Otondi v Lagat & another (Civil Appeal E020 of 2023)
[2024] KEHC 16442 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16442 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CIVIL APPEAL E020 OF 2023

F GIKONYO, J

DECEMBER 20, 2024

BETWEEN

ERICK SANGAYE OTONDI ..... APPELLANT

AND

NANCY NJEPTEPKENY LAGAT ..... 1ST RESPONDENT

HARUN KAMAU MACHARIA ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. A.N. Sisenda (SRM) delivered on 24/10/2022 in Narok CMCC No. E023 of 2021)

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. E023 of 2021 delivered on 24/10/2022 in which the trial court made awards as follows: -

    a. Liability 80%

    b. General damages Kshs. 300,000/=

    less 20% Kshs. 60,000/=

    85% Kshs. 240,000/=

    c. Special damages Kshs 7,550/=

    TOTAL Kshs. 247,550/=

    d. Costs of the suit plus interest at court rates

2. The memorandum of appeal dated 13/03/2023 cited three (3) grounds of appeal which relate to; i) liability and ii) quantum of damages.

Background

3. The suit arose from a road traffic accident, which occurred along Narok- Mai-Mahiu road on 07/12/2020 involving a motor vehicle registration Nos. KCP 225V and KCP 688C.The appellant was traveling in motor vehicle registration no. KCP 225Vas a fare-paying passenger. The appellant blamed the driver (1st respondent). The appellant sustained serious bodily injuries in the accident. Particulars of negligence were set out against the driver of the 2nd respondent.

4. The appellant during the trial testified and did not call any other witnesses.

5. The respondents did not call any witnesses.

Directions of the court

6. The application was canvassed by way of written submission.

The Appellant's Submissions

7. The Appellant submitted that the trial court erred by apportioning liability in the ratio of 20:80 in favour of the appellant against the respondents yet the respondents did not call any witnesses to rebut the appellant's record. The appellant contends that failure to wear a seat belt is not known in law to contribute to the occurrence of the accident especially where two vehicles are involved and the appellant being a passenger in one of them. The appellant further contends that the trial court erred in stating that the appellant did not request for judgment against the 2nd respondent yet the said request was endorsed on 13/08/2021. The appellant argued that there was overwhelming evidence adduced that the respondents should be 100% liable for the said accident. The appellant relied on the case of *Rosemary Wanjiku Kuru v Francis Mutual Mburu And Arnold* [2014] eKLR, L*inus Nganga Kiongo & 3 Others V Town Council of Kikuyu* [2012], *Interchemie E.A. Limited v Nakuru Veterinary Centre Limited* Nairobi (Milimani)HCC No. 165B of 2000, *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 citing *Edward Muriga Through Stanley Muriga V Nathaniel D. Schulter* Civil Appeal No. 23 of 1997.

8. The appellant submitted that the trial court erred in law and fact by awarding inordinately low general damages bearing in mind the nature of injuries borne by the appellant. The appellant proposed an award of Kshs. 1,000,000/= as general damages. The appellant relied on the case of *Issa Transportes Ltd v Chengopangatswa* Mombasa HCC 151/2017.

The 1st Respondents' Submissions

9. The 1st respondent submitted that while failure to fasten a seat belt could not have caused or contributed to the occurrence of the accident, it could have however mitigated the extent of the injuries sustained and or minimized the adverse effects of the accident on the appellant. The 1st respondent urged the court to hold that in the absence of evidence that the appellant had taken adequate measures in averting the extent of injuries by fastening his seat belt such the judgment on liability at 20:80 was well placed and only ought to be reviewed in the instance that both respondents ought to shoulder liability, equally. The 1st respondent relied on *Haybourhill V Young* [1992] 2 ALL ER 396 quoted in Benson *Dulo V Joseph Waire Njoroge* [2022] eKLR, page 4 of the NTSA highway code, section 56, 68(1)(3), 22A (3) of the *Traffic Act*, *Oscar Omondi Onoka V H.A. Amin & Co Ltd* [2011] eKLR, *R*

V Sande [1978] KLR41, *Kamau V Nairobi City Council* [1976-80] 1 KLR 90, *Karugi & Another V Kabiya & 3 Others* [1987] KLR 347

10. The 1st respondent submitted that the doctor's opinion was suspect to the extent that rib fractures are medically described as fractures to the right rib no. 7(r7' etc no such injury exists anywhere. The 1st respondent contends that Kshs. 300,00/= would suffice. The 1st respondent relied on *West (H) & Son Ltd V Shepherd* (1964) AC 326 at page 345 And *Limp Poh Choo V Camden And Islington Area Health Authority* [1979] 1 ALL ER 332 both of which were approved and cited in *Cicilia W Mwangi & Ano. Ruth W. Mwangi* C. A No. 251 Of 1996, *Sheikh Mushtaq Hassan V Nathan Mwangu Kamau Transpoerterds & 5 Others* Nbi Caca No. 123 Of 1985, *Patrisia Adhiambo Omolo V Emily Mandala* [2020] eKLR, and *West Kenya Sugar Company Limited V David Luka Shirandula* [2017] eKLR.

The 2nd Respondent's Submissions.

11. The 2nd respondent did not file any written submissions.

ANALYSIS AND DETERMINATION

Duty of court

12. As the first Appellate Court, will, evaluate the evidence afresh and make any of its conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & Anor –v - Associate Motor Boat Co. Ltd* 1968 EA 123.

Issues

13. This appeal relates to liability and the quantum of damages.

Liability

14. Who is to blame for the accident, and by what proportion if at all?

15. The trial court found the appellant was partly to blame for failing to have his seat belt on.

16. The appellant sought 100% liability for the respondents.

17. Where does the evidence lead the court?

18. The police abstract does not indicate which vehicle was to blame for the accident; the matter was referred to insurance as there was a tire burst.

19. The respondents did not call any witnesses to rebut the appellant's case.

20. Be that as it may, the respondents bear the burden of proof and establish negligence or contribution by the passenger.

21. The respondents did not establish how the appellant contributed to the accident either, for the alleged lack of buckling up or diligence.

22. The appellant has argued that, failure to wear a seat belt is not known in law to contribute to the occurrence of the accident especially where two vehicles are involved and the appellant being a passenger in one of them.

23. This submission is limited, and does not encompass; the 'reasonable person standard' requirement of a plaintiff to take reasonable steps to protect self from injury; and the real purpose of wearing a

seat belt. A person claiming damages for personal injury is required by 'reasonable person standard' to take reasonable steps to protect self from injury. A passenger in a motor vehicle is by law required to wear a seat belt when travelling. Fastening of a seat belt secures and protects a person from, prevents or mitigates injury. Therefore, the trial court did not err in attributing contributory negligence to the appellant due to failure to wear a seat belt, which reduces the quantum of damages recoverable by the appellant.

24. Accordingly, the appeal on liability fails. The decision by the trial court thereof is upheld.

Quantum

25. On quantum, the Appellant contended that the award of Kshs. 300,000/- issued by the trial court for general damages is low and the same should be increased to a figure of Kshs.1,000,000/=.

26. The general rule is that the 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).

27. See also the case of *Catholic Diocese of Kisumu v Sophia Achieng Tele Civil Appeal*, no 284 of 2001 [2004] 2 KLR 55, where the Court of Appeal stated that: -

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

28. Assessment of compensation for general damages depends on circumstances of the case; the nature, extent and effects of the injuries and case law on comparable awards which reflect reasonable compensation. *Simon Taveta v . Mercy Mutitu Njeru* [2014] eKLR

29. According to the medicolegal report of Dr. Obed Omuyoma, the appellant sustained the following injuries; multiple rib fractures right side of the chest, colles fracture of the right wrist, and blunt injury to the knee leading to soft tissue injuries. The injuries were classified as grievous harm.

30. The medical report indicates that the appellant suffered several injuries and at the time of the examination, he complained of chest pain. Permanent disability was assessed at 8%.

31. In the case of *A.M suing through their next friend M.A.M v Mohamud Kahiye* 2014 civil case 209 of 2010 where an award of Kshs.800,000/- was made for multiple fractured ribs on the left side, extensive friction burns on the chest, abdomen and both legs and intra-abdominal injuries with laceration of the liver. This court finds that the Injuries in the case of *A.M suing through the next friend M.A.M v Mohamud Kahiye* 2014 civil case 209 of 2010 were more severe in the sense that they included "intra-abdominal injuries with laceration of the liver."

32. No two cases can be similar and decided cases act as a guide. But, the real determinant of reasonable compensation are the injuries suffered. Based on the injuries sustained which are severe, the award of

Kshs. 300,000 is inordinately low and is hereby set aside. With the inflationary trends attending, this court awards a sum of Kshs.600,000/- in this case as general damages for pain and suffering suffered by the Respondent as a result of the accident.

33. In an upshot, the appeal partially succeeds; on quantum of damages. Judgment is entered in favour of the appellant in the following terms-;

    i. The respondents are 80% liable; appellant 20%.

    ii. General damages Kshs. 600,000/= less 20% contribution

    iii. The rest of the award by the trial court was not challenged in this appeal. This court therefore leaves them undisturbed.

    iv. The appellant is awarded the costs of this appeal

34. Orders accordingly

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION, THIS 20TH DAY OF DECEMBER, 2024.

F. GIKONYO M

JUDGE

In the presence of: -

1. Musa Machage for appellant

2. Karanja for respondents

3. Otolo C/A