Guracha v Ringler & another (Civil Appeal 282 of 2019)
[2024] KEHC 12209 (KLR) (Civ) (6 August 2024) (Judgment)

Neutral citation: [2024] KEHC 12209 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 282 OF 2019

MA OTIENO, J

AUGUST 6, 2024

BETWEEN

ABDI ABDUBA GURACHA ..... APPELLANT

AND

URS RINGLER ..... 1ST RESPONDENT

ALEX NJOROGE WAICHAROW ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate at Nairobi Honourable D.A. Ocharo delivered on 17/05/2019 in MILIMANI CMCC No. 5955 Of 2017)

JUDGMENT

Background

1. This is an Appeal from the decision of the magistrate's court delivered on 17th May 2023 in the Milimani CMCC No. 5955 of 2017 in which the Appellant had sued the Respondent seeking damages for injuries suffered in a road traffic accident which occurred on 21st February 2019 along Ruaka Road.

2. The Appellant's claim at the lower court was that while riding his motor cycle registration number KMDD 247J he was hit by the 1st Respondent's motor vehicle registration No. KBH 716K, then being driven 2nd Respondent.

3. On 17th May 2019, the trial court rendered its judgment in the dispute dismissing the Appellant's suit with costs to the Respondents.

The Appeal

4. Aggrieved by the decision of the trial court, the Appellant vide his memorandum appeal dated 27th May 2019 lodged an appeal to this court raising four grounds of appeal that; -

    a. The learned magistrate erred in law and in fact in finding that the Appellant was 100% liable for the accident by relying on extraneous evidence not adduced before the court and disregarding the Appellant's evidence.

    b. The learned magistrate erred in law and in fact by failing to apply proper legal principles regarding evidence and thus arriving at a bad decision.

    c. The learned magistrate erred by failing to consider the Appellant's submissions.

    d. The learned magistrate erred by failing to assess quantum of damages.

Submissions

5. The appeal was canvassed by way of written submissions. The Appellant's filed their submissions dated 18th January 2024 whilst the Respondents filed theirs dated 31st January 2024.

Appellant's submissions

6. The Appellant submitted that in reaching its determination on liability, the trial court ignored the Appellant's evidence as to how the accident occurred, but instead relied on extraneous evidence not adduced by the Respondent at trial. According to the Appellant, the finding of the trial court went against the evidence in the police abstract and that of the witnesses – PW1 and DW1 who testified and blamed the 2nd Respondent for the accident.

7. The Appellant further submitted that the trial court ignored the Respondent's admission at trial that the Appellant had the right of way. Relying on the decision in *Kennedy Macharia Njeru v Packson Githongo Njau & another* [2019] eKLR, the Appellant asserted that the trial court ought to have considered the facts of the case and come to a conclusion of who between the two mostly contributed to the accident and that where the court is in doubt as to who is at fault, then, liability ought to be accordingly apportioned.

8. Referring to the parties' evidence before the trial court, the Appellant urged this court to reevaluate the evidence submitted before the trial court and come to a different conclusion by setting aside the trial court's finding on liability and substitute the same with an order of this court finding the 2nd Respondent 100% liable for the accident.

9. On quantum of damages, the Appellant submitted that the trial committed an error of law and of fact in failing to assess quantum of damages despite its finding that liability had not been established. On this, the Appellant relied on among others, the case of *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR where the court emphasized that it is the duty of the court of the first instance, and indeed any other court whose decision is not final, to assess damages even where liability has not been established.

10. Citing the case of *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR, the Appellant submitted that this court, on appeal, has the powers to assess damages even in cases where the trial court failed to assess damages.

11. Accordingly, the Appellant urged this court to consider the injuries suffered as a result of the accident as supported by the evidence submitted at trial and award a sum of Kshs. 800,000/- in damages for pain

and suffering. The Appellant cited the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR in support of the quantum.

12. On special damages, the Appellant urged this court to award a sum of Kshs. 12,650 being the amount pleaded and proved in evidence at trial by production of receipts.

13. The Appellant further urged this court to award them the cost of the suit at the lower court since the Respondents occasioned the suit by failing to settle despite a letter of demand and notice of intention to institute proceedings having been given to them.

Respondent's submissions

14. The Respondents' answer to the Appellant's submissions on the issue of liability was that the trial court was right in its finding on liability and that the same was based on evidence on record, well-reasoned and justified in the circumstances of the case. The Respondent asserted that the court correctly dismissed the Appellant's suit. The Respondent emphasized that the Appellant failed to prove their case to the standards imposed by section 107 and 109 of the *Evidence Act* Cap. 80 Laws of Kenya.

15. Referring to the respective parties' testimonies and evidence before the trial court, the Respondent asserted that contrary to the Appellant's submissions, the magistrate reviewed all the evidence submitted at trial and reached a fair and just conclusion in the circumstances of the case. The Appellant referred this court to page 5 of the lower court's judgment in that regard.

16. Relying on the decision of *Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another* [2010] eKLR the Respondent submitted that Appellant needed to prove his case in negligence against the Respondent since the mere occurrence of an accident does not ipso facto mean that the driver was driving negligently and therefore occasioned the accident.

17. Additionally, referring to the decision in *Kennedy Nyangoya v Bash Hauliers* [2016] eKLR, it was the Respondent's submissions that contrary to the Appellant's assertions, a police abstract on its own, without evidence being called in its support, cannot be a basis of assigning liability to a party to an accident.

18. On quantum, the Respondents submitted that the omission by the trial court to assess damages that would have been awarded had the Appellant's claim succeeed was not fatal. Citing the case of *Frida Agwanda & Ezekiel Onduru* (*supra*), the Respondent concurred with the Appellant assessment of damages can still be done by this court.

19. Referring to the injuries suffered by the Appellant as a result of the accident as supported by the medical reports admitted in evidence, the Respondent submitted that an award of Kshs. 200,000/- would be sufficient to compensate the Appellant in the event that the appeal is successful. The Respondents placed reliance on three cases where awards of between Kshs. 150,000 to Kshs 250,000 were made by the court for injuries which the Respondent submitted, were closely comparable to those suffered by the Appellant in the instant appeal.

20. On special damages, the Respondents submitted that not the entire Kshs. 12,650/- pleaded by the Appellant was proved in evidence. Relying on the case of *Wycliffe Lubanga Kefa v Dennis Ochola & another* [2020] eKLR the Respondents submitted that only a sum of Kshs. 3,630 is payable hereunder since that is what had been proved by the Appellant at trial by way of production of admissible receipts.

21. The Respondents concluded their submissions by urging this court to find that the appeal lacks merit and dismiss the same with costs to the Respondents.

Analysis and determination

22. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion on the issue of liability and on quantum. I am however aware to the fact that unlike the trial court, I did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. I will therefore give due allowance for this. See the Court of Appeal decision in *Peters v Sunday Post Limited* [1958] EA where the court stated that; -

> " 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.....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..."

23. At the same time, I will also bear in mind the fact that an appeal to this court is by way of retrial and that this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial court .....is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

24. I have perused the memorandum of appeal and submission by the parties and note the following three issues are for determination in this appeal; -

    a. Whether the learned trial magistrate erred in finding the Appellant 100% liable for the accident.

    b. Whether the trial magistrate erred in law by failing to assess quantum of damages

    c. Who should be awarded the costs of this appeal.

Whether the learned trial magistrate erred in finding the Appellant 100% liable for the accident?

25. The Appellant submitted that the trial court ignored the Appellant's evidence on how the accident happened, but instead relied on extraneous evidence not adduced by the Respondent at trial. The Appellant insisted that the finding by the trial court was against the evidence in the police abstract and that of police officers – PW1 and DW1 who testified and blamed the 2nd Respondent for the accident.

26. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof is on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same *Act* on both parties. See *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, where the Court of Appeal stated 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 cast 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."

27. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when the decision is clearly wrong and based on no evidence or on the application of wrong principle. This was the holding in *Khambi and Another v Mahithi and Another* [1968] EA 70, where the court stated that: -

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

28. From the proceedings, I note that the Appellant testified at trial as PW1 and adopted his witness statement of 23rd March 2017 in evidence. He told court that on 21st February 2017, he was riding his motorcycle registration number KMDD 247J on Ruaka Road, towards Gigiri. However, when he reached the Maa Drive Junction, motor vehicle registration No. KBH 716K then being driven by the 2nd Respondent from the opposite direction, suddenly and without due regard to other road users, Appellant included, turned right and entered the said junction, thereby knocking him down. He blamed the 2nd Respondent for the accident.

29. Further, No. 77168 Police Constable Boby Okari, a police constable then attached to Gigiri Police Station, traffic section testified on 4th April 2018 as PW2 and informed court that the accident involving motor vehicle registration No. KBH 716K and motor cycle registration number KMDD 245J was reported at their station under OB No. 7/21/2/2017. The witness informed court that he visited the scene and from his review of the circumstances of the accident, the driver of motor vehicle registration number KBH 716K was to blame for failing to give right of way. He produced in evidence an extract of the Occurrence Book as PEXh. 8.

30. For the Respondents, the 2nd Respondent testified on 28th February 2018 as DW2 and informed court that on the material day, he was on Runda drive, driving towards Gigiri. On reaching the Maa Drive Junction, he stopped at the junction waiting for road to clear before he could turn right. However, the Appellant who was then overlapping while riding his motorcycle registration No. KMDD 247J from the opposite direction hit his motor vehicle thereby causing the accident.

31. Additionally, the Respondents had No. 82376 PC George Mwende then based at Parklands Police Station testify in their favour as DW1. The witness produced in evidence a police abstract dated 21st February 2017 which blamed the Appellant for the accident. The witness however confirmed to court that the details in the said abstract did not tally with the entry in the occurrence book. In fact, he was categorical in his evidence in chief that that "the abstract blaming the motor vehicle is the correct one as per the facts in the occurrence book." In effect, DW1 disowned and brought to question the authenticity of the police abstract he himself produced thereby bringing his testimony to question.

32. I note from the trial court's judgment that in coming to its conclusion on liability, the court, despite having noted in its judgment that the police abstract presented by the DW1 did not match the contents of the occurrence book, the court still placed the abstract in the same pedestal as the one produced by PW2 No. 77168 Police Constable Boby Okari. In my view, the discrepancy in the evidence of DW1 makes his testimony less credible as compared with that of PW2.

33. While I agree with the Respondent's submissions that police abstract on its own, cannot be a basis of assigning liability to a party in road traffic accident cases as per the decision in Kennedy Nyangoya v Bash Hauliers [2016] eKLR, I however find in this case that the police abstract produced by PW2

carried some weight, particularly taking into account the fact that unlike DW1 who did not visit the scene of the accident, PW1 visited the scene of the accident and drew his conclusions from what he actually saw at the scene.

34. Further, it is also evident from the Appellant's evidence as corroborated by evidence of PW2 that as compared to the 2nd Respondent, the Appellant had right of way and consequently, the Appellant owed him a higher duty of care. The Respondent testified that the Appellant was at the time overlapping. This, even if true, can only point towards some level of contribution in liability on the part of the Appellant, but does not wholesomely absolve the 2nd Respondent from exercising greater caution while making a turn from a main road.

35. In view of the above, I find that this is a clear case where this court should interfere with the trial court's discretion on the apportionment of liability. I find that the discretion of the trial court in apportioning liability was exercised in error and did not take into account the evidence on record.

36. Based on the evidence on record, I find that the 2nd Respondent carried more blame for the accident. However, this does not mean that the plaintiff was entirely not to blame, particularly taking into account the evidence of the 2nd Respondent that the Appellant was at the time overlapping.

37. While the Appellant in his submissions urged this court to ignore the 2nd Respondent's testimony that the Appellant was at the time overlapping for not being corroborated, this court takes note that the accident happened at a junction and the Appellant was equally expected to slow down as he approached the junction. For this reason, I find the Appellant to have contributed to the accident as well.

38. On apportionment of liability, the Court of Appeal *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR stated as follows; -

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* [1953] A.C. 663 at p. 681 as follows:
>
> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation 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.....
>
> "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 mean that the accident must be regarded as having been caused by the faults of all of them. 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."

39. Taking into account the totality of evidence submitted by the parties at trial and bearing in mind the principles governing the apportionment of liability in road traffic accident matters, I set aside the trial court's finding on liability for not being supported by the evidence on record. Consequently, I hereby apportion liability in this case in the ratio of 80:20 in favour of the Appellant.

Quantum

40. The guiding principle is that assessment of damages is within the discretion of the trial court and that an appellate court should only interfere in instances where the trial court, in assessing damages, erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see *Mbogo v Shah* (1968) EA 93 and *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727).

41. This court is equally alive to the principle that in awarding general damages, the courts ought to give an award that reflects the nature and gravity of the injuries. That comparable injuries should as far as possible, be compensated by comparable awards, always bearing in mind that not two cases are precisely alike. This is the guidance given by the Court of Appeal in the case of *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR.

42. In this case, it is common ground that the trial court failed to assess quantum of damages that ought to have been awarded if the suit were to succeed. Both Parties however agree that in instances like this, the appellate court has the jurisdiction to assess damages. The case of *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR cited by both parties is clear that where the trial court fails to assess damages, this court has powers to do so. The court stated as follows; -

> " I come to the conclusion that the Plaintiffs/Appellants; had proved their case on the balance of probabilities as a required by law. They should have been given a favourable judgment in assessed damages both special and general. 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 for returning the file to the lower court for assessment."

43. However, I must state, as was stated by Mabeya J. in *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR that it is the duty of the court of the first instance, and indeed any other court whose decision is not final, to assess damages even where liability has not been established. In the circumstances, I find that the trial court erred by failing the assess damages in this case, dismissal of the Appellant's suit notwithstanding.

44. The Appellant urged this court to consider the injuries suffered in this case as a result of the accident and award a sum of Kshs. 800,000/- in damages for pain and suffering. In support of his position, the Appellant cited the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR where an award of Kshs. 600,000/- was made by the high court for fracture of the right tibia fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and pain on the injured areas with a permanent capacity assessed at 18%.

45. The Respondents on their part submitted that an award of Kshs. 200,000/- would be sufficient to compensate the Appellant. They cited three cases where awards of between Kshs. 150,000 to Kshs 250,000 were made by the court for injuries which the Respondent submitted, were closely comparable to those suffered by the Appellant in the instant appeal.

46. I have carefully considered the submissions by both parties on the issue of general damages for pain and suffering. From the pleadings, I note that the Appellant stated that he had sustained blunt injuries on the chest, fracture of the lower end of the right fibula, dislocation of the right ankle joint and dislocation of the lower tibial fibula joint. These injuries were supported by the medical report from Nazareth Hospital dated 13/04/2017 where the Appellant was initially attended to. Dr. W.M. Wokabi, in his

medical report dated 4th July 2017 also confirmed the injuries to the chest and right leg as pleaded. He assessed permanent disability at 8%.

47. From the foregoing, it is evident that the injuries suffered by the Appellant in this case were less serious than those suffered in the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR where the level of permanent disability was assessed at 18%. It is also evident that the cases cited by the Respondents are also not very helpful since cases were old, having been decided between the years 2012 and 2015.

48. Taking into account the injuries suffered by the Appellant in this case and drawing from the decision in *Hussein Sambur Hussein* (supra), I award the Appellant a sum of Kshs. 400,000/- as damages for pain and suffering. The award is to be subjected to the 20% contribution by the Appellant.

49. On special damages, the Appellant urged this court to award a sum of Kshs. 12,650 being the amount pleaded and proved in evidence by production of receipts. The Respondents however on their part submitted that only a sum of Kshs. 550/= for Motor vehicle search and a further Kshs 3,080 for medical expenses had been proved by production of authentic legible receipts.

50. I have perused the record of appeal and agree with the Respondents' submissions and award the Appellant a sum of Kshs. 3,630/= in special damages. The cost of obtaining the medical report of Kshs. 2,000/- is not awardable since the Appellant produced an invoice instead of a receipt. Further, save for receipts amounting to Kshs. 3,080, the rest of the receipts for medical expenses are ineligible and cannot therefore be awarded.

51. In view of the foregoing, I find the appeal merited and is hereby allow the same with costs.

Disposition

52. Accordingly, I set aside the trial court's Judgment of 17th May 2019 and the consequential decree and hereby substitute the same with the Judgment and an order of this court as follows: -

    i. Liability = 80%:20% in favour of the Appellant

    ii. General damages for pain, suffering and loss of amenities - Kshs. 400,000/=

    (Less 20% contribution – Kshs. 320,000)

    iii. Special damages – Kshs. 3,630/=

    iv. Costs and Interest of the lower court Suit to the Appellant.

53. The Cost of this appeal shall be borne by the Respondents.

54. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 6TH DAY OF AUGUST 2024

ADO MOSES

JUDGE

In the presence of:

Moses..... Court Assistant

Ms. Bwire..... for the Appellant

Mr. Otieno .....For the Respondent