



REPUBLIC OF KENYA



**MO (Minor Suing Thru Mother & Next Friend AAM) v Nd'ung'u & 2 others (Civil Appeal E0168 of 2019) [2023] KEHC 24483 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24483 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E0168 OF 2019  
SM MOHOCHI, J  
OCTOBER 30, 2023**

**BETWEEN**

**MO (MINOR SUING THRU MOTHER & NEXT FRIEND AAM) .. APPELLANT**

**AND**

**JEREMIAH ND'UNG'U ..... 1<sup>ST</sup> RESPONDENT**

**PHILLIP OSORO ..... 2<sup>ND</sup> RESPONDENT**

**VINCENT OMBARI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the judgment/decree of Hon. J.B KALO (CM)  
delivered in Nakuru CMCC No. 1070 of 2016 on 24th September, 2019)*

**JUDGMENT**

### **Background**

1. This appeal arises from the judgment delivered on 24<sup>th</sup> September 2019 in Nakuru CMCC No, 1070 of 2016 where the trial court held that the Appellant had not proved their case against the Respondents and dismissed the suit.
2. That at all material times of this suit, the 1st Respondent was the registered owner and/or insured of motor vehicle registration number KAS 836B while the 2nd Respondent was the beneficial owner and the 3rd Respondent was their authorized driver, servant, and/or agent.
3. That on the 19<sup>th</sup> June, 2016 and/or thereabouts, while the Appellant was lawfully traveling in motor vehicle registration number KAS 836B along Nakuru- Eldoret at Ngata area, the 3<sup>rd</sup> Respondent carelessly and/or negligently managed the said - motor vehicle that it was involved in a Collision with motor vehicle registration number KBR 764R as a result of which an accident occurred and the Appellant sustained very serious injuries.



4. The Appellant particularized negligence on the part of the 3<sup>rd</sup> Respondent in his plaint to include:
  - a. Driving without due care and attention to other road users
  - b. Driving without proper look out before proceeding on.
  - c. Driving with an excessive speed in the circumstances.
  - d. Failing to stop after the accident.
  - e. Failing to swerve, control the motor vehicle KAS 836B and/or brake in any way to avoid the accident.
  - f. Making an abrupt U-turn when it was not safe to do so.
  - g. Failing to ascertain the road ahead was clear before proceeding on.
  - h. Driving a defective motor vehicle in the circumstances.
  - i. Being generally Careless and negligent.
  - j. Driving under the influence of alcohol.
  - k. Res Ipsa Loquitor.
5. The Appellant pleaded that as a result of the accident he sustained;
  - a. a Blunt injury to the anterior chest wall leading to severe soft tissue injuries;
  - b. Soft tissue injury of the right side of the face;
  - c. Blunt injury to the left hand leading to severe soft tissue injuries; and Blunt injury to the left knee joint leading to soft tissue injury.
6. The Respondents entered appearance and filed his defence dated 6<sup>th</sup> December, 2016. They denied the entire claim, negligence and occurrence of the accident.
7. In the alternative and on without prejudice basis, the Respondents averred that, if the accident did occur, it occurred due to negligence on the part of the Appellant and prayed for the suit to be dismissed with costs.
8. Following the hearing, the trial court found that the Appellant failed to prove his case against the Respondents and consequently dismissed the suit with costs awarded to the Respondents

## **Appeal**

9. The Appellant being dissatisfied with the judgment, lodged the present appeal vide the Memorandum of Appeal dated 4<sup>th</sup> October, 2021 based on the following grounds:
  - i. The trial court erred in law and fact in dismissing the suit on account of the Appellant's failure to prove the case against the Respondents when there was sufficient evidence to make him find otherwise;
  - ii. The trial court erred in law and fact in misapprehending the law and facts placed before him and determined the suit beyond the standard of proof established in law for civil cases;
  - iii. The trial court erred in law and fact in failing to assess general damages payable to the Appellant; and



- iv. The trial magistrate occasioned a travesty of justice by misapprehending the law and facts placed before him and failing to take into account the submissions placed before him by the appellant.
10. The Appellants' appeal challenges the dismissal of his case, as being a travesty of justice, and seeks that the finding of the trial magistrate be set aside or reviewed and that this court assesses general damages awardable.
11. The Appeal proceeded by way of written submissions. The Appellant filed his written submissions on 17<sup>th</sup> January, 2023. The Respondents filed their written submissions on 5<sup>th</sup> June, 2023.

## **Submissions**

### **The Appellant's Case**

12. The Appellant submitted in support of his Appeal summarily that in Dismissing the Suit the Learned Trial Magistrate erred in law and fact misapprehending the law and facts placed before it and determined the suit beyond the standard of proof established in law for civil cases; failed to assess general damages payable to the Appellant; and to take into account the submissions placed before her by the Appellant.
13. That Appellant refines the issues for the consideration by this court into two issues for determination:
  - i. Whether the court erred in finding that liability was not proved?
  - ii. Whether the Court erred in declining to award damages to the Plaintiff?
14. That during trial PW1 AA testified on behalf of her son (Minor) MO. She produced Certificate of Birth as Pexh 1 and testified that on 19<sup>th</sup> June 2016 she was travelling with her son MO as fare paying passengers on board of motor vehicle registration number KAS 836B along Nakuru-Eldoret at Ngata area when the driver of the said motor vehicle while making a U-turn negligently collided with another motor vehicle registration number KBR 764R she and her son sustained severe injuries.
15. PW1 testimony was corroborated by the Testimony of PW3 PC Samson Okello who confirmed that indeed an accident occurred along Nakuru- Eldoret Highway near Ngata Area involving motor vehicle registration number KAS 836B Toyota Matatu and KBR 764R Nissan Tida. That in her testimony she testified that the accident occurred when Matatu registration number KAS 836B made a negligent U-Turn and in the process, it hit motor vehicle registration number KBR 764R as a result of which several passengers sustained injuries wherein the Appellant was among the people who were injured.
16. Further in cross-examination he stated that though the name of the Appellant was not listed in the OB in full, the name M occurred and the said report indicated that the victim had been attending Hospital. Further, he confirmed that indeed the name M appearing in the OB referred to MO the Appellant herein, when the abstract was issued to her mother AA.
17. In addition, the Primary documents produced in support of the Appellant's case such as the treatment note and the P3. The said treatment note from PGH was produced as Plaintiff exhibit 7(a) contains the following information; 1<sup>st</sup> it is dated 19<sup>th</sup> June, 2016 the same date the accident occurred. 2<sup>nd</sup> the reason why the Appellant visited the facility, which was because he was involved in a road traffic accident.
18. That in conclusion, from the testimonies of the Appellant witnesses and the documents which they produced (Both Primary and Secondary), It is evident that the road traffic accident occurred on 19<sup>th</sup> June, 2016 along Nakuru-Eldoret highway involving Motor vehicle registration number KAS 836B



and KBR 764R. KAS 836B was blamed for the accident as its driver made a negligent U-Turn this hitting Motor vehicle registration number KBR 764R this is per the testimony of PW1, PW3, the OB and the Police Abstract.

19. That further, the issue of the Appellant's name as indicated in the OB as M was Clarified by PW 3 who indicated that it referred to MO and proceeded to explain the reason for the error being that the Plaintiff was in hospital receiving treatment. The reason given by Police was corroborated by primary documents produced that is, the treatment card from PGH which on the face of it indicates the date the Plaintiff visited the Hospital being the 19<sup>th</sup> June, 2016 "the same date the accident occurred', reason being that he was involved in the road traffic accident.
20. That the Appellant submission that he proved his case on the required standard which is on the balance of probability. And that the learned magistrate erred in making a finding that liability has not been proven which he now seeks to overturn and make a finding that liability was indeed proved.
21. That after the accident the Appellant was rushed to Nakuru Provincial General Hospital, the treatment card from the said hospital was produced as Plaintiff exhibit No. 9(a) and it confirmed that indeed the Plaintiff sustained the aforementioned injuries. Further, the Plaintiff was also examined by Dr Obed Omuyoma who in his report dated 29<sup>th</sup> July, 2016 and produced as Plaintiff exhibit no 7(a) confirmed the aforementioned injuries and further indicated that the Appellant has healed bruises on the right side of the face and that movement of the left knee joint is restricted because of pain, in his opinion he classified the degree of injury as harm.
22. The Appellant submits that, Kshs 400,000/- shall fairly compensate the Appellant putting into consideration the injuries sustained and the inflation trends. the Appellant wish to rely on the following Authorities;Catherin Waniku Kingori & 3 Others -Vs- Gibson Theuri Gichubi[2005 eKLR. The 3<sup>rd</sup> Plaintiff had sustained multiple soft tissue injuries and the Court awarded him Kshs. 350,000/- Coast Broadway Co.ltd -Vs- Elizabeth Alaka Achebi [2015] eKLR. The Appellate Court upheld the award of Kshs 300,000/- to the Plaintiff who had sustained similar injuries as the Plaintiff herein.
23. The Appellant also prays for special damages of Kshs 10,750/- which has been pleaded and proved.

### **Respondents Case**

24. The Respondents called three witnesses in the trial court, PW1, AA PW2, Dr. Obed Omuyoma, PW3 Benjamin Tanui; and, PW4, Samson Okello. That PW2; PW3; and PW4 testimony has no bearing on liability as the testimony of PW1.
25. That PW1 stated that MO was her son and that she was injured in a road traffic accident along Nakuru-Eldoret Highway. She stated that, they were issued with a police abstract and that the minor was treated at the Provincial General Hospital. On cross-examination, she confirmed to the court that the accident occurred on 19<sup>th</sup> June, 2023 and that she never testified in any traffic case where the driver of KAS 836B had been charged. She also confirmed that Dr. Omuyoma relied on the treatment notes which did not show any injury and that it was Dr. Omuyoma who filled the P3 though she could not remember who filled the P3.
26. That PW2 testified that he examined the plaintiff and that he had sustained soft tissue injuries. On cross-examination, he testified that he used the treatment notes which were blank and the P3 form filled 9 days after the accident.
27. That PW3 was a records officer at Provincial General Hospital. He testified that the Plaintiff visited the facility on 19<sup>th</sup> June, 2023 but no treatment was given to him. He stated that the hospital register did



- not indicate any injury or diagnosis with regard to the plaintiff. He produced the said blank treatment note and register as evidence before court. On cross-examination, he did not explain why the treatment notes were blank.
28. That, PW4 testified that the plaintiff was a victim in the accident and that his name was captured in the OB as M.
29. The Respondents submit that the Appellant in this case is MO and the name M indicated in the OB does not show that it refers to the Appellant herein. The Respondents further submit that the treatment notes from Provincial General Hospital did not indicate the injuries sustained by the Appellant. This might imply that the Appellant did not sustain the injuries pleaded in the plaint: The same is confirmed by PW3 who stated that the Appellant was not in the Hospital's register and that he had no reasonable explanation treatment notes were blank.
30. The Respondents submit that the Appellant proceeded to Dr. Omuyoma who filled the P3 and prepared a medical report based on blank treatment notes. Without the treatment notes and the identity of the Appellant and the identity of Mike recorded in the OB ascertained, the Appellant failed to prove any form of association between the accident and the injuries sustained by the Appellant.
31. That from the above testimonies, it is clear that the Appellant did not prove negligence by the respondent on a balance of probability. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provides that;
- “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.”
32. The Respondent further relies on the case of *Bwire Vs Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022 (Judgment)
- “Direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts... The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant.”
33. The Respondents therefore submit that, this court upholds the trial magistrate's decision and dismiss this appeal since the Appellant has not proved their case on a balance of probability.
34. On the Issue of Quantum, the Respondents submits that, the Appellant was not awarded any damages in the lower court but the Appellant sustained soft tissue injuries and the Respondent submit that the sum of Kshs. 80,000.00 would be sufficient and adequate compensation if this court is less inclined to dismiss this appeal.
35. The Respondents rely on the case of *Power Lighting Company limited & another -Vs- Zakayo Saitoti Naingola & another* (2008) eKLR cited in the case *Jennifer Mathenge Vs Patrick Muriuki Maina* [2020] eKLR. Where the court held;
- “On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages;
- a. Damages should not be inordinately too high or too low.



- b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
- c. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
- d. Where past awards are taken into consideration as guides an element of inflation should be considered as well as the purchasing power of the Kenyan Shillings, then at the time of the judgment...”

36. That in lieu of the above, the Respondents invites this court to consider the following cases cited in determining this matter:

a) *Ndungu Dennis Vs Ann Wangari Ndirangu & Another* [2018] eKLR

“The Respondent adds the following injuries to these: blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands. That report also says that the Respondent still experiences back pains and chest pains on exertion. The court stated that, “if one takes into consideration the actual injuries suffered by the Respondent - to wit soft tissue injuries to the lower right leg and to the back - it becomes readily obvious that an award of Kshs. 300,000/= is manifestly excessive. Given the policy goal of Courts to try to compensate comparable injuries as far as possible by comparable awards, these two factors call for this Court to revise the quantum awarded to the Respondent. In my view an award of Kshs. 100,000/= would be adequate to compensate for the injuries suffered in this case.

b) *Eva Karemi & 5 others Vs Koskei Kieng & another* [2020] eKLR

Where the court awarded the 1st appellant was awarded Kshs. 70,000/- She sustained injuries to her right thigh and bruises on her lower and upper limbs. The 2<sup>nd</sup> appellant was awarded Kshs. 40,000/- for injuries on the right shoulder pain and cut wound on her mouth. The 3rd appellant was awarded Kshs. 45,000/- for injuries on and pain on her back and right shoulder pain. The 4th appellant was awarded Kshs. 40,000/- for cuts on the chin and right shoulder tenderness. The 5th appellant was awarded Kshs. 60,000/ for injuries sustained; 2cm cut on the forehead, cut wound on the right elbow and right limb (leg and ankle joint). The 4<sup>th</sup> appellant was awarded Kshs. 65,000/- for injuries sustained being bruising on the forehead, hip and left ankle.

37. In conclusion, the Respondents' submit that the sum of Kshs. 80,000.00 will be sufficient and adequate compensation to the appellant if this court is less inclined to dismiss this appeal.

38. It is the duty of advocates to present their case in a factual manner presenting their client's case truthfully on Appeal. I associate fully with the position held by Matheka J. in *Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Limited* [2020] eKLR:

“It is my humble view that in their submissions counsel for the respondent failed in their duty as given under Section 1A of the *Civil Procedure Act* which states;

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.” (emphasis mine)

39. I shall proceed to determine the appeal.

### **Duty of the Court**

40. This being a first Appeal, I am guided by the decision in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.
41. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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”
42. Having gone through the record of appeal and the submissions by counsel, in my considered view the issues for determination are;
  - a. Whether Negligence and liability was satisfactorily proven before the trial court?
  - b. Whether the Appellant is entitled to damages for loss injuries;
43. My re-evaluation of the entire record from the trial court reveals as follows;
  - i. PW1 in her evidence in chief and/or cross-examination did not offer any evidence to prove negligence on the part of the Respondent. No direct evidence was laid as to how the accident occurred.
  - ii. No evidence was led to demonstrate that the 3<sup>rd</sup> Respondent was charged before a court of law for a traffic offence relating to this accident.
  - iii. No single act of negligence was led in evidence or proven as had been particularized in the plaint.
44. The legal burden of proof as heavily postulated in Section 107, 108 and 109 of our *Evidence Act*. (See the principles in *Surgi Pharm Limited v Medilife Pharmaceuticals Ltd* HCC Number 624 of 1990). By virtue of the above Sections, the trial Court was expected to test the evidence by the Appellant and whether it exploded the burden of proof on a balance of probabilities. The evidence legitimately expected was on the two sets of facts on liability and damages relevant to the occurrence of sense an accident.
45. This Court equally notes that the medical evidence tendered could not vouch for the alleged injuries occasioned, that the lack of primary treatment notes was fatal to the extent that the expert witness



who allegedly examined the Appellant could not have undertaken the examination in the absence of treatment notes.

46. Having concluded that the Appellant's evidence on liability was wanting and insufficient under the circumstance, this court shall not evaluate quantum of damages.
47. Given the essentials of this case, my evaluation reveals and leads me to the conclusion that the trial court did not err in law and fact in dismissing the suit on account of the Appellant's failure to prove the case against the Respondents.
48. This Appeal is accordingly disallowed and that the trial court judgment was sound and that same is accordingly upheld.
49. This Appeal is dismissed with costs to the Respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TERMS AT NAKURU  
THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.**

**Mohochi S.M.**

**Judge of The High Court**

