Kimonde v NBW (Minor suing through his mother and next friend Hotensia Wira Mbugua) (Civil Appeal 34 of 2023) [2024] KEHC 15041 (KLR) (Civ) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15041 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 34 OF 2023

CM KARIUKI, J

NOVEMBER 28, 2024

BETWEEN

ISAAC KAMAU KIMONDE ..... APPELLANT

AND

NBW (MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND HOTENSIA WIRA MBUGUA) ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of the E. Wanjala Principal Magistrate at Engineer, in SPMCC No. E164 of 2021, dated and delivered on 22nd December 2022)

JUDGMENT

1. This is an appeal arising from Engineer SPMCC E164/2024 in which the trial court awarded the claimant as follows:
    a. Liability - 100%
    b. General Damages for pain and suffering Kshs. 900,000
    c. Special Damages Kshs. 9,860
    d. Total Kshs 909,860
2. Being aggrieved by the award above, the appellant appealed and set out the eleven (11) grounds of appeal on pages 5-6 of the record of appeal, which compressed into two issues.
    i. Whether the Learned Magistrate's findings on liability went against the weight of evidence.
    ii. Whether the Learned Magistrate erred and misdirected himself on the principles applicable to damages and her findings.

3. Appellant Submissions

4. From the grounds of appeal encapsulated in the memorandum of appeal on page 5 of the Record of Appeal, issues for determination by this Honourable Court are:-

   a. Whether the learned magistrate's findings on liability went against the weight of evidence

   b. Whether the learned magistrate erred and misdirected himself on the principles applicable to damages and her findings.

5. The issues shall be addressed as hereunder: -

6. Whether the learned magistrate's findings on liability went against the weight of evidence.

7. This being a first appeal, the Court is urged to bear in mind that since it is an appellate court, it did not have the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand. Therefore, the Jurisdiction to review the evidence should be exercised with caution. The same was stated in the locus classicus of Selle vs Associated Motor Boat Company Limited, which was reiterated by Justice Kamau in Jacob Momanyi Orioki V Kevian Kenya Ltd [2018]eKLR, wherein he stated among other things

> " This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand".

8. This was aptly stated in the cases of Selle vs. Associated Motor Boat Company Ltd [1968] EA 123 and Peters vs. Sunday Post Limited [19851 EA 424 where in the latter case, the court therein rendered itself as follows: -

> " 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...But 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..."

9. In Godfrey WamalwaWamba& another v KyaloWambua [2018] eKLR. This is a first appeal. This court is under a duty to re-evaluate and assess the evidence and draw conclusions. It must. However, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand.

10. PW2, the Police Officer, indicated that he was not the Investigating Officer (Page 51 of Record of Appeal). The Police Officer testified that the point of impact was on the road and further indicated that the minor pedestrian wanted to cross the road when the accident occurred. It was his testimony that the other minor was on the other side of the road when the accident occurred, meaning the minor had been left alone on the road.

11. The Respondent admitted leaving the minor and crossing the road to the right side of the road. The plaintiff intentionally left the minor unattended, knowing very well that the minor is five and a half years old and not capable of understanding instructions. Clearly, the Plaintiff is wholly to blame for exposing the minor to foreseeable danger. The plaintiff's negligence made the minor run across the road. The Plaintiff and her own witness, the police officer, did testify that the minor ran across the road following his mother. Clearly, the Plaintiff is negligent in the suit herein and not the Defendant.

12. The Police Officer testified that the Defendant's driver applied emergency brakes; however, due to the proximity, an accident ensued. This shows that the driver attempted to avoid the accident. Further, it is indispensable to note that the OB did not indicate that the driver was speeding or driving recklessly.

Further, the OB did not blame the driver for the accident.

13. The Trial Magistrate rendered in her judgment that in the absence of any evidence from the Defendant, the Defendant is found 100% liable. The burden of proof does not shift to the Defendant at any instance. Thus, it is submitted that the learned Trial Magistrate was in error for finding that the mere fact that the Appellant did not adduce evidence then ipso facto the Respondent's case was proved. The Respondent must prove on a balance of probabilities that the Appellant is liable. The Court of Appeal in the case Charterhouse Bank Limited (under Statutory Management Vs. Frank N. Kamau (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-

> " We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination, and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant, convinces the court that, on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."
>
> 21. The appellants, at trial, made the same error as the respondents. The appellants did not give evidence to support the allegations of negligence in their complaint, and those allegations remained unproven.
>
> Disposition
>
> 22. In view of the above, I find the appellants' appeal without merit. It is dismissed with costs.

14. The Plaintiff cannot leave a minor of five and a half years and expect that the minor will not run after her. The Plaintiff ought to have crossed the road having held both children's hands. There was no reason to leave a five-and-a-half-year-old on the road alone. The Plaintiff's negligence led to the minor's misfortune, as clearly proven by the Police Officer's testimony.

15. The Appellant's driver was not charged with any traffic offense. In fact, the matter is pending investigation. Thus, it was prayed that the Respondent's case be dismissed with costs or contributory negligence, which is apportioned 50-50 between the Appellant and Respondent.

whether the learned magistrate erred and misdirected himself on the principles applicable to damages and her findings

16. The Respondent's injuries particularized under paragraph 5 of the Plaint (Page 10 of the Record of Appeal) are;

a. Head injury to the linear fracture of the left parietal bone

b. Deep cut wound on the forehead leading to soft tissue injuries

c. Blunt injury to the left elbow joint leading to soft tissue injuries

d. Blunt injury to the left hip joint leading to soft tissue injuries.

17. Indispensable to note from the Plaintiff's doctor's report that the minor did not sustain any fracture or any permanent disability. The medical report indicates that the minor suffered a linear fracture of the left parietal bone with soft tissue injuries. A linear skull fracture is a break in a cranial bone resembling a thin line, without splintering, depression, or distortion of bone- to wit- there is a break in the bone, but it does not move the bone, hence the soft tissue injuries. The Plaintiff testified that the minor is currently in school and has recovered from the injuries sustained.

18. At the onset, we respectfully draw this Honourable Court's attention to the following words by Justice Kuloba. in his book 'Measure of Damages for Bodily Injuries' concerning the duty of an appellate court on an appeal against quantum (at page 25). It states;

> " On appeal, every member of the appellate court is anxious to do all he can to ensure that the damages are adequate for the injury suffered so as far as there can be compensation for an injury and to help the parties and others to arrive at a fair and just figure in all circumstances. An endorsement of extravagant damages in one case becomes a yardstick of the next so that no margin is left for certain losses, for example, total disability."

19. That in all cases, courts, at first instance, are prone to compensate generously, and it would be absurd to shut one's eyes to the fact that because, in these days of third-party and personal insurance, loss almost always falls on a large financial corporation, there may be a tendency to extravagance. As large sums are awarded, premiums for insurance rise higher and higher. This reasoning is to be found in the case of *Hassan v Nathan Mwangi Kamau Trans otters & 5 others NBI CACA NO 123 of 1985* where it was held that: -

> " ...Inordinately high awards will lead to monstrously high premiums for Insurance of all sorts, and it is to be avoided for the sake of everyone in the country..."

20. The appellate court has the authority to interfere with the quantum of damages if the amount is so inordinately high. This was authoritatively underscored in Butt v Khan (1977) 1 KAR thus:

> " 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."

21. Henry Hilaya Ilanga Versus Manyema Manyoka (1961) EA 705, which dealt with principles of assessing damages::

> " The appellate court is entitled to re-evaluate the evidence and then determine the evidence upon which the trial judge relied upon to arrive at those conclusions..."

22. The case of Kemfro Africa Limited T/A Meru Express Services, Gathongo Kanini, Versus A.M. Lubia, And Olive Lubia was decided by the court of appeal on the 27th day of February 1985. The court of appeal held, among other things, that:

> "The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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, he amount is so inordinately high that it must be a wholly erroneous estimate of the damages"

23. It is trite law that awards must be within consistent limits, and court awards for damages must be made, taking into account comparable injuries or similar injuries and awards. See - Kenya Power & Lighting Co. Ltd [2013] eKLR.

24. An award for general damages of Kshs. 900,000 is extremely high considering the injuries sustained and the fact that the Respondent has healed, as confirmed by the Plaintiff's doctor. The Learned Trial Magistrate Court only explained the reasons for such an award by examining the Respondent's submissions without giving a further view to the Appellant's submissions. This contention is informed by the fact that the lower court's award reflects that the principles applicable to the award of damages were not adhered to.

25. First, the principle of compensation (restitution in integrum) requires that a Plaintiff receive no more and no less than his actual loss such that compensation is fair to both the Plaintiff and the Defendant, a principle reiterated in the well-known case of Lim Poh Choo in which Lord Denning M.R. stated that a Plaintiff was not necessarily to be compensated for all the loss and detriment suffered. It is not the law; he is only entitled to what is, in the circumstances, fair compensation. Fair both to him and the Defendants.

26. That the following cases guide this Honourable Court;

27. In Telkom Orange Kenya Limited vs I S O minor suing through his next friend and mother J N [2018] eKLR where, the injuries sustained by the child were head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. The two doctors who examined the child concluded that the child sustained severe head injuries, which put him at risk of developing seizures as a long-term complication, together with disfiguration resulting from the scalp and leg scars. The High Court awarded a sum of Kshs. 500,000/- general damages.

28. In GA (Minor suing thro' her father and next friend BZ) v Paul Muthiku [2020] eKLR where the High Court increased an awarded Kshs 500,000.00 in general damages to an Appellant who suffered multiple fractures of the frontal left orbital roof (comminuted), multiple fractures of right temporal bones (petrous), bleeding in the skull airspaces (haemosinus), cut on the head (frontal) and cut on the chin, in May 2020.

29. From the above case, it is contended that the injuries suffered by the various plaintiffs/respondents were more grievous than the respondent herein. Further, it is perspicuous that the awards given by the multiple judges were between the years 2018 to 2020. The accident in the instant suit occurred in 2021; therefore, it is argued that the above authorities are within the economic error of the instant suit. Thus, it submitted that an award of Kshs 500,000 would be reasonable compensation for the Respondent, considering he suffered a NO permanent physical disability.

30. The respondent submission was not available at the time of drafting the judgment.

31. Trial court judgment

32. The plaintiff minor filed this suit seeking compensation from the defendant for the injuries that he sustained in a road traffic accident that occurred on 20.8.2021 while a pedestrian was walking together with his mother along the Flyover-Njambini road in Ha-Nene area when the defendant's motor vehicle registration no. KCY-044 N lost control, veered off its lane into the pedestrian path, and knocked down the minor; the plaintiff blamed the driver the defendant's driver, for negligence, particularly in paragraph 4 of the plaint.

33. The defendants filed a defense denying the plaintiff's claim and blaming the plaintiff's next friend and minor for negligence, particularly in paragraphs 7 and 8 of the defense.

34. Plaintiffs case;

35. Hortensia Wire Mbugua, the mother to the minor plaintiff, stated that she adopted her statement dated 5.11.2021 as her evidence and produced documents on the list dated 5.11.2021 as P EX 1-13 save for the police abstract marked for identification; she stated that the minor sustained head injuries, left hand and cuts at the back, on cross-examination, she said that at the time of examination the minor aged 51/2 years.

36. On the day of the accident she was walking with two children, the minor was knocked while on the road, PW 1 had assisted him to cross the road, she knew the child was not supposed to be near the road, in reexamination she stated that she had crossed with the minor and left him on the side of the road. She went to assist the other child cross, but the plaintiff minor decided to follow her, and in the process, the child was knocked.

37. PW2 P.C Wilson Wambua Mbuvi stated that on 20.8.2021 at 0800hours at Wanene along Njambini-Flyover an accident happened involving vehicle KCY 044N driver was John Musina and a pedestrian Nixon Boro Wira aged 5 years, the vehicle was from Njambini to Flyover, upon reaching location of the accident, a female adult holding 2 children besides the road on the left side as one faces flyover in the process one child Nixon Boro crossed the road to the right side when he realized he was alone.

38. The boy crossed back to the leading female without checking, the driver applied emergency brakes and the child was slightly knocked by the said vehicle, he sustained head bruises and was rushed to Bambo health center for treatment and later referred to Naivasha district hospital.

39. Ngugi visited the scene, the vehicle was escorted to Magumu police station for inspection, within the vicinity of the accident was a shopping center called Wanene, a school called Kinyata primary school, and there is a sharp corner, the driver ought to have approached the place with caution, he was paid Kshs. 5000= for court attendance, he produced the abstract as P EX7; on cross-examination, he stated that P.C Ngugi was the investigating officer but was transferred to the Mombasa police station;

40. The witness did not visit or process the scene; from the occurrence book, the minor was hit on the road, he was struck while crossing the road the minor was aged 5.5.yeras, the minor was with the mother and was crossing back to follow the mother who had left him on the other side of the road, the driver was not blamed for the accident, the case was pending under investigations, in reexamination, he stated that the mother had already assisted the minor to cross the road. Still, the minor decided to follow the mother back.

41. The defendant did not tender any evidence.

42. Parties filed submissions; the issues for determination are on liability and quantum.

43. Liability

44. The plaintiff's unchallenged evidence is that an accident involving the plaintiff, minor Nickson Boro Wira, and vehicle KCY 044N occurred on 21.8.2021. The accident was proved by an abstract in which no one was blamed for the accident; the circumstances were that the minor had been assisted by his mother to cross the road, but he decided to cross back and follow the mother, and in the process, he was hit.

45. The plaintiff blamed the defendant for negligence, the defendant did not challenge the evidence of the plaintiff, PW 2 the police officer stated that the place of the accident had a shopping center and a primary school and had a sharp corner hence the driver ought to have been cautious, the defendant did not tender any evidence to demonstrate that he was cautious as required so as to avoid the accident with the 5.5. year child.

46. Despite the mother having, to some extent, contributed to the occurrence of the accident by leaving the minor unattended, hence his decision to follow the mother. However, since the defendant did not tender any evidence to warrant apportionment of liability, the plaintiff's evidence is not challenged, and taking into account the age of the child being five years as such he could not be held liable for negligence and he did not have the road sense, see; South Nyanza Sugar Company Limited v Samson Odoyo Oyoo [2017] eKLR Motex Knitwear Limited V Gopitex Knitwear Mills Limited [2009] eKLR

47. Premised on the evidence on record on a balance of probabilities and guided by the above cases, I hold the defendant 100% liable for the accident.

48. The defendant raised the issue that the plaintiff was not the mother to the minor but that the mother was Mercy Agnes Lusiola; however, this issue never arose at trial. Still, in submissions, though the defendant had raised it in the defense, the plaintiff herein signed a witness statement stating that she is the mother to the minor. As such, I find that the name Mercy Agnes Lusiola may have been an error since it only appears in paragraph one of the plant.

49. Quantum

50. The plaintiff pleaded that the minor sustained head injury to the linear fracture of the left parietal bone, deep cut wound on the forehead leading to soft tissue injuries, blunt injury to the left elbow joint leading to soft tissue injuries, and blunt injury to the left hip joint leading to soft tissue injuries, the injuries were proved by a patient referral form from Bamboo health center, a radiology report form L n L x-ray & Imaging center, a p3 form and a medical report by Dr. Obed Omuyoma dated 12.10.2021 confirmed injuries as pleaded and were classified as grievous harm.

51. The minor had a permanent scar on the forehead, measuring 6cm long, and a CT scan of the head showed a linear fracture of the left parietal bone with soft tissue injuries of the scalp; movement at the left elbow joint was restricted because of pain, movement of the left hip joint restricted because of pain.

52. The plaintiff proposed an award of Kshs 1,000,000/=in general damages for pain and suffering and relied on the case of Panniack Investments Limited v Davidson Mwanzia Kamuta [2018] eKLR.

53. The respondent sustained serious head injuries with: -

    i. Fracture of the left temporal parietal bones.

    ii. Acute epidural hematoma on the left temporal parietal lobes;

    iii. Mags effect with midline shift;

iv. Effacement of the sulci and basal cisterns;

v. Concussion with lucid moments; and

vi. Bleeding from the left ear (otorrhea)

54. On 10.8.2018, the High Court upheld an award of Kshs. 800,000/= in general damages for pain and suffering. S.M v Mahesh Kerai & Manoj A. Patel [2009] eKLR

55. The injuries and the quantum proposed by Mr. Mazrui seek to rely on the hospital records, P 3 form, and Doctor's reports, all of which detail the injuries suffered by the child as:

a. Linear fracture left parental bone extending to the roof left arbit

b. Fracture of the right front parietal bone

c. Thin fracture of the anterior wall of the right maxillary sinus

d. Head concussion injury leading to a coma

e. Multiple facial bruises

f. Multiple forearm bruises on both forearms

56. The High Court awarded Kshs. 1,000,000/=on 28.10.2009.The defendant proposed an award of Kshs. 100,000/=in general damages, Milimani CMCC 941 of 2016 Godwin Ireri vs. Franklin Gitonga [2018] eKLR: -In this case, the Respondent had been awarded Kshs. 300,000/= as general damages by the lower court for two cut wounds on the forehead cuts on the scalp, and bruises on the left ankle and right knee. The award was reduced, on appeal, to Kshs. 90,000/=

57. Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR: -This case was an appeal from an award made on 10 December 2015; the Respondent had been awarded Kshs. 300,000/= by the trial court for soft tissue injuries. These included minor bruises on the back and tenderness on the right leg. The award was considered manifestly excessive and was reduced to Kshs—100,000/= in a Judgment delivered on 1 February 2018.

58. Guided by the above-cited cases by the parties, in the case cited by the plaintiff, the plaintiff suffered severe injuries since several fractures were suffered, unlike in the plaintiff's case, where only a single fracture was sustained.

59. The authorities cited by the defendant do not have comparable injuries to the plaintiffs herein.The guiding principle on the award of damages was stated in the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR .

60. Issues Analysis And Determination

From the grounds of appeal set out in the memorandum of appeal on page 5 of the Record of Appeal, the evidence adduced, and submissions on record, the court finds the issues for determination are whether the learned magistrate's findings on liability went against the weight of evidence, whether the learned magistrate erred and misdirected himself on the principles applicable to damages, and her findings and the orders as to costs.

61. I have considered the submissions of the parties in this appeal. This being the first appellate court, it was held in Selle –vs.- Associated Motor Boat Co. [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial. The principles of the Court of Appeal acts are that the court must reconsider the evidence, evaluate it, and draw its conclusions. However, 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, the court is not necessarily bound 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 demeanor of a witness is inconsistent with the evidence in the case generally."

62. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that it must rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its mind, not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from overruling it if, on full consideration, the court concludes that the judgment is wrong...When the question arises of which witness is to be believed rather than another, and that question turns on manner and demeanor, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanor, which may show whether a statement is credible or not, and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."
>
> Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyze them, evaluate them, and arrive at its independent conclusions, always remembering and giving allowance for the fact that the trial court had the advantage of hearing the parties"

63. It was therefore held by the Court of Appeal in *Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982* [1982-1988] 1KAR 278 that:

> " A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

64. In this appeal, it is clear that the determination of the appeal revolves around the question of whether the Respondent proved her case on the balance of probabilities and what ought to have been the quantum of damages. The burden of proof was on the appellant to prove his case, which is in doubt. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

65. This is called the legal burden of proof. There is, however, an evidential burden of proof, which is captured in Sections 109 and 112 of the same Act as follows:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless any law provides that the proof of the fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

66. The two provisions were dealt with in Anne Wambui Ndiritu –vs.- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held 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 the case upon any party, the burden of proving any particular fact that he desires the court to believe in its existence, which is captured in Sections 109 and 112 of the Act."

67. The general rule is that the plaintiff, the appellant in this appeal, has the initial burden of proof, but depending on the circumstances of the case, the respondents may also bear the burden.

68. In Evans Nyakwana –vs.- Cleophas Bwana Ongaro [2015] eKLR, it was held that:

> " As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Sections 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden, and as Section 108 of the *Evidence Act* provides, the burden lies in that person who would fail if no evidence at all were given as either side."

69. I agree that the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defense or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court must examine that evidence to satisfy itself that, indeed, the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

70. However, just like any other general rule, there are exceptions to this rule. The plaintiff herein was a child aged 51/2 years. In Bottorff v. South Construction Company,184 Ind. 221, 110 N.E. 977 (1915), the Indiana Supreme Court stated:

> " Law writers and the courts have laid down that the time of infancy is divided into three distinct periods, during each of which different presumptions prevail; the first period is that up to the age of seven years, during which the infant is conclusively presumed to be incapable

of understanding the nature of crime and can in no way be held responsible therefor; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crimes. Still, the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act. The third period is after the age of fourteen years, when the infant is presumed to be capable of committing a crime and can be held the same as an adult. It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases."

71. The law in cases involving children of tender years was, however, reiterated by the Court of Appeal in Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 where it was held that:

> " The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and after that, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission... The preceding decision does not say that a person under the age of ten years cannot be guilty of contributory negligence but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her safety, and then he or she is only to be found guilty if blame is attached to him or her. A child does not have the road sense of their elders and therefore cannot be found negligent unless they are blameworthy."

72. In arriving at that the decision, the Court cited decisions in South Nyanza Sugar Company Limited v Samson Odoyo Oyoo [2017] eKLR and Motex Knitwear Limited V Gopitex Knitwear Mills Limited [2009] eKLR, which echoed the holding in Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] 1 KAR 1; [1981] KLR 349 in which Law, JA expressed himself as hereunder:

> " It would need a great deal of persuasion before imputing contributory negligence to the child aged eight years having regard to her tender age. Even if she did step off into the car, it would not be right to count it as negligence on her part, such as a momentary act of inattention or carelessness. A young child cannot be guilty of contributory negligence, although an older child might be guilty of it, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for their safety, and a finding of contributory negligence should only be made if blame could be attached to the child...Clearly, each case must depend on its peculiar circumstances. In the instant case, the learned Judge was right in finding that the defendant had been negligent, that the plaintiff was struck when almost halfway across the road, and that, at the most, the plaintiff had committed an error of judgment for which contributory negligence should not be attributed to him."

73. 49. It was on the same basis that it was held in Nkudate vs. Touring & Sporting Cars Ltd and Another [1978] KLR 199; [1976-80] 1KLR 1333 that:

> " The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take

precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these."

74. In my judgment, it is clear that the learned trial magistrate correctly took into account the age of the victim and whether, in those circumstances, she could be deemed to have negligently contributed to the accident or negligently caused the accident. The law, when it comes to accidents involving children of tender years, seems to place strict liability on the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for their safety.

75. In this case, the learned trial magistrate not only relied on that legal presumption but also relied on the defense's failure to adduce evidence of rebuttal and found that, based thereon, the defendant was 100% liable. The trial court made a finding that the defendant did not challenge the evidence of the plaintiff, PW 2 The police officer stated that the place of the accident had a shopping center and a primary school and had a sharp corner; hence, the driver ought to have been cautious, the defendant did not tender any evidence to demonstrate that he was cautious as required so as to avoid the accident with the 5.5. year child.

In Bashir Ahmed Butt vs. Uwais Ahmed Khan (supra), the court expressed itself as hereunder:

> "High speed can be prima facie evidence of negligence in some cases. A person traveling within or at the permitted speed limit may be immune from prosecution for a traffic offense. It is another matter as far as the question of negligence is concerned. Even 15 m.p.h may not be safe in the early hours of the morning when children go to school along and cross a road known to the driver, as in the instant case, it serves an area with several schools in it. In the manner of speaking, there would be children here, children there, and children everywhere. The safe speed on an occasion like this will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the *Traffic Act* is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will forgive the driver, even traveling at half that speed may not afford a defense in a case of negligence."

76. In HKM vs. Francis Mwongela Ncebere (2017) eKLR, it was held that:

> "As a general rule, the presence of a child or children along the road should awaken an intuitive signal of the high possibility that the child or children may enter or cross the road without notice. That realization should make the driver cautious and take such preemptive actions as slowing down considerably, moving away from their position at the time, or making an abrupt stop if need be. From his statement, the driver had a clear, immediate vision of the deceased child. At the time he saw the boy running, he ought to have been put on notice that he must exercise particular care and anticipate that the child would cross the road without looking. According to his statement, the driver saw the boy emerging from the vehicle he had passed, but it seems he did not give the presence of a child any appropriate significance; had he acted properly, he would have taken more decisive steps in dealing with the scenario that was unfolding fast. So his testimony that he tried ''to swerve and brake but was too close'' is not anywhere close to proper care and control of the vehicle in the circumstances of the case"

77. In this case, the driver ought to have taken extra care near a school. While the appeal is only based on the finding that the Plaintiff's age did not permit the court to find her negligence, the other ground, which was that the evidence adduced showed that the Driver was negligent, was not addressed by the

appellant in this appeal. Having considered the evidence afresh, I find no reason to interfere with the learned trial magistrate's finding on liability.

78. As regards quantum, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " 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."

79. It was therefore held by the same Court in Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court, when naturally and reasonably says to himself, "What figure would I have made?" and reaches his figure, must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

80. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court, before it interferes with an award of damages should be satisfied that the Judge acted on the wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

81. The trial court considered the submissions of both sides on submissions on quantum and stated Quantum.

82. The plaintiff pleaded that the minor sustained head injury to the linear fracture of the left parietal bone, deep cut wound on the forehead leading to soft tissue injuries, blunt injury to the left elbow joint leading to soft tissue injuries, and blunt injury to the left hip joint leading to soft tissue injuries, the injuries were proved by a patient referral form from Bamboo health center, a radiology report form L n L x-ray & Imaging center, a p3 form and a medical report by Dr. Obed Omuyoma dated 12.10.2021 confirmed injuries as pleaded and were classified as grievous harm. The minor had a permanent scar on the forehead, measuring 6cm long, and a CT scan of the head showed a linear fracture of the left parietal bone with soft tissue injuries of the scalp; movement at the left elbow joint was restricted because of pain, movement of the left hip joint restricted because of pain.

83. The plaintiff proposed an award of Kshs 1,000,000/=in general damages for pain and suffering and relied on the case of Panniack Investments Limited v Davidson Mwanzia Kamuta [2018] eKLR

84. The respondent sustained severe head injuries with: -

vii. Fracture of the left temporal parietal bones.

viii. Acute epidural hematoma on the left temporal parietal lobes;

ix. Mags effect with midline shift;

x. Effacement of the sulci and basal cisterns;

xi. Concussion with lucid moments; and

xii. Bleeding from the left ear (otorrhea)

85. On 10.8.2018, the High Court upheld an award of Kshs. 800,000/= in general damages for pain and suffering. S.M v Mahesh Kerai & Manoj A. Patel [2009] eKLR

86. The injuries and the quantum proposed by Mr. Mazrui seek to rely on the hospital records, P 3 form, and Doctor's reports, all of which detail the injuries suffered by the child as:

g. Linear fracture left parental bone extending to the roof left arbit

h. Fracture of the right front parietal bone

i. Thin fracture of the anterior wall of the right maxillary sinus

j. Head concussion injury leading to a coma

k. Multiple facial bruises

l. Multiple forearm bruises on both forearms

87. The High Court awarded Kshs. 1,000,000/=on 28.10.2009.The defendant proposed an award of Kshs. 100,000/=in general damages, Milimani CMCC 941 of 2016 Godwin Ireri vs. Franklin Gitonga [2018] eKLR: -In this case, the Respondent had been awarded Kshs. 300,000/= as general damages by the lower court for two cut wounds on the forehead cuts on the scalp, and bruises on the left ankle and right knee. The award was reduced, on appeal, to Kshs. 90,000/=

88. Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR: -This case was an appeal from an award made on 10 December 2015; the Respondent had been awarded Kshs. 300,000/= by the trial court for soft tissue injuries. These included minor bruises on the back and tenderness on the right leg. The award was considered manifestly excessive and was reduced to Kshs—100,000/= in a Judgment delivered on 1 February 2018.

89. Guided by the above-cited cases by the parties, in the case cited by the plaintiff, the plaintiff suffered severe injuries since several fractures were suffered, unlike in the plaintiff's case, where only a single fracture was sustained.

90. The authorities cited by the defendant do not have comparable injuries to the plaintiffs herein. The guiding principle on the award of damages was stated in the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] Eklr.

91. . In this case, apart from urging the court to interfere with the quantum, no basis was laid for doing so. I have, on my part, considered the award, and taking into account the injuries sustained, I find no compelling reason to interfere with the same. Thus, court makes the orders;

i. On the premises, I find no merit in this appeal, and therefore dismiss same with costs to the respondent.

ii. Judgement accordingly.

JUDGMENT, DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 28TH DAY OF NOVEMBER 2024.

C. KARIUKI

JUDGE