



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 34 OF 2018

MAXIM LIMITED.....1ST APPELLANT

PHILIP MACHAMA KANYURU.....2ND APPELLANT

VERSUS

LK.....RESPONDENT

(Being an appeal from the Ruling delivered on 15th January, 2018 by Hon. D.O. Mbeja (SRM) Milimani Commercial Courts in CMCC No. 4408 of 2016)

JUDGMENT

1. The Respondent instituted this case against the 1st and 2nd Appellants as the owner and driver respectively of motor vehicle registration No. KBJ 376K. The Respondent claimed damages arising out of road traffic accident involving her and the said motor vehicle on 24th October, 2015. The Respondent attributed the accident to the negligent manner in which the motor vehicle was being driven at the material time.
2. The Appellants filed a Statement of Defence and denied the claim. In the alternative, the Appellants blamed the accident on the Respondent's negligence.
3. The Respondent filed a reply to the Defence, joined issues with the Appellants and reiterated the contents of the pleadings.
4. After a full hearing, the trial court entered judgment for the Respondent against the Appellants on a 100% liability basis for Ksh.1,000,000/= general damages, Ksh.25,765/= special damages and a further Ksh.500,000/= for future medical expenses, costs and interest.
5. The Appellants were dissatisfied with the said judgment and appealed to this court.
6. The Appellant raised ten grounds of Appeal which he summarized in his submissions as the issue of liability, the award of general damages and the award of future medical expenses.
7. I have considered the grounds of appeal and the written submissions filed by the respective counsel for the parties.
8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An appeal to this Court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

9. The Respondent's father, LKM testified (PW1). His evidence was that the then 4 year old Respondent was involved in an accident with the motor vehicle herein on 24th October, 2015 while the minor was crossing the road. His further evidence was that he was informed of the accident and proceeded to attend to his daughter who had already been taken to hospital.

10. The Police Abstract Form in respect of the accident was produced as an exhibit by PW3 PC Antony Omondi. The Police Abstract Form reflects that the accident occurred between the motor vehicle and the minor herein. The 1st Appellant is reflected as the owner of the motor vehicle. The accident was reflected as **"pending under investigations"**

11. The driver of the motor vehicle, DW2 Philip Machama Kanyuru testified that he was driving from Thika. That he saw children who were holding hands and crossing the road from the right to the left and that the accident victim started crossing ahead of the others. That he slowed down and stopped but the child hit the right side headlight and sustained injuries.

12. From the evidence adduced by both parties, it is abundantly clear that there was an accident between the child and the motor vehicle. None of the witnesses called by the Respondent were at the scene. However, the Police Abstract Form bears the details of the accident. DW1 who was the driver of the motor vehicle gave evidence that confirms that the accident occurred and that the minor herein was injured. It comes out from the driver's evidence that he saw the children on the road. He therefore ought to have exercised caution.

13. It has been argued by the Appellants' counsel that a child can bear some responsibility for an accident. Both parties referred the court to the case of **Basier Ahmed Butt v Uwais Ahmed Khan [1982-88] 1 KAR 1 & [1981] KLR 349** where the Court of Appeal held as follows:

"It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness...A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child..."

14. Both parties also relied in the Court of Appeal decision in **Rahima Tayab & others v Anna May Kinanu[1983] KLR 114 1KAR 90** where the court stated:

"Since the learned judge found that the plaintiff paused on the side of the road before beginning to cross, the defendant should have seen the plaintiff before the moment of impact and had she seen the plaintiff at the roadside, she might have been able to avoid hitting her by slowing down or taking avoiding action. Therefore the find that the defendant was negligent is correct..."

The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission...

The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blamed is attached to him or her. A child has not the road senses of his or her elders and therefore cannot be found negligent unless he or she is blameworthy..."

15. From the aforesaid decisions, the age of the child must be taken into account. The minor in the case at hand cannot be blamed for contributing negligence because of her tender age. The driver's evidence is that he saw the children crossing. The driver ought to have exercised caution and stopped for the children to cross first. I agree with the trial court's decision and find the Appellants 100% liable for the accident.

16. The medical report dated 11th December, 2015 by Dr. G. K. Mwaura (PW1), a physician, reflects the Plaintiffs injuries were a deep cut above the eye and cuts on the face and left temple. The Plaintiff is described as having suffered from blood loss and was left with prominent facial scars that would require plastic surgery to remove at a costs of Ksh.500,000/=.

17. The report dated 30th January, 2017 by Dr. Wokabi, a Consultant surgeon (DW1), produced by the Defendants' side similarly states that the Plaintiff had open wounds on the forehead which healed after several weeks but left a prominent scar on the forehead. According to Dr. Wokabi, the Plaintiff is young and the scar will continue to evolve and become smaller and less prominent. Dr. Wokabi did not recommend surgical excision of the scar.

18. From the evidence of the two doctors, their point of departure is whether the Plaintiff will require plastic surgery or not. Although Dr. Wokabi's report is more recent, Dr. Mwaura saw the Plaintiff in court on the day he testified and his view was that the Plaintiff requires plastic surgery for cosmetic purposes. It is difficult for the court to accept the evidence of one of the two doctors over the other. I would in the premises award 50% of the costs of future medical expenses estimated by Dr. Mwaura. This comes to Ksh.250,000/=.

19. Taking into account the Respondent's injuries and having considered awards in comparable case, this courts view is that the award of general damages at Ksh.1,000,000/= by the trial court is excessive and is persuaded to reduce the same.

20. On whether to interfere with the award of general damages, this court is guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**: where the Court of Appeal observed:-

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

21. I assess general damages at Ksh.250,000/=.

22. The total is as follows:

General damages	Ksh.250,000/=
Special damages	Ksh.25,765/=
Future medical expenses	<u>Ksh.250,000/=</u>
Total	<u>Ksh.525,765/=</u>

23. Consequently, I set aside the Judgment of the trial magistrate and substitute the same with a Judgment for the sum of Ksh.525,765/= costs and interest. The Appeal having been partially successful, each party to bear own costs of the Appeal.

Dated, signed and delivered at Nairobi this 24th day of Sept., 2020

B. THURANIRA JADEN

JUDGE