



**BS (A Minor Suing through her Mother & as Next Friend of GK)
& 2 others v Eshirima & another (Civil Appeal 65, 66 & 67 of 2019
(Consolidated)) [2023] KEHC 3171 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 65, 66 & 67 OF 2019 (CONSOLIDATED)
TM MATHEKA, J
MARCH 29, 2023**

BETWEEN

**BS (A MINOR SUING THROUGH HER MOTHER & AS NEXT FRIEND OF
GK) 1ST APPELLANT
KA (MINOR SUING THROUGH HER MOTHER & AS NEXT FRIEND OF
GK) 2ND APPELLANT
BENARD MANGALA KARANI 3RD APPELLANT**

AND

**FANUEL OKWARO ESHIRIMA 1ST RESPONDENT
IBRAHIM MAKAHAMA 2ND RESPONDENT**

(Being appeals from the Judgments and Decrees of Hon. L. Gicheba, SPM(as she then was) in Nakuru delivered on 20th March, 2019 in Nakuru by HON B. Mararo CMCC NO.233,231 & 250 OF 2019 respectively)

JUDGMENT

1. Each Appellant vide a Plaint dated 1st March 2016 instituted a suit against the respondents in Nakuru CMCC No.233, 231 & 250 all of 2016 respectively seeking General Damages, Special Damages and Costs and interest of the suit.
2. They alleged that on 4th January, 2016 or thereabout while lawfully travelling in Motor Vehicle Registration number KCC 663 H along Eldoret - Nakuru Highway, the 2nd Respondent so negligently drove, managed and/or controlled the aforesaid Motor Vehicle Registration Number KCC 663 H as a result of which it was involved in an accident and subsequently caused serious injuries to them.



3. The particulars of negligence enumerated against the 2nd respondent were: Driving Motor Vehicle Registration number KCC 663 H in excessive speed in the circumstances; Driving without due care and attention to other road users; Failing to slow down, swerve or in any way maintain the said Motor Vehicle so as to avert the accident; Driving a defective Motor Vehicle in the Circumstances; Failing to apply brakes on time to avoid the accident; Failing to ascertain that the road ahead was clear before proceeding on and Res ipso loquitor.
4. The appellants averred that the 1st Respondent was held vicariously liable for the acts/omissions of the 2nd Respondent.
5. They averred that by reasons of the aforesaid accident they sustained the following injuries:-
 1. 1st Appellant- Soft tissue injuries of the chest and the back, and bruises on the right elbow.
 2. 2nd Appellant- Soft tissue injuries of the forehead; Bruises on the right hand and right knee.
 3. 3rd Appellant- Soft Tissue injuries of the right shoulder joint, right side of the chest and the lower back.
6. The respondents denied liability through their amended defence dated 15th May, 2017. In the alternative they averred that if the accident occurred the same was solely or substantially contributed to by the negligence of the Appellants. Particulars of negligence against the Appellants were; failing to take any or any adequate precaution for his own safety; failing to heed the instructions on safety precautions when travelling; failing to heed the traffic rules and regulations when travelling; and the doctrine of res ipsa loquitor was inapplicable.
7. The respondents averred that the Appellants' claim was fraudulent and based on misrepresentation by the appellants that they had been involved in an accident and injured and that the same was unlawful, improper and or an abuse of the court process.
8. The particulars of fraud and misrepresentation on the part of the appellants were as follows: -
 1. Swearing a false affidavit
 2. Fabricating documents to support a fake claim
 3. Forging documents to further this claim
 4. Obtaining or attempting to obtain by false pretense money from the respondents by way of damages claimed in the fake claim
 5. Purporting to have been injured in an accident whilst travelling in Motor Vehicle Registration Number KCC 663 H.
 6. Informing and misrepresenting facts to the police that they had been injured in an accident involving motor vehicle registration number KCC 663 H when they knew the same to be false and misleading.
 7. Fraudulently obtaining claim supporting documents from Provincial General Hospital- Nakuru.
 8. Instructing advocates to pursue a claims on their behalf to recover damages for injuries allegedly sustained in the accident knowing the same to be misleading and fraudulent as they were not injured either as alleged or otherwise and thus no damages are payable to them.



9. Instituting fake/non-genuine suit in this court in which the appellants represented that they had been injured in an accident and attending Provincial General Hospital- Nakuru thus causing to be served upon the appellants' summons to enter appearance and plaint.
 10. Materially, fundamentally and intentionally misleading advocates for the Respondents in the suit and the Honourable trial court by adducing fraudulent and doctored evidence in support of this claim.
9. The respondents also averred that in the alternative any such occurrence as the Appellants may prove occurred without any negligence on their part and the same was due to inevitable accident.
 10. They prayed that the Appellants' suit against them be dismissed with costs.

The Appellants' Case

11. The 1st & 2nd Appellants testified through their respective parents that on the material date while travelling in the subject Motor Vehicle they were involved in an accident in which they sustained the respective pleaded injuries. They stated that they were taken to Nakuru Provincial Hospital where they were treated and issued with treatment cards. It was their testimony that the matter was reported to the police station and they were issued with a P3 form which was filed at Nakuru Provincial Hospital, and that they were examined by Dr. Kiamba. They produced their respective P3 forms as exhibits before court and prayed to be awarded damages as prayed.
12. The third Appellant testified that he was involved in the accident and sustained the injuries as pleaded. That he was taken to Provincial General Hospital for treatment and he was issued with a treatment card. He confirmed he was issued with a P3 form after reporting the accident which was filled at the aforesaid hospital. He also confirmed that he was examined by Dr. Kiamba. He produced the P3 form as an exhibit and prayed to be awarded damages as prayed.
13. Dr. Kiamba(PW2) confirmed that he examined the above Appellants and that they sustained injuries as pleaded in their respective Plaints. It was his evidence that he relied on the treatment notes while preparing their respective medical reports. He also said that he physically examined each one of them and he classified the degree of injuries as harm. He produced their respective medical reports and receipts thereof as exhibits before court.
14. PW3 was Dr. Patrick Mokaya, a Chief Clinical Officer at Nakuru Provincial General Hospital. It was his testimony that he had worked in the said hospital from the year 2016 and that the treatment notes issued to each of the appellant was authentic and it emanated from their facility. He produced the said treatment notes as exhibits in evidence.
15. In cross examination, he reiterated that the treatment notes emanated from Provincial General Hospital and that they were readily available. He did not know if they were issued by an authorized person. He confirmed he did not treat the Appellants and when the accident occurred he was not at the hospital. It was his testimony that when the accident claims are on the rise, the hospital usually assign one staff to handle all patients and they are normally issued with the type of treatment notes produced herein.
16. In re-examination, he stated that the said hospital went digital in the year 2010 - 2011 but the treatment notes such as the ones produced herein are still in use.



Defence Case

17. DW1 - Benjamin Tanui was a Records officer at Nakuru Provincial Hospital. He testified that when he perused the hospital documents he did not find the names of Appellants herein and therefore the treatment notes did not emanate from their facility.
18. He said their treatment notes did not have an outpatient number, they were authored by persons not known to the hospital. He testified that they usually wrote the patients' numbers and after diagnosis the Doctor's name would be indicated. That in this case the names of the Appellants herein were not indicated. He stated that they went digital in 2016 and that it was the hospital's opinion that the treatment cards were authored by unknown people. He produced respective letters revoking the aforesaid treatment notes as exhibits.
19. In cross examination, he reiterated that the said treatment notes did not emanate from Provincial General Hospital. He confirmed he only keeps records at the hospital and stated that they receive patients on registration since documentation is done by the doctor and nurse. He said when the accident involves many people, patients are normally attended to first then they come back for registration but they cannot be given medication or injection without having a hospital number. It was his testimony that the treatment notes such as the ones produced herein were only available for inpatients. He confirmed the said treatment notes have Provincial General Hospital (PGH) Logo and were signed.
20. In re-examination, he stated that the Appellants herein did not appear in any of the Hospital's records and none had come back for registration.
21. DW2 was PC Samson Okello from Nakuru Central Police Station. He produced the Occurrence Book showing that the appellants names did not appear in the list of injured persons. In cross examination, he stated that the entries in the OB were preliminary and were made on 4.1.2016. He confirmed that he did not have the Police file and did not know whether the Appellants' names were listed in the Police File. He however said that the information in the Police file emanates from the OB. It was his testimony that there are people who normally report after the accident and when such reports are made their names are indicated in the Further OB.
22. In re-examination he stated that when people report later their names are put in the further OB and their statements recorded. He did not have a further OB.
23. The trial court after evaluating the evidence on record dismissed the Appellants' case on grounds that they did not prove that they were passengers in the subject Motor Vehicle and that they had been injured. The court further held that if the Appellants had proved their respective cases it would have awarded Kshs. 130,000/= to each one of them as general damages.
24. The appellants were aggrieved by the said judgment and they lodged this Appeal on 11th April, 2019 on grounds that: -
 1. The learned Magistrate erred in fact and in law in failing to find that the Appellant had not proved her case on a balance of probabilities despite there being overwhelming evidence.
 2. The Learned Magistrate erred in fact and in Law in disregarding the Appellants' testimony and in disregarding the evidence tendered by the appellants during the hearing of the above suit.
 3. The Learned Magistrate erred in fact and in law in disregarding PW3 evidence who was a senior clinical officer thus arriving at a wrong conclusion.



4. The Learned Trial Magistrate erred in fact and in law in dismissing the Appellant's suit despite there being overwhelming evidence to hold the respondents 100% liable
25. The Appellants thus proposed the following orders: -
 1. That the appeal be allowed.
 2. That the judgment/decree of the Honourable Magistrate delivered on the 20th of March 2019 in NAKURU CMCC N0.233 OF 2016 be set aside.
 3. That this Honorable Court finds the respondents liable for the said accident.
 4. That this Honorable Court assesses the damages to be awarded to the Appellants.
 5. That the costs of this Appeal be provided for.
26. The Appeal was canvassed through Written Submissions. Only the Appellants' submissions are on record.

Appellants' Submissions

27. The Appellants filed their submissions on 11th October, 2022.
28. The counsel for the appellants' submitted that the Police Abstracts issued to the Appellants herein was a proof that they were involved in the accident on 4.1. 2016. He contended that there were no fraud allegations raised in regards to the said Police Abstracts.
29. The counsel argued that DW2 did not have the police file which is usually comprehensive as a proof that indeed the minors and the 3rd Appellant were not involved in the accident. The advocate argued that the Appellants were issued with a Police Abstract and the P3 form after showing that they were victims in the material accident.
30. Regarding treatment cards from Nakuru Provincial General Hospital, the appellants submitted that lack of outpatient number on the treatment notes did not invalidate them. They argued that the Records officer in his testimony confirmed that even though manual treatment cards are being phased out they still do exist and are issued to patients and that during emergency cases patients are treated without registration. Reliance was placed on the case of Bigot Flowers (K) Limited vs David Were [2016] eKLR where the court stated as follows: -

“It is not practical for a patient when seeking treatment to question the treatment card or notes he is given from the institution or even to inquire as to the names and qualifications of the treating officer. The hospital has a duty to make sure that documents given to patients who attend their institutions for treatment are genuine and the necessary entries in their registers are properly filled. That can never be a duty of a patient. It is not clear why the treatment card was marked for identification by the trial court. It has been held and confirmed in numerous decisions that a treatment card or notes is the property of the patient, and as such, he is the right person to produce it as exhibit in court. It would be a denial of justice to a party to be asked to go and bring the maker of a treatment card from a medical institution when such party may not even know who in particular treated him. Many a times a records officer from the hospital or clinic would deny existence of such card or records, yet admitting that such card was from the said institution. In *Timsales Ltd -vs- Harun Thuo Ndungu C.A No 102 of 2005 (Nakuru)*, the court held that treatment notes



and card belong to the plaintiff, not the hospital, and therefore it is the plaintiff who ought to produce it as an exhibit, and not the hospital representatives...”

31. The Appellants submitted that the injuries listed in their respective treatment notes tallied with the ones listed in their respective Medical Reports.
32. On whether the allegations of fraud were proved by the respondent, the appellants submitted that the fact that a patient’s name does not at first appear in the occurrence book ipso facto does not mean that the patient was not involved in an accident. That it should be noted that the particulars or information filed in the abstract emanate from the occurrence book and that all documents are usually and constantly amended.
33. They further submitted that before concluding that there was fraud thorough investigation needed to be conducted. That in this case the hospital neither conducted investigations nor involved the Appellants before revoking their treatment cards.
34. They submitted that failure to afford them an opportunity to be heard infringed on their constitutional rights to justice and was contrary to the Rules of natural Justice. To support this position, they cited *Mary Muathe Muthikwa & another vs Isaac Maina Thomba* [2017] eKLR where the court stated:

“I have carefully re-evaluated the evidence before the trial court. A finding of fraud on the part of the plaintiff was without proper analysis of evidence. There was obvious contradiction between the plaintiff’s evidence and that of DW1. It was not the duty of DW1 to make entries on the O.B. His decision to revoke the Police Abstract and P3 was ultra vires. In any event, he could not revoke a document which had conferred certain rights to the appellant without hearing the applicant on the issue. Further, fraud is a criminal offence, and before a court declares a process fraudulent, cogent and non-conflicting evidence must be placed before the court. So, on the issue of liability this court upholds the appeal and finds the respondent liable.”
35. Counsel submitted that the Appellants proved their case on a balance of probability and prayed that the Respondent be held 100% liable.
36. On quantum, each appellant prayed for an award of Ksh. 500,000/= as general damages. They urged this court to be guided by *Francis Ochieng & another vs Alice Kajimba* [2015] eKLR where the court awarded Kshs. 350,000/= as general damages for severe soft tissue injuries.
37. They contended that in view of passage of time and inflation factor the proposed sum is sufficient.
38. On special damages, the counsel argued that it is trite law that special damages must be specifically pleaded and strictly proved. For this proposition they relied on the case of *Hahn vs Singh* (1985) KLR 716 as referred to in *Mohammed Ali & another vs Sagoo Radiators Limited* [2013] eKLR.
39. The Appellants thus prayed to be awarded special damages of Kshs.8, 600/=, Ksh. 11,700/= & Ksh. 8,600/= respectively.

Issues For Determination

40. The issues that arise for determination are as follows: -
 1. Whether the trial court erred in holding that the Appellants did not prove that they were involved in the accident.



2. Whether the trial court erred by finding that the Appellants did not prove that they were injured as a result of the Accident
3. If answers to the above is in the affirmative, what damages would suffice in the circumstances.

Issue No.1

41. It is trite law that he who alleges must prove. Sections 107, 108 and 109 of the [Evidence Act](#) Cap 80 Laws of Kenya provide as follows: -

“ 107. Burden of proof

1. Whoever desires any court to give judgement 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.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

42. The Appellants argued that they were involved in the material accident. It was therefore incumbent upon them to adduce evidence in proof of involvement. The Appellants produced a police abstract and a P3 form as a proof of involvement. The defence questioned the involvement of the Appellants in the material accident on grounds that their names were not listed in the Occurrence Book.
43. There is no evidence that the Police Abstract and the P3 form were fraudulently obtained. The respondent failed to lay a basis under which these documents were issued to the Appellants herein and in the circumstances therefore it is my considered view that the Appellants proved on a balance of probability that they were involved in the material accident.

Issue No.2

44. It was the DW1 testimony that the treatment notes produced by the Appellants were fraudulently obtained for reasons that the same did not have an outpatient number, issued by unknown person and were phased out in the year 2010 when the hospital allegedly went digital. He however confirmed that the manual treatment notes were still in use and were available for in-patient. PW3 on the other hand stated that the treatment notes produced emanated from PGH and that they were still in use. He said the documents have the PGH logo and were duly signed. The evidence of these two witnesses were contradictory. Neither of them treated the Appellants herein.
45. The evidence of the Appellants is credible compared to the Respondent because the treatment notes have PGH logo and duly signed, they were revoked by the Respondent without Appellants' involvement, the same were still in use at the material time and the P3 form confirming the injuries pleaded were filled at PGH hospital.



46. The Respondent did not prove the fraud claim against the Appellants. In *Urmilla W/O Mahendra Shah vs Barclays Bank International Ltd and Another* [1979] KLR 76; [1976-80] 1 KLR 1168, the Court of Appeal held that:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned.”

47. In this case, it is clear that DW1’s evidence was simply that from the records in his possession. He did not carry out further investigations to ascertain whether the Appellants were indeed treated therein and did not even consult the doctor who filled the Appellants’ P3 forms in their facility on the basis under which he ascertained the aforementioned injuries. The evidence on record shows that he only perused the documents in his possession and unilaterally reached a conclusion that they were fraudulent. In addition, the allegations of fraud against the Appellants were never reported to any police station.

48. Hence the Appellants proved they sustained injuries as a result of the material accident through their oral evidence, P3 form and the evidence of the Doctor(PW2).

Quantum

49. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages 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.” In *Savana Saw Mills Ltd –vs- George Mwale Mudomo (Reported) (2005)* and *Tridev Construction –vs- Charles Wekesa Kasembeli*, the learned Judge quoted the findings in *Kemfro Africa Limited t/a Meru Express Services & Another –vs- A.M. Luvia and another (No. 2) [1982-88] L KAR 727* at page 703 that:

“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 or 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.”

50. The injuries sustained by the Appellants herein were in the nature of soft tissue injuries. Precisely, 1st Appellant sustained soft tissue injuries of the chest and the back, and bruises on the right elbow, 2nd



Appellant sustained Soft tissue injuries of the forehead and Bruises on the right hand and right knee while the 3rd Appellant sustained Soft Tissue injuries of the right shoulder joint, right side of the chest and the lower back.

51. Before the lower court the Appellants prayed for general damages of Kshs. 400,000/= relying on the case of Devki Steel Mills Ltd vs James Makau Kisuli [2012] eKLR where the court awarded Kshs. 250,000/= as general damages for severe soft tissue injuries to the left side of the pelvis & to the right shoulder while the Respondent relied on the case of Menengai Oil Refineries Ltd vs Jeremiah Mwaura Wandeto [2012] eKLR where the court awarded General Damages of Kshs. 60,000 to respondent for soft tissue injuries. i.e. scars on the left forearm and right hand and residue pain in the left shoulder joint.
52. The injuries sustained by the Appellants herein were not severe compared to those sustained by the Appellant in the Devki Steel Mills Ltd vs James Makau Kisuli(supra).
53. The trial court considered authorities by both parties and stated that it would have awarded Kshs. 130,000/= as general damages had the Appellants proved their case. This award in my view was neither manifestly excessive or low to warrant any interference.
54. With respect to Special damages, it is trite that special damages should be specifically pleaded and strictly proved. The Appellants only produced receipts for Medical Reports by Dr. Kiamba. The 1st Appellant produced a receipt of Kshs. 5,000/= while the 2nd and 3rd Appellants each produced a Medical Report receipt of Kshs. 7,000/=.
55. The 1st Appellant is entitled to Kshs.5,000/= and the 2nd and 3rd Appellants Kshs. 7,000/= each as special damages.
56. On liability it is my view that the finding of the learned trial magistrate that the respondents were 100% liable was correct as the appellants were passengers and nothing was placed before the court to demonstrate that they in any way caused the accident or contributed to the same.
57. The upshot is that the Appeal succeeds. The learned trial courts finding dismissing the appellants claims is set aside and substituted with the following orders:

Each appellant is awarded General damages for pain and suffering of Ksh. 130,000/=, special damages of Ksh. 5,000/=, and Ksh. 7,000/= respectively for the 1st, 2nd and 3rd appellants, plus costs and interest at court rates with effect from 15th February 2019.

58. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH MARCH, 2023.

MUMBUA T. MATHEKA

JUDGE

In the presence of:

C/A Edna

Ms. Ogange holding brief for Gitonga & Co. Advocates – For the Appellants

Kimondo Gachoka & Co Advocates - For the Respondent N/A

