Chemwor & another v RKS (Suing as the father and next friend to AR (Minor) (Civil Appeal E030 of 2021) [2022] KEHC 14110 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14110 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E030 OF 2021

LN MUTENDE, J

OCTOBER 19, 2022

BETWEEN

MARTIN BERA CHEMWOR ..... 1ST APPELLANT

JULIUS NDUGU CHUAGA ..... 2ND APPELLANT

AND

RKS (SUING AS THE FATHER AND NEXT FRIEND TO AR (MINOR) ..... RESPONDENT

JUDGMENT

1. This appeal arises out of a suit where the respondent, a minor, through his father and next of friend, sued the appellants claiming for general and special damages arising out of a road traffic accident that occurred on the December 29, 2015, involving the minor respondent and motor vehicle registration No Kxx xxxJ Mitsubishi FH 215 (subject motor vehicle) owned by the 2nd appellant, which at the time was being driven by the 1st appellant.

2. The minor who was walking on the side walk of Bungoma-Mumias Road at the time, blamed the 1st appellant for driving the motor-vehicle carelessly, negligently and recklessly, an act that made the minor sustain injuries.

3. The appellants denied the claim. It was averred that RKS had no capacity to sue on behalf of the minor. They denied occurrence of the accident, the manner in which it was described to have occurred and the particulars of negligence alleged against them by virtue of the doctrine of vicarious liability.

4. Further, the doctrine of *res ipsa loquitor* was denied; it was also contented that if the accident occurred, the Respondent was to blame for it and/or contributed to it.

5. The trial court considered evidence adduced and found the appellants 100% liable for the accident. The 2nd appellant was held vicariously liable for the negligence of the 1st appellant, his driver. On quantum of damages, the court awarded general damages of Ksh 1,000,000/- and special damages of Ksh 21,358/-.

6. Aggrieved by the decision of the court, the appellant's proffered an appeal on grounds that:

    1. That the learned trial magistrate erred in law and fact in finding and holding the appellants 100% liable in view of the evidence on record.

    2. That the learned trial magistrate erred in law and fact in failing to consider the evidence tendered by the appellants on the circumstances that lead to the accident thereby arriving to an erroneous decision as liability

    3. That the learned trial magistrate erred in law and fact by failing to consider the appellants submissions on both liability and quantum.

    4. That the learned trial magistrate erred in law and fact in applying wrong principles when assembling damages to be awarded to the respondents (if any) and failed to apply precedents and tenets of the law applicable.

    5. That the trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstances was excessive thus occasioning miscarriage of justice

7. In the result the appellant sought an order dismissing and setting aside the judgment, and/or the court to assess the damages downwards.

8. This being a first appeal, as a superior court, its duty is to reconsider evidence afresh, re-evaluate it then come to its own independent conclusions. In doing so, the court must bear in mind the fact of not having seen or heard witnesses who testified. This was held in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others (1986) EA 123* where it was stated that:

    > ' This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.

9. The minor sued through PW1 RKS, his father who did not witness the accident, but, PW5 Hassan Hamisi Kwenyu who witnessed the accident stated that the minor was walking off the road on the foot path beside Total petrol station, when the subject motor-vehicle which was coming from the petrol station knocked him. He rushed to the scene and found the minor unconscious and injured and the motor-vehicle did not stop.

10. The 1st appellant stated that as he drove, the minor appeared from the right side intending to cross the road. That he applied emergency brakes but the distance was short therefore the accident occurred. He denied having been driving at a high speed as traffic was heavy and there were bumps. He blamed the child for crossing the road without checking both sides of the road and the guardian of the child for not caring for him.

11. I have considered rival submissions by both learned counsels for the appellants and respondent respectively, and, a myriad of authorities cited both at the lower court and on appeal.

12. It is not in dispute that an accident occurred involving the subject motor-vehicle that was being driven by the 1st appellant and the minor. Section 109 and 112 of the *Evidence Act* provides that:

> 109. 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.
>
> 112. In civil proceedings, when any fact is especiallywithin the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

13. In the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another (2005) IEA 334*, the Court of Appeal held that;

> ' As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* Cap 80, which provides:
>
> 07. (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.'
>
> There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act.

14. It is a general rule that the burden of proof in a civil suit lies with the plaintiff. It is up to the plaintiff to prove the truthfulness of the allegations; and, the standard of proof is usually on a balance of probabilities. In the instant case which is founded on negligence, the legal burden of proof of breach of duty owed to the party lies with the plaintiff. But, where the defendant alleges presence of contributory negligence as herein, the evidential burden shifts to the defence to prove the alleged contributory negligence.

15. The burden of proof in matters of negligence was determined in the case of *Statpack Industries Limited vs James Mbithi Munyao, NKR HCCA No 320 of 2004*, where Visram J stated that:

> ' It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable.'

16. PW5 the eye witness testified that the child was off the road when hit, while the 1st appellant argued that the child emerged with an endeavor of crossing the road when hit. The driver (1st appellant) owed all pedestrians including the minor reasonable care to avoid an instance of knocking them. Failure to exercise the duty is prove of negligence. The 1st appellant confirmed having seen the minor prior to the accident but argued that he was crossing the road. PW5's argument was that the minor was going to where he was, off the road therefore he did not have to cross the road. The 1st appellant alluded to having seen the minor escape being hit by another vehicle and when he applied brakes the distance was too short. He also agreed that the traffic was heavy hence the motor-vehicle was not moving fast. This having been the case he should have been capable of stopping the vehicle instantaneously. The minor, a child of about six (6) years could not be blamed for having contributed to the accident, as there was no

evidence to establish blameworthiness on his part. (Also see *Rahima Tayab and Others vs Anna Mary Kananu (1983) KLR 114 & 1 KAR 90)*

17. This court has been called upon to alter the findings of the trial court. Circumstances that prevailed clearly show that the 1st appellant failed to exercise a duty of care expected of a driver. He failed to avoid the accident due to his negligence and the 2nd appellant, his employer and owner of the motor-vehicle was vicariously liable for the act of the 1st appellant. In that regard the learned trial magistrate did not fall into error in finding them 100% liable.

18. On the question of quantum, the minor suffered injuries on the limbs that were as follows:Laceration and bruises over the right elbow joint area.Crush injury on the left hand and fingers.Laceration of the forearm.Painful ankle.

19. On re-examination by Dr Mulianga Ekesa on September 14, 2019, it was found that the minor had sustained soft tissue injuries; fracture of left hand bones including crush fracture of the thumb; degloving injury of the posterior left forearm; loss of left thumb and psychological trauma. He assessed incapacity at 20%.

20. On cross examination Dr Ekesa opined that soft tissue injuries and crush injuries involving muscles, nerves and bones, would make the minor not re-gain his pre-accident state.

21. Notably, awarding damages for pain and suffering in general damages is within the discretion of a trial court. An appellate court can only interfere with the award if it is inordinately high or low, or if the court misapprehended the evidence. This was well stated in the case of *Shabani vs City Council of Nairobi (1985) 516 and 5(8-9)* as follows:

> ' The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in Butt v Khan, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:
>
> 'An appellate court will not disturb an award of 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 the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.'

22. According to the case of *Simon Taveta vs Mercy Mutitu Njeru (2014) eKLR*, compensation must be determined by the nature and extent of the injuries and comparable awards made in judicial decisions.

23. In the case of *Kenya Steel Fabricators limited vs Tom Moki (2018) eKLR* where the plaintiff had a fracture of the right index finger with 4% permanent disability, the court awarded general damages of Ksh 260,000/-.

24. In the case of *Eastern Produce (K) Ltd vs Allan Kisai Wasike Gitatian*, the court awarded Ksh 200,000/- as general damages to a plaintiff who had his index finger amputated.

25. In the case of *Blow Plast Ltd vs Julius Ondari Mose (2018) eKlR* the court substituted an award of Ksh 800,000/- with Ksh 600,000/- for a plaintiff who lost an index and middle finger. The disability was at 25%.

26. Having looked at comparable awards, this is a case where an award of Ksh 600,000/- would be appropriate. Special damages that were specifically pleaded and proved were not in dispute.

27. The upshot of the above is that the appeal succeeds partially in that I confirm the judgment on liability, but, set aside the aware on general damages which I substitute with an award of Ksh 600,000/-

28. The total award would therefore be as follows:

General damages: Ksh 600,000/-

Special damages : Ksh 21,358/-

Total : Ksh 621,358/-

The appellants to pay costs at the lower court and on appeal.

29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 19TH DAY OF OCTOBER, 2022.

L. N. MUTENDE

JUDGE