



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 90 OF 2013

MJ (minor suing through his father and next friend)

1. JM

2. JM

3. NMJA.....APPELLANTS

VERSUS

SWALEH O. SHABIBY.....RESPONDENT

JUDGMENT

Outline of facts and pleadings at trial

1. By a plaint dated 4/7/2009 and later amended on the 17/12/2011, the plaintiff, now appellant, sought to recover from the Defendant, now respondent, general and special damages on account of a road traffic accident pleaded to have occurred on the 29/6/2008 at about 8.30pm when the appellant was said to have been hit by the Respondents motor vehicle Registration No. KAS 047T then driven by the Respondent or his agent. The general damages sought must were in the nature of pains and suffering and loss of amenities while the special damages were essentially the costs and expenses occasioned by the resultant injury to the plaintiff. The suit was grounded on the tort of negligence and therefore particulars of negligence as well as those of injuries and special damages were pleaded and set out.

2. Together with the plaint was filed a brief witness statement by the father and next friend. That statement blamed the respondent or driver to have negligence veered off the road and hit the plaintiff minor as he opened the father's car doors to get in. The plaintiff equally filed list of documents to include, a police abstract, P3 form, medical report prepared by DR Ajoni Adede, Receipt for Kshs. 2000 as well as Treatment notes for the Mombasa hospital and invoices as well as receipts in settlement.

3. On service the defendant filed a statement of defence which admitted the occurrence of the accident but claimed any negligence and the particulars therefore and instead attributed the cause of the accident to the negligence of the plaintiff's next of friend for failure to take care of the infant and thereby exposing the infant to danger of being hit. As a consequence the defendant denied all the particulars of injury and special damages and wrapped it up with a denial of the allegation that he had contributed the sum of Kshs.15,000/= for the treatment of the infant. That allegation of negligence against the next of friend appears to have attracted a Reply to default in which the pleadings at paragraphs 4 & 5 of the defence were denied and defendant put to strict proof thereof. The defendant on his side filed a third party notice and dated the next of friend as the first of third parties and one Nabila Mohammed Juma Alamry as the second defendant and blamed both, being the parents of the infact for being neglected their duty of care to the infant and exposed him to the danger sued upon. The notice was apparently served because, there was an appearance thereto filed by the plaintiff advocate who also filed a third party defence.

4. In as far as nothing appears in the rules to forbid a plaintiffs advocate acting for a third party, I find it a fertile ground for conflict of interest in that the same advocate may be forced to have to contend with the prospect of doing a defence against the plaintiff's case.

Evidence adduced

5. At trial the plaintiff called the next friend as PW 2, Dr. Ajoni Adede as pw 2 and one P.C. Joseph Mugumbi as PW 3. The evidence of PW 1, the only eye witness was to the effect that on the material day at about 7pm, he parked his motor vehicle along Kenyatta Avenue as the child went with the mother, 2nd, 3rd party, to a nearby KCB ATM Lobby. After the ATM Transaction the mother and the child came back to where the father was and was standing by the door. When the minor was hit by the Respondents motor vehicle which was said to have been at a speed. As a result of the collision the plaintiff suffered injuries to the head and after fractured leg. The Appellant was taken for treatment at Mombasa Hospital where he was admitted for 2 months as exhibited by the treatment notes and documents which were produced

as PEXH. 1a, b, c & d and he met hospital bills in the sum of Kshs.322,966/= for which he produced exhibit P3. Later the plaintiff was examined by Dr. Adede PW 2 who prepared a medical report and charged a fee of Kshs.2000/=.

6. The Respondent was blamed for failing to slow down at a corner and for driving too fast on the road. He denied that the plaintiff was knocked as he cross the road and reiterated that the collision occurred after he had reached the door to the father vehicle.

7. In cross examination, the witness said that he had parked on a pavement and that the collision occurred when the Appellant had reached the vehicle and was trying to open the left car door. He said that before the accident the mother to the appellant had been holding him by the hand and that at the time of the collision she had eased off the hands. When cross-examined further the witness stated that he saw the Respondent as the driver at the material time and that the respondent admitted to meet ½ the costs of treatment for the minor, followed the witness to hospital and infact gave a sum of Kshs.30,000/= towards treatment but later charged his mind. He denied any negligence on himself and on the plaintiff's mother.

8. PW 2, the doctor; gave evidence that he examined the plaintiffs on the 12/5/2009 and established that the plaintiff had suffered a fracture of the left femur, thigh bone as well as degloring tissue injury to the head. At the time of examination, the plaintiff was walking unaided but had a 16cm scar on the left side of the leg, head and the left leg had a curved deformity. He formed the opinion that the bone injury was grievous but the tender age of the victim would allow satisfactory recover with residual disability while the scar on the head would cause cosmetic concern. He said that he charged Kshs.2000/= to prepare the medical report and Kshs.3000/= to attend court.

9. On cross examination, the witness said that he personally examined the appellant and for treatment notes he established that he had been hospitalized for a period of 15 days and that there was need for the patient to go back to hospital as an outpatient.

10. The police office, PW 3, was called purely to produce the police abstract but was never the investigating officer. He said there was reported an occurrence of a road traffic accident on 29/6/2008 involving the minor appellant and a motor vehicle KAS 047J driven by the respondent. He was firm that he was unable to know who was on the road and who was on the right but and stated that the matter was still under investigations at the time of giving evidence.

11. For the respondent, the only evidence was by the respondent himself. He fixed the time of accident at 8.30pm and the scene at the bend/junction of Jomo Kenyatta Avenue and Mombasa road. He said that at the bend he saw a motor vehicle parked on the wrong side of the road swerved to avoid the motorvehicle but as soon as he had passed the motor vehicle he heard something hit his car braked and saw that a child had hit himself against the car at the back door. He blamed the parents for failing to attend to the child by letting him walk alone. He admitted to having taken the child to hospital, offered to pay half of the treatment costs of about Kshs.120,000/= and infact gave out Kshs.30,000/= on the material day but the further of the child refused to accept the later payment. To him the child had only been injured on the head.

12. On cross examination, he admitted being the owner and driver of the motor vehicle on the material day. He said there was no source of light save for the motor vehicle lights. He said that he felt like his vehicle's rear tyre had chartered out something and stopped after two (2) metres. He said that he reduced speed while taking the bend but denied seeing the child before the accident. The plaintiffs counsel thereafter adopted plaintiff evidences as that of the 3rd.

Decision at trial

13. Having heard the parties and received written submissions, the trial court held and rendered itself as follows:-

“On the issue of liability, I have observed as follows. First, liability is a question of evidence. One can only prove that another is liable by adducing evidence to that effect. As the old quoted maxim states: he who alleges must prove.

In this particular case, there was no eye witness who was called to testify for the plaintiff. PW 1 said in his cross examination that he never witnessed the accident. That puts into question his entire narration of events during his examination is over what is clear is that just before the accident, the minor plaintiff who was then aged 2 ½ years was on his own.

Secondly, considering the age of the plaintiff at the time of the accident, I am on the strong view that he should have been under constant watch and guidance of his parents. PW 1 stated that plaintiff left with his mother to go to the ATM as he remained in the car. It is therefore safe to assume that the mother witnessed the accident. Why she was not called as witness to help in pinning at on liability can only be known to them.

From the foregoing, it is clear that the element of liability has not been proved. The fact that an accident occurred does not open facts, place liability or he all. It would be a travesty if the only thing to be proved in such a case were to be the occurrence of the accident. As even the traffic police officer who testified as PW 3 said no conclusion has been reached. It his words to my knowledge, the file is still pending investigations. Thus I have no material before me from which I can conclusively apportion liability has not been proven against the defendant to the required degree. As such, I do apportion 90% liability to the 3rd parties. The defendant meanwhile will shoulder 10% liability”.

(Emphasis added)

14. On the quantum of damages payable, the court awarded the special damages of Kshs.325,660/= less Kshs.30,000/= admitted to have been paid by the respondent to the appellants, together with general damages in the sum of Kshs.350,000/=. The plaintiff was additionally awarded costs and interests on the damages.

15. That is the judgement the appellant has challenged in this appeal by the nine (9) grounds of appeal set out in the memorandum of Appeal dated and filed on the 01/08/2013. Even though set out as nine grounds, all can be consolidated into four grounds:-

- **The trial court erred in law and fact by misapprehension of the legal principles applicable when subjected to the evidence adduced and thereby came to an erroneous conclusion and finding on apportionment of liability.**
- **The learned magistrate erred in law in apportioning liability to a minor of tender years.**
- **The learned trial magistrate erred in law in failing to comply with the provisions of Order 21 Rule 4 Civil Procedure Rules.**
- **The learned trial court erred in law in awarding damages that were inordinately so low without regard to the nature of the injuries pleaded and proved.**

I will thus consider the appeal on those four grounds.

The law on first appeal, the analysis of the evidence

on record and determination

16. This being a first appeal, the court is mandated to re-appraise, reanalyze and re-examine the entire evidence on record and come to own conclusion without being bound to agree with the trial court provided reasons be given either way^[1]. It is also a principle of law that the burden is at all times upon he would lose if no iota of evidence is led^[2].

17. As found by the trial court, the accident, the injury and even the fact that the respondent, upon accident, agreed to shoulder a halt of the treatment costs, are not in dispute. The biggest dispute is who was to blame for the accident. There was evidence by the **PW 1** that the minor was next to the rear left door trying to open the door when he was knocked.

18. According to the Respondent, however, he had passed the wrongly parked car when he heard something knock his car and when he stepped he saw the child had been injured. He also said that he felt like his rear left tyre had run over something. He however did not advert to seeing the child before the collision but said he saw the next friends car as he negotiated the corner.

19. I do find the evidence of the respondent difficult to reconsider. It is difficult to reconsider because, if the child knocked himself against the rear left part of the car, it would not have been possible for him to be under the car to be stepped upon by the rear left tyre. Secondly, the injuries of a broken limb may not be consistent with a child of that age hitting self against an object. To me the totality of the evidence point a hit by the car rather than the child hitting self against the car. If that is the case then the question would be what amount of outlook and care did the respondent accord other road users was it credible that with his lights on he was totally unable to see the child before he had knock? I find the respondents evidence to have been contradictory and incapable of being the basis to apportion liability to the third parties at 90%.

20. The second reason I find the apportionment of liability untenable is the court's own finding that he had no material from which to conclusively apportion liability. Having found as such, what then informed the apportionment at 90:10? This is the kind of a finding by court, which is not only contradictory but also adrift the evidence on record. It is thus unsupportable and must be set aside.

21. In this case, however, counsel would have done more to help the court reach a just decision. More could have been probed from the witnesses. It would have been of some worth to for example find out from the two eye witnesses where the child fell in relation to the road and the two motor vehicles. It would also have been of benefit to find out if the collision left any dent on the respondent's motor vehicle. It would appear both counsel steered clear of such path. In doing so, they left the court with gaps that would otherwise have been filled by basic probing of the witnesses.

22. The law applicable, this having been a civil claim, is that proof was expected on a balance of probabilities or preponderance. A proof on a balance of probabilities is met when a tribunal or court properly directing itself is able to say we find it is probable that it so happened^[3]. The cause here having been founded on the tort of negligence, the relevant question to ask would have been, it having been established that there was a collision between the child and the respondent's motor vehicle, whether the driver acted in a manner expect of a reasonable and prudent person in his position and circumstances. To answer that question no empirical scientific formula is required. All a court requires to employ is flowing logic. The flowing logic demand that a decision reached reasonably flows from its congruent foundation. When a decision appears incompatible with its basis it deviates from a logical one and may not escape being perceived as a whim. **Lord Reid** words in **Stapley – Vs – Gypsum Mines Ltd (2) (1953) AC 663 at pg 681** captures this view very eloquently that;-

“To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of It is quite irrelevant in this connection in a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...”

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of items. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is

proper to discard all but one and to regard that one as the sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

23. In my determination upon analysis of the evidence I do find that as much as the third parties had a duty to take care of the infant on a public road, the respondent, being a driver of a petrol propelled vehicle equally had a duty to other road users to ensure that he was always on the look out to avoid any preventable harm to such road user. Here the harm to the infant was capable of prevention and could have been prevented had the respondent kept adequate lookout and noticed the presence of the infant proximate to the road. In so acting he was equally negligent and therefore I do find that both the respondent as much as the 2nd and 3rd appellant were equally to blame. I therefore apportion the liability between them at 50:50%. I therefore set aside that decision of the trial court on liability and in its place I do substitute and judgment apportioning liability between the respondent and the 2nd and 3rd appellants equally. Each side bears 50%. Since their tort was joint, as against the 1st appellant, I do enter a joint and several judgment against them.

24. Having so found I do consider that the appeal on liability is substantially determined in favour of the applicants. Accordingly, the next two grounds captured hereinabove are to this court not genuine grounds of appeal against the judgment of the trial court. I say not genuine because even a very casual reading of the judgment reveals that no liability was apportioned against the minor. In thus not genuinely asserting that the trial court erred in apportioning liability to the minor. Further, even though I have found the judgment to have been erroneous on the reason leading to the conclusion on apportionment of liability, it substantially complied with the dictates of Order 21 Rule 4 of The Civil Procedure Act. Those two grounds of appeal fail for being unfounded and are thus dismissed.

25. On quantum of damages awarded, the law is that assessment of damages is in the province of exercise of judicial discretion and this court as an appellate court must be slow to interfere^[4]. It is not enough that had I sat I would have awarded a different sum. I can only interfere where and when demonstrated that the award is so low as to demonstrate wholly erroneous estimate of damages^[5]. Here no demonstration has been made and I decline to intervene with the consequence that the award of damages is upheld.

26. The upshot is that the appeal succeeds to the extent of the apportioned liability only. It is allowed with half costs to the appellant. It is so ordered.

Dated signed and delivered this 22nd day of January 2019.

P J O Otieno

Judge

^[1] In the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, this court said the following with regard to the duty of a first appellate court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

^[2] Kenya Ports Authority v Raphael Obure & 2 others [2018] eKLR

^[3] Lord Denning J. in **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372.**

^[4] Peter M. Kariuki v Attorney General [2014] eKLR

^[5] ^[2] **Kemfro East Africa vs Lubia [1982-1988] 1KAR** where the court, Kneller JA said of an Appellate court:-

“...it must be satisfied that either the judge in assessing 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 must be wholly erroneous estimate of damages...”