



**Kabutia & another v PK (Suing as the Guardian and Next Friend of DM – Minor)
(Civil Appeal E025 of 2022) [2023] KEHC 413 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E025 OF 2022
EM MURIITHI, J
JANUARY 30, 2023**

BETWEEN

ALICE KABUTIA 1ST APPELLANT

EDWARD CHIBWAYI AMWAYI 2ND APPELLANT

AND

**PK (SUING AS THE GUARDIAN AND NEXT FRIEND OF DM –
MINOR) RESPONDENT**

*(An appeal from the Judgment of Hon. E. Tsimonjero (R.M)
in Meru CMCC No.78 of 2020 delivered on 21/10/2021)*

JUDGMENT

1. Before the trial court was a claim commenced by a plaintiff dated February 18, 2020 in which the respondent herein (the plaintiff in the trial court) sued the appellants herein (the 1st and 2nd defendants in the trial court) seeking general damages for loss of amenities, pain and suffering, special damages as pleaded plus interest together with costs of the suit and interest thereon.
2. The respondent pleaded that on or about January 7, 2020 the minor was travelling as a pillion passenger aboard Motor Cycle Registration No KMER XXXX along Meru-Nkubu Road, Ngonyi area, when the 1st appellant drove, managed and/or controlled Motor Vehicle Registration No KBU XXXX so negligently that it veered off its rightful lane and rammed into the motor cycle the minor was riding in, occasioning him serious injuries, from which he claims damages.
3. The appellants denied the claim by their defence dated June 2, 2020 and prayed for the respondent's suit to be dismissed.



4. After conclusion of the trial, the trial court found the appellants to have been 100% liable for the accident and awarded general damages of Kshs 300,000 and special damages of Kshs 20,750 totaling to Kshs 320,750 plus costs and interest.

The Appeal

5. On appeal, the appellants filed their memorandum of appeal on February 18, 2022 listing 7 grounds as follows:
 1. The learned trial magistrate erred in law and fact in awarding the respondent 100% liability as against the appellants; Kshs 300,000 as general damages and Kshs 20,550 for special damages which amount was exorbitantly high in the circumstance and injuries suffered by the respondent.
 2. The learned trial magistrate erred in law and fact in holding that the respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
 3. The learned trial magistrate erred in law and fact by failing to acknowledge that the P3 is a secondary document and by relying on it while awarding the respondent.
 4. The learned trial magistrate erred in law and fact when he failed to consider the appellants' evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondent.
 5. The learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 6. The learned trial magistrate erred in law and fact in failing to pay regard to submissions and decisions filed alongside the appellants' submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
 7. The learned trial magistrate erred in law and fact in finding that the respondent was entitled to general damages that were too high in view of the injuries suffered by the respondent.

Duty of the court

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (*See Selle v Associated Motor Boat Co & others [1968] EA 123*).
7. This appeal and Civil Appeal No E024 of 2021 emanate from the same accident, and the parties are similar save for the minors who were involved in the accident. Therefore, since the evidence tendered in this matter is strikingly similar to that adduced in Civil Appeal No E024 of 2021, I will not reproduce it here.



Submissions

8. The appellants urge that since there were no initial treatment notes presented by the respondent to showcase the injuries sustained by the minor, the same were not proved on a balance of probabilities, and cite [*Benter Atieno Obonyo v Ann Nganga & Another \[2021\] eKLR*](#) and [*Sospeter Kimutai & Another v Isaac Kiplating Boit \[2021\] eKLR*](#). They urge that there was absolutely no initial evidence on the alleged injuries sustained by the minor and therefore the respondent failed to prove as such. They urge that the only injuries suffered by the minor were soft tissue in nature with absolutely no disability or permanent incapacity assessed, and rely on [*Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd \[2013\] eKLR*](#), [*Godfrey Wamalwa Wamba & another v Kyalo Wambua \[2018\] eKLR*](#), [*Michael Okello v Priscilla Atieno \[2021\] eKLR*](#), [*PF \(Suing as next friend and father of SK \(Minor\) v Victor O Kamadi & another \[2018\] eKLR*](#) and [*Blue Horizon Travel Co Ltd v Kenneth Njoroge \[2020\] eKLR*](#). They urge the court to allow the appeal with costs and substitute the trial court's award of Kshs 300,000 with Kshs 100,000.
9. The respondent highlights the circumstances under which an appellate court can interfere with an award of damages, as set out in [*Joseph Kivati Wambua v SMM & Another \(Suing as the Legal Representative of the Estate of EMM- Deceased\) \[2021\] eKLR*](#). He urges the court to uphold the award of Kshs 20,750 for special damages as the same was not only pleaded but also proved. He submits that the injuries sustained by the minor were categorically listed in the plaint and the medical report of Dr Gituura, and the appellants did not either rebut the same or adduce evidence to the contrary. He urges that the appellants did not object to the production of the P3 form, and relies on [*Henry Binya Oyala v Sabera O Itira \[2021\] eKLR*](#). He urges the court to adopt the trial court's reasoning and find that his evidence stood uncontroverted and unimpeached, hence sufficient to establish the stated injuries. He submits that the trial court did not apply any wrong principle, regard any irrelevant factor or issue an award inordinately high from the prevailing trends of awards, and urges the court to dismiss the appeal with costs.

Analysis and Determination

10. Having analysed the pleadings and the rival submissions as well as the cited authorities, the issues for determination are (a) whether the apportionment of liability at 100% was proper; (b) whether the award made by the trial court was exorbitantly high; and (c) whether the appellants' submissions and authorities were considered.

Apportionment of Liability

11. PW1 recorded in his statement, which he adopted as his evidence in chief that, the minor was a pillion passenger aboard Motor Cycle Registration No KMER XXX C, when the 1st appellant so negligently, carelessly, recklessly and without due regard drove Motor Vehicle Registration No KBU XXXY, that it veered off its rightful lane and rammed into the motor cycle the minor was riding in, thus occasioning the minor serious injuries. The respondent produced the copy of records showing that as at February 12, 2020, the accident motor vehicle was owned by the 2nd appellant. The appellants on cross examination focused on the respondent's relationship to the minor, the minor's injuries and how the hospital bill had been paid, but no attention was given to how the accident had occurred and/or who was to blame.
12. This court thus finds that the respondent proved by uncontroverted evidence that the appellants were wholly to blame for the accident, as the 1st appellant veered off its rightful lane and bumped into the motor cycle the minor was riding in, and the trial court's apportionment of liability at 100% was proper.



Exorbitant general damages

13. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of [*Catholic Diocese of Kisumu v Sophia Achieng Tete \[2004\] eKLR*](#) in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see [*Kemro v A M Lubia & Olive Lubia \[1982-88\] 1 KAR 727*](#) and [*Kitavi v Coast Bottlers Limited \[1985\]KLR 470*](#)).”

14. PW1 testified that the minor, his niece, was rushed to Meru Level 5 Hospital after the accident where he was treated and discharged on the same day. He recorded in his statement that the minor’s quality of life had since the accident taken a drastic toll due to occasional pain on the affected joints which can get so severe forcing him to use painkillers. It was recorded that, as a result of the accident, the minor could no longer walk for long distances. The injuries the minor sustained were enlisted in the P3 form and in the medical report by Dr Gituura to be soft tissues injuries comprising of degloving injury on the left thenar region, a deep cut on the right hypothenar region, pain and swelling on the right knee and abrasion injury on the right knee region about 3CM in diameter. The doctor concluded that although the minor was stable, he had a high possibility of developing PTSD and/or early osteoarthritis on the affected joint.
15. It is clear from the medical report, by Dr Gituura, who testified as PW2 that the injuries sustained by the minor were more serious than those sustained by the minor in Civil Appeal No E024 of 2021. In writing the medical report, the doctor relied on the duly filled P3 form, the drug prescription forms and the X-Ray radiograph. The fact that the said drug prescription forms and the X-Ray radiograph were not produced as exhibits cannot be construed to mean that they did not exist.
16. This court, therefore, finds that the award of general damages of Kshs 300,000 for a minor who sustained soft tissues injuries which were serious in nature, was fair and justified.

Special damages

17. The court finds that the respondent produced receipts in support of his claim for special damages, and therefore the same was not only pleaded but also proved.

Consideration of the appellants’ submissions and authorities

18. This ground of appeal is quite unfounded as the trial court duly considered the respondent’s submissions and authorities alongside those of the appellants in reaching the decision it did. In fact, the trial court noted that it had read through the case of [*Agneta Busolo v Africa Blooms Limited \[2020\] eKLR*](#) cited by the appellants in addressing the issue of non-availability of the initial treatment notes and the significance of a P3 form.



Orders

19. Accordingly, for the reasons set out above, the court finds that the appeal is without merit and it is dismissed.

20. The respondent shall have the costs of the appeal to be paid by the appellants.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JANUARY, 2023.

EDWARD M MURIITHI

JUDGE

Appearances

Mr Kimondo Gachoka Advocate for appellants.

Mr Kaimba Peter Advocate for respondent.

