REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 150 OF 2019

WEDDY KENDI KABIRA alias WEDDY KENDI KABIRA.....1ST APPELLANT

GRACE MUTHONI KOBIA alias GRACE MUTHONI.....2ND APPELLANT

VERSUS

VM alia VM (A minor suing though her next friend and mother IKH)...RESPONDENT

JUDGMENT

Introduction

1. Following a road traffic accident that occurred on 15th September 2015 involving the driver of motor vehicle registration number KBU 743B and the Respondent, the Respondent sustained injuries. Through her mother and next friend, she then filed Meru CMCC No. 215 of 2016 seeking damages and vide Judgment delivered by Hon E. Mbicha SRM, the Appellants were found 100% liable for the accident and the Respondent was awarded a total of Ksh 2,500,000/= as damages.

Appeal

2. Being dissatisfied with the outcome of the Judgment, the Appellants have preferred the instant appeal and vide the Memorandum of Appeal dated 18th November 2019 the Appellants raise 2 grounds of appeal as follows: -

> **i. The Learned Magistrate erred in law in finding the Appellants wholly liable for the accident.**
>
> **ii. The Learned Magistrate erred in law and fact in awarding general damages of Ksh 2.500.000/= which were excessive in the circumstances.**

3. They ultimately pray that the Appeal be allowed with costs and the decision of the lower Court be set aside.

Appellants' Submissions

4. The Appellants filed submissions dated 10th August 2020 and they submit that as a first appellate Court, the Court is obliged to re-evaluate the evidence within the laid down legal principles as was held in the case of ***Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123*** and the case of ***Peters v Sunday Post Limited (1958) EA 424***. They submit that no evidence was led to prove that the accident was caused by their negligence contrary to the principles of evidence under Section 107 and 109 of the Evidence Act. They reproduced the evidence of PW2, one Joel Njeri Ungu M'Mukira and stated that the veracity of her evidence is in doubt as she is not named in the Police Abstract as a witness.

5. They further submit that as captured in the Police Abstract, the accident involved motor vehicle registration number KBU 743B and motor cycle registration number KMDE 006H and that through PW2's testimony, it was indicated that the reason the Defendant's vehicle lost control was because of the obstruction by the said motorcycle and that the implication of this is that had the said motor cycle dropped the passenger off the road, the accident would have been avoided. They therefore submit that the Respondent ought to have enjoined the said motor cyclist and the failure to do so ought not be visited against the Appellants. They submit that obstruction is a traffic offence and this illegal act is never to be visited upon the vehicle being obstructed but upon the vehicle that so obstructs and they urge the Court that it is the motorcyclist who caused the accident. They submit that although they did not adduce evidence, the claims by the Respondent do not prove that the Applicants were liable for the accident. They submit that failure by a defendant to adduce evidence does not discharge the plaintiff's burden of proof as was held in the case of ***Susan Kanini v John Wambua Machakos HCCA No. 64 of 2017***. They submit that the fact that

the Appellant was charged and convicted of the offence of causing death by dangerous driving does not exclude the culpability of the motorcyclist and that failure by the Respondent to sue the motorcyclist can only mean that the Respondent should shoulder any liability that the said rider would have been apportioned by the Court. Citing the case of Hussein Omar Farah v Lento Agencies (2006), the Appellants submit that where a collision occurs between two vehicles and there is no available evidence incriminating either of the Defendants, both parties ought to be held equally to blame. Citing the other case of ***Michael Hubert Kloss & Another v David Seroney & 5 Others (2009) eKLR***, they submit that the trial Court was under a duty to determine if there was sufficient evidence to show that the said motor cycle contributed to the accident. They pray that the finding of the trial Court on liability be substituted with a finding of liability in the ration of 50:50.

6. They further submitted that the award of Ksh 2,500,000/= as general damages was excessively high in the circumstances going by the fact that minor who was 6 years old at the time suffered skull and arm fractures and was hospitalized for 5 days and that going by the medical report by Dr. John K. Macharia dated 11th June 2016, the minor had healed completely with no neurological loss, which was supported by Dr. Wambugu in his report dated 6th June 2017. They submit that had the trial court considered these medical reports, it would have found that the minor had completely healed with no anticipated disability with only a 5% risk of convulsions. They submit that there was no legal or factual basis for the award of Ksh 2,500,000/= and that the trial Court also failed to distinguish the decision in John Joel Kosgei vs KPLC HCCC 171 of 1998 Nakuru where the Plaintiff had been admitted in hospital for 3 months and was eventually sent on early retirement due to the nature of his injuries and was also found to have suffered permanent incapacity of 30% whilst the minor herein was only admitted for 5 days and did not suffer any permanent disability. They submitted that the Court should have placed far more emphasis on the finding of the Court in David Kibue Mchomba & Another v Alex Mutua Munyua (2019) eKLR where the Appellate Court found that the Respondent had suffered a simple fracture to the skull, and a fracture to the right femur and awarded Ksh 800,000/=. They pray that the award of Ksh 2,500,000/= be substituted with an award of Ksh 600,000/=.

Respondent's Submissions

7. The Respondent filed submissions dated 18th August 2020. She started by giving a background of the procedural history of the matter which this Court will not reproduce herein. On ground number 1, it is submitted that where a party fails to call evidence in support of its case, the party's pleadings are not to be taken as evidence and the pleadings thereof remain mere statement with no power. For this assertion, he relied on the cases of ***Nairobi HCCCOM No. 731 of 2008 North End Trading Company Limited (Carrying on business under the registered name of Kenya Refuse Handlers Limited) v The City Council of Nairobi; Nairobi HCCC No. 635 of 2009 Joseph Kahinda Maina v Evans Kamau Mwaura & 2 Others; Mombasa HCA No. 227 of 2017 Gateway Insurance Co. Ltd v Jamila Suleiman & Another.*** It is submitted that despite having pleaded negligence against the Respondent, the Appellants did not give any evidence to support the said particulars of negligence. It is submitted therefore that the Appellants failed to prove any liability against the Respondent.

8. Concerning the Appellants' assertion that motor cycle registration number KMDE 006H was to blame for the accident, and that the Respondent had a duty to enjoin the owner of the said motor cycle to the proceedings, the Respondent submits that in her plaint in the power Court, she pleaded negligence on the part of the 1st Appellant as the owner of motor vehicle registration number KBU 743B Toyota Premio which is the one that hit her and not the motor cycle and as such, she had no reason to enjoin the owner or the pillion rider of the said motor cycle and that if the Appellants deemed it fit, they would have taken out third party proceedings against the owner of the motor cycle as per Order 15 of the Civil Procedure Rules. It is submitted that despite having been first granted leave to amend their defence, the Appellant failed to do so and their second application to amend their defence was dismissed for being *res judicata*. It is submitted that these two applications were mischievously not included in the Record of Appeal which amounts to abuse of court process. It is submitted that the Respondent discharged its burden of proof in the lower Court by calling PW1 and PW2 who were never cross-examined by the Appellants and that PW2 who was an eye witness testified that the motor vehicle hit the motor cycle, lost control and hit and threw the child off the road and that at the time of the accident, the driver of the motor vehicle was talking on phone and as such, the Court rightfully found the Appellants 100% liable. It was also submitted that failure to name PW2 as a witness in the Police Abstract is not fatal and further, that the 1st Appellant was indeed charged in Traffic Case No. 559 of 2015. It was submitted that submissions cannot take the place of evidence and the Respondent cited the case of ***Nairobi Civil Appeal No. 105 of 2007, Robert Okari Ombeka v Central Bank of Kenya*** and the case of ***Douglas Adhiambo Apeal & Emmanuel Omolo Khasino v Telkom Kenya Limited CA No. 115 of 2006.***

9. On ground number 2, the Respondent submits that the award of Ksh 2,500,000/= was lawful taking into account the severe injuries sustained by the Respondent being depressed fracture, depressed right parietal skull fracture, loss of consciousness, fracture of the right humerus and bruises on scalp and knees with a 5% chance of developing epilepsy or convulsion. She submits that the Appellant's medical report by Dr. Wambugu indicating that the risk of epilepsy will disappear after 2 years was not based on any fact and neither was it subjected to any medical test or cross-examination. She urges that award of damages is discretionary as held in the case of ***Catholic Diocese Kisumu v Tete (2004) 2KLR 55***. It was submitted that the evidence adduced in the trial Court proved the severity of the injuries sustained and as such, the trial Court was justified in awarding Ksh 2,500,000/=. It is submitted that the Appellants have not demonstrated that the trial Court applied the wrong principles or that it took into account some irrelevant factor or left out relevant ones or that it misapprehended the evidence and thereby arrived at a figure so inordinately high so as to represent an entirely erroneous estimate as would be required in order to successfully challenge an award of damages. It is submitted that the case of ***Nakuru HCCC No. 171 of 1998 John Joel Kosgei v KPLC (unreported)*** cited by the Appellants was decided in 2005, almost over 14 years ago and further, the injuries sustained therein as well as the injuries sustained in the case of ***David Kibue Mchomba & Another v Alex Mutua Munyao (2019) eKLR*** are starkly different from those sustained by the Respondent. The Respondent prays that the Appeal be dismissed.

Determination

10. This being a first appeal, the Honourable Court is invited to look at both questions of fact and of law. The two central issues for determination from the pleadings filed is on apportionment of liability and quantum. This Court has identified the following two issues for determination: -

i. Whether the Court erred in finding the Appellants wholly liable for the accident.

ii. Whether the general damages of Ksh 2.500.000/= awarded to the Respondent were excessive in the circumstances.

Whether the Court erred in finding the Appellants wholly liable for the accident.

11. In the case of ***Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu, the Court (1982-88), KAR 278***, a principle was laid that a court on Appeal will not normally interfere with a finding on fact by a 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. Liability is an issue that is predominantly dependent on the evidence adduced.

12. It is not in dispute that in the trial Court, the Appellants did not adduce evidence in support of their defence. They also sought to amend their defence, and they were given an opportunity but repeatedly failed to do so and vide the Ruling delivered on 26th June 2019 (see page 8 of the Record of Appeal), their second application to amend their defence, which application as made way after the pre-trial stages had been concluded, was found to be *res judicata*. This Court agrees with the submissions made by Counsel for the Respondents that mere pleadings which are not supported by evidence remain pleadings with no probative value. In the premises, neither the trial Court nor this Court has the benefit of testing whether or not the allegations of negligence on the part of the Respondent, as raised by the Appellant in its Statement of Defence are true. But in any event, as pointed out by the Learned Magistrate, the Respondent being a minor of 6 years, she could not have had the capacity to contribute to the negligence leading to the accident. This Court agrees with this finding only adding that this is the normal practice but each case depends on the circumstances. See the case of **Gough vs. Thorne (1966) WLR 1387 and the other Court of Appeal case of Rahima Tayab & Others vs. Anna Mary Kinanu (1983) KLR 114 & I KAR 90.**

13. It is thus clear that the trial Court only got to analyze the evidence of the Respondent as the Appellants did not adduce any. The Learned Magistrate at page 3 of the Judgement, relying on the evidence tendered by the Respondent found that: -

> **"The Plaintiff Witness, PW2 testified that it is the subject motor vehicle which lost control, hit a motor cycle and then violently hit two (2) children including t*he minor Plaintiff herein. This evidence has not been challenged.***
>
> **In any event, the child subject herein was a minor of around 6 years and decided cased including Bashir Ahmeb Butt v Uwais Ahmed Khan, Civil Appeal No. 40 of 1997 hold that a person under the age of 10 years cannot be guilty of contributing negligence."**

14. In this respect, the trial Court found that it is the subject motor vehicle which is owned and/or was being driven by the Appellants which lost control, consequently hit a motor cycle and consequently hit the Respondent.

15. In their submissions, the Appellants argue that it was PW2's testimony, that the reason the Defendant's vehicle lost control was because of the obstruction by the said motorcycle and that the implication of this is that had the said motor cycle dropped the passenger off the road, the accident would have been avoided. They therefore submit that the Respondent ought to have enjoined the said motor cyclist and the failure to do so ought not be visited against the Appellants.

16. This Court has perused through the evidence of PW2 and finds that there is no indication whatsoever that PW2 mentioned that the motor cycle was to blame. In fact, this Court hereby reproduces what PW2 said as per the record of the proceedings found at page 74 of the Record of Appeal: -

> **My name is NJERI UNGU M'MUKIRA**
>
> **I come from Igembe Central**
>
> **I am a farmer and businessman**
>
> **I know the Plaintiff I. I do not know her prior to the incidence.**
>
> **A motor vehicle hit her child. She was hit by a motor vehicle No. KBU 743B Toyota Premio.**
>
> **I witnessed the accident. I have recorded the statement.**
>
> **I witnessed the accident.**
>
> **I pray my statement dated 15/08/2016 be adopted. (Adopted)**
>
> **<u>I blame the driver of the subject motor vehicle for the accident</u>. *It hit a motorcycle, it lost control, hit and threw the child off the road.***
>
> **<u>The driver was talking using a mobile phone when the accident occurred.</u>**
>
> **That is all.**

17. From the above, it is clear that PW2 only blames the driver and/or owner of the motor vehicle KBU 743B. The allegation that the motorcycle was also to blame did not feature anywhere in the Plaintiff's evidence. This was a creation of the Appellants. This Court finds

that the Plaintiff's case was that the party to blame was the drive of motor vehicle KBU 743B.

18. This Court however adds that had the Appellants prosecuted their defence well, they would possibly have shown that the rider of the motorcycle was to blame. In doing so, it would have been incumbent upon the Appellants to enjoin the owner and/or rider of the said motorcycle. This Court does not agree with the Appellant's submission that it was the Respondent's duty to enjoin the said owner and/or rider of the motor cycle to the suit. According to Order 1 Rule 15 of the Civil Procedure Rules 2010, the duty to enjoin a third party lies on the Defendant who is attributing fault to the acts of the said third party. The catch in this phrase is the very last part i.e ***"who is attributing fault to the acts of the said third party"***

19. It being that it is the Appellants, who were the Defendants in the trial Court and who are introducing the element of fault on the part of the rider of the motor cycle, then it behooved them to so enjoin the said rider by way of third party proceedings. Since the Appellants failed to do so, and it being that the Court cannot make a finding to affect a person who is not a party to the proceedings, then the very Appellants have to bear the burden of shouldering any responsibility that would have otherwise been ascribed to any such would have been third party.

20. This finding is supported by the High Court decision in the case of ***James Gikonyo Mwangi vs D M (Suing through his Mother and Next Friend, IMO (2016) eKLR*** at paragraph 41 thereof, where Okwany J held that: -

> **"I find that the Respondent (Plaintiff in trial Court) had no reason to enjoin a third party to the suit as the Respondent was positive that that it was the Appellant's (Defendant's) driver and nobody else.**
>
> **"I blame our driver for speeding and veering off its lane. That is why I did not enjoin the other Motor Vehicle"**
>
> **It is worthy to note that it was the appellant who has introduced the aspect of a third party in this proceeding and I find that under those circumstances it was incumbent upon the appellant, if his case was that a third party was to blame for the accident, to enjoin the said third party as he had already alluded to in his own pleadings (defence) at paragraphs 5 and 7."**

21. I have also conclusively dealt with this issue of who has the burden of enjoining a third party to proceedings in the case of ***Civil Appeal No. 136 of 2019 Kubai Kithinji Kaiga (Suing as the legal representative of the estate of John Kaiga (Deceased) v Kenya Wildlife Service.***

22. On the question of PW2 not having been mentioned in the Police Abstract, this Court finds the same to be immaterial. A Plaintiff in a civil suit has the liberty to call as many witnesses as she would like in as long as sufficient notice had been given to the Defendant in the form of service of a List of Witnesses and Witness Statements. This is the essence of pre-trial under Order 11.

23. For the above reasons, I find that the trial Court did not err in apportion 100% liability on the Appellants and find no reason to disturb the finding of the trial Court on liability.

Whether the general damages of Ksh 2.500.000/= awarded to the Respondent were excessive in the circumstances.

24. The Appellants submitted that the award of Ksh 2,500,000/= as general damages was excessively high in the circumstances. The Respondent on the other hand submits that the award of Ksh 2,500,000/= was lawful taking into account the severe injuries sustained by the Respondent being depressed fracture, depressed right parietal skull fracture, loss of consciousness, fracture of the right humerus and bruises on scalp and knees with a 5% chance of developing epilepsy or convulsion.

25. The court has considered the principles for appellate interference with assessment of damages y trial courts as settled in numerous decisions since ***Nance v. British Columbia Electric Railway Co. Ltd.*** (1951) A.C. 601 that "***before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v Lovell****, [1935] 1 K.B.), approved by the House of Lords in* ***Davies v. Powell Duffryn Associated Collieries Ltd.*** *[1942] A.C. 601." See* ***Henry H. Ilanga v. M. Manyoka*** [1961] EA 705; ***Shabani v. City Council of Nairobi*** (1985) KLR 516;***Kemfro Africa Ltd t/a Meru Express Service (1976) & Another v. Lubia & Another*** (1987) KLR 30; ***Paul Kipsang & Anor. v. Titus Osule Osore*** (2013) eKLR.

26. This Court has analyzed the facts and principles that the trial Court considered in arriving at the award of Ksh 2,500,000/=. Some of these were the age of the Respondent (6 years), the nature of injuries suffered (depressed fracture, depressed right parietal skull fracture, loss of consciousness, fracture of the right humerus and bruises on scalp and knees), the possibility of future complications (5% chance of developing epilepsy or convulsion). The trial Court further relied on among others the case of **John Joel Kosgei vs KPLC HCCC 171 of 1998 Nakuru** to arrive at the figure awarded. This Court finds that there was indeed both factual and legal basis to award the amount of Ksh 2,500,000/=.

27. The issue that the Appellants raise in the Appeal being the fact that the minor only spent 5 days in hospital is immaterial. While there may be some relation, the severity of injuries sustained is not directly proportional to the number of days one spends in hospital. Further, the Appellants have attempted to trivialize the injuries sustained which this Court will not entertain. The Respondent already distinguished that the authorities the Appellants were relying on were for years back and this Court agrees that in awarding damages, the present economic times have to be taken into consideration.

28. For these reasons, this Court finds no reason to disturb the award of damages by the trial Court.

ORDERS

29. In the end, this Court makes the following orders: -

i. The Appellants' appeal herein is hereby dismissed.

ii. The Judgment of the trial Court in Meru CMCC No. 215 of 2016 is hereby upheld.

iii. The Respondent will have the costs of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S C. W. Chege & Co. Advocates for the Appellants

M/S Nyamu Nyaga & Co. Advocates for the Respondents