN

SAMSON SIMBE ..... APPELLANT

AND

CALLEN OBONYO NYANGAU ..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon M. O. Wambani (CM) delivered at Nyamira in Chief Magistrate's Court Case No 97 of 2016 on 13th April 2021)

JUDGMENT

Introduction

1. In his decision of 13th April 2019, the Learned Trial Magistrate, Hon M. O. Wambani, Chief Magistrate, found the Appellant to have been wholly to blame for the accident herein and entered Judgment against him in favour of the Respondent as follows:-

   General Damages Kshs 2,000,000/=

   Special Damages Kshs 134,255/=

   Kshs 2,134,255/=

   Plus costs of the suit and interest thereon at court rates. Interest on general damages to be assessed from the date of judgment and interest on special damages to be assessed from date of filing suit.

2. Being aggrieved by the said decision, on 12th May 2021, the Appellant filed a Memorandum of Appeal dated 10th May 2021. He relied on four (4) grounds of appeal.

3. The Appellant's Written Submissions were dated 21st February 2021 and filed on 23rd February 2021 while those of the Respondent were dated 25th March 2022 and filed on 30th March 2022. The

Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court is not bound necessarily to accept the findings of fact by the court below and that on appeal while it must reconsider the evidence, evaluate it itself and draw its own conclusions, it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

    a. Whether or not the Learned Trial Magistrate erred in having found the Appellant wholly to have been to blame for the accident herein warranting interference by this court; and

    b. Whether or not the Learned Trial Magistrate erred in having awarded the Respondent herein damages that were excessive and/or inordinately high warranting interference by this court.

7. The court therefore found it prudent to determine the said issues under the following distinct and separate heads.

I. Liability

8. Grounds of Appeal Nos (1), (3) and (4) were dealt with under this head because they were related.

9. The Appellant submitted that the Respondent's evidence and that of the rider of Motor Cycle Registration Number KMDK 590G (hereinafter referred to as "the subject Motor Cycle") in which the Respondent was a pillion rider, Josiah Ogwaro Agwata (hereinafter referred to as PW 2") showed that they were on the path of the lane of his Motor Vehicle Registration Number Registration Number KCE 197T (hereinafter referred to as "the subject Motor Vehicle") and were therefore at fault.

10. He was emphatic that the fact that the accident occurred was not proof that he was the one who caused the same. He argued that the burden of proof lay with the Respondent to prove that he caused the accident but that No 51024 PC Samuel Opiyo (hereinafter referred to as "PW 3") failed to produce the Police file. He added that although PW 2 knew him, he was not charged with any offence, an indication that liability of the person who caused the accident was unclear. He blamed the Respondent wholly for having caused the accident because the same occurred on his lane.

11. In this regard, he placed reliance on Sections 107 and 108 of the *Evidence Act* which place a burden on a plaintiff to prove his case on a balance of probabilities for the court to enter judgment on his behalf.

12. He further relied on the case of *Joseph Wabukho Mbayi vs Frida Lwile Onyango* [2019] eKLR where the court therein held that he who alleges must prove and went on to find that the appellant therein had failed to prove acts or omissions of the respondent therein. He also referred to the case of *Kamanduu Kaumba & Another vs Kingsway Motors* [2020] eKLR where the court found that the plaintiff therein had failed to discharge the burden of proof by establishing the link between the defendant's actions and the cause of action.

13. On her part, the Respondent urged this court not to disturb the liability as was apportioned by the Trial Court. She submitted that the Appellant moved from his left lane and veered to where they were on the right side of the road and hit them from behind as they were stationary.

14. She pointed out that the Appellant did not lead any evidence to blame her and PW 2. In this regard, she relied on the case of *Lake Flowers vs Cila Francklyn Onyango Ngonga & Another* [2008] eKLR where the court held that without the appellant therein adducing evidence to counter what the 1st respondent therein stated, it was difficult to for it to contest the liability that was blamed against it.

15. As was correctly pointed out by the Respondent herein, the Appellant did not adduce any evidence to rebut her evidence and that of PW 2. A perusal of the evidence that they both adduced showed that on the material date of 12th November 2015 at about 6.30 pm, the Respondent herein was a pillion rider on PW 2's subject Motor Cycle and they had parked on the right side of the road. The Appellant drove the subject Motor Vehicle and veered to their side and hit them from behind. As a result, the said subject Motor Vehicle overturned and lay on top of the Respondent who had been thrown into the ditch.

16. PW 2 alluded to three (3) passengers in the said subject Motor Vehicle appearing drunk. On being cross-examined, he admitted that he did not see them drinking alcohol.

17. PW 3 did not witness the accident. He stated that no one was charged with any offence and as at the time of trial, the matter was pending under investigations. On being cross-examined, he conceded that PC Kimeli and Corporal Charo who had been indicated in the Police Abstract Report as witnesses did not attend court to testify. It also emerged from his evidence that PW 2 was not licensed to ride motor cycles but he was not charged with the offence of riding a motor cycle without a license.

18. It was evident that the circumstances under which the accident occurred were hazy. It was not clear if PW 2 had parked completely off the road as his evidence and that of the Respondent of exactly where they were parked was not stated. It was also not clear if the Appellant drove at an excessive speed, lost control and veered on the opposite side of the road where his subject Motor Vehicle hit the Respondent and PW 2 as they were stationary.

19. This court had due regard to the decision of the Court of Appeal in *Hussein Omar Farah Versus Lento Agencies* [2006] eKLR where it was held:-

> "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 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."

20. Notably, PW 2 did not adduce any evidence that the Appellant herein was drunk at the material time of the accident. However, as the Appellant did not adduce any evidence to rebut the Respondent's and PW 2's evidence, this court was not persuaded that it should find that the Respondent was to blame for the accident as he had alluded because she was a pillion rider. If she contributed to the causation of the said accident, then he failed to demonstrate the same.

21. Be that as it may, the fact that the Appellant hit the Respondent and PW 2 while they were stationary and his subject Motor Vehicle overturned was proof that he drove the subject Motor Vehicle recklessly, without due attention and care and at an excessive speed. The accident occurred at about 6.30 pm

when visibility was still clear and he ought to have seen the Respondent and PW 2 parked on the side of the road and taken evasive measures to avoid hitting them from behind.

22. Having said so, in the absence of any evidence of how far PW 2 had parked the subject Motor Cycle from the road, this court found and held that PW 2 could not escape liability entirely as was he expected to have reasonably foreseen that being close to the road was fraught with dangers due to carelessness from other road users. Since he was acting under the Respondent's instructions, then his contribution ought to be attributed to her.

23. In arriving at this conclusion, this court had due regard to the case of *De Frias vs Rodney* 1998 BDA L5 15 that was cited in the case of *Mohammed Kassim & 2 Others vs Salim Fumo Bwanamkuu* [2019] eKLR, it was held that for a person to be found guilty of contributory negligence all that was required was that the plaintiff should have failed to take reasonable care of their own safety.

24. In the premises foregoing, this court found and held that apportionment of liability at 90%-10% against the Appellant and PW 2 respectively would be fair in the circumstances of the case herein.

25. In the premises foregoing, Grounds of Appeal Nos (1), (3) and (4) were partially merited and the same be and are hereby upheld.

II. Quantum

26. Ground of Appeal No (2) was dealt with under this head.

27. The injuries that the Respondent sustained were not in dispute. She sustained multiple fractures of the ribs, fracture with dislocation of the tibia and talus bones, extreme degloving injury on the left ankle and malleolar and dislocation of the left thumb.

28. The Appellant submitted that a sum of Kshs 2,000,000/= was excessive and proposed a sum of Kshs 400,000/=. In this regard, he placed reliance on the case of *David Otieno Owino & Another vs Elizabeth Otieno Owuor* [2020] eKLR where the court awarded a sum of Kshs 400,000/= general damages where the respondent therein had sustained compound fracture of right tibia and fibula, deep cut would and tissue damage to the right leg, head injury, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg.

29. He also relied on the case of *Joseph Kimanthi Nzau vs Johnson Macharia* [2019] eKLR where the appellate court reduced the award of general damages to Kshs 800,000/= where the appellant therein had sustained fracture of the skull, right clavicle, left 1st and 2nd ribs (sic) and multiple soft tissue injuries. The Respondent urged this court not to disturb the award on general damages as the same was not inordinately or manifestly excessive.

30. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of *Margaret T. Nyaga vs Victoria Wambua Kioko*[2004] eKLR.

31. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

32. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

33. Indeed, in the case of *Kigaraari vs Aya*(1982-88) 1 KAR 768, it was stated as follows:-

> " Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

34. Despite combing through the Record of Appeal, this court did not see the Medical Report of Dr Ogando that the Respondent referred to in her Written Submissions in the Trial Court in which he had assessed the degree of disability at forty five (45%) per cent. Be that as it may, the fact that the Respondent herein was admitted to the Intensive Care Unit (ICU) to be monitored for the first twenty four (24) and forty eight (48) hours and the fact that she was admitted for about a month and underwent several procedures upon being admitted in hospital several times thereafter was evidence of the seriousness of the injuries that she sustained.

35. Remaining faithful to the doctrine of stare decisis, this court had due regard to the cases with comparable awards to come to a fair and reasonable assessment of the general damages that ought to be awarded herein.

36. In the case of *Agnes Wakaria Njoka vs Josphat Wambugu Gakungi* [2015] eKLR, the plaintiff therein sustained two (2) deep cut wounds on her hand, fracture of the skull, deep compound fracture on the right forearm and loss of left hand at wrist which was cut off. In 2015, Limo J awarded a sum of Kshs 650,000/= for general damages, pain and suffering and loss of amenities.

37. In the case of *Zachary Kariithi vs Jashon Otieno Ochola* [2016] eKLR, the plaintiff therein sustained compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3rd, 4th 5th ribs of the right side and injuries to the forehead, hip joint, big left toe, waist and pains in the chest. In 2016, Majanja J awarded a sum of Kshs 1,500,000/= general damages, pain and suffering and loss of amenities.

38. In the case of Margaret T. Nyaga vs Victoria Wambua Kioko(Supra) the plaintiff therein had sustained ruptured urinary bladder, fracture of the fibula and superficial injuries to the right axle, left hand and both knees. In that case the trial court therein had awarded a sum of Kshs 450,000/= which on appeal was reduced to Kshs 300,000/= as the appellate court had found the sum of Kshs 450,000/= to have been excessive.

39. In the case of *Florence Njoki Mwangi vs Chege Mbitiru* [2014] eKLR, on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screwsor.

40. Bearing in mind the injuries the Respondent suffered, comparable general damages that have been awarded in similar cases and the inflationary trends, that this court came to the firm conclusion that the sum of Kshs 2,000,000/= that was awarded by the Learned Trial Magistrate was not inordinately high to have warranted the interference by this court.

41. In the premises foregoing, Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

Disposition

42. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 11th May 2021 was partly merited. The effect of this is that the apportionment of liability at 100% basis against the Appellant herein that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgement that liability be and is hereby apportionment at 90%- 10% basis against the Appellant and Respondent herein respectively.

43. Accordingly, judgment be and is hereby entered in favour of the Respondent herein against the Appellant herein for the sum of Kshs 1,920,829/= made up as follows:-

    General damages Kshs 2,000,000.00

    Special damages Kshs 134,255.00

    Kshs 2,134,255.00

    Less 10% contributory negligence Kshs 213,425.50

    Kshs 1,920,829.50

    Plus costs of the suit and interest thereon at court rates. Interest on general damages will accrue from the date of judgment while interest on special damages will accrue from the date of filing suit.

44. As the Appellant was partially successful in the Appeal herein, each party will bear its own costs of the Appeal herein.

45. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 19TH DAY OF JULY 2022

J. KAMAU

JUDGE