



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 191 OF 2019

DHARMAGHA PATEL.....1ST APPELLANT

AKSHAR AUTOSPARES LTD.....2ND APPELLANT

VERSUS

TA (A minor suing through the mother

And next friend HH).....RESPONDENT

J U D G M E N T

(Appeal from the Judgment/Decree of the Chief Magistrate Hon. J. B. Kalo

delivered on 15th October 2019 in Nakuru Chief Magistrate's Civil Case Number 64 of 2008)

1. The accident, the subject of the suit in the Subordinate Court and this appeal occurred on 18th October 2007 in which a minor aged one (1) year nine (9) months was knocked down by a motor vehicle registration number KAW 585 W Mercedes Benz driven by the 1st appellant, owned by the 2nd appellant. According to the plaint dated on 22nd January 2008 the motor vehicle was carelessly or negligently driven, hit, and dragged the child who was playing in their compound at Subukia Estate Nakuru.

2. It is also indicated that the child sustained the following injuries;

- a) *Severe soft tissue injuries on the arms.*
- b) *Severe head injuries*
- c) *Friction burns on the face*

And suffered permanent disabilities

- a) *Permanent facial laceration*
- b) *Permanent head injury leading to drastic behavioural change and attention span deficit.*
- c) *Learning impairment*
- d) *abnormal growth development*

3. The plaintiff sought judgment against the defendants for;

- a) **General damages**
- b) **Special damages**
- c) **Costs and interest**

d) Any other relief the court may deem fit and just to grant

4. These claims were denied by the defendants vide their statement of defence dated 27th February 2008, and put the plaintiff to strict proof thereof. The defendants also accused the plaintiff's mother of failure to exercise proper, effective supervision of the minor, and relied on the doctrine of *res ipsa loquitur*.

5. The matter proceeded to hearing in the subordinate court on 15th September 2016. On that date the defendants indicated that they would require a second medical examination of the plaintiff. The court ruled that the same could be done even as the trial was ongoing.

Plaintiff's case

6. The mother to the plaintiff HH told the court that the child was playing in their compound, when the defendant's motor vehicle was driven to the neighbour's place. The accident happened when as the 1st defendant was leaving, she reversed and hit and dragged the child. The plaintiff heard neighbours screaming. She came out, took the child to Valley Hospital. The child was treated and required an MRI. She took him to Nairobi. That when she took the child to Dr. Malik he refused to examine the child because he was the defendant's doctor. She then took the child to Dr. Ngetich, the child was admitted at Provincial General Hospital Nakuru.

7. She testified that;

- *The child's eye could not see*
- *He could not read or concentrate*
- *That the child was in nursery at that time while the age mates were in class three (3)*

On cross examination she said that she had a report from Kikuyu Hospital that one eye's visual ability had reduced. That that report was made when the child was five (5) years. She produced the documents in support of the claims.

8. **PW2 No. 69679 PC Samson Okello** from Nakuru Police Station testified that Mrs. Patel was charged with careless driving and fined Kshs. 1,000/= in default thirty (30) days imprisonment. He produced the OB extract.

9. **PW3 Dr. Isaac Kiplimo Ngetich** a surgeon based at the Provincial General Hospital Nakuru testified that he had a P3 filled by a Dr. Wanga who had earlier left for further studies. The P3 was filled on 22nd October 2007 it was for an infant who had sustained injuries on head and face;

– *bruises on head and face*

– *extreme bruises on face and neck*

– *frictional burns*

The degree of injury was assessed as grievous harm.

10. Dr. Ngetich also prepared a medico-legal report dated 23rd November 2007. He was informed that since the accident the child had been treated and discharged, but on 25th October 2007, was presented to hospital with nose bleeding; that the child was irritable, excessive crying, restlessness and attention span deficit. That the child was being treated for ASD and convulsions.

11. On examination he noted that the child was in fair general condition, was restless and could not sit still, and there was hypo pigmentation of the face and chest. He concluded;

“The child sustained serious injury resulting in permanent facial laceration and permanent head injury leading to drastic behavioural change and attention span deficit. This change will lead to learning impairment and development abnormally. I award 40% permanent disability.”

12. On cross examination Dr. Ngetich told the court that he relied on the P3 form, medical card and observation of the child in preparing his report. He said the child having gone into a coma after the Road Traffic Accident was indication of seriousness of the injury. That a brain concussion at an early age presents high chance of brain contusion or laceration. The plaintiff closed her case.

Defendant's case

13. **DW1 Dharamgan Patel** testified that on the material date 18th October 2007 she went to visit a friend at Section 58. She parked her car in front of the house. After the visit she got into her car and started the engine. There were children playing in the field nearby. As she started to reverse she heard someone shout “*mtoto wangu!*” She came out and found a child at the rear of her car. She picked the child and they took the child to hospital with the mother, she was told the child was ok by the doctor and would be detained for one day, she denied being charged with any offence.

14. On cross examination she said the motor vehicle was parked in front of her friend's house, that the child stayed in hospital for one day,

that she only visited the child for two (2) days and had not visited again. She said she did not know when the child last visited hospital. She denied being charged with any offence and or reporting the matter to the police, she said she did not know Dr. Malik personally but that her husband would know him. She testified that she did not expect anyone to be behind her car when she reversed and that she was negligent. She said she did not ask Dr. Malik to examine the child. On re-examination she denied being negligent.

15. On 6th May 2019, the report by Dr. Malik dated 25th July 2011 was produced by consent, and the defence closed its case. The report indicated that the child was examined at five (5) years old. The child had sustained frictional burns on left side of the face and forehead, chest, both arms, abrasions on left leg.

16. That he had lost consciousness for half (½) an hour after the Road Traffic Accident.

17. The present complaints at that time were that the child scared easily that the mother denied that the child suffered from any convulsions and that his mental behavior was normal.

18. He found no evidence of brain injury, no scars on the arms and legs, but fairly visible scars on the left cheek and temporal area. He concluded that, *the child suffered total incapacity of a temporary nature for one week, followed by partial incapacity of temporary nature for a further one week, there was no permanent physical disability.*

19. In his judgment dated 15th October 2019, the learned Chief Magistrate found for the plaintiff;

- **Liability – 100%**
- **General Damages – 1,500,000/=**
- **Special Damages – 3,000/=**
- **Costs of the suit interest at court rates on General Damages and Special Damages from date of Judgment and on costs from date of filing suit.**

20. The appellants were aggrieved and they filed this appeal.

21. Parties agreed to proceed by way of written submissions.

22. Before the hearing of the appeal the appellants sought to introduce new evidence, medical evidence i.e. which application was declined.

i. The appellant's set out the following grounds of appeal *Whether the trial magistrate erred and misdirected himself as to the exact nature of the Respondent's injuries and as result erred in his assessment of the damages awardable to the Respondent.*

ii. *Whether the trial magistrate erred in failing to consider and analyse the 2nd Medical Examination Report by one Dr. M. S. Malik hence arriving at the wrong determination of the quantum awardable.*

iii. *Whether the trial magistrate erred in law and in fact by failing to give proper and sufficient justification for the outright dismissal of Dr. Malik's Medical Report which was conducted to give a comparative analysis of the Respondent's injuries.*

iv. *Whether the trial magistrate erred in law and in fact by failing to give a comparative analysis of the awards made in respect of the injuries sustained by the Respondent to justify the awards made in respect of quantum.*

v. *Whether the trial magistrate erred in law and in fact by failing to consider the Defendant's written submissions and the subsequent authorities cited and attached thereof in support and in respect of the medical and health status of the Respondent from medical report of Dr. M. S. Malik dated 25th July 2011 and the quantum awardable.*

vi. *Whether the trial magistrate erred in law and in fact by awarding general damages that were excessive and unrealistic considering the injuries sustained; and*

vii. *Whether the trial magistrate failed to appreciate the totality of the evidence before him and failed to give a concise statement of the case, the points of determination, the decision thereon and the reasons for the judgment.*

23. And the following issues for determination;

a) *Whether the trial magistrate failed to consider the medical report by Dr. Malik?*

b) *Whether the learned trial magistrate's failure to consider the medical report by Dr. Malik influenced the final quantum awarded.*

c) *Whether the learned trial magistrate used the wrong principles in assessing damages; and*

d) *Whether the learned trial magistrate's award in General Damages was excessive.*

24. The role of the first appellate court is settled;

“To subject the whole evidence to a fresh and exhaustive scrutiny and make my own conclusions about it bearing in mind that I did not have the opportunity of seeing and hearing the witness first hand.”

See **China Zhongxing Construction Company Limited vs Ann Akuru Sophia [2020] eKLR, Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** among others.

25. I have carefully considered the evidence presented, the rival submissions and authorities cited by each counsel. The appellants are not disputing that a Road Traffic Accident occurred or that the minor sustained injuries. The only issues they are raising are two: Whether or not the trial magistrate considered the medical report by Dr. Malik, and if so, whether the damages that were awarded were excessive.

26. It is common ground that the only issue the appellant has with the judgment of the trial court is that the appellant holds the view that the learned trial magistrate did not consider the medical report by Dr. Malik and hence arrived at the wrong quantum of damages.

27. Let me point out from the outset that I noted from the record that there was no evidence that the minor was present when his mother testified, and neither is there a record that the court observed or saw the minor. However the court was shown photographs of the minor taken on the day the accident happened.

28. There is a letter from the minor’s school, showing that he had learning difficulties and limited attention span.

29. The rest of the evidence on the injuries effects on the minor was to be found in the medical evidence of Dr. Ngetich and Dr. Malik both consultant surgeons.

30. From the authorities cited by counsel for the appellant it is their key argument that the learned trial magistrate completely failed to take into consideration the evidence of Dr. Malik’s Medical Report.

31. This is what the learned magistrate stated;

“There are two conflicting medical reports with regard to the nature and extent of injuries sustained by the plaintiff. Dr. Ngetich awarded a permanent disability of 40% while Dr. Malik opined that the plaintiff did not suffer permanent disability. Dr. Ngetich found that the plaintiff sustained serious injury resulting in permanent facial laceration and permanent head injury leading to drastic behavior and attention span deficit while Dr. Malik found that the plaintiff did not suffer any permanent physical disability. Both doctors are consultant surgeons and there is nothing to tell them apart. It is a herculean task for the court to determine which medical report to go by. At the time of examining the plaintiff Dr. Ngetich was working at the Provincial General Hospital Nakuru while Dr. Malik was in private practice and was instructed to examine the plaintiff in that capacity. In the circumstances of this particular case the court shall rely on the finding of Dr. Ngetich by virtue of the fact that he was not specifically instructed by the plaintiff’s parents to examine the plaintiff and is therefore unlikely to be biased...”

Upon that basis, and the basis of the submissions, authorities cited, awarded General Damages for pain and suffering at Kshs. 1,500,000/=.

32. It is the argument of counsel for the appellant that the learned magistrate erred in relying on Dr. Ngetich’s report, while at the same time holding that it was a herculean task for the court to determine which report to go by. That what the court was required to do was to weigh the evidence, and give it its probative value; that the court was not being called upon to choose one report from the other, but to consider the expert evidence of each of the two doctors, and weigh the same. That in the event of conflicting expert opinion, he was required to test it against the background of all the other evidence; The appellant cited these cases.

1. **Stephen Kinini Wangondu vs The Ark Limited [2016] eKLR**

2. **Apex Security Services Limited vs Joel Atuti Nyaruri [2018] eKLR**

Further that the learned magistrate could only reject the expert opinion on firm grounds – see **Republic vs National Social Security Fund Board of Trustees & Another exparte Town Council of Kikuyu [2014] eKLR Odunga J.**

33. For the respondent it was argued that the record clearly showed that the learned magistrate took into consideration both reports, the respondent relied on **China Road and Bridge Corporation (Kenya) vs Job Mburu Ndung’u [2021] eKLR** where the appellate court found that although the trial magistrate did not say anything about the conflicting awards on permanent disability by two different doctors, she considered the degree of injuries and awarded damages accordingly: see also **Samwel Kimemia Gathoga vs Njoro Canning Factory (k) Limited [2017] eKLR** where the Court of Appeal upheld the trial court’s decision by finding that the learned appellant judge had not appreciated the evidence of the two (2) medical doctors.

34. *What then is the situation here?* The learned trial magistrate rejected the findings of Dr. Malik on the ground that he was likely to be biased, because he had been instructed by the defendants.

35. It is true that Dr. Malik’s unlike Dr. Ngetich, evidence was not subjected to cross examination, and the report was admitted by consent. However, is the mere fact that a doctor is instructed by the other party, a good reason to arrive at a determination that he or she may be biased? I respectively disagree. That fact alone cannot be the basis upon which to arrive at that determination. To reject an expert report in toto, it must be on firm grounds.

There must be a testing of the evidence *viz a viz* the rest of the evidence on record. For instance the age of the reports, one was made a few

months after the accident, the other about four (4) years later, that could explain some of the differences in the two (2) reports, had the two (2) surgeons seen the patient the same time and come up with the two different reports, then there would have been reason for concern by the court and perhaps the need have both cross examined on their reports, but in this case the two (2) reports were years apart, and the differences could have been expected.

36. Be that as it may, the point of departure was whether or not the child had suffered any permanent disability. Dr. Ng'etich put it at 40%. Dr. Malik said there was none, the testimony of the mother was that after the Road Traffic Accident the child went into a coma for a while. It was Dr. Ngetich's testimony on oath that that was evidence of injury on the brain, though no MRI on CT scan was conducted. There is no evidence that Dr. Malik had any CT scan or MRI conducted on his part. Taking a leaf from the **China Road** case cited above, the trial court could have considered that perhaps with the passage of time some of the injuries would have healed, that is the nature of things. However as per the testimony of the mother the child had been affected by the accident, and the trauma had resulted in developmental problems. These Dr. Ng'etich spoke about under oath. Hence, it is my view though the learned trial magistrate expressed his opinion over Dr. Malik's report, he had Dr. Ngetich's testimony on record, on oath. He weighed the two, he compared the findings and chose to go by the report of Dr. Ng'etich..

37. I have perused Dr. Ngetich's evidence on oath, and his report, I have also perused Dr. Malik's report, and I am of the view that the trial magistrate did consider both reports, he compared them and his opinion relied on Dr. Ngetich's report. Hence, he did not just reject it. He considered the report then proceeded to reject it.

38. Did his rejecting Dr. Malik's report affect the award of General Damages? Of course it did because he awarded damages on the basis that the child suffered permanent disability at 40%.

39. It is trite that an appellate court will not disturb an award of damages because as argued for the appellants it is an exercise in discretion which will only be disturbed if it is inordinately high or low or made on wrong principles or upon a misapprehension of the evidence in some material respect :see **Butt vs Khan (1982 – 1988) 1KAR 1** **Asal vs Muge & Another [2001] eKLR**.

40. The appellants also argued that General Damages are meant to compensate, not to enrich a victim, and awards must be a commensurate to others where victims sustained similar injuries. Relying on **Duncan Muenda & 2 Others vs Silas Kinyua Kitheka [2018] eKLR** where the plaintiff sustained severe blunt injury (head) intracerebral hematoma, damage to extensor tendon of the left middle finger, soft tissue injuries to chest wall, admitted for five (5) months, unconscious, award of Kshs. 600,000/= was reduced to Kshs. 350,000/= on appeal; **Grace Mwihiaki Ngugi vs NWM (minor suing through next friend) ANO [2019] eKLR**, plaintiff sustained severe head injury, comatose for one week, deep cut wound on posterior knee blunt trauma to back, deep, extreme lacerations on chest, multiple lacerations on both legs, extreme frictional burns on left thigh, admitted for three (3) weeks in hospital, Kshs. 350,000/= General Damages.

41. For the respondent it was argued that the minor sustained;

- *Severe soft tissue injuries on both arms*
- *Severe head injuries*
- *Friction burns on face with resultant permanent facial lacerations*
- *Permanent head injury leading to drastic behavioural change and attention span deficit*
- *Learning impairment*

Relying on **AAM vs Justic Gisairo Ndarera & Another [2010] eKLR** where a minor was awarded 2.5 million, with the court citing, **Ochieng vs Ayieko (1985) KLR 494** where a ten (10) year old suffered severe brain damage and compound injuries to the left thigh, awarded General Damages of Kshs. 700,000/= the rest being Special Damages. **Paul, Mary & Another Beckingham vs The Attorney General & Haret Abdi HCC 2268 of 1998** Nairobi 2nd plaintiff awarded Kshs. 600,000/= General Damages for 2nd plaintiff who sustained head injuries and required psychotherapy (Judgment on 18th April 2002), **James Katina Peter vs Simon Mutua Muasya HCC 135 of 2001 Machakos** where the plaintiff sustained severe head injury, Kshs. 2,000,000/= General Damages for pain and suffering, Kshs. 500,000/= for future operations arising from injuries sustained (Judgment 8th February 2008).

42. It was argued for the respondent that the respondent's injuries were similar to the ones above cited, and this court should not interfere with the award.

43. I have carefully considered these submissions and the authorities cited. I have taken into consideration the laid down principles upon which the appellate court can interfere with an award of General Damages. The only argument is that it is excessive because it never took into account the medical report by Dr. Malik.

44. I have shown that the learned trial magistrate, despite the reason given for rejecting the report, he, considered Dr. Malik's report and chose to rely on the report by Dr. Ngetich. There is the evidence of the Dr. Ngetich on oath and that of the mother. In view of this I am of the view that the appeal is not merited. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 15TH DAY OF OCTOBER, 2021.

Mumbua T. Matheka

Judge

In the presence of:-

Edna Court Assistant

Mahinda & Maina Company Advocates for the appellants

Gordon Ogola, Kipkoech & Co. Advocates for the defendants