



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 67 OF 2019

BK Suing Thro' His Mother and Next of

Friend EM.....APPELLANT

VERSUS

WILSON GITARI MBURUGU.....RESPONDENT

(An appeal against the judgment delivered on 28/05/2019 by Hon. Samwel M. Mungai (CM) in Isiolo CMCC No.59 of 2016)

JUDGEMENT

1. The appellant being the plaintiff in the trial court sued the respondent for Kshs. 53, 654/-, general damages for pain and suffering and loss of amenities, costs of the suit and interest. On 28/5/2019 the trial court entered judgment in favour of the respondent as follows:

- a) **Liability.....50%**
- b) **General damages – pain and suffering**
- & loss of amenities.....Kshs. 400,000/-**
- Less**
- TOTAL.....Kshs. 200,000 /-**
- c) **Costs and interest**

2. The appellant being aggrieved by the decision filed her appeal based on three (3) grounds which may be summarized into two: **that the learned trial magistrate erred both in law and fact in her assessment of liability and damages.**

3. This appeal was canvassed by way of written submissions. The appellant submitted that the contributory negligence was not well founded considering the minor is aged 5 ½ years. Thus, the liability be assessed at a ratio of 10: 90 in their favour. Based on the injuries sustained by the minor the trial magistrate award was insufficient and negligible. An award of Kshs. 1,000,000/- would be fair. As for the special damages the appellant pleaded and produced sufficient proof through the receipts which were adduced. Thus, the appeal ought to be allowed.

4. The respondent submitted that appellant has failed to establish any sustainable ground to make this court to interfere with the decision of the trial court both on liability and quantum. Therefore, the appeal be dismissed with costs to the respondent.

5. As the first appellate court, this court is to evaluate, assess and analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

6. **PW1 EM** mother to BK told the court that 14/2/2016 before leaving church she told her children to wait for her. As she was inside the church she was informed that her son had been hit by a motor vehicle. They went to Isiolo District Hospital where she was told that her son was knocked while on the side of the road. They were later referred to Kenyatta Hospital where the child was admitted and operated on. He stayed there from 25th up to 29th. Later he was referred to Meru National Hospital for follow up.

7. **PW2 WM** aged 12 and brother to BK recalled that on 14/2/2016 he, his brother, B and M left the church. B and M crossed the road first and he and his brother remained on the other side. B who was ahead of him was knocked by the motor vehicle which he did not see approaching as it was overtaking a lorry. There are no bumps at the scene. He went and called **PW1** and they went to hospital where his brother was taken. His brother has not fully recovered to date.

8. **PW3 NO. 84043 PC Daniel Miluwi** officer attached to Isiolo Police Station stated that the report of the incident was recorded by PC Peter Leruk his colleague. The investigating officer was PC Wilson Ngaiya who filled in the police abstract. He stated that motor vehicle Toyota Fielder KCF 150Z which hit the child along Meru Isiolo road near Cereals Board.

9. **PW4 NO. 72009 PC Peter Ngaruiya** officer attached to Isiolo Police station Traffic Office stated that he was the one who investigated this matter. The driver being the defendant reported to their office that he had knocked down a pedestrian whom he had rushed to Isiolo Referral Hospital for treatment. He visited the scene where there were no visible marks as the victim was a minor who was not seriously injured. There was no blood or debris of the vehicle at the scene. That it was difficult to know what had transpired as the vehicle had been moved. He did not charge the driver since there was no fault on him as the scene had already been interfered with.

10. At the close of the plaintiff's case the defendant gave a sworn testimony. **DW1 Wilson Gitari**, a prison officer attached to Meru GK Prison, told the court that on 14/2/2016 he was driving from Meru to Isiolo. When he reached Cereals Board within Isiolo town he saw two boys on the left side of the road who were holding hands. The younger one bolted off and started crossing the road. He swerved the car to the left but the boy followed resulting in child being hit by the left side of the car. He rushed the boy to Isiolo District Hospital and catered for the child's medical expenses. He reported the matter at Isiolo Police Station where his car was detained. He was also detained and asked to pay cash bail of Kshs. 15,000/- but was never charged with any traffic offence.

11. The issues of determination are:

1. Whether the trial court erred in its assessment of liability

2. Whether the trial court adopted wrong principles in the assessment of damages.

12. On the issue of liability, it is not in dispute that an accident occurred on 14/2/2016 involving the minor and the respondent's motor vehicle along the Meru Isiolo road. According to **PW2** his brother was hit by the respondent's motor vehicle which was overtaking a lorry. The evidence of **DW1** is that he was driving at a speed of 50 kilometers per hour when he saw two boys on the left side of the road holding hands. Suddenly, the minor bolted off and started crossing the road. He swerved to the left side but the boy followed him and was hit by the side of his car. **PW4** stated that it was difficult to know what had transpired as the vehicle had been moved. Gikonyo J in the case **H K M (suing on behalf of the estate of the deceased son K M v Francis Mwangela Ncebere [2017] eKLR** stated as follows:

“As a general rule, presence of a child or children along the road should awaken an intuitive signal of the high possibility that the child or children may enter or crossing the road without notice. That realization should make the driver to be extremely careful and to take such preemptive actions as slowing down considerably or moving away from their position at the time or making an abrupt stop if need be.”

The Court of Appeal comprising of Madan, Wambuzi & Law JJA in the case of **Butt v Khan [1981] KLR 349** at page 357 Wambuzi JA stated as follows:

“I have had the advantage of reading in draft the judgment prepared by Law JA. I agree that the learned judge directed himself properly on the question of contributory negligence and I do not think it has been shown that this court is justified in interfering with his finding that the plaintiff aged 7 ½ years at the time of the accident, was not guilty of contributory negligence.”

13. **PW1** told the court that she was in church with her children whom she had told to wait for her and had no authority to leave. However, **PW2** came and told her that they were heading home. According to her the children would normally leave Sunday School and go home on their own. It seems that that is exactly what **PW2** and the minor did accompanied with other children. **PW4** who is the investigating officer could not ascertain how exactly the accident transpired. Considering that the victim is a minor who is said to be 5 ½ years at the time of the accident and who did not testify goes to show that he could not exactly comprehend his actions in terms of what to do and what not to do. Therefore, that is why the courts have concluded that they cannot be guilty of contributory negligence. The respondent saw about 10 children who were not accompanied any adult and he ought to have been extremely careful when he saw the children beside the road. He ought to have been ready for any eventually if the children were to abruptly step into the road that would allow him to stop his vehicle. The fact that he swerved the motor vehicle means that he was at a high speed that would not have allowed him to stop. The fact that the children were on the left and he swerved towards the same direction instead of away from the children means that he was the one at fault.

14. I therefore, find that the trial magistrate erred in his assessment of liability. I do hereby assess liability at a ratio of 10:90 in favour of the appellant.

15. The assessment of General damages is discretionary and in the case of **Butt v Khan [1981] KLR 349** Law, JA held 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 he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

Also, the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** similarly held:

“As a general principle, assessment of damages lies in the discretion of the trial court and 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 he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

16. In regard to special damages the appellant pleaded Kshs. 53,654/-. Special damages must be specifically pleaded and proved. The appellant produced receipts to prove the medical expenses incurred. The respondent testified that he catered for all the expenses. He has no receipts to show as he sent the money directly to PW1 through Mpesa. In spite of adducing statements when PW1 was recalled and cross examined she confirmed that the respondent catered for all the expenses at Isiolo Hospital where he took the minor. He also catered for Kenyatta Hospital as well by sending her the money. That the respondent catered Kshs. 6,000/- for travel and also catered for money used to travel to the hospitals. Accordingly, I am of the view that the trial magistrate did not err when he did not award special damages. Had the Respondent not catered for the medical expenses of the appellant the court would have awarded proven special damages as pleaded at Ksh. 53,654/-.

17. As for general damages, the appellant cannot be fully compensated for the loss but through the award the court aims to compensate him fairly and reasonably but not to penalize the respondent. According to the doctor's report the minor suffered multiple injuries to the face; soft tissue injury to the thorax, abdomen as well as on his upper and lower limbs; severe injuries to the maxilla and mandible resulting to loss of five (5) teeth with cut on the lip. The injuries have left him with cosmetic damage to the mouth but critical functions such as feeding and talking have not been impaired. But he may need future surgical consultations for functional or cosmetic reasons. There is the possible need for continued future dental care.

18. In the case of **Mombasa Maize Millers (Ksm) Ltd & another v Rengo Joshua Wafula [2017] eKLR** the High Court set aside the award of Kshs. 600,000/- and substituted with an award of Kshs. 400,000/- for facial injury with fracture, injury to the right jaw and teeth, injury to the chest and fracture right condylar (mandible).

19. In the case of **Boniface Njiru v Tohel Agencies and Another [2011]eKLR**, the plaintiff therein sustained a blunt head injury with loss of consciousness for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries. The court therein awarded him a sum of Kshs 1,000,000/= general damages for pain, suffering and loss of amenities.

20. In **Anne Nyachomba Gitau & another v Paul Muigai Murigi [2019] eKLR** the High Court upheld the award of Kshs. 600,000/- for *extreme and severe craniofacial injuries, fractures of the jaw and fractures of facial bones as a result of an accident that occurred in 2006.*

21. *In consideration of the comparable awards and comparable injuries this court is of the view that the assessment of General Damages by the trial court was reasonable and therefore there would be no need to unsettle the same.*

22. Accordingly, the appeal herein is merited in so far as assessment of liability is concerned and this court therefore makes the following final orders:

a) General damages.....Kshs. 400,000/-

b) Less 10% contribution.....Kshs 40,000/-

TOTAL.....Kshs. 360,000 /-

c) Costs of the suit in the lower court and interest at court rates from the date judgment was delivered in the Lower court i.e 28th May 2019

d) Cost of the Appeal to borne by each party.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 20TH DAY OF FEBRUARY 2020.

In the presence of :

C/A: Kinoti :-

Appellant: -Mr Mutunga holding brief for CB Mwangela Advocate Appellant.

Respondent: - Ms Nyagah for Respondent

HON A. ONG'INJO

JUDGE