Rentco East Africa Limited v SW (A Minor Being sued Through Father and Next of Friend HMW) (Civil Appeal E003 of 2021) [2023] KEHC 17672 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 17672 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E003 OF 2021

DO CHEPKWONY, J

FEBRUARY 24, 2023

BETWEEN

RENTCO EAST AFRICA LIMITED ..... APPELLANT

AND

SW (A MINOR BEING SUED THROUGH FATHER AND NEXT OF FRIEND HMW) ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of the Honourable D.O. MBEJA (MR.) (SRM) made on 27th December, 2018)

JUDGMENT

Background

1. The background of this appeal is that the respondent filed a suit against the appellant *vide* a plaint dated November 5, 2018 before the trial court.

2. It was alleged that on or about October 25, 2017, the Respondent was lawfully walking along Mathare near Huruma Chiefs Camp when the defendant's/ authorized driver, servant and or agent managed and controlled and or drove motor vehicle registration number GKB 275H so carelessly and or negligently at a very high speed that he lost control causing the said motor vehicle to collide onto the respondent, thereby causing the respondent serious bodily injuries, endured pain and suffered loss and damages. The particulars of negligence are set out at paragraph 4 of the plaint.

3. As a result of the accident, the respondent sustained severe injuries which include a fracture of femur distal 1/3 and swollen, painful, tender left thigh.

4. Before the trial court, the respondent prayed for judgment against the appellant for general damages for pain and suffering and loss of amenities, special damages of Kshs 3,550/= plus costs and interests.

5. On March 18, 2019, the defendant filed a statement of defence wherein he denied liability and in the alternative attributed acts of negligence on the part of the plaintiff for among other things failing to walk with due care and attention and walking along the road in a reckless manner.

6. After the close of the pleadings, the matter proceeded for full hearing and both sides called one witness each. Thereafter the trial court reserved the matter for judgment.

Evidence

7. On August 15, 2019, HMW , the respondent testified as PW1 before the trial court whereby he adopted his witness statement as his evidence in-chief and produced the list of documents dated November 5, 2018. On cross examination, PW1 stated that the accident occurred along Juja road near Oilibya Petrol Station and that the minor was 7 years when the accident occurred. He also said that there was no trench but there is a pedestrian walkway. He stated that he knows how to drive a car and there is a speedo-meter inside vehicle but he did not see it.

8. The defendant, now the appellant in this appeal called one witness DW1- No 94406 PC Hassan Abdi who also adopted his witness statement dated March 18, 2017 as his evidence in-chief. He stated that on October 25, 2017 he was on routine patrol along Juja road. When he reached Oilibya Petrol Station and a boy ran to cross the road. DW1 said he tried is best to avoid hitting the boy but in vain as the boy hit the vehicle on the right side. He said the boy was not observant as he crossed while running and hit the vehicle. DW1 stopped, picked the boy and took him to hospital. The boy's father came and he left the boy with him and the vehicle was taken for inspection.

9. During cross-examination, DW1 stated that he was the driver of the suit motor vehicle. He said that he had not submitted the work ticket to the court but he reported the accident. He confirms that the police abstract did not indicate his name. He stated that there is a slum in Mathare predominantly a residential area and one would expect children playing to be playing. He told court he was driving at 40Kph and applied emergency brakes to avoid hitting the boy and then swerved.

10. Upon close of the defence case, the trial court delivered its Judgment on January 10, 2020 awarding the respondent Kshs 1,000,000/= in general damages for pain and suffering together with special damages of Kshs 3,550/= plus costs and interest.

The Appeal

11. Being dissatisfied with the judgment and orders of the learned trial magistrate honourable D. O Mbeja (MR) (SRM) issued on January 10, 2020 in Nairobi CMCC No 10000 of 2018, the appellant preferred this appeal *vide* a memorandum of appeal dated January 6, 2021 challenging the aforesaid decision. The grounds in the appeal are couched in the following terms (verbatim):-

    a. The learned magistrate erred in law and in fact in finding that the defendant 100% liable for negligence.

    b. The learned magistrate erred in law and in fact in not finding that the plaintiff failed to prove liability on the part of the defendant.

    c. The learned magistrate erred in law and in fact in disregarding the evidence of the defendant.

    d. The learned magistrate erred in law and in fact in failing to analyse the evidence adduced.

e. The learned magistrate erred in law and in fact in awarding excessive and exorbitant damages to the plaintiff.

It is proposed to pray the appellate court for orders:-

a. That the appeal be allowed.

b. That the judgment and decree of honourable D. O Mbeja (MR) (SRM) made on December 27, 2019 in Nairobi CMCC No10000 of 2018 be set aside and be substituted with an order dismissing the suit with costs.

c. That the costs of the appeal be awarded to the appellant.

12. The appeal was amended *vide* an amended memorandum of appeal dated on December 15, 2021. The amendment was meant to change the date when the trial court delivered its judgment from December 27, 2019 to January 10, 2020 but the rest of the grounds and prayers remained intact.

13. The appeal was admitted for hearing on February 17, 2022 and directions issued that the appeal be canvassed by way of written submissions. The appellant's submissions are dated March 21, 2022 while the respondent's submissions are dated April 25, 2022.

Analysis and Determination

14. I have carefully considered the grounds of appeal by reading through the original record of proceedings before the trial court and the written submissions by both counsel alongside the cited authorities in determining his appeal..

15. This court as a first appellant court is under an obligation to re-evaluate the evidence that was adduced before the trial court afresh and come up with its own independent findings while bearing in mind that it did not hear nor see the witnesses testifying, hence the need for an allowance in this regard. In the case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123, it was held that:-

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

16. Therefore, this court has an obligation to look into the factual issues and revisit the facts as presented before the trial court, analyse, re-evaluate and come up with an independent conclusion bearing in mind that it did not have the opportunity hear the witnesses testify and observe their demeanor.

17. In this appeal, it is clear from the pleadings filed that the same revolves around the following issues:-

a. Whether the learned magistrate erred in law and in fact in finding the appellant 100% liable for the accident?

b. Whether the damages awarded were manifestly excessive?

Whether the learned Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident?

18. The law places the burden of proof on the person who alleges and in this case the respondent had the burden of proving the negligence on the part of the appellant that resulted in the accident. This can only be done by a party adducing evidence to support the claim or allegations.

19. Section 107 of the *Evidence Act* provides:-

> " Burden of proof.
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

20. In the instant case, there is no dispute that the accident occurred. There is also no dispute that the minor suing through the respondent suffered injuries. The first question this court is called upon to answer is who is to blame for the said accident and whether the trial court was in order when it held the appellant 100% liable. It was the evidence of PW1, Haron Maina Wamahia in his testimony before the trial court that he blamed the appellant for the accident involving the minor aged 7 years. On the other hand, DW1 for the appellant testified that the minor ran onto the road without observing and though he tried to avoid hitting him by swerving and applying brakes, the boy hit the right side of his vehicle. He also said he was driving at 40 Kph since the road along which he was driving was in a residential area. The record indicated the boy was 7 years old.

21. In my humble view, it is important to note that since the appellant's driver was driving in such a residential area, he bore a great responsibility of driving with due care and attention so as to avoid collision or hitting such a child of tender years. In a nutshell, the motor vehicle should have been driven at a manageable speed to avoid any eventuality on the road. It is also noteworthy that the victim was aged seven (7) years thus, a child of tender years and therefore cannot be held liable for any contributory negligence.

22. There are several decisions in our jurisprudence relating to children of tender years in regard to contributory negligence. For instance, in the case of *Tayab v Kinanu* [1983]eKLR, the court held that:-

> " The practice of the 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 the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A very young child cannot be guilty of contributory negligence. 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. A child has not the road sense of his or her elders. He or she is not found negligent unless he or she is blameworthy."

23. Based on the forgoing reasons, I find that the appellant's driver was wholly liable for the accident involving the minor and therefore the trial magistrate did not error in finding the appellant liable for the accident at 100%. In the circumstances, this court upholds the finding of the trial court and proceed to dismiss the ground seeking to apportion liability between the minor and the appellant.

Whether the learned Magistrate erred in law and in fact in awarding excessive damages to the Respondent?

24. The appellant has challenged the award of damages awarded to the respondent. In his submissions, it was contended that the award of Kshs 1,000,000/= for pain and suffering was excessively high. The appellant cited several authorities in support of this. For instance, the case of *Reamic Investment Limited v Joaz Amenya Samuel* [2021]eKLR, where the respondent suffered open left femur fracture, abrasion on the left knees, face, neck, right upper limp and left upper lip as well as a contusion on the anterior chest. The court awarded Kshs 600,000/= in general damages was set aside by the appellate court and substituted with Kshs 350,000/=.

25. He also cited the case of *Berwel Bosire v Lydia Kemunto Mokora* [2019]eKLR, the respondent suffered serious multiple fractures with 40% incapacitation. The appellate court set aside an award of Kshs 2,000,000/= in general damages and substituted it with Kshs 700,000/=. Another cited authority is the case of *Mombasa Maize Millers (KSM) Ltd & another v Rengo Joshua Wafula* [2017]eKLR, the respondent suffered facial injury to the right jaw and teeth, injury to chest and fracture right condylar (mandible). He was awarded Kshs 400,000/= in general damages.

26. It is trite law that comparable injuries should attract comparable award of damages. In the case of *Stanley Maore v Geoffrey Mwenda* [2004]eKLR, where the court held that;

> " ....we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

27. It therefore follows that an appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. The same position was reiterated in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, where it held that:

> " An appellate court will not disturb an award for general 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..."

28. Accordingly, guided by the decision in the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022]eKLR, the respondent sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh just like in this appeal and the court set aside an award of Kshs 1,400,000/= as general damages and substituted it with an award of Kshs 800,000/=.

29. In line with the rate of inflation and the current economic times, this court finds the award made by the trial court reasonable in the circumstances and there is no need to interfere with the court's finding.

30. Having considered the submissions by both parties and the plethora of authorities relied upon, this court is satisfied that the award of damages by the trial court was within the law and therefore upholds the same.

31. In totality of the foregoing, the appellant's appeal fails and the same is hereby dismissed with costs to the respondent.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS ...24TH ... DAY OF ...FEBRAURY... 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Chepkorir for M/S Muhoho for Appellant

Court Assistant – Simon