



Wamboi & another v NAS (Suing as the Next Friend and Father of P O (Civil Appeal 36 of 2020) [2022] KEHC 10475 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 36 OF 2020
WM MUSYOKA, J
JUNE 24, 2022**

BETWEEN

CATHERINE WAMBOI 1ST APPELLANT

SAMWEL MAKIO OSONYO 2ND APPELLANT

AND

NAS (SUING AS THE NEXT FRIEND AND FATHER OF P O RESPONDENT

(Being an appeal from the judgment of Hon MI Shimenga, Senior Resident Magistrate, delivered on April 16, 2020, in Butere SPMCCC No 39 of 2018)

JUDGMENT

1. The suit before the trial court was by the respondent against the appellant, for compensation, with respect to injuries arising from a road traffic accident, on August 31, 2016, between a vehicle owned, controlled and driven by the appellants, on the one side, and the minor respondent, on the other, wherein the minor respondent sustained severe injuries. Negligence was attributed to the appellants. The appellants resisted the suit by a defence, in which they denied everything alleged against them by the respondent. In the alternative, they attributed negligence on the minor respondent and on the major respondent, NAS. A trial was conducted, and liability was assessed against the respondent at 100%, and quantum at kshs 800, 000.00 general damages and special damages at kshs 6, 850.00.
2. The appellants were aggrieved, hence the appeal. They aver that negligence was not proved; they were not 100% liable; the evidence of their witnesses was not taken into account; evidence was not analyzed; the amount of general damages is excessive; and their submissions were not considered.
3. Directions were taken on November 3, 2021, for written submissions. Both sides have submitted. The collision is not contested, but the manner in which it happened is what is in issue. The appellants submit that PW3 was unreliable and the court should have believed DW1 and DW2 more. It is further submitted that the minor respondent was not a child of tender years. It is submitted that the



respondent did not prove negligence. In the alternative, the appellants submit that liability should have been apportioned. On quantum, it is submitted that the trial court should have awarded not more than Kshs 400,000.00, for the nature of injuries sustained, and the respondent has not cited authorities to support her case. On her part, the respondent points at page 111 of the record of appeal, and submits that the minor respondent was walking along the road, and that the trial court was not wrong on liability. On quantum, the respondent supports the award made by the trial court.

4. The appeal turns on two issues; liability and quantum. On liability, there are two sub-issues; whether liability should have been adjudged at 100%, and, in the alternative, whether there should have been some contribution attributed to the minor respondent. On quantum, the issue is whether the award was excessive.
5. On liability, I note that the minor respondent did not testify. It is submitted that that was an account of her health and physical condition. PW1 was the doctor and PW2 was her father. They did not witness the accident. PW3 alleged to have had witnessed the collision. He said that the same did not happen in the middle of the road, but the vehicle belonging to the appellants swerved off the road to the left and it hit the child who fell in the middle of the road. PW4, the police witness, was not very helpful. He only came to court to produce the police abstract. He was not the investigating officer. He did not know how the accident happened, and he said that no one was charged. DW1 was the owner of the vehicle, she witnessed the accident. She said the child jumped into the road, but was not knocked in the middle of the road, but on the left side. The vehicle was damaged. DW2 was the driver. He said the child jumped into the road and was hit by the left headlight. He said the collision happened on the right lane as he had swerved, and collision was in the middle of the road.
6. The evidence on records points to the point of impact being on the road, and not off it as alleged by PW3. PW3 said the child fell into the middle of the road. It is not possible that the vehicle could have veered off the road, hit the minor outside the road, by its left head lamp, and then she fell on to the middle of the road. DW2 said that he swerved away from the child, from the left lane to the right lane, and that he hit her while at the middle of the road. That has to be tested against the testimony of DW1. She said the child was knocked while in the road on the left side, and was insistent that the collision was not in the middle of the road. I do not believe that the collision was off the road nor in the middle of it, but on the left lane or side of the road. PW3 said that he was not a driver, and, therefore, his testimony about the child being hit off the road, and falling into the middle of the road, should be taken against that background. He should be understood to say that the child was not in the middle of road when she was hit, but was on the left side of it, and that she fell on the road, rather than outside of it. DW2 was the driver of the accident vehicle, and his testimony must be understood in the context of a person who is attempting to get some form of exoneration. DW1 was the fairest of them all. She said that the child was on the left side of the road, she was hit while on that left side of the road, and fell on that left side, and not in the middle. Her testimony is more credible than that of PW3 and DW2.
7. So, who was negligent, the child or DW2? DW1 said that when they got to Khumailo, they saw children in school uniform leaving a school, and they were on both sides of the road. According to him, the child in question, was running on the left side of the road. Then she jumped in to the road, and the collision happened. She was insistent that the collision was on the left side of the road, on which the child was. DW2 conceded that there were school children on both sides of the road, and they were primary school children coming from school. The fact that DW1 and DW2 came across primary school children coming from school, is testimony that DW2 ought to have driven the accident vehicle, at that point, and in those circumstances, with due care and attention, noting that he was surrounded, on both sides of the road, by excitable school children. Did he drive with care? I do not think so. He knocked down one of the pupils, who allegedly jumped on to the road. He allegedly swerved to avoid her, but



he still hit her. What is critical is the fact that the collision was bad enough to cause damage to the headlamp of the vehicle. DW1 testified that the headlamp broke and the bonnet was damaged, meaning that DW2 must have been driving at high speed, in the circumstances. The injuries too point to the fact that the vehicle was being driven at high speed. These was loss of consciousness and a compound fracture of the right tibia and fibula. The seriousness of the injuries points to a high speed impact. No doubt, DW2 did not slow down, when he came upon or encountered the group of school children on both sides of the road. Both DW1 and DW2 did not talk of the vehicle slowing down or braking, at the sight of the school children. All these point to lack of due care and attention, and carelessness, even recklessness, which are the ingredients of negligence. A higher duty of care was owed to the primary school children. Consequently, I find that the trial court did not err in finding the appellants wholly liable for the collision.

8. On quantum, PW1, the doctor, stated that the minor respondent suffered a compound fracture of the right tibia and fibula, and soft tissue injuries, being laceration wounds and abrasions. She also lost consciousness, due to a head injury to the brain. His testimony, on the injuries, was consistent with the P3 form and the medical report placed in evidence. The trial court awarded kshs 800,000.00 for those injuries. The appellants argue that that is on the higher side. After reviewing the authorities cited by both sides, it would appear that the High Court has been making awards of damages, in recent times, ranging from kshs 250, 000.00 to kshs 800, 000.00, for injuries comparable to those suffered by the minor respondent herein. I shall accordingly not interfere with what was awarded by the trial court.
9. Consequently, I find that the appeal has no merit and I hereby dismiss the same with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF JUNE 2022

W MUSYOKA

JUDGE

Mr Erick Zalo, court assistant.

Mr Karanja, advocate for the appellants

Mr Mukisu, instructed by Mukisu & Company, advocates for the respondents

