



REPUBLIC OF KENYA



KENYA LAW
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Bosire v DAY (Minor Suing thro' Father & Next Friend JYO) & 2 others (Civil Appeal E106 of 2022) [2023] KEHC 19124 (KLR) (26 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E106 OF 2022
MS SHARIFF, J
JUNE 26, 2023**

BETWEEN

MARGARET NYANCHAMA BOSIRE APPELLANT

AND

**DAY (MINOR SUING THRO' FATHER & NEXT FRIEND
JYO) 1ST RESPONDENT**

FAHARI CARS LIMITED 2ND RESPONDENT

MARY WANJIRU MWAI 3RD RESPONDENT

*(Being an appeal from the judgement and decree of Hon L. Akoth (R.M)
in Kisumu CMCC No. 494 of 2018 delivered on 10th February, 2022)*

JUDGMENT

1. The respondents suit in the trial court, the 1st respondent pleaded that on June 25, 2016 while travelling aboard the appellant's a three-wheeler car registration number KTTWA xxx, the said three-wheeler was negligently driven that they collided leading to personal injuries on her. She attributed negligence to the accident.
2. Upon service, the appellant entered appearance and filed her statement of defence attributing the occurrence of the accident to the 1st respondent's negligence and the owner and or driver of motor vehicle registration number KBY xxx.
3. PW-1 JO stated that his daughter and grandchild were hurt in an accident involving a tuktuk and a lorry. They were hurt and were taken to Jaramogi Oginga Odinga Teaching and Referral Hospital. D was hurt that she could not speak.



4. PW-2, DA stated that as a result of the accident, she lost consciousness, she sustained on the legs, chest, eyes and upper limb and teeth while her son D was seriously hurt. She could recall how the accident occurred.
5. PW-3 PC Nyoka Mkwewe stated that upon conducting investigations, the police charged the tuktuk driver with the offence of careless driving. He confirmed the accident involved 2 vehicles.
6. The trial magistrate returned a verdict holding the appellant 100% liable for the accident, made an award of Kshs 400,000/- in general damages and Kshs 1,030/- in special damages. The appellant being aggrieved instituted the instant appeal vide a memorandum of appeal dated November 7, 2022 raising the following grounds;
 - i. The learned trial magistrate erred in awarding general damages of Kshs 400,000/- which award was excessive and not commensurate to the nature of injuries sustained by the plaintiff.
 - ii. The learned trial magistrate in failing to consider the evidence that was tendered on quantum during the hearing of the suit.
 - iii. The learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.
7. The court directed the appeal to be disposed of by way of written submissions. The appellant submits that the award of Kshs 400,000/- is extremely high and proposes the sum of Kshs 80,000/- because the respondent sustained soft tissue injuries. To buttress their assertion, counsel cites *Michael Okello Vs Priscilla Atieno (2021)eKLR*, *George Mugo & another Vs AKM (minor suing thro' next friend and mother of ANK) (2018) eKLR*, *George Kinyanjui T/A Climax Coaches & another Vs Hussein Mahadi Kuyala (2016)eKLR*, *Ndungu Dennis Vs Ann Wangari Ndirangu & another (2018) eKLR*, *PF (suing as the next friend and father of SK(minor) Vs Victor O Kamadi & another (2018)eKLR*, *Blue Horizon Travel Co Ltd Vs Kenneth Njoroge (2020) eKLR*, *Godwin Ireri Vs Franklin Gitonga (2018)eKLR* and *Lamu Bus Services & another Vs Caren Adbiambo Okello (2018) eKLR*.
8. The respondent on the other hand in supporting the award relied on the authorities in *Lucy Njihuka Vs Benard Mutwori Meru HCCA 17 of 1983*, *Robert Ghonzi Kimani Vs David Dwire Khisa & another Kisumu CA 4'B' of 2009* and *Samuel Martin Njoroge Kamunyu Vs Mildred Okweya Barasa (2020)eKLR*.

Analysis and determination.

9. The duty of a first appellate court as stated in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*, is;

' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way'
10. Further, in *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*, the Court of Appeal stated that;

' [A]n 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 allowances in this respect'

11. I have considered the record of the trial court, the grounds of appeal and the submissions filed herein and I am satisfied that the instant appeal is a challenge on the issue of damages as awarded by the trial court.

12. As observed by several court, the grounds under which the court can reverse a trial court's finding on fact is limited. This was the position by the court in *Ephantus Mwangi & Another V Duncan Mwangi Wambugu [1982-88] 1 KAR 278* it was held:-

' A Court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.'

The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.'

13. The other justification for the reversal of the trial court's exercise of discretion in award of damages for personal injuries are limited. The instances under which this can be done have been explained and restated in several decisions of this court and the Court of Appeal. Among them is *Rahma Tayab & Another V Anna Mary Kinaru[1987-88]1KAR 90* in which the Court stated that;-

' On appeal, the Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out on account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.'

14. According to the P3 form filed in the subordinate court, the respondent sustained injuries to the right pre-orbital regions, scar on the upper and the lower lip, injury to the right eye injury to the upper limb which were classified as harm.

15. The trial court in arriving at the award considered the case of Samuel Martin Njoroge (supra) where the sum of Kshs 300,000/- in the year 2020. The injuries sustained are not contested. A look at the authorities supplied by the parties vis-à-vis the injuries sustained leads me to the conclusion that the authorities by the appellant portray less severe injuries as compared to the ones sustained by the 1st Respondent in this case. I thus find the respondent's authorities more in conformity with the precedents and proceed to affirm the award by the trial court.

16. The appeal herein is thus dismissed with costs to the 1st respondent.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 26TH DAY OF JUNE 2023

M.S. SHARIFF

JUDGE

