



REPUBLIC OF KENYA



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Were v RMA (Suing Through His Father and Next Friend JAK – Deceased) (Civil Appeal E140 of 2023) [2024] KEHC 16568 (KLR) (31 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E140 OF 2023
RE ABURILI, J
DECEMBER 31, 2024**

BETWEEN

EDWARD MUTESA WERE APPELLANT

AND

**RMA (SUING THROUGH HIS FATHER AND NEXT FRIEND JAK –
DECEASED) RESPONDENT**

*(An appeal arising out of the Judgement & Decree of the Honourable
G. Serem in the Chief Magistrate’s Court at Kisumu delivered
on the 25th July 2023 in Kisumu CMCC No. E510 of 2021)*

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a plaint dated 23rd November 2021 for amongst others, general damages, special damages, future medical expenses, damages for loss of earnings and future earning capacity as well as costs of the suit for injuries sustained following a road traffic accident that happened on the 13th October 2021 along the Kisumu – Nairobi road.
2. The respondent averred that on that particular date, the respondent’s son was crossing the road at Nyamasaria Centre Zebra crossing along the Kisumu – Nairobi road when the defendant negligently and/or recklessly drove motor vehicle registration no. KCL 973N, Toyota Axio in such a manner that he caused the same to hit and knock down the respondent’s son.
3. In response, the appellant filed a statement of defence dated 14th June 2022 in which he denied all the particulars in the plaint save for the descriptive parts of the plaint being paragraphs 1 and 2. The appellant further averred that the respondent’s son contributed to the occurrence of the accident.



4. The trial magistrate apportioned liability at 100% against the appellant on the grounds that the appellant failed to adduce any evidence in support of its case. The court proceeded to award general damages of Kshs. 500,000, future medical expenses of Kshs. 1,300,000, special damages of Kshs. 7,550 as well as costs of the suit.
5. Aggrieved by the trial court's judgement, the appellant filed his appeal dated 18th August 2023 in which he raised the following grounds of appeal:
 1. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same.
 2. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on evidence adduced and the submissions filed by the appellant.
 3. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.
 4. The learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.
 5. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the appellant.
 6. The learned trial magistrate erred in failing to hold that the respondent had failed to prove negligence on the part of the appellant while the onus of proof lay with the respondent.
 7. The learned trial magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to be awarded to the respondent and failed to apply precedents and tenets of law applicable.
 8. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
 9. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that the glaring myriad of contradictions contained in the documentary evidence produced by the respondent and by the testimonies by the respondent's witnesses filed and adopted by the trial court should accord the appellant benefit of doubt and find the respondent liable for the accident.
8. It was submitted that the judgement by the trial magistrate did not demonstrate proper analysis of the facts and the law and as such the conclusion therein was unsustainable in law.
9. The appellant submitted that the mere fact that an accident occurred does not follow that a particular person has driven negligently as was held in the case of Jamal Ramadhan Yusuf v Ruth Achieng Onditi & Anor [2010] eKLR.



10. On quantum it was submitted that the trial magistrate based his judgement on wrong principles of law as there was no medical evidence adduced in support of the respondent's son injuries and thus this court ought to set aside the trial court's decision on the same as was held in the case of Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR.
11. The appellant submitted that an award of Kshs. 200,000 would be commensurate with the injuries sustained by the respondent's son. Reliance was placed in the cases of;
 - a) Elizabeth Wamboi Gichoni v JOO (Minor suing through mother and next of friend) VAA [2019] eKLR where the court on appeal reduced the award for general damages from Kshs. 350,000 to Kshs. 180,000 for similar injuries that had healed and/or were expected to heal with no disability occasioned.
 - b) Nickson Kazungu Karisa & Another v Isaac Solfa Muye [2020] eKLR where the court of appeal set aside an award of Kshs. 400,000 and substituted the same with Kshs. 275,000 as damages for injuries similar to those suffered by the respondent herein.

The Respondent's Submissions

12. The respondent submitted that the appellant's allegation that his evidence was contradictory were unfounded and further that he produced a CT scan from JOOTRH as P Exh. 5 (b) that indicated that he had a displaced fracture of the angle of the right mandible essentially showing that he broke his right jaw bone.
13. It was his submissions that he duly proved his case on a balance of probabilities and the trial court rightfully held the appellant 100% liable.
14. On quantum, the respondent submitted that the authorities relied on by the appellant did not relate to the same injuries. The respondent submitted that the court ought to uphold the general damages award of Kshs. 500,000. He relied on the following cases;
 - a) Ahmed Mzee Famau t/a Najaa Coach Ltd and Another v Veronica Ngii Muia aka Veronica Muya aka Veronica Ngui Muiya [2017] eKLR where the plaintiff sustained the fracture of the right mandible, deep cut on the left forearm, blunt object injury to the right ear and blunt object injury to the chest and the court affirmed an award of Kshs. 500,000 as general damages.
 - b) Telkom Orange Kenya Ltd v JSO Minor suing through his next friend and mother JN (2018) eKLR where the court awarded a sum of Kshs. 500,000 as general damages 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.
 - c) Peter Muvake & Another v Agness Nduku Mutie (2018) eKLR where the court on appeal upheld an award of Kshs. 400,000 where the Respondent suffered chest injury, fractured mandible, injuries on the right knee.

Analysis and Determination

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and reach its own 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 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.”

16. 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 *Mkubo 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.”

17. In Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, I find the issues for its determination to be:
- a. Whether or not the finding on liability was fair and reasonable in the circumstances of this case.
 - b. Whether or not the award of quantum was unjustified in the circumstances of this case so as to warrant interference by this court.
18. This court will therefore deal with the issues under the separate heads shown herein below.

Liability

19. 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.”

20. That was the position 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.
21. 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.
22. None of the respondent’s witnesses saw the accident take place. The closest the court got to a narration of the accident was the testimony of PW3, PC Simon Biwott who produced an abstract dated 21st October 2021 as P Exh. 2 detailing the occurrence of an accident. It is trite that a police abstract is not evidence of an accident occurring but rather that the said accident was reported.
23. However, the testimony of PW1, the father of the respondent, in cross-examination was that he was informed that his son had been involved in accident while crossing the road and so he proceeded to the



- scene where he found the son herein lying on the road and subsequently took him to hospital where he was treated. PW1 reiterated in re-examination that the scene of the accident was at a zebra crossing.
24. From the evidence above, it is clear that an accident did occur. The question this court has to answer is whether the appellant was wholly to blame for the material accident.
 25. The testimony of the respondent's father was that he was hit at a zebra crossing was based on the fact that he found the respondent lying on the road near a zebra crossing. He however did not see the accident take place at a zebra crossing and neither did the person who told him testify on what he saw. Further, the police who issued the abstract did not say why they did not produce a sketch plan or map of the accident scene to confirm that it was at a zebra crossing. Additionally, the respondent was 16 years old and hence not a child of tender years and as at the time of hearing of the case, there was no evidence adduced as to why he could not testify to tell the court on what transpired.
 26. It is true that the defendant did not adduce any evidence or call any witness in support of its case. In the case of *Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002*, Lessit, J citing the case of *Autar Singh Bahra and another v Raju Govindji, HCCC No. 548 of 1998* appreciated that:

“Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
 27. In the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No 1243 of 2001* the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
 28. However, the burden of proof still lies on he who alleges and in this case, the plaintiff was under a duty to prove on a balance of probabilities that the defendant was wholly to blame for the accident.
 29. The fact of the accident occurring at a zebra (pedestrian) crossing as testified by PW1 would suggest that the respondent was using the correct part of the road in crossing the road and that the appellant was indeed negligent and/or reckless in his handling of motor vehicle registration no. KCL 973N, Toyota Axio. He ought to have slowed down or even stopped at the pedestrian crossing to allow the pedestrians cross before proceeding on. He was expected to give way for other road users. However, there was no witness who saw the plaintiff/ respondent being knocked on a pedestrian crossing and therefore it would be incorrect to adopt the evidence of his father as fool proof of exactly what happened. The respondent could have been knocked far off the zebra crossing and dragged up to the scene. There are many possibilities which only the respondent or an eye witness could tell. They chose not to tell the court.
 30. The appellant on the other hand in his submissions in this appeal attempted to lead evidence to the effect that there was another car in the accident as gleaned from the evidence presented by the respondents. Firstly, it is trite that submissions do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions and on appeal without leave of court to adduce additional evidence. I have considered the evidence adduced before the trial court. No such evidence of involvement of another car was adduced. See the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR*. Secondly, the appellant had



the opportunity, before the trial court, to enjoin the alleged other driver in lines with the provisions of Order 1 Rule 15 of the Civil Procedure Rules.

31. The above leads me to the conclusion that both the appellant and the respondent were equally to blame for the occurrence of the accident which took place in the evening hours. The court was told of the state of the road, if straight or at a corner, the weather condition, visibility etc.
32. Accordingly, I am inclined to disturb the findings of the trial court on liability. I set aside the order finding the appellant to be 100% liable and substitute it with an order that both the appellant and the respondent were equally to blame in the ratio of 50:50.

Quantum

33. The appellant submitted that the award on quantum to 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. 200,000. The appellant however did not plead or address this court in regards to the award of future medical expenses or special damages.
34. In *Butt v Khan* [1982-88] KAR 1 it was held that:

“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”.
35. I have considered the submissions tendered together with the authorities cited by the parties.

General Damages

36. 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).
37. The respondent pleaded that he sustained the following injuries:
 - Head injuries with and cut wound loss of consciousness
 - Injuries to the neck
 - Injuries to the mouth and teeth
 - Injuries to the chest
 - Injuries to the back with bruises
 - Injuries to the L knee with bruises
 - Injuries to the L ankle joint with a cut wound
38. The said injuries were substantiated in the Discharge summary and CT Scan report produced by PW4 as P Exh. 5a and b. PW2 who also examined the respondent testified that based on his examination,



he established that the respondent had sustained a fracture to the right mandible as well as other soft tissue injuries. It was his testimony through his report adduced as P Exh. 6a that at the time of examination of the respondent, he would require 1.3 million for future medical expenses for analgesics and physiotherapy.

39. From the uncontroverted evidence adduced by the respondent, it is clear that the respondent sustained an injury to the right jaw as well as other soft tissue injuries.
40. I have considered the authorities relied on by both parties herein and I find that those relied on by the respondent are comparable in the injuries sustained juxtaposed against those relied on by the appellant.
41. I thus find no reason to interfere with the trial court's award of general damages of Kshs. 500,000 for pain, suffering and loss of amenities. I do not disturb the other awards as they were not challenged. I uphold the same. However, the general damages as awarded shall be subjected to 50% contributory negligence.
42. The upshot of the above is that I find that this appeal merited and proceed to allow it to the extent stated above.
43. As the appellant has only succeeded on liability being split and shared equally, I order that each party shall bear their own costs of the appeal.
44. Lower court file to be returned with a copy of this judgment via email.
45. This file is closed.

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

R.E. ABURILI

JUDGE

