



REPUBLIC OF KENYA



**Kabutia & another v PK (Suing as the Guardian and Next Friend of MG - Minor)
(Civil Appeal E024 of 2022) [2023] KEHC 458 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E024 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 MG -
MINOR) RESPONDENT**

*(An appeal from the Judgment of Hon. E. Tsimonjero (R.M)
in Meru CMCC No.77 of 2020 delivered on 20/10/2021)*

JUDGMENT

1. Before the trial court was a claim commenced by a plaintiff dated 18/2/2020, 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. It was pleaded that on or about 7/1/2020, the minor was travelling as a pillion passenger aboard Motor Cycle Registration No KMER 840 C along Meru-Nkubu Road, Ngonyi area, when the 1st appellant drove, managed and/or controlled motor vehicle Registration No KBU 419 Y so negligently that it veered off its rightful lane and rammed into the motor Cycle the minor was riding in, occasioning her serious injuries, from which she claims damages.
3. The appellants denied the claim by their defence dated 2/6/2020 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 Ksh 175,000 and special damages of Ksh 20,750 totaling to Ksh 195,750 plus costs and interest.

The Appeal

5. On appeal, the appellants filed their memorandum of appeal on 18/2/2022 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 175,000 as general damages and Kshs 20,750 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).

The Evidence

7. PW1 Pius Kirimi, the respondent herein, produced the police abstract, copy of motor vehicle records, medical report by dr Gitura, P3 form, demand letter, receipt for special damages for Kshs 20,750. After adopting his statement dated 18/2/2020 as his evidence in chief, he testified that:

“MG is my niece. She was involved in an accident... The minor was treated at Meru general hospital she had injuries on the hands and legs. The accident was reported at Meru Police



station a P3 was filled she was also examined by a doctor....I pray that the court orders compensation for the injuries as well as the costs of the suit.”

8. On cross examination, he stated that:

“My ID No is XXXX. I do not have the ID in court. The minor in issue is my niece only one of our parents (mother is alive) I was given the authority to file the suit. My statement is dated 18/2/2020. The accident occurred in Munyi area. It involved a vehicle and a motorcycle I was not at the scene I was informed by the children. The minor was taken to hospital. I was asked when the minor was in hospital. She sustained injuries on hands and legs. As at the time I arrived to hospital they had been treated. They were treated and discharged the same day. I was not at the scene. It is me who paid the doctor who examined the minor and issued me with a receipt. I did not use my NHIF. I was not helped to pay the bill.”

9. On re-examination, he stated that:

“The minor is my niece. I was allowed to file the case. The minor mother stays at Tharaka Nithi. I stay in Meru town and that is why I was authorized to file the case. I paid Kshs 20,000 to the doctor through my advocate.”

10. PW2 dr Gituma Dickson, working at Meru Teaching and Referral hospital produced the minor’s medical report dated 14/1/2020 as Pexh 3. He stated that he had previously examined the minor.

11. On cross examination, he stated that:

“I did not treat patient. I relied on the treatment notes and p3 form. The injuries were about a week old. They were not...There were no pre-accident injuries. I could tell the nature of the injuries. I was told that the injuries were from the accident.”

Submissions

12. 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 Kipleting Boit* [2021] eKLR. They urge the court to set aside the entire finding of the trial court on liability as the respondent failed to prove his case on a balance of probabilities. They urge the court, in the event it finds that liability was proved, to find that the minor suffered only soft tissue injuries with absolutely no disability or permanent incapacity, and rely on *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR, *Michael Okello v Priscilla Atieno* [2021] 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 Ksh 175,000 with Ksh 80,000.

13. The respondent reminds the court of its mandate as an appellate court, 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 Ksh 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 submits that the trial court’s award was commensurate with applicable principles, contemporary awards and the injuries sustained by the minor, and cites *Hantex Garments (Epz) Ltd v Haron Mwasala Mwakawa* [2017]



eKLR, [Dickson Ndungu Kirembe & Another v Theresa Atieno & 4 Others](#) [2014] eKLR and [China Wu Yi Company Ltd v Andrea Githinji Gitonga](#) [2016] eKLR. He urges the court to dismiss the appeal with costs, as the defence of the same has occasioned expenditure on his part.

Analysis and Determination

14. 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

15. 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 8540 C, when the 1st appellant so negligently, carelessly and recklessly drove Motor Vehicle Registration No KBU 419 Y, that it veered off its right 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 12/2/2020, 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.
16. This court thus finds that the respondent proved by uncontroverted evidence that the appellants were wholly to blame for the accident, and the trial court's apportionment of liability at 100% was proper.

Exorbitant General Damages

17. 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).”

18. PW1 testified that the minor, his niece, was rushed to Meru Level 5 Hospital after the accident where she was treated and discharged on the same day. He recorded in his statement that:

“The plaintiff's minor quality of life has drastically taken toll due to occasional pain on the affected joints which can get so severe forcing her to use painkillers. In addition, the minor can no longer walk for long distances as she used to before the accident.”

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 abrasion injury on the lateral aspect of the right forearm just above the wrist, abrasion injury on the right knee region about 4CM in diameter, abrasion injury on the left knee region about 5CM in diameter, pain, swelling and reduced range of motion on both



knee joints. The doctor concluded that although the minor was stable, she had a high possibility of developing PSTD and/or early osteoarthritis on the affected joints.

19. The appellants are now challenging the reliance on the P3 form yet the initial treatment notes, which according to them, are the primary evidence, were not produced. The minor was treated at the same hospital where the P3 form was filled. The minor was later on examined by a doctor working in the said hospital who then wrote the medical report. That doctor testified in this case as PW2 and on cross examination, he stated that, "I relied on the treatment notes and p3 form. The injuries were about a week old." It would appear from his testimony that the treatment notes indeed existed but they were inadvertently not produced in court. By virtue of the P3 form, the medical report from dr Gituura D M as well as the oral testimony from the respondent, and in the absence of any rebuttal from the appellants, this court finds that the respondent proved that the minor sustained soft tissue injuries following the accident.
20. This court therefore finds that the award of general damages of Ksh 175,000 for a minor who sustained soft tissues injuries, with a high possibility of developing PSTD and/or early osteoarthritis on the affected joints, was fair and justified.

Special Damages

21. 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

22. This objection 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

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

Mr. Kaimba Peter Advocate for Respondent.

