



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MURANG'A

CIVIL APPEAL NO. 33 "B" OF 2017

CHARLES GICHUKI KANYUIRA.....APPELLANT

VERSUS

JKK (a minor suing through his father

and next friend, BKK.....RESPONDENT

[Appeal from the judgment of D. M. Kvuti, Senior Resident Magistrate, in Kangema SPMCC No. 20 of 2015 delivered on 20th July 2017]

JUDGMENT

1. The appellant challenges the findings of the lower court on the twin issues of *liability* for negligence and *quantum* of damages.
2. On 25th February 2020, I directed that the appeal be canvassed through written submissions. The appellant filed submissions on 6th March 2020 while those by the respondents were lodged on 28th January 2021.
3. On 12th April 2021, I heard brief arguments from learned counsel for all the parties.
4. This is a first appeal to the High Court. It is thus on both facts and the law. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Rapid Kate Services & another v Fredrick Ringera*, High Court at Machakos, Civil Appeal 91 of 2015 [2019] eKLR.
5. The respondent was a child aged 4 years at the time of the accident. In the amended plaint dated 17th July 2015, he claimed that on 9th May 2014, he was standing by the roadside at Rwathia Town Centre when motor vehicle registration number KAV 955S belonging to the appellant lost control, veered off the road and knocked him down. He sustained, among others, injuries to his head, deep cut to the left temporal region and a fracture of the femur.
6. In its statement of defence, the respondent denied the claim *in toto*. It also pleaded in the alternative, and without prejudice, that the minor or his minder substantially contributed to the occurrence of the accident.
7. The learned trial magistrate found that the appellant was liable at the ratio of 85:15. He assessed general damages at Kshs 680,000; special damages at Kshs 28,150; and the doctor's attendance fees of Kshs 20,000. The respondent was also granted costs and interest.
8. The memorandum of appeal was lodged on 11th August 2017. It raises 14 grounds which are overlapping and repetitive. I would add that the draftsmanship is inelegant. I will condense those grounds into three. Firstly, that the respondent's evidence was contradictory, unreliable or insufficient to found liability; secondly, that the appellant's evidence and submissions were disregarded; and, thirdly, that the learned trial magistrate employed wrong principles in assessing the general and special damages.
9. The respondent called two witnesses. The first was Dr. Kimani Mwaura. He confirmed the injuries I outlined earlier and which were captured in his medical report (exhibit 1A). He classified the injuries as grievous harm. I will revisit the matter shortly.
10. PW2 was Boniface Karoki Kamau, the father of the minor. He testified that he and the plaintiff were walking along the road. The appellant's motor vehicle loomed at a high speed, veered off the road and hit the minor. The plaintiff sustained serious injuries and was rushed to Murang'a Hospital and later transferred to Kenyatta National Hospital.
11. On cross-examination he confirmed that the accident occurred at 6:30 p.m. and not 9:53 p.m. as indicated in the police abstract. He also conceded that he could not tell the actual speed of the offending vehicle but he formed the opinion that it was over-speeding.

12. The appellant, Charles Kanyuira, testified as DW1. He was driving to his farm to pick some animal feed when he saw a young boy crossing the road and he slowed down. However, the child ran back across the road and was hit by the vehicle on the right hand side. He blamed the child and his father. He said the father had called out to the child causing confusion and leading to the accident.

13. The appellant admitted that he was charged for the offence of dangerous driving, pleaded guilty and was slapped with a fine of Kshs 20,000. He did not prefer any appeal.

14. I thus find that the *occurrence* of the accident is *not* disputed. It is also common ground that the *appellant* was the *driver* of the vehicle that hit and injured the minor. What was disputed was who bore the blame for the accident. Although the respondent denied liability, I concur with the learned trial magistrate that he was *substantially* at fault. He said he saw the minor crossing the road and he slowed down to give way. He claimed that the minor ran back onto the road causing the accident.

15. I think the appellant was less than candid. If he was not speeding and saw the minor from a distance, he would have easily managed to brake, swerve or take other evasive action. The truth is that he was unable to control the vehicle which then became a lethal weapon and caused grave injuries to the minor.

16. Furthermore, the appellant was *convicted* in traffic proceedings, pleaded guilty and was sentenced to a fine of Kshs 20,000. He admitted this in cross-examination (page 94 of the record). It cannot now fall from his lips that he had nothing to do with the accident or that liability was not proved on a balance of probabilities.

17. It is not lost on me either that the victim was a young child of 4 years who bore little if any contributory negligence. See generally **Butt v Khan** [1982-88] 1 KAR 1, [1981] KLR 349. The learned trial magistrate blamed the minor's father because he "*had a duty to take extreme care in the event of the child using the road*". I may not entirely agree with that analysis but in the absence of a *cross appeal* on liability, I will let the matter rest.

18. In any trial there are bound to be discrepancies between witnesses. For instance, the mother's details on the minor's birth certificate had errors. And so also was the time of the accident as recorded on the police abstract *vis-à-vis* the respondent's eye witness account. But I find that those incongruities were minor and immaterial. There was never any doubt about the identity of the minor, his injuries and the occurrence of the accident to which the appellant was found criminally liable.

19. From the totality of the evidence, I readily find that the appellant was negligent and caused the injuries to the respondent. It is also clear in the impugned judgment that the learned trial magistrate took into account the statement of defence and the testimony of the appellant. That is the reason why he apportioned liability at the ratio of 85:15.

20. The upshot is that grounds 1 to 7, 9, 10, 11, 13 and 14 of the Memorandum of Appeal challenging the findings on *liability* are without merit and are disallowed. The appeal on liability is *dismissed*.

21. I will now turn to grounds 8 and 12 on quantum of damages. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. **Butt v Khan** [1982-88] 1 KAR 1, [1981] KLR 349; **Arkay Industries Ltd v Amani** [1990] KLR 309.

22. According to the medical report dated 18 December 2014 (exhibit 1) the plaintiff sustained a fracture of the left femur, brain (head) injury with loss of consciousness, deep cut wound to the left temporal region, deep cut wound to the left cheek and blunt trauma to the left leg. Although the injuries had healed at the time of the trial, there remained a risk of "*post traumatic epilepsy and osteoarthritis*" of the fractured leg.

23. The trial court relied on two authorities in assessing damages. I have considered some relevant precedents. In **Antony Mwendu Maina v Samuel Gitau**, Nairobi High Court Civil Case 1150 of 2001 [2006] eKLR, the court assessed general damages at Kshs 1,200,000 for injuries that were fairly similar to the ones here. See also **Muhoro Komu v Mercy Wandegi Ndegwa**, Murang'a High Court Civil Appeal 31 of 2016 [2020] eKLR, where the court awarded general damages of Kshs 1,000,000.

24. I am thus unable to say that the award in the instant case was *so high* or *inordinately low*; or, founded on *wrong* principles. Granted the nature of injuries I decline to disturb the award of general damages.

25. I will now turn to special damages. The appellant contends that these were neither pleaded nor proved. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See **Kampala City Council v Nakaye** [1972] E.A 446. The degree of *certainty* and *particularity* of proof depends on the circumstances and nature of the acts themselves. See **Hahn v Singh** [1985] KLR 716.

26. Paragraph 3 of the amended plaint pleaded particulars of special damages as follows: Medical expenses of Kshs 26,150 and cost of the medical report of Kshs 2,000. Those two items were proved through documentary evidence (Bundle of receipts, exhibit 5). In addition, Dr. Mwaura (PW1), was paid Kshs 20,000 as witness expenses as per the receipt dated 11th May 2017 (exhibit 1C). The trial court was satisfied that the amounts were properly incurred by the witness. The impugned judgment clearly states that the award of special damages is only Kshs 28,150 plus the witness expenses of Kshs 20,000.

27. The upshot is that the entire appeal is devoid of any merit and is hereby *dismissed* with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 27TH DAY OF APRIL 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.