



Otieno v SOO (Minor Suing through Next Friend RAO) (Civil Appeal E125 of 2024) [2024] KEHC 16601 (KLR) (31 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E125 OF 2024
RE ABURILI, J
DECEMBER 31, 2024**

BETWEEN

WILFRED OMONDI OTIENO APPELLANT

AND

SOO RESPONDENT

MINOR SUING THROUGH NEXT FRIEND RAO

*(An appeal arising out of the Judgement & Decree of the Honourable
J. Kimetto in the Principal Magistrate's Court at Maseno delivered
on the 21st May 2024 in Maseno PMCC No. E076 of 2021)*

JUDGMENT

Introduction

1. This appeal is part of a series of matters filed against the appellant herein which include Civil Appeal E124 of 2024 between the same parties save that the plaintiff/ respondent in the latter matter is RAO who is the next friend for the minor in this matter sued in her own right as the injured claimant.
2. The appeal herein arises from a claim filed by the respondent through his mother RAO, vide a plaint dated 16th April 2021 and determined in the trial court wherein the respondent sought general and special damages for injuries sustained in a road traffic accident that occurred on the 1st January 2021.
3. The respondent herein was a baby being in the company of his mother and both were pillion passengers aboard motor cycle registration number KMCY 324Z that was hit by motor vehicle registration number KCY 204L Toyota Isis Station Wagon owned by the appellant that was driven carelessly and recklessly causing it to veer off its lane and onto the motor cycle's lane.



4. The appellant denied all the respondent's claim vide his statement of defence dated 28th May 2021 and attributed negligence on the part of both the respondent and the rider of motor cycle registration KMCY 324Z.
5. Following the trial, the trial magistrate rendered her judgement on the 21st May 2024 in which she found the appellant 100% liable for the accident before proceeding to award the respondent general damages of Kshs. 250,000 as well as the proven special damages of Kshs. 7,150 and costs of the suit.
6. Aggrieved by the trial court's judgement, the appellant filed this appeal dated 18th June 2024 raising the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact in arriving at a decision that is contrary to the law and facts/evidence before the court.
 2. That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record thus reaching an erroneous finding on quantum and liability awarded to the respondent.
 3. That the learned trial magistrate erred in law and fact by failing to consider and analyze the appellant's submissions and the judicial authorities tendered before court thereby arrived at wrong findings on the issues before the court.
 4. That the learned magistrate erred in fact and in law in ignoring the testimony of the appellant that the respondent boarded a motor cycle being controlled by an unqualified rider, wore no protective gear and took absolutely no measures to avoid the accident thus contributing to the accident.
 5. That the learned trial magistrate erred in law and facts by making an award of general damages that was excessive in the circumstances and not in consonance with earlier precedence.
 6. That the learned trial magistrate erred in law and facts by failing to find that the respondent had failed to prove her case and thereby failing to dismiss the case for want of merit.
7. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

8. On behalf of the appellant, it was submitted that the Respondent failed to produce any substantive evidence and/or call any independent witness to corroborate her testimony and allegations of negligence on his part. It was further submitted that the inadequacy in the Respondent's evidence as to how the accident occurred and/or causation thereof is a clear indication that the Respondent failed to prove her case on a balance of probability further that the Police abstract produced by the Respondent did not show who was to blame for the accident but only indicated that the matter was pending under investigations.
9. The appellant submitted that the trial court erred in making its determination that the Appellant was wholly to be blamed for the accident despite the fact that the Respondent was aware that the rider was not qualified to operate the motor cycle but chose to board nevertheless. The appellant urged the court to look at the cases of
10. The Appellant invited this Court to consider the cases of Daniel Mbeche Sero v Husseina Enterprise & Another (2020) eKLR and that of Evans Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR where it was stated inter alia that the burden of proof was at all times upon the plaintiffs to prove their case and that is not in doubt



11. On the quantum of damages awarded by the trial court, the appellant submitted that the award of Kshs. 250,000 was quite excessive in the circumstance considering that the respondent sustained soft tissue injuries and further that the medical report produced in court did not show that the convulsions were caused by the accident.
12. It was the appellant's submission that an award of Kshs. 100,000 would have been reasonable considering the injuries sustained by the respondent. The appellant further submitted that the treatment notes filed in court from Siaya County Referral Hospital and Inuka Hospital only showed 'mild head injury and a deep cut wound' as the only injuries suffered by the Respondent after the accident and that for them to appear in court with a whole list of injuries in the medical report that were not included in the initial treatment notes is worth noting, an attempt to misguide and mislead court as these were the only injuries mentioned under section B of the P3 form filed in court.
13. Further Reliance was placed on the case of *Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihaki* (Civil Appeal 54 of 2016) [2018] KEHC 8799 (KLR) (1 February 2018) (Judgment) where the injuries suffered by the Respondent included minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg and the Judge concluded that these amounted to soft tissue injuries, while substituting an award of Kshs. 300,000 with Kshs. 100,000.

The Respondent's Submissions

14. On liability, the respondent's counsel submitted that the appellant failed to demonstrate that the trial court erred in apportioning liability as it was the appellant who failed to stop after the accident. The respondent further submitted that there was nothing to warrant this court's interference with the award on liability as was held in the cases of *Mkuba v Nyamuro* [[1983] KLR, *Peres Wambui Kinuthia & Another v S.S. Mehta & Sons Limited* [2015] eKLR and *Kenya Bus Services Ltd v Humphrey* where the Court of Appeal cited the case of *Kansa v Solanki* [1969] EA 318.
15. On the issue of quantum, the respondent urged the court not to interfere with the trial court's award as the same was not excessive considering the injuries sustained by the respondent. Reliance was placed on the cases of:
 - a. *Fred Barasa Matayo v Channan Agricultural Contractors* [2013] eKLR where the court reviewed downwards an award of Kshs. 250,000 to Kshs. 150,000 for moderate soft tissue injuries that were expected to heal in eight months.
 - b. *Dickson Ndungu v Thresia Otieno & 4 Others* [2014] eKLR where the court reviewed the award of Kshs. 250,000 to Kshs. 127,5000 for soft tissue injuries which produced no present complaints.

Analysis and Determination

16. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.”

17. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

18. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, I find the following issues for determination: -

- i. Whether or not the finding that the appellant was wholly liable for the accident was fair and reasonable in the circumstances of this case.
- ii. Whether or not the award of quantum was excessive in the circumstances of this case so as to warrant interference by this court.

19. This court has dealt with the issues under the separate heads shown herein below.

Liability

20. On liability, in *Khambi and Another v Mahithi and Another* [1968] EA 70, it was 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.”

21. That position was also taken in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

22. The law is clear that he who alleges must prove. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein he was allegedly injured.

23. The respondent’s mother testified as PW1. She adopted her witness statement dated 16/4/2021 as her evidence in chief in which she reiterated her narration of the accident as stated in the plaint. She further produced the already filed documents as exhibits 1 – 12.

24. In cross-examination, the respondent’s mother testified that the respondent was her son and that she was with him during the accident. She testified that the child sustained injuries on the head with some cuts, injuries on the chest and back; that he was okay but convulses while biting his teeth or clenching them.

25. On his part, the appellant testified that he was driving but met an oncoming motorcycle that had 3 passengers together with the rider and that they had no helmets on. The appellant reiterated that he



- tried to avoid the accident but the motor cycle rider still came to his side and they collided. He testified that after the accident, he stopped the motor vehicle and organized for the respondent to be taken to the hospital. He testified that the following day, he took the occupants of the motor cycle to Siaya District Hospital for a CT scan, bought the motor cycle rider crutches and used to send him money.
26. In cross-examination, the appellant confirmed that he had not produced anything to show that he paid for the treatment and that neither had he provided any receipt to prove damages of his motor vehicle. The appellant further admitted that he had not called the alleged witness who he claimed was with him when the accident occurred.
27. I have considered the varying testimonies by both parties and their submissions in support of and against the appeal herein. In *Andrews v Freeborough* (1966) 2 ALL E.R. 721 where a child aged 8 years stepped onto a kerb into the path of an oncoming car, Wilmer, LJ stated, and I concur:
- “I should have a good deal of persuasion before imputing contributing negligence to the child having regard to her tender age.”
28. Davies LJ in the same case stated:
- “Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness.”
29. In *Gough v Thorne* (1966) 1 WLR 1389, the Appellate court of England refused to apportion liability or negligence to a girl aged 13 ½ years old who was knocked down while crossing the road. Lord Denning stated:
- “A very young Child cannot be guilty of contributory negligence. An Older Child may be. But it depends on the circumstances. 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 own safety; and then he or she is only to be found guilty if blame is attached to him or her. He or she is not to be found guilty unless he or she is blameworthy”
30. In the persuasive case of *Miller v Graf* 196 Md. 609, 78 A. 2d 220 (1951), the Court, after deciding that there was sufficient evidence of negligence, from skid marks and other evidence of speed, to allow the case to go to the jury, said:
- “It is also plain that the child in this case cannot be held guilty of contributory negligence as a matter of law. In considering the question of contributory negligence, the Court recognizes that a child is required to exercise only that degree of care which a reasonably careful child of the same age and intelligence would exercise under similar circumstances. The mere fact that a young child, when frightened or bewildered, turns around in the street near one sidewalk and starts to come back to the other sidewalk when called by the screams of a parent is not necessarily evidence of negligence. In this case the child was only four years old at the time of the accident. We have definitely held that a child four years old cannot be guilty of contributory negligence under any circumstances.”
31. In *Bashir Ahmed Butt v Uwais Ahmed Khan*, Civil Appeal No. 40 of 1977, Madan J.A. said;
- “Indeed, I am of the opinion that the practice of civil courts ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of doing the



act or making the omission, he had capacity to know that he ought not to do to the act or make the omission.”

32. The aforementioned was reiterated in the case of ALA (Suing as the Next Friend and Father to ZM) v Philip Obonyo Oluoch [2021] eKLR.

33. Finally, in Rahima Tayab v Anna Kinanu [1983] KLR 114; it was stated;

“A judge should only find a child guilty of contributory negligence if he or she is of such age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her.”

34. According to Lord Denning, the test is whether the child is of such an age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child. For instance, in Attorney General v Vinwood [197] E.A. an 8 ½ year boy was found to have minimally contributed to the accident owing to his age and degree of intelligence at that time because he crossed the road in between two parked cars and was hit by a vehicle which was being driven at 15 miles per hour. The Court of Appeal agreed with the trial judge for apportioning liability at 10% to 90% against the Defendant as the child was said to have clearly misjudged and miscalculated when he thought he could safely cross the road at the material time that he did. Thus, each case depends on its own circumstances.

35. Turning to this appeal, and considering that the respondent is a child and had no control over having boarded or controlled the suit motor cycle or even control of the suit motor vehicle, it is my view that the respondent baby bore no liability in causation of the said accident. I have had occasion to decide on a similar issue in QVA (Minor Suing Through her *Mother and Next Friend MGO*) v *Ogedah (Civil Appeal E055 of 2022)* [2024] KEHC 480 (KLR) (22 January 2024) (Judgment) where I stated:

“Accordingly, it is my finding that the appellant had discharged the burden of proof and proved on a balance of probabilities, that the Respondent’s driver was negligent. I find that there was no material to apportion liability between the appellant minor and the Respondent’s driver, even if the minor’s mother did contribute to a larger extent, to the injuries she herself sustained as she rode on the motorcycle without a helmet and with three children.

36. I thus find that the trial court did not err in failing to apportion liability against the respondent baby and in finding the appellant 100% liable for the material accident. I uphold the finding.

Quantum

37. The appellant submitted that the award on quantum made in favour of the respondent was inordinately high considering the injuries sustained by the respondent and past comparable awards and that this court ought to reduce the same to Kshs. 100,000. The appellant further submitted that the respondent only suffered soft tissue injuries and that there was no evidence adduced of the alleged convulsions as the same were not in the original treatment notes.

38. In *Butt v Khan* [1982-88] KAR 1 it was held -

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded



on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

39. I have considered the evidence tendered in support of the injuries sustained and submissions on quantum of damages together with the authorities cited by the parties. The following is my analysis and finding, applying the relevant legal principles on assessment of damages.

General Damages

40. In dealing with an appeal on quantum, this court is guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where it was held that:

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

41. In the case of *Savanna Saw Mills Ltd v Gorge Mwale Mudomo* (2005) eKLR the court stated as follows:

“It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ...”

42. The other critical point of convergence for the court is to bear in mind the fact that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the Learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. (See *Simon Tavera v Mercy Mutitu Njeru* [2014] eKLR).

43. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab v Kinanu* [1983] KLR 114 and *West (H) & Son Ltd v Shephard* [1964] AC 326, 345).

44. The respondent pleaded that he sustained the following injuries in the material accident:

- i. Head injury with and cut wounds
- ii. Injury to the chest with bruises
- iii. Injury to the back with swelling
- iv. Injury to the left elbow joint with bruises
- v. Injury to the right leg with bruises

45. The said injuries were substantiated in the treatment notes from Inuka Hospital and Siaya County Referral Hospital and in the P3 form all produced as exhibits 4, 5 and 7. I do note that the respondent’s pleadings do not provide for him suffering any convulsions and further, that none of the hospital treatment documents relied on by the respondent provides for him suffering convulsions. The said



convulsions were thus not pleaded nor proven and as such, it is my opinion that the only proven injuries sustained by the respondent were soft tissue injuries which were pleaded.

46. I have considered the authorities relied on by both parties herein. In Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others [2019] eKLR Majanja J set aside the lower court award of Kshs. 55,000 for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000.
47. In Ufrah *Motors Bazaar & another v Kibe (Civil Appeal 39 of 2021)* [2023] KEHC 1285 (KLR) (27 January 2023) (Judgment) where the respondent sustained soft tissue injuries similar to the ones sustained by the minor herein and the appellate court upheld the trial court's award of Kshs. 220, 000 as general damages.
48. In the circumstances of this case, I find no reason to interfere with the trial court's award on general damages of Kshs. 250,000 and I proceed to uphold the same.
49. The upshot of the above is that I find that this appeal lacks merit and I proceed to dismiss it. This matter is related to HCCA 124 of 2024. In the latter appeal, the court apportioned liability between the appellant and the respondent in the ratio of 80:20. The two appeals have been fast tracked to hearing. I order that each party bear their own costs of this appeal. Decree to be drawn.
50. The lower court file to be returned with copy of this judgment via email.
51. Judgment to be uploaded.
52. This file is closed

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

