Muthoni & another v Ibrahim (Civil Appeal E962 of 2023)
[2025] KEHC 142 (KLR) (Civ) (13 January 2025) (Judgment)

Neutral citation: [2025] KEHC 142 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E962 OF 2023

RC RUTTO, J

JANUARY 13, 2025

BETWEEN

FAITH MUTHONI ..... 1ST APPELLANT

DANSON MWANIKI ..... 2ND APPELLANT

AND

MOHAMED NOOR IBRAHIM ..... RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi (H.M. Ng'ang'a, PM.) delivered on 5th September 2023 in CMCMCC Case No. E9656 of 2021)

JUDGMENT

1. This is an appeal against the award of liability and quantum. The facts of the claim are contained in the amended plaint dated 9th September 2021, where the respondent averred that on 6th November 2019, he was a lawful paying passenger aboard motor vehicle registration number KBV 296A along Thika road. That the motor vehicle was owned by the 1st appellant and driven by the 2nd appellant.

2. The respondent alleged that on the material day, the 2nd appellant drove the said suit vehicle so negligently that it lost control and rammed into motor vehicle registration number KCB 953J. As a result of the accident, the respondent suffered fractures to the left inferior pubic rami, left acetabulum, left tibia plateau and right superior pubic rami. For those reasons, the respondent sought general damages for pain and suffering, special damages of Kshs. 6,000.00 costs and interest of the suit.

3. In its judgment dated 5th September 2023, the trial court found the appellants 100% liable in negligence. Consequently, judgment was entered in favor of the respondent against the appellants jointly and severally in the sum of Kshs. 2,006,000.00 being general damages of Kshs. 2,000,000.00 and special

damages of Kshs. 6,000.00. Also awarded was costs of the suit and interest from the date of judgment until payment in full.

4. The appellants being aggrieved with those findings filed their joint memorandum of appeal dated 13th September 2023 raising 10 grounds of appeal summarized as follows: the learned magistrate failed to consider the provisions of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act CAP 405, applied wrong principles of law and failed to consider their submissions thereby awarding general damages that were exorbitantly high; that the trial court failed to holistically evaluate the evidence thereby arriving at a wrong conclusion; the award of general and special damages was without any legal or factual basis; the learned magistrate erroneously found the appellants 100% liable against the weight of the evidence adduced; and the findings of the learned magistrate were a nullity as they occasioned a miscarriage of justice. The appellants urged this court to set aside and/or quash the decision dated 5th September 2023 or in the alternative review the award on general damages downwards. The appellants further prayed for costs of the appeal and those incurred at the trial.

5. When the appeal was placed before this court on 25th July 2024, the appellants sought and were granted 3 days to file their written submissions. However, as at the time of writing this judgment, the appellant had not filed their submissions. On the other hand, the respondent, filed their written submissions dated 15th July 2024.

6. The respondent submitted that the appellants were to blame for not calling any witness and not filing their written submissions during trial at the lower court thus, it was incorrect to allege that the trial magistrate did not consider them. He lauded the findings of the trial court which assessed uncontested evidence and applied proper principles of law. He contended that he discharged his burden of proof to the required standard thus the trial magistrate properly found that the appellants were 100% liable in negligence.

7. On the award of general damages, the respondent submitted that the trial court properly awarded the sum of Kshs. 2,000,000.00 taking into account the extent of injuries he had sustained. In any event, nothing was advanced as to demonstrate why this court ought to interfere with those findings. He urged this court to find that the grounds set out in the memorandum of appeal lacked merit and ought to be dismissed in their entirety with costs.

8. I have considered the memorandum of appeal, the respondent's written submissions, examined the record of appeal and analyzed the law. As a first appellate court, my primary role is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. [See Selle v Associated Motor Boat Company Ltd (1968) EA 123; Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR].

9. The issues calling for determination are

    i. whether the trial court erred in finding the appellant 100% liable in negligence;

    ii. whether the trial court exercised its discretion judiciously in awarding the general and special damages?

10. On liability, the evidence on record is as follows: PW1 (the respondent herein) testified that on 6th November 2019, he was aboard motor vehicle registration number KBV 296A along Thika road as a lawful paying passenger. He was seated at the driver's cabin. Upon reaching GSU drift area, the 2nd appellant drove the said vehicle so negligently and recklessly consequently ramming into motor vehicle registration number KCB 953J. As a result of the accident, he sustained bodily injuries. He was

admitted at Defence Forces Memorial Hospital on 6th November 2019 and discharged on 4th December 2019.

11. The accident was reported at Kasarani Police Station and he was issued with a P3 form. The respondent blamed the 2nd appellant for causing the accident as he was reckless, negligent on the road and failed to have due regard to passengers and other road users. He stated that he had not fully recovered and continued to take physiotherapy sessions. He also stated that he had to miss out on his studies as a result of the accident.

12. PW2 Sgt. Maureen Odera based at Kasarani Police Station confirmed that indeed an accident occurred on 6th November 2019 along Thika road at GSU drift. The accident involved motor vehicles registration numbers KBV296A and KCB 953J. As a result of the accident, the respondent was injured. The 2nd appellant was blamed for causing the accident.

13. From the evidence adduced by the witnesses, the respondent was a lawful paying passenger. He was seated at the driver's cabin and thus witnessed the accident occur. His testimony was that, the 2nd appellant was negligent and reckless in his driving as a result of which he rammed into another vehicle. This evidence was corroborated by PW2 a police officer, who produced the abstract and confirmed that the 2nd appellant was to blame for the accident.

14. The trial court guided by the case of Paul Njagi Kamau v Stanley Gachomo Kariuki & Another (2020) eKLR noted that the failure to adduce evidence does not waive the plaintiff's duty to prove its case on a balance of probability and proceeded to hold that the appellants had failed to adduce any evidence in rebuttal, and in the absence of a rebuttal the respondent's testimony remained uncontroverted.

15. I therefore find that the trial magistrate properly and accurately analysed the evidence and found that the 2nd appellant was liable for causing the accident and the 1st appellant was vicariously liable. I am satisfied that the respondent could not be blamed for causing the accident. I therefore proceed to uphold the finding of the trial court on liability.

16. On quantum, the respondent suffered the following injuries: a left inferior pubic rami fracture, left acetabulum fracture, left tibia plateau fracture and right superior pubic rami fracture. These injuries were captured in the amended plaint and the respondent's discharge summary dated 4th December 2019. It is also instructive to note that the respondent spent almost one month in admission at Defence Forces Memorial Hospital between 6th November 2019 and 4th December 2019. According to the medical report dated 25th August 2021, all the fractures had since healed; he had metal screws in the left tibia and may require further surgery for removal at an estimated cost of Kshs. 100,000.00. The degree of permanent incapacity was assessed at 20%.

17. In deciding whether to interfere with the award of general damages, I find useful guidance in the decision of the Court of Appeal in the case of Kemfro Africa Limited T/A Meru Express Services [1976] and another vs. Lubia and another (No.2) [1985] eKLR, in which the Court stated as follows:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage. See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."

18. Similarly, in Gitobu Imanyara and 2 others vs. Attorney General [2016] eKLR, the same Court held as follows:

> " It is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum in order to justify reversing the trial Judge on the question of the amount of damages. It will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principles of law or that the amount awarded was so extremely high or so very low as to make it in the judgment of this Court an entirely erroneous estimate of the damage to which the plaintiff is entitled."

19. The trial court relied on the following comparable authorities: Peace Kemuma Nyang'era vs. Michael Thuo & another [2014] eKLR where the appellant suffered a fracture of the sacrum bone, fracture of the right superior pubic ramus of the pubic one, fracture of the right ischium pubic ramus of the pelvic bone, hematoma on both thighs and lumbo-sacral hematoma. In this case, the court awarded Kshs. 2,500,000.00 in general damages. The case of Fred Ogada Azere vs. Ezekiel Kiarie Ng'ang'a [2019] eKLR awarded the appellant Kshs. 1,350,000.00 who had suffered a commuted fracture of the right acetabulum, posterior dislocation of the right hip joint and other soft tissue injuries.

20. The trial court then held:

> " In consideration of the severity of the injuries suffered by the plaintiff, taking into account inflation and the injuries sustained by the plaintiff, and guided by the above authorities and principles, I hold that an award of Kshs. 2,000,000.00 as general damages would be reasonable and fair compensation."

21. The respondent sustained the fractures as enumerated in the earlier paragraphs of this of this judgment. He was admitted in hospital on 6th November 2019 and discharged on 4th December 2019. He had present complaints of having not completely healed. Furthermore, his degree of permanent incapacity was assessed at 20%. He needed physiotherapy treatment. I find that the trial court applied proper principles and took account of the evidence adduced in awarding Kshs. 2,000,000.00 general damages. I therefore find no reasons to interfere with that finding. On special damages of Kshs. 6,000.00, I find that the same was pleaded and proved thus awarded properly.

22. It is apparent that the appellants decided not to participate in the proceedings. They did not call any witnesses at trial and further elected not to file written submissions. In similar fashion, the appellants failed to file written submissions in this appeal. While I have carefully reconsidered the evidence adduced at the trial court, the appellants cannot be heard to blame either court for not taking their written submissions into consideration when they never filed any. In this case, the appellants are the authors of their own misfortunes.

23. In view of the foregoing, I find no fault on the part of the trial court. In the circumstances, I find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

    It is so ordered.

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY 2025

RHODA RUTTO

JUDGE

For Appellant:

For Respondent:

Court Assistant: