



**MN (Minor Suing Through Her Mother and Next Friend VWT) v Owles & 3 others
(Civil Appeal 29 of 2023) [2024] KEHC 12120 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 29 OF 2023
GL NZIOKA, J
SEPTEMBER 26, 2024**

BETWEEN

**MN (MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND
VWT) APPELLANT**

AND

**JOHN OWLES 1ST RESPONDENT
JANE KATHERINE OWLES 2ND RESPONDENT
JOSEPH KAMANDE NJUGUNA 3RD RESPONDENT
ELIJAH WAWERU KARIUKI 4TH RESPONDENT**

(Being an appeal from the decision of Hon. N. N. Njagi, Principal Magistrate delivered on 31st August 2010 Page | 1 vide Senior Principal Magistrate’s Civil Case No. 363 of 2004 at Naivasha)

JUDGMENT

1. By a plaint dated 14th April 2004 and amended on 1st December 2007, the plaintiff (herein “the appellants”) sued the defendants (herein “the respondents”) seeking for the following orders: -
 - a. General damages.
 - b. Special damages of Kshs 72,959
 - c. Provision for future medical expenses and operations
 - d. Costs and interest of the suit.
 - e. Any other or further relief this Honourable Court deems fit to grant.



2. The appellant's claim arose out of a road accident that occurred on 2nd June 2003, wherein the appellant who was lawfully travelling in motor vehicle registration number KAP 549Y Toyota Hiace Matatu owned by the 3rd respondent and driven by the 4th respondent was injured and died when that motor vehicle collided with another motor vehicle registration number KAP 023R owned by the 1st respondent and driven by the 2nd respondent.
3. It is the appellant's case that the accident was caused by the negligence of the 2nd and 4th respondents as per the particulars of negligence at paragraphs 9 and 10 of the amended plaint. Further, the 1st and 3rd respondents are vicariously liable for the acts and/or omissions of the 2nd and 4th respondents.
4. That as a result of the said accident, the appellant sustained the following injuries: -
 - a. Left mid shaft fracture tibia and fibula
 - b. Fracture of the right tibia
 - c. Contracture of the Achilles tendon resulting in foot deformity.
5. However, the 1st and 2nd respondents filed a statement of defence dated 27th April 2004 denied liability for the accident and instead blamed the 4th respondent for solely and/or substantially causing the accident and the 3rd respondent for vicarious liability. The 1st and 2nd respondents further averred in the alternative that, the accident was inevitable despite the due diligence and care on the part of the 2nd respondent.
6. The 3rd and 4th respondent filed their defence dated 3rd June 2003 and denied the allegation that the appellant was travelling as a lawful passenger as alleged and/or an accident occurred. That in the alternative and without prejudice to the foregoing, that if an accident occurred it was wholly and/or substantially due to the negligence of the 2nd respondent.
7. On 15th June 2010, parties entered into a consent judgment on liability in the ration of 90%:10% in favour of the appellant as against the 1st and 2nd respondent. The matter proceeded to hearing on the issue of quantum.
8. Subsequently, the trial court entered judgment dated 31st August 2010 on quantum as follows: -
 - a. General damages-----Kshs 500,000 (Less 10% contribution)
 - b. Special damages-----Kshs 73,359
 - c. Cost of the suit and interest
9. However, the appellant is aggrieved by the decision of the trial court on the following grounds: -
 - a. That the learned trial Magistrate erred in law and in fact in awarding the appellant damages which were too low as compared with the injuries the plaintiff sustained and the resultant effects.
10. As a result, the appellant seeks for the following orders: -
 - a. That the appeal herein be allowed.
 - b. That the general damages awarded to the appellant be reviewed and enhanced
 - c. That costs of this appeal be borne by the respondent.



11. The appeal was disposed of vide filing of submissions. The appellant in submissions dated 28th April, 2023 submitted that the appeal was solely on the amount of Kshs 500,000 awarded for general damages as it was too low.
12. The appellant cited the case of *Tride v Construction v Charles Wekesa Kasembeli* Civil Appeal 121 of 2002 where the High Court quoted the case *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M.M Lubia & another* (1982-88) 1 KAR 727 which laid down the principles to be considered before interfering with an award of damages.
13. That the subject principles states that the trial court acted on the wrong principles of law by taking into account an irrelevant factor or failed to take into account a relevant factor and in doing so arrived at an award so inordinately low or so inordinately high to be a wholly erroneous estimate of the damages.
14. The appellant submitted that, the injuries sustained were severe and that Dr. Omuyama classified the degree thereof as grievous harm and assessed permanent disability at 30%. He relied on the case of *Lucy Waruguru v Francis Kinyanjui Njuku* [2017] eKLR where the respondent sustained right femur fracture, right tibia segmental fracture and right fibula segmental fracture, and the High Court upheld the trial court's award of Kshs 1,600,000 as general damages.
15. Further, in the case of *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] eKLR, the plaintiff suffered a fracture of the left tibia and fibula and the High Court awarded general damages of Kshs 1,300,000.
16. The appellant argued that the injuries he sustained were more severe compared to the injuries sustained in the authorities relied on by the respondents and in the circumstances an award of Kshs 3,000,000 would suffice taking into consideration the age of authorities cited and inflation.
17. However, the 1st and 2nd respondent in submissions dated 20th April 2023 stated that the appellant's claim was fully settled. That, before filing the appeal, the appellant had demand for payment of the decretal sum of Kshs 631,911 from the 1st and 2nd respondents' advocates. That, after discounting various items from the appellant's advocates legal fees, the respondents' advocate instructed Occident Insurance Co. Ltd to pay the appellant the sum of Kshs, 580,463 through the appellant's advocates as full and final settlement which amount the appellant received without any protest. As such the appellant's claim ought to be marked as settled.
18. The respondents also submitted that, the appeal is fatally defective for being filed in the name of the next friend Virginia Wanjiku Thiongo despite the fact that the cause of action occurred almost 20 years ago and as per the medical report, the minor was now about 30 years old.
19. On the issue of quantum, the 1st and 2nd respondents submitted that the sum of Kshs 500,000 awarded as general damages by the trial court close to 13 years ago was adequate compensation for pain, suffering and loss of amenities at the time. That, if the amount was to be computed today taking into account inflation and passage of time, it would be in the region of Kshs 700,000 to Kshs 750,000.
20. The respondents relied on the case of *James Okongo v Elmat Sagwe Ogega* [2021] eKLR where the respondent sustained more serious injuries being a right fracture of the tibia, fibula and femur, bruises to the face and blunt trauma to the chest and was hospitalized for three (3) months, and High Court reduced the trial court award of Kshs 1,500,000 as general damages and substituted it with an award of Kshs 900,000.
21. The 3rd and 4th respondent did not enter appearance neither did they file any submissions.



22. Having considered the appeal in light of the materials placed before the court, I note that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123.

23. The Court of Appeal thus observed: -

“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 by the High 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. As regards quantum, the law is settled that the appellate court will not interfere with the decision of the trial court on the same unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another v Shah* (1968) EA and *Mkubee v Nyamuro* 1983 KLR 403.

25. In the instant matter the respondents main submissions is that the appeal is comprised by payment of the decretal sum, as such the appellant cannot retain the benefit thereof and appeal against the same. Apparently, the appellant has not responded to this submission.

26. In relation to that issue, I find that, there are varying court authorities on whether payment of the decretal sum compromises an appeal. In the case of: *Dr. Sunny Samuel v Simon M. Mbwika & another* [1998] eKLR the Court of Appeal declined to allow the applicant’s application seeking extension of time to file his appeal out of time on the grounds that he had been paid the decretal amount in full and stated as follows: -

“I have given most anxious consideration to this submission and the point raised. In my judgment, in the circumstances now obtaining, the applicant is precluded from attacking the judgment. He is no longer an aggrieved person.

Nor can he be allowed to approbate and reprobate the judgment at the same time. I am not persuaded that in the circumstances the applicant is entitled to proceed with his appeal.

In not too dissimilar circumstances, Mustafa JA (as he then was) delivering the first judgment of the Court of Appeal for East Africa in the case of *Industrial and Commercial Development Corporation v Kariuki Gatheca* 1977 KLR 52 was inclined to the view that the applicant had in effect affirmed and approbated the judgment, and had enjoyed and continued to enjoy the full benefit of it and would be precluded from attacking it. Law V-P, agreed in every respect with the judgment prepared by Mustafa, JA and so did Musoke JA”



27. Similarly, in the case of; *Premier Food Industries Limited v Public Health Prosecutor – Kisumu* [2021] eKLR where the High Court stated as follows: -

“29. 29. Secondly, I note that the Applicant had already received payment of the taxed costs. The said payment was made on the basis of the decision by the Taxing Officer, who had awarded the costs in the sum of Kshs 200,550/=.

30. Having received payment on the strength of the Ruling dated 16th September 2020, the Applicant was now seeking leave to challenge the very same Ruling. In effect, the Applicant was seeking to challenge the validity of the decision from which it has been conferred with a benefit, whilst at the same time retaining the said benefit.

31. In the case of *Evans v Bartlam* (1937) 2 ALL. E.R. 649, at page 652 Lord Russel of Killowen said;

“The doctrine of approbation and reprobation requires for its foundation, inconsistency of conduct, as where a man, having accepted a benefit given him by a judgement cannot allege the invalidity of the judgement which conferred the benefit.”

32. It is well settled that the court cannot approve an attitude in which a party approbates and reprobates. For that reason, too, the application before me fails.”

28. Furthermore, the High Court in the case of *Lucas Adhola Olal v Patrick Mutua Nderitu* [2017] eKLR had this to say on the issue: -

“The court notes that counsel for the appellant has not denied receiving the cheque. Infact, the submissions by the appellant are very silent on that issue. In the circumstances, the conclusion that this court would make is that the decretal sum was indeed paid. The respondent’s letter dated 24th January, 2011 is very clear that the same was paid in full and final settlement. The fact that the appellant’s advocate accepted the cheque and went ahead to encash the same, implies that they received it on the same terms that it was forwarded by the respondent and that was “in full and final settlement”.

I wholly agree with the finding by Mutungi J. in the case of *Laban Onono & another v Dan Owiti* (supra) “that the subject matter of the appeal herein having been paid in full, even if it were to be heard, serves no purpose, and would be a waste of valuable judicial time”.

Having said that, I find and hold that the appeal herein is incompetent and the same is dismissed with costs to the respondent.”

29. However, other courts have held that payment of the decretal amount does not extinguish a party’s statutory right to appeal against the decision of a court where such party feels aggrieved. In the case of; *Machakos District Co-Operative Union Limited v Philip Nzuki Kiilu* [1997] eKLR the Court of Appeal in allowing the applicant to reinstate his appeal dismissed the respondent’s argument that the decretal sum had been paid and stated that:

“Mrs. Mwangangi also argued that there is no point in appealing as the decretal sum has been paid. With respect, payment of decretal sum does not take away a right of appeal.”



30. Similarly, the High Court in the case of; *Bash Hauliers Limited v Peter Mulwa Ngulu* [2020] eKLR stated that: -

“27. It was again contended that it was an abuse of the court process for the Respondent to proceed with the appeal after the decretal sum had been settled. A not too dissimilar issue arose before the Court of Appeal in *Machakos District Co-Operative Ltd. v Nzuki Kiilu* Civil Application No Nai 17 of 1997 where it was argued that since the decretal sum had been paid, the right of appeal had been lost. The Court (Shah, JA) however had no hesitation in holding that the fact that the decretal sum has been paid does not deprive a party of the right of appeal. Waki, JA, on his part in *Seventh Day Adventist Church East Africa Ltd. & another v M/S Masosa Construction Company* Civil Application No Nai. 349 of 2005 held that:

“Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

28. It follows that the mere fact that a party has paid or has been paid the full decretal sum does not preclude him or her from preferring an appeal where he/she is dissatisfied with the award. It may well be that he/she feels, as the Respondent herein, that the award was not sufficient. In fact, the general rule is that once judgement is made, it ought to be settled notwithstanding the fact that one may or may not have appealed since an appeal does not act as automatic stay of execution.

29. It is therefore my view that the fact of settlement of the decretal sum herein did not preclude the Respondent from proceeding with his cross-appeal and a person exercising his/her constitutional right cannot be said to be abusing the court process.”

31. Furthermore, in the case of; *Ismael Lonkishu Kobei v David Kariuki Gichangi & another* [2017] eKLR the applicant was seeking for an order to dismiss the appeal before the court on the grounds that the decretal sum was paid in full. However, the court in dismissing the application held that: -

“Section 65 (1) (b) confers a right of appeal on an aggrieved party to challenge a judgement of a magisterial court. The appeal of the appellant was admitted into hearing by this court on 28/6/2017 pursuant to section 79 of the *Civil Procedure Act*. The effect of such an admission is that the appeal is not frivolous. It is also not an abuse of the court process. A statutory right of appeal guarantees a fair trial. If the trial court committed errors of law or fact, the appeal court is at liberty to review and correct those errors. The right of appeal which is conferred upon the appellant can only be taken away by another statute.

6. Furthermore, the invocation of section 3A of *Civil Procedure Act* which saves the inherent powers of the court cannot defeat the express provisions of section 65 (1) (b) of the *Civil Procedure Act*. In the circumstances, I find that the provisions of section 3A cannot defeat the provisions of section 65 (1) (b) of



Civil Procedure Act. Additionally, the provisions of section 1A and 1B of the Civil Procedure Act are not applicable to the instant appeal. Those provisions are in relation to the just determination and efficient disposal of court cases in terms of section 1B of the Civil Procedure Act whose main objective is to require the courts to facilitate the just, expeditious, proportional and affordable resolution of civil dispute. It is therefore clear that those provisions are of no assistance to the respondents.

7. The equitable doctrine of “clean hands” and the rule that one cannot approbate and reprobate at the same time cannot override the appellant’s statutory right of appeal.”
32. To revert back to the subject herein, I note that, from the documents availed attached to the respondents’ submissions, the first cheque No 014119 dated 5th September 2010 for the sum of Kshs 516,023 was sent to the appellant’s advocate on 21st September 2010 evidence by a letter of the even date forwarding the same. This payment was made before the appeal was filed on 23rd September 2010. Even after filing the appeal, the appellant’s law firm received a further cheque No 014250 dated 30th September 2010 for the sum of Kshs 64,440 received on 7th October 2010 being the costs of the suit awarded. None of these cheques were received on a without prejudice basis.
33. There are several questions that arise when you allow a litigant to have double benefits as against the other party. Firstly, assuming the appeal fails and the appellant is unable to refund the money, how will the other party recover the money? Secondly, how does one address interest that would have accrued on the sum already paid, had it been held in an interest earning account? Thirdly, what protection does the respondent retain? Further, for how long can a party be pursued in litigation especially without knowledge of how long the appeal may take? Finally once the payment is made and claim settled, is there a an appeal to pursue?
34. In my considered opinion if the appellant wants to appeal he has to choose to refund the money paid back with interest and pursue the appeal or keep the money and be satisfied. To allow the appellant to retain the same amounts to a double bite on the cherry.
35. As the appellant has an opportunity to litigate further in case he exercises the option to refund the money and pursue the appeal, the court will not prejudice the matter by making any final order on the merit of the case.
36. The upshot of the aforesaid is that, the appeal is not allowed. Costs thereof to the respondents.
37. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF SEPTEMBER, 2024

GRACE L. NZIOKA

JUDGE

In the presence of: -

Ms. Kiberenge for the appellant

Mrs. Wachira for the 1st and 2nd respondent

Mr. Komen: Court Assistant

