Interpel Investments Limited v DBM (Minor Suing through Next Friend and Father JMMO) (Civil Appeal E026 of 2023) [2024] KEHC 16396 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E026 OF 2023

RN NYAKUNDI, J

DECEMBER 23, 2024

BETWEEN

INTERPEL INVESTMENTS LIMITED ..... APPELLANT

AND

DBM ..... RESPONDENT

MINOR SUING THROUGH NEXT FRIEND AND FATHER JMMO

JUDGMENT

Representation:

1. The appeal is both on quantum and liability. In the trial Court the Respondent had sued the Appellant claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 19/12/2019, wherein it is alleged that the Respondent was a lawful passenger aboard motor vehicle registration number KDH 2005011486 along Eldoret-Nakuru road at Kondoo area when the said motor vehicle owned by the defendant was being driven at a high speed, so negligently, recklessly and/ or without any due care, regard and/ or attention by the defendant's servant, agent and or authorized driver that it lost control veered off the road and rolled hence occasioning the claimant severe injuries.

2. The appellant filed a response to the statement of claim dated 26th September, 2022 and denied the occurrence of the accident. He instead blamed the respondent for the occurrence of the accident and stated that the same was contributed to by the negligent acts and omissions on the part of the respondent.

3. After trial Judgment was delivered on 27/1/2023 and the Appellant was found 100% liable and damages assessed as hereunder: -

    a. General Damages..... Kshs.180,000/=

b. Special Damages..... Kshs.6,000/=

c. Total .....Kshs.186,000/=

d. Plus, costs and interests

4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (12) grounds: -

a. That the learned trial magistrate improperly exercised her discretion and/or duty by taking into account matters which she ought not to have taken into account and failing to take into account matters which she should have taken into account.

b. That the learned trial magistrate erred in law and fact rendering a decision which was against *the constitution* of Kenya, the *law of succession Act*, the *Fatal Accidents Act*, the *Law Reform Act*, The *civil procedure Act*, The *Evidence Act* and the Applicable Common Law.

c. That the learned trial magistrate erred in law and fact in apportioning liability at 100% against the appellant.

d. That the learned magistrate erred in failing to appreciate and find that at all times the burden of proof rested upon the Respondent.

e. That the learned magistrate erred in failing to consider and adopt the only available evidence tendered on the circumstances of the accident in question on his determination of liability.

f. That the learned magistrate erred in reaching a conclusion of liability which was directly in contrast from and against the weight of the evidence tendered at the trial adopting a selective and biased approach to the evidence tendered in this case.

g. That the learned magistrate erred in fact and in law by failing to consider the appellant's pleadings.

h. That the learned magistrate erred in shifting the burden of proof and imposing upon the appellant standard of proof which is higher than that relevant and applicable for cases of this nature.

i. That the learned trial magistrate erred in failing to list and determine all issues arising from the pleadings and evidence tendered before her.

j. That the learned magistrate erred in making awards of damages which were inordinately excessive on the circumstances of this case and contrary to the principles applicable to and trend of awards of this nature.

k. That the learned magistrate erred in making awards of damages which are not supported by the applicable law and facts.

l. That the learned magistrate erred in failing to take into consideration and applying the principles of facts and law relevant and applicable in assessment of damages.

5. The appeal was canvassed through written submissions. The Appellant on 22/01/2024 filed submissions dated 17/01/2024 whereas the Respondent filed none at the time of drafting this judgment.

The Appellant's Submissions

6. On liability, learned counsel for the appellant started by submitting that it was not the registered and/ insured owner of the subject motor vehicle registration number KDH 2005011486 as at the time of the occurrence of the alleged accident on 19.12.2019. He cited section 8 of the *Traffic Act* on this. It was his argument that a perusal of page 28-36 of the record of appeal reveals that the subject motor vehicle was owned by Sadat Zahid Investment U Ltd and not the appellant.

7. It was submitted for the appellant that the Respondent failed to discharge his burden of proof as regards ownership of the subject motor vehicle registration KDH 2005011486. That the Respondent failed to produce in the least a motor vehicle copy of records or logbook to prove ownership and/or link the appellant to the ownership of the subject motor vehicle. Further, he stated that the respondent failed to produce a copy of the certificate of insurance to prove that the appellant was the insure of the subject motor vehicle.

8. The respondent maintained the position that whereas the respondent relies on the police abstract produced, it should be noted that the police abstract was challenged and all import documents revealed that the subject suit motor vehicle did not belong to the Appellant. On this he cited the court's decision in Benard Muia Kilovoo v Kenya Fresh Produce Exporters (2020) eKLR.

9. That there exists documentation to prove ownership of the subject motor vehicle registration number KDH 2005011486 which unequivocally reveal that the appellant is not the owner of the subject motor vehicle registration number KDH 2005011486 but indeed the said motor vehicle belonged to a party who was not a party to the suit.

10. In sum, the appellant submitted that the police abstract cannot be used as conclusive evidence to forcefully and conclusively link the Appellant to the ownership of the subject motor vehicle yet documentary evidence as produced by the appellant has not been challenged. Counsel invited the court to look at the decision in Joseph Wabukho Mbayi v Frida Lwile Onyango (2019), wherein the issue of vicarious liability was discussed.

11. As regards to whether the respondent proved their case on a balance of convenience, counsel submitted in the negative. He stated that the respondent failed to call any witness whatsoever to testify before court to prove their case. The Respondent failed to call the investigating officer or the doctor who allegedly prepared the medical report which the Honourable Magistrate relied on to compute general damages in favour of the respondent.

12. It was submitted for the appellant that the respondent failed to call the investigating officer to produce the abstract dated 26th August, 2020 which abstract the Honourable Court relied on to apportion liability against the Appellant. Counsel cited section 35(b) of the *Evidence Act* and the decision in Valji Jetha Kerai & another v Julius Ombasa Manono & another (2019) eKLR, in which with approval the court cited the court of appeal's decision in *Mohammed Musa & another vs peter M Mailanyi & another Civil Appeal No. 243 of 1998*.

13. In light of the above, it was stated that the respondent failed to call the doctor that prepared the medical report that he sought to rely on and the appellant did not get an opportunity to challenge the said medical report. That the court therefore erred in relying on the said medical report to determine general damages.

14. On quantum, he argued that it remains a mystery as to how the adjudicator arrived at a quantum of Kshs. 120,000/= for general damages. I however take note that the award is Kshs. 180,000/=. He

equally argued that the special damages should be set aside for reasons that they were not specifically proven.

Analysis & Determination

15. Being a first appeal, the Court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 into account of particular circumstances or probabilities materially to estimate the evidence."

16. As stated above the two limbs to this appeal are quantum and liability. The gravamen of this appeal is the question of ownership. I shall proceed to address the same and make a determination.

17. A good starting point would be Section 8 of the *Traffic Act* (Cap 403 of the Laws of Kenya) which provides that:

> " The person in whose name a vehicle registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

18. The appellant at the lower court produced a gate pass, receipts, bill of lading and a proforma invoice to establish that the motor vehicle belonged to a third party, Sadat Zahid Investment and not the appellant herein. According to him, the respondent failed to produce a copy of the certificate of insurance to prove that the appellant was the insured of the said motor vehicle. On the part of the Respondent, a police abstract was relied on as conclusive evidence of ownership.

19. With respect to the evidentiary value of a police abstract as proof of ownership, in the case of Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another, (2010) eKLR the Court of Appeal held as follows: -

> " Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

20. Additionally, in the case of *Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003* the Court of Appeal expressed itself as follows:

> " The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied

with the evidence... The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent."

21. And Warsame J. (as he then was) in the case of Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001 held as follows:

> " Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the *Evidence Act*. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence."

22. On perusing the court record, I have confirmed that indeed the police abstract was produced and its contents were challenged by the appellant. In doing so, the appellant produced a gate pass, receipts, bill of lading and a proforma invoice as part of documentation in support of his argument. That being the case and from the foregoing authorities cited, it was incumbent on the respondent to go a mile further and place before the court a certificate of search evidencing the ownership of the subject motor vehicle.

23. The Court of Appeal in the case of; Joel Muga Opinja -vs- East African Sea food limited (2013) eKLR quoted in the case of; Ignatius Makau Mutisya -vs Reuben Musyoki Muli stated that:

> " We agree that the best way to proof ownership would be to produce to the court a document from the registrar of Motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot be denied later."

24. This subject motor vehicle from the documentary evidence was an import transiting to Uganda. The Kenya Police abstract therefore is not applicable to prove ownership for it is not one of those to be registered locally with the National Transport and Safety Authority (NTSA) the sole agent tasked with registration of motor vehicles in Kenya. It follows therefore that the burden of proof vested with the Respondent as to the ownership of the motor vehicle using a police abstract was never discharged. (see the principles in Evans Nyakwana v. Cleophas Ong'aro (2015) eKLR).

25. The Court of Appeal in Daniel Toroitich Arap Moi V. 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 defence 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 has a duty to examined 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."

26. The bone of contention in this appeal is whether the Respondent and Claimant suing as a personal representative of the victim of the accident who was at the time aged one-year-old discharged the burden of proof on liability anchored in the following elements as defined in Clerk and Lindsell on the tort of negligence as follows:

    a. The existence in law of a duty of care situation.

    b. Careless behaviour by the defendant;

    c. A causal connection between the defendant's careless conduct and the damage;

    d. Foreseeability that such conduct would have inflicted on the particular claimant the particular damage of which he complains; (once (a) to (d) are satisfied, the defendant is liable in negligence and only then the next two factors arise);

    e. The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible;

    f. The monetary estimate of that extent of damage.

27. The Court of Appeal in Michaeal Hubert Kloss & Another vs. David Seroney & 5 others (2009) eKLR addressed the issue of liability and the guidelines to be followed when exercising judicial discretion to apportion negligence in Road traffic accident claims thus:

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that a matter of history several people have been at fault and that of any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."

28. In this case, the evidence by the Respondent did not discharge the burden of proof as to who was in control of the offending motor vehicle and who so negligently drove it and as a consequence of it collided with their motor vehicle to occasion loss and damage capable of being compensated by an award of damages. The act of a collision between motor vehicle Reg. No. KDH 2005011486 with motor vehicle Reg. No. KCQ 732M is not denied. What is disputed is how the accident occurred for it is neither alluded to by the Investigating officer PW1 who produced the police abstract or the Claimant PW2. The circumstances of the accident to give rise to the inference of negligence are nowhere to be found in the testimony of PW1 and PW2. It is the burden of proof for the Claimant to establish that the cause of the accident connotes negligence. That blameworthiness is the one which leads the court to assess damages for the loss suffered as a result of the accident. In accident claims of this nature, the doctrine of vicarious liability which creates a legal relationship to the person who did the act of driving

negligently is significant within the scope of occurrence of an accident. It is in line to this that the Court of Appel in Civil Appeal No. 31 of 1981 (CA – Nairobi) Anyanzwa v. Gasperis held:

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i. For one to establish vicarious liability it must be shown that the agent at the material time was acting on the owner's behalf and for the owner's benefit.

ii. A third party who has been injured by the negligent act of a driver of an insured motor vehicle of another person may have his damages satisfied by the Insurer of the motor vehicle only if the driver .... Was joined as a defendant, his negligence established and judgment obtained against the driver or his employer. It is also conditional that the insured motor vehicle was at the material time being driven by the driver as an authorized driver within the terms of the policy of insurance."

29. On the same breadth, the same court in Civil Appeal No. 119 of 1986 Khayigila v. Gigi & Co. Ltd & Another (1987) KLR 76 held

i. In order to fix liability on the owner of a car for the negligence of its driver it was necessary to show either that the driver was the owners servant, or that at the material time the driver was acting on the owners' behalf as his agent.

ii. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at owners' request, express or implied, or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.

iii. At the time of the accident the 2nd Respondent was not using the car at the 1st Respondents request but he was using it furtively against its instructions and therefore no liability attached to the 1st Respondent on the well-known principle of respondent superior."

30. In the case at bar, in order for the trial court to affix liability against the appellant as the offending motor vehicle, it was necessary for the evidence to show either the driver or employee in control of the motor vehicle on the material day, is an employee of the Appellant or he was acting on the owner's behalf as an agent or servant. What was required of the Plaintiff Respondent to this Appeal was to establish the existence of the agency relationship. That the driver who collided with the other motor vehicle on his way to Uganda, he was using the motor vehicle at the request or instructions of the Appellant to perform the task of driving the vehicle to the Republic of Uganda. I have examined the evidence on record and this conditions precedent are missing for liability to stand proven on a balance of probabilities. What are we told from the testimony of CW1? He was not even the investigating officer and had no knowledge of what transpired at the scene of the accident. All he did was to produce a police abstract with no accompanying investigation diary, witness statement and the basis of the recommendation that the appellant's vehicle was the one to blame for the accident. That being the case, prove of liability by the trial court fell in the realm of conjecture with no cogent or credible evidence to establish the logical analysis by the trial court to exercise discretion to make a finding that the appellant was liable for the accident. I find no correlation as between the ownership of the offending motor vehicle and the appellant who gave rebuttal evidence on their mandate as the clearing house of imported motor vehicles on transit to other countries in the East African region. The appellant witness at the trial court demonstrated that the driver was not at the time of the accident driving the vehicle as a servant or agent of the appellant. The witness went further to show by virtue of documentary evidence more so the bill of lading and delivery notes as the company trading in the name and style Sadat Zahid Investment U Ltd. This appeals court declines to impose vicarious liability on the part of the appellant and as a consequence of it all, the appeal is allowed with no orders as to costs.

31. On the second limb, the trial court held that the appellant was liable in negligence on the basis of scanty evidence but applying the test in furtherance of this court's jurisdiction, if liability could have been established I could have found it difficult to interfere with the award on damages

32. As to whether the award of general damages of Kshs. 180, 000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".

33. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.

34. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] Kneller. J.A, stated:

> " 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. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."

35. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

36. To start with, the injuries suffered by the Respondent were listed in the P3 form and the Medical report by Dr. Joseph Sokobe as:

    a. Cut wound on the left eyebrow

    b. Cut wound on the lower lip

    c. Cut wound on the left ear

    d. Blunt injury to the chest

    e. Lacerations on the left hand posteriorly

    f. Blunt injury on both legs

37. At this juncture it worth pointing out that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.

38. Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

39. From the evidence adduced by Dr. Joseph Sokobe medical report it is clear that the Respondent herein sustained soft tissue injuries. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.

40. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that the trial court was properly guided by the authorities cited before her and arrived at a reasonable assessment of general damages. The learned trial Magistrate cannot be faulted as the award of Kshs.180,000/= is neither too low nor too high in the circumstances. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR, the award of Kshs. 230,000/= was set aside and substituted with one for Kshs. 180,000. In JOSEPH MWANGI KIARIE & ANOTHER Vs ISAAC OTIENO, H.C.C.A NO. 30 OF 2018, in which the award of Kshs.300,000/= was reduced to Kshs.180,000/=, for soft tissue injuries. In MICHAEL ODIWUOR OBONYO Vs CLARICE ODERA OBUNDE, H.C.C.A. NO. 01/2020, the award of Kshs. 500,000/= was reduced to Kshs. 200,000/= for soft tissue injuries.

41. Turning to special damages, Kshs. 6,000/= was pleaded and strictly proved as was held in the case of Hahn vs. *Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows;

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

42. In the end the court does not find liability on the part of the appellant for reasons that he is not the owner of the subject motor vehicle. The award on damages remains undisturbed and is entered in the following terms;

    i. General Damages..... Kshs.180,000/=

    ii. Special Damages..... Kshs.6,000/=

    iii. Total .....Kshs.186,000/=

    iv. Plus, costs and interest

It is ordered so.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 23RD DAY OF DECEMBER 2024.

.....

R. NYAKUNDI

JUDGE

In the Presence of: