Devkan Enterprises Limited v Mutisya (Minor Through Next Friend Suing Margaret Mwende Paul (Deceased)) (Civil Appeal E154 of 2021) [2024] KEHC 14895 (KLR) (25 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14895 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E154 OF 2021

FR OLEL, J

NOVEMBER 25, 2024

BETWEEN

DEVKAN ENTERPRISES LIMITED ..... APPELLANT

AND

PAUL MUSIYA MUTISYA ..... RESPONDENT

MINOR THROUGH NEXT FRIEND SUING MARGARET MWENDE PAUL (DECEASED)

(Being An Appeal From The Judgment And Decree Of Hon Martha Opanga (srm) Delivered On 24Th August 2021 In Kangundo SPMCC No. 10 of 2020)

JUDGMENT

A. Introduction

1. The Appellant was the Defendant in the primary suit, where they had been sued by the respondent claiming damages arising from a road traffic accident, which occurred on 2nd June 2019 along Nairobi-Kangundo Road at Kaumoni Area involving the Appellant's Motor vehicle registration Number KCK 983W Mahindra Van (hereinafter referred to as the 1st suit motor vehicle) and motor vehicle registration number KAS 506W Toyota Matatu (hereinafter referred to as the 2nd suit motor vehicle).

2. The respondent averred that on 2nd June 2019, he was lawfully travelling as a fare-paying passenger in the 2nd suit motor vehicle, when the appellant's employee, driver, servant and /or agent negligently drove, managed and/or controlled the 1st suit motor vehicle along the said road, drove on the wrong lane from the opposite direction and permitted/caused the 1st suit motor vehicle, to violently collide with the 2nd suit motor vehicle and as a result, he sustained severe bodily injuries.

3. The appellant herein filed their statement of defence dated 3rd March 2020 where they denied the occurrence of the accident and stated in the alternative that if at all the accident did occurr, (which was denied) then it was caused solely and/ or largely contributed to by the negligence of the driver of the 2nd suit motor vehicle. The particulars of the negligence of the 2nd suit motor vehicle driver, was stated in the Appellants statement of defence.

4. The suit was heard on merit, and the learned magistrate in her judgment delivered on 24th August 2021 apportioned Liability at 100% as against the Appellant and proceeded to award the Respondent Kshs.1,244,750/= as damages plus costs and interest.

5. The Appellant, being dissatisfied by the judgement did file their memorandum of Appeal on 21st June, 2022 and raised several grounds of appeal namely:-

    a. That the trial court erred in finding the appellant liable for the suit accident when the respondent did not adduce evidence of negligence.

    b. In finding the appellant 100% liable for the subject accident, the trial court proceeded on the wrong principles and took into account irrelevant factors and failed to take into account the relevant factors.

    c. That the trial court awarded general damages which were too high for the injuries sustained by the respondent.

B. Facts of the Case

6. PW1 Margaret Mwende Paul testified that Paul Musiya Mutisya (the Minor herein) was her nephew. She relied on her filed witness statement, which she adopted as her evidence in chief before the court, and produced all her documents as Exhibits 1 to 12. She further testified that on 02.06.2019, she received a phone call from Kangundo level four hospital and was informed that her nephew who was traveling back to school by public means had been involved in a road traffic accident and was admitted at the said Hospital. The next day she went to the said hospital and found out that her nephew had been seriously injured and they had to transfer him to Kenyatta National Hospital for further specialized treatment.

7. She went to Kangundo police station, where she was informed that the two suit motor vehicles had been involved in an accident and that it was the driver of the 1st suit motor vehicle who was to blame for the said accident and he was subsequently charged with a traffic offense under case Kangundo Traffic Case No 276 of 2019. Her nephew has since recovered but still, occasionally nose bleed and felt dizzy whenever he stood for a long spell. The minor was born on 28.05.2004 and was in class eight, when the accident occurred. She prayed for general damages, special damages, the cost of the suit plus interest. Under cross-examination, she confirmed that the matter was still pending under investigation as stated in the police abstract.

8. The Appellant did not call any witness to testify on their behalf.

C. Parties Submissions.

Appellant's Submission

9. The Appellant submitted that the trial Magistrate erred in holding its driver negligent in causing the said accident, yet there was no eye witness or police evidence adduced to support that assertion. The evidence of the respondent was hearsay and could not be relied upon to establish liability in disregard of

Section 63 of the *Evidence Act*, Cap 80 laws of Kenya, which provides that oral evidence must in all cases be direct evidence. Reliance was placed in the case of Cheserem v HZ & Company Limited (1892) KLR 24, Musyoka vs Returning Officer Independent Electoral and Boundaries Commission, Machakos county & 3 others. (Constitutional Petition E004 of 2021) {2022} KEHC 160 (KLR), Where it was emphasized that evidentiary burden does not shift where a party relies on hearsay.

10. The allegation that the respondent's driver was negligent therefore remained unproven. No nexus was shown to exist between the unidentified traffic charge and the particulars of negligence made against the appellant's driver. Finally, the particulars of the traffic offense charges were not produced in court to show that the appellant's driver was found guilty and fined and/or jailed for Section 47A of the *Evidence Act* to come into play. Reliance placed on the case of Kennedy Muteti Musyoka v Abedinego Mbole [2021] e KLR, Clistus Ochieng Oyalo & Others Vrs Mr & Mrs Aoko, Civil Appeal No. 130 of 1996 & CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978] EKLR.

11. On whether the damages awarded were too high, it was submitted that the minor's injuries were proved through the medical report by Dr. Mwende K Ndibo who assessed permanent disability at 2%. An award of kshs.600,000/= would be fair based on the following cases: Telkom Orange Kenya Limited v SO minor suing through his next friend and mother JN [2018] e KLR, Civil Holdings Co Ltd vs Hellen Anyango Okeyo & another [2020] e KLR, GA (minor suing through her father and next friend BZ v Paul Muthiku [2020]e KLR.

12. The Appellant further submitted that the cases cited by the respondents involved severe injuries, including those with multiple fractures and therefore had greater assessments of permanent disability. The said citations were not relevant to the instant case and they urged the court to vary the damages awarded.

13. The Appellant urged this court to find that their Appeal had merit and it be allowed as prayed.

(ii) Respondent Written Submissions

14. The Respondent gave a background of the pleadings and facts relating to the accident, which resulted in the plaintiff sustaining serious injuries. The Appellant stated in their defence that they would initiate third party proceedings as against the owner/driver of the 2nd suit motor vehicle but did not do so and further during hearing did not deem it necessary to call any witness. It was to be noted that the Appellants witness had filed their witness statement, where their Magton Kinona Wamati (the appellant's driver) expressly admitted liability for the accident, which occurred as he was driving on the wrong side of the road.

15. By virtue of provisions of Order 2, Rule 11 of the Civil Procedure Rules, the parties were bound by the pleadings filed, unless traversed by the opposite party. At paragraph 5 of the plaint, the respondent had expressly blamed the Appellants driver for causing this accident and in response, the Appellant had traversed the same and alleged that it was the driver of the 2nd suit motor vehicle that was negligent. This implied that they admitted that an accident did occur save for contribution, but failed join the 2nd suit motor vehicle driver as a third party. The trial court was therefore right to hold that the Appellant driver was negligent and they were fully liable for the accident that occurred. Reliance was placed on the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 0thers(2014) EKLR, Adetoun Oladeji (NIG) Vrs Nigeria Breweries PLC SC 91/2002 & Charles Okwoyo Getume v Caroline Ntangarisa{2018} Eklr.

16. The respondent further submitted that, their evidence that the Appellants driver was subsequently charged in Kangundo Traffic Case No 276/2019 was never controverted nor did they challenge the production of the police abstract, and its content could not be ignored by court. Reliance was made to

the case of Joel Muga Opija v East African Sea Food Limited [2013] eKLR , Dakianga Distributors (K) LTD vs Kenya Seed Company Limited[2015] eKLR, Superfoam Ltd & Another vs Gladys Nchororo Mbero [2014] eKLR.

17. Finally, on the issue of liability, the respondent did submit that the Appellant never called any witness to rebut their evidence and the negligence alleged on the part of the 2nd suit motor vehicle driver was never proved. Their evidence, therefore stood unchallenged as the averments made in the statement of defence were unsubstantiated. The finding on liability was therefore correct and they urged the court no to interfere with the trial Magistrate's decision on the same. Reliance was made to the case of Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 others [2012] , Autah Singh Bahra and Another vs Raju Govindji, HCCC NO 548 of 1998, Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009} and the case of Gateway Insurance Co Ltd v Jamila Suleiman & another [2018].

18. On damages, the Respondent submitted that the award was within range, given the serious nature of injuries the Respondent had sustained. It had also not been shown that in arriving at the said decision, the trial court had exercised its discretion in an arbitrary manner, misapprehended the law or evidence adduced and finally the award, was not high too high to represent an entirely erroneous estimate. To the contrary, the award was within range of similar injury accidents and the Respondent urged court no to interfere with the same. Reliance placed in the case of Arrow Car Limited v Elijah Shamall Bimomo & 2 others [2004] Eklr, Florence Ngina Nyalando Achacha v Daniel Munyua Njathi & another [2015] EKLR, Joseph Mwanza vs Eldoret Express [2004], Catholic Diocese of Kisumu v Tete [2004] eKLR, P.N.Mashru Limited v Omar Mwakoro Makenge [2018] EkLR. Nyambati Nyaswambu Erick Vrs Toyota Kenya Ltd & 2 others HCCA NO 66 of 2018 & Bashir Ahmed Butt Vrs Uwais Ahmed Khan (1982-88) KAR 5.

19. The court was urged to dismiss this appeal with cost to the Respondent.

Analysis and Determination.

20. I have considered the pleadings, evidence presented and submissions of the parties in this appeal. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions. As held in Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123 it was stated that;

> " 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 principals 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 conclusion 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 demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed Saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270,

21. Also in the court of appeal case of *Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No 77 of 1982*{ 1982 -1988}1KAR 278 the appellate court did state 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 circumstance's 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."

22. The issues which arise for determination in this appeal, is whether liability was correctly apportioned and whether the quantum awarded was inordinately high to warrant a review of the same by this court.

i. Liability

23. The court in Khambi & Another vs. Mahithi and Another [1968] EA 70, held that:

> " It is well settled that where a Trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge"

24. PW1 was the only witness who testified and produced all claim supporting documents as Exhibits in support of their case. She did not witness the said accident but blamed the 1st suit motor vehicle driver for being negligent based on information given to her by the police. She further alleged that the said driver was eventually charged in Kangundo Cmcr Traffic case No 276 of 2019, but did not provide proof thereof.

25. The appellant did not call any witnesses to rebut the evidence of the respondent, but averred that her evidence was hearsay and the evidentiary burden did not shift. The burden of proof was not discharged and it was therefore wrong for the trial court to find them 100% liable for the accident which occurred.

26. Order 7 Rule 5 of the Civil Procedure Rules provides that,

> " The defence and counterclaim filed under rule 1 and 2 shall be accompanied by
>
> a. an affidavit under order rule 1(2) where there is a counterclaim,
>
> b. a list of witnesses to be called at the trial,
>
> c. written statements by witnesses, except expert witness, and
>
> d. copies of documents to be relied upon.

27. Order 7 rule 5 of the Civil Procedure Rules as read with Section 2 of the *Civil Procedure Act*, confirms that the statement of defence and accompanying documents are pleadings, which a party relies upon to prove/defendant their case, as the circumstances may dictate. The court must primarily consider the pleadings filed and evidence adduced to arrive at a logical determination of matters arising.

28. The Appellant filed two witness statements of Magaton Kinona Wamati (the driver of the Appellants motor vehicle) and Titus Kipngetich Solit, (turn boy) both of whom confirmed that the said accident occurred when the Appellant driver was overtaking a salon car and his vehicle collided head-on with an oncoming matatu, being the 2nd suit motor vehicle. The Appellant deliberately failed to call the said witnesses to testify as their evidence would bolster the respondents' case. The court cannot turn a blind eye to the pleadings filed and takes judicial notice of the facts stated in the said witness statement, which amount to admission of liability.

29. Section 17 and 18 of the *Evidence Act*, Cap 80 also deals with issue of Admission of evidence. Section 17 of the *Evidence Act*, Cap 80 defines admission general as;

> " An admission is a statement, oral or documentary, which suggests and inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned."

30. Section 18(1) of the *Evidence Act*, Cap 80 also provides that;

> " statements made by a party to the proceedings, or by an agent to any such party whom the court regards in the circumstances of the case as expressly to impliedly authorized by him to make them, are admissions."

31. Therefore, while I do find and hold that PW1 did not witness the accident and gave hearsay evidence regarding parties liability to the said accident, the Appellants witness statements, which are part of the pleadings field herein, confirmed the Appellants culpability and having " fried themselves in their own fat," they cannot be allowed to run away from their pleadings where they themselves had established their own wrong doing. The trial court finding that they were 100% liable for the accident therefore cannot be faulted.

ii. Quantum.

32. In Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

33. The Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 also restated these principles which should guide the court in awarding damages, where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it

> is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured.

34. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 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 wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages 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."

35. Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision on whether or not to interfere with an award by the trial court must necessarily be restricted.

36. The respondent suffered various injuries which were classified in the P3 form and by Dr Mwende K Ndibo as Grievous harm. The injuries suffered included mild head injury (Transient loss of consciousness), left interior orbital rim and greater wing sphenoid fracture, scalp laceration on the right temple region extending to the right eye brow, deep cut wound on the right ear extending to the eye brow, right eye lid avulsion, tenderness and swelling on the face, bruises on the right knee and on the left shin and tenderness and swelling on the lower limbs bilaterally. The said injuries were proved by the P3 form, the medical report of Dr. Mwende K Ndibo and various treatment notes filed from Kenyatta National Hospital.

37. I have perused the authorities relied on by both parties herein. I am alive to the fact that no two injuries can be exactly the same. However, I find the authorities relied on by the respondent herein are far more comparable to the injuries sustained by the Respondent. For example, in the case of Catholic Diocese of Kisumu vs Tete [2014], the respondent suffered head injuries-moderate to severe concussion, cut wound on the scalp and other soft tissue injuries and whereas in the case of Joseph Mwanza vs Eldoret Express the plaintiff suffered head injury with multiple facial injuries, lacerations right frontal scalp, diplopia of right eye, swelling and tenderness facial side bone where the court awarded kshs.1,300,000/= and kshs.1,200,000/= respectively as general damages.

38. The Appellant has not proved that the trial court erred in her estimation of the damages, based the award on wrong principles or that she misapprehended the evidence in some material aspect. There is therefore no basis upon which this court can interfere with the damages as awarded as the same was proportional and reflected the trend of previous, recent, and comparable awards.

Disposition

39. Having exhaustively analyzed all the issues raised in this appeal I find that the same has no merited and dismiss the same with costs to the Respondent.

40. The Costs herein are assessed at Kshs 200,000/= all inclusive.

41. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 25th day of November, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam/Susan Court Assistant