PNM (Suing as the guardian & next friend of BMM) v Bofad and Sigma Agencies Company Limited (Civil Appeal E047 of 2023) [2024] KEHC 13880 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13880 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E047 OF 2023

WA OKWANY, J

OCTOBER 31, 2024

BETWEEN

PNM (SUING AS THE GUARDIAN & NEXT FRIEND OF BMM) .. APPELLANT

AND

BOFAD AND SIGMA AGENCIES COMPANY LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment in the Chief Magistrate's Court at Nyamira, Civil Suit No. E005 of 2023 delivered by Hon. W. C. Waswa, Senior Resident Magistrate on 17th August 2023)

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where she sued the Respondent, in her capacity as the minor's guardian and next friend, seeking the following reliefs: -
    a. Special Damages of Kshs. 11,500/=
    b. Future Medical Expenses of Kshs. 50,000/=
    c. General Damages
    d. Costs of the Suit
    e. Interests on (a), (b) and (c) above at court rates; and
    f. Any other relief that the Court considers fit and just to grant.
2. The Appellant's case was that the minor was on or about 11th December 2022, a lawful pillion passenger travelling aboard motor cycle Registration No. KMDV 797M along Kisii-Kericho Road when at Corner 'T' area, the Respondent, his driver, agent or servant negligently drove, managed and controlled motor vehicle Registration No. KDG 235P thereby permitting it to lose control, veer on and off the

road and collide with the motor cycle as a consequence of which the minor sustained grievous bodily injuries.

3. The Respondent filed its Statement of Defence in which it denied the allegations made in the Plaint and instead blamed the motor cycle rider and the minor for the accident.

4. The matter was heard before trial court where the Appellant testified as PW1 and presented the evidence of two other witnesses, namely; Dr. Morebu Peter Momanyi (PW2) and No. 83327 P.C. Justus Kipkoech (PW3).

5. The Defendant did not tender any evidence before the trial court and in a judgment delivered on 17th August 2023, the court held that the Appellant did not prove her case on a balance of probabilities. The court however assessed damages as follows: -

    General Damages – Kshs. 300,000/=

    Future Medical Expenses – Kshs. 50,000/=

    Special Damages – Kshs. 11,500/=

    Total – Kshs. 361,500/=

6. The trial court dismissed the suit with costs to the Respondents.

7. Aggrieved by the decision by the trial court, the Appellant filed the instant appeal and listed the following grounds of appeal in the Memorandum of Appeal: -

    1. The Learned Trial Magistrate erred in fact and in law by dismissing the Plaintiff's case without considering the minor Plaintiff was a pillion passenger and could not have caused the accident.

    2. The Learned Trial Magistrate erred in fact and in law by dismissing the Plaintiff's case despite the Defendant not calling any witness to testify in its defence.

    3. The Learned Trial Magistrate erred in fact and in law by dismissing the Plaintiff's case without considering the doctrine of Res Ipsa Loquitor pleaded by the Plaintiff in this case.

    4. The Learned Trial Magistrate erred in fact and in law by dismissing the Plaintiff's case despite the Defendant not filing a third party notice as required by law.

    5. That the Learned Trial Magistrate erred in fact and in law by proposing that the injuries as sustained would attract sums of Kshs. 300,000/= which award is inordinately low considering the inflationary trend of the Kenyan Shilling.

    6. That the Learned Trial Magistrate erred in fact and in law by failing to pay regard to the submissions by the Plaintiff with respect to liability and quantum.

8. The Appeal was canvassed by written submissions.

The Appellant's Submissions

9. The Appellant submitted that her case was pegged on the doctrine of Res Ipsa Loquitor as the minor was a pillion passenger and could not have done anything to stop the accident. She cited the decision in the cases of *Susan Kanini Mwangani & Another v Patrick Mbithi Kaita* (2019) eKLR and *Uchumi Supermarket Limited and Another v Boniface Ouma Were* (2021) eKLR. It was submitted that the Respondents was wholly liable for the accident. Reference was made to the decision in *Janet Kathambi v Charity Kanja Njiru* (2021) eKLR and *Semsum Construction Company Limited v Lua & Another* (2023) KEHC 3360 KLR.

10. On quantum, it was submitted that the award of Kshs. 300,000/= suggested by the trial court was inordinately low because the minor's injuries were grievous in nature as the Medical Reports assessed permanent disability at 5%. The Appellant proposed an award of Kshs. 500,000/.

The Respondent's Submissions

11. The Respondent submitted that the Appellant did not discharge her burden of proof as the particulars of the alleged negligence were not proved. It was submitted that Respondent was not to blame for the accident and that the Appellant did not sue the motorcycle rider so as to enable the trial court to determine how to distribute liability. Reference was made to the decisions in the cases of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka and Another* (2016) eKLR, *Margaret Wanjiru Ndirangu & 4 Others v Attorney General* (2020) eKLR and *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* (2016) eKLR.

12. It was submitted that the doctrine of Res Ipsa Loquitor was not applicable to the case because the Respondent's negligence was not the only inference that the Court could make under the circumstances of the case. It was the Respondent's case that the trial court's assessment of damages should not to be interfered with because the Appellant had not established that the same was inordinately low or based on wrong principles or that the trial court did not consider an important factor. Reference was made to *Kemfro Africa Ltd t/a/ Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p. 730.

Analysis and Determination

13. The duty of the first appellate court was explained in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* Civil Appeal No. 161 of 1999 thus: -

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...."

14. I have considered the Record of Appeal and the parties' rival submissions. I find that the main issue for determination is whether the trial court arrived at the correct finding on liability and quantum.

i. Liability

15. It was not disputed that an accident involving motor vehicle Registration No. KDG 235P and motor cycle registration No. KMDV 797M occurred on 11th December 2022. It was also not disputed that the minor herein was a pillion passenger aboard the said motorcycle. PW1 produced a Police Abstract (P.Exh7) to show that the said accident occurred and that the motor cycle rider sustained fatal injuries.

16. My finding is that even though PW1 did not witness the said accident, and that PW3 stated that the matter was still pending under inquiry, the evidence presented by the Appellant was, on a balance of probabilities, sufficient to prove that there was an accident and that the minor was injured.

17. A perusal of the copy of Motor Vehicle Search Records (P.Exh 8a) shows that the Respondent herein was the registered owner of motor vehicle Reg. No. KDG 235P. PW1 also produced the P3 Form (P.Exh 3), Medical report (P.Exh5) and a Discharge Summary (P.Exh6) to show that the minor sustained injuries in the said accident.

18. As I have already stated in this judgment, the trial court dismissed the Appellant's case on the basis that the pleadings did not show how the accident occurred and further, that the evidence presented was at variance with the pleadings since Appellant's statement indicated that the accident occurred on 6th December 2022, yet the Plaint showed 11th December 2022 as the date of the accident.

19. My analysis of the totality of the evidence presented before the trial court leads me to the conclusion that there was typographical error on the date of the accident as stated in the Appellant's statement because all the other documents that the Appellant relied on pointed to 11th December 2022 as the actual date of the accident. Her witnesses also stated that the accident occurred on 11th December 2022. I find that the Appellant proved, on a balance of probabilities, that the accident did occur on 11th December 2022.

20. Turning to the issue of how the accident occurred, I find that it was not disputed that the Respondent's motor vehicle collided with the motor cycle. I therefore find that the mere fact that Investigating Officer (PW3) did not testify on how the accident occurred does not connote that it did not happen. It is my finding that in the circumstances of this case, requiring the Appellant to provide further details on how the accident occurred would be akin to raising the standard of proof in a civil suit to proof beyond reasonable doubt more so considering the fact that the Respondent did not tender any evidence to counter the Appellant's case or take out third party proceedings against the owner of the motor cycle.

21. I find that the trial court erred in dismissing the Appellant's case on the basis that the Appellant did not demonstrate how the accident occurred. I am guided by the decision in *Baker v Market Harborough Industrial Co-operative Society Ltd* (1953) 1 KLR 1472, 1476, where Lord Denning L.J. observed inter-alia that: -

> " Every day proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them."

22. Case law is replete with authorities on assessment of liability in accidents involving pillion passengers; for example, in *Baro Ngo Sevelius Yophen v Jared Ndemo* [2020] eKLR Ougo J. held thus: -

> " 11. There is no contention that the respondent was a pillion passenger. It was not shown how his failure to wear a helmet or how the fact that there were two pillion passengers on the motorcycle would have contributed to the occurrence of the accident. As a pillion passenger, the respondent had no control of the motor cycle and could not have done anything to cause or avoid the accident.
>
> 12. For his part, the appellant who was driving his vehicle at the material time had a duty to look out for other road users including the respondent and the motor cycle rider....Moreover, if the appellant was of the view that the motorcycle rider was responsible for the accident he should have instituted third party proceedings against him. He failed to do so. For these reasons, I uphold the trial court's finding that the appellant was wholly liable for the accident."

23. Guided by the decision in the above cited cases, I find that the Appellant proved her case on a balance of probabilities. I further find that the Respondent was 50% liable for the said accident as the accident occurred following a collision between its motor vehicle and the motor cycle, in which case, it is only fair to share the blame between the two parties.

ii. Quantum

24. It is trite that an appellate court will not ordinarily interfere with the trial court's findings on quantum unless it is shown that the finding is not supported by evidence or is based on misapprehension of evidence or principles. In *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR, 278 it was held that:-

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did."

25. The minor sustained the following injuries as pleaded at paragraph 5 of the Plaint: -

    a. Fracture of the Left Upper Canine Tooth

    b. Lacerations on the face

    c. Bunt trauma to the back

    d. Bruises on the Right Upper Limb

    e. Lacerations on the left Knee

    f. Bruises on the face

    g. Blunt trauma to the chest

    h. Bruises on the left knee.

26. It is trite that comparable injuries attract comparable awards. (See *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR).

27. I have considered the following comparable authorities: -

    a. *Paul Kipsang Koech & another v Titus Osule Osore* [2013] eKLR: The plaintiff was awarded Kshs. 200,000/= in General Damages for bruised lower lip, cheek, elbow and left knee, fracture of the right upper lateral incisor tooth loosening of the right upper canine tooth, loosening of the right upper incisor tooth and blunt injury to the neck and abdomen.

    b. In *Moiz Motors Limited & another v Harun Ngethe Wanjiru* [2021] eKLR, the High Court revised an award of Kshs. 700,000/= general damages to Kshs. 500,000/= where the Respondent had sustained multiple facial lacerations, depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises on both hips, swollen toes on the right leg and bruises on both knees.

    c. In *Joseph Mutua Nthia v Fredrick Moses M. Katuva* [2019] eKLR, Odunga, J. (as he then was) awarded Kshs. 400,000/= where the claimant suffered loss of 2 teeth and loosening of 3 others, with an injury to the face, blunt chest injury and blunt back injury.

28. The Respondent urged this Court to adopt the assessment of Kshs. 300,000/= General Damages made by the trial court while Counsel for the Appellant argued that the same was too low and proposed an award of Kshs. 500,000/=. Having regard to the above cited authorities and taking into account the current inflationary trends, I set aside the trial court's assessment of Kshs. 300,000/= and substitute it with an award of Kshs. 400,000/= in general damages.

29. I have perused the receipts produced by the Appellant to support the claim for Special Damages and I am satisfied that the Appellant specifically pleaded and proved the special damages. I therefore award the sum of Kshs. 11,500/= for special damages. I also award the Appellant the costs for replacing the minor's fractured tooth in the sum of Kshs. 50,000/= as indicated on the Medical Report by Dr. Morebu (P.exh 5a).

30. In conclusion, I find that the appeal is merited and I therefore allow it and enter judgment in favour of the Appellant as follows: -

    Liability – 50% against the Respondent

    General Damages – Kshs. 400,000/=

    Special Damages – Kshs. 11, 500/=

    Future Medical Expenses – Kshs. 50,000/=

    Total – Kshs. 230,750/=

31. I also award the Appellant the costs of the appeal and the lower court case together with interest on damages and costs at court rates from the date of this judgment till payment in full.

32. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE