



## CIVIL

- Under what circumstance will an appellant court interfere with trial's court award of general damages.
- Whether inherent condition of a claimant is relevant when considering injuries suffered.

### REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

### AT MERU

### HIGH COURT CIVIL APPEAL CASE NO. 79 OF 1999

**J.A.W (Suing through next friend and mother R.W.N) ..... APPELLANT**

**VERSUS**

**JULIUS MUTEA ..... RESPONDENT**

***(An appeal from Ruling and Orders of Mutitu Chief Magistrate in  
CMCC No. 863 of 1998 dated 25<sup>th</sup> June 1999)***

### JUDGMENT

R.W.N (appellant) mother of J.A.W.W (J) sued the respondent Julius Mutea in the lower court seeking for special and general damages in regard to injuries suffered by J when the respondent's vehicle hit J. The facts of the case which are not contested are that the defendant's motor vehicle registration number KNF 366 whilst parked rolled on its own motion and hit J causing her injuries. The driver who had been authorized to drive that vehicle by the respondent stated in evidence as follows:-

***“I had parked besides the road and placed hand brake on it. I also placed a stone at the rear of the wheel. My vehicle started moving without me being inside. I do not know what caused it to start moving. I had parked it on a sloppy place.”***

The vehicle on rolling down the slope hit J which resulted in injuries described by Dr. K.K. Munene as follows:-

- ***Severe head injury with brain contusion.***
- ***Fracture base of skull with otorhea and rhinorhea.***
- ***Linear rupture right tympanic membrane***

J, according to PW2 was hospitalized for 3 days. On examining her, PW2, the doctor found the

following:-

- ***Suffers headaches/dizziness***
- ***Absence attacks on/off***
- ***Repeated eye infections – Right, due to inability to close the eye.***
- ***Drooling/Dribbling saliva from left side of mouth as she cannot close/control its function.***
- ***Reduced hearing on the right side.***
- ***Sick child.***
- ***Has palsy of the 6<sup>th</sup> and 7<sup>th</sup> cranial nerves***
- ***Conjunctivitis right eye***
- ***Restless with reduced concentration.***

PW2's opinion of the injuries suffered by J was:-

***Alice Wawira was involved in a road accident and injured as above. She sustained grievous harm as can be noted from the facial palsy and hearing defeat for which she is still on treatment. She also exhibits symptoms of early post traumatic stress disorder. These afflictions are very difficult to treat and recovery is very subjective and she shall require vigorous treatment and careful follow-up. Complete recovery or extent of this cannot be discerned as in case of other physical injuries due to the complexity of the central nervous system and therefore follow-up in assessment and regular review shall be required. At this instant she is about 20% (twenty percent) disabled.”***

The trial magistrate contrary to the submissions made by the respondent's counsel did not find that J contributed to the accident. He found that the respondent was 100% liable for the accident. The trial magistrate awarded J Kshs. 300,000/= which he reduced by 50% on the ground that J had a pre-existing condition which contributed to her injuries. J was therefore awarded Kshs. 150,000/=. That award aggrieved the appellant who has filed this appeal. The appellant presented the following grounds of appeal:-

- 1. The magistrate erred in law and fact in arriving at a decision against the weight of the evidence on record.***
- 2. The magistrate erred in law and fact in holding a minor of 3 ½ year liable to the tune of 50% contrary to law and fact on record and without evidence to support the holding.***
- 3. The award was in ordinally law comparing the authorities on similar injuries.***
- 4. The magistrate failed to consider appellant's advocate submissions.***

The appellant was aggrieved by the amount of the award given to J and by the reduction of that amount by 50% by a trial court. The trial court by its judgment in that regard stated thus:-

***“Mr. Kamundi pointed out the fact that Dr. Kalunga noted that the 2<sup>nd</sup> plaintiff (J) could have been suffering from facial palsy before the accident and that the accident could only have worsened the condition. I have no doubt to agree (sic) with Mr. Kamundi that the 2<sup>nd</sup> plaintiff (J) current medical condition cannot be solely be (sic) blamed on the present accident. It is my considered view and I do agree with Mr. Kamundi that the accident cannot be blamed for 50% of the plaintiff's condition so that any award given to the plaintiff should be reduced accordingly.”***

I have considered the evidence of PW2 the doctor and I do not find evidence to the effect given in the judgment of the trial court. The doctor gave evidence on the injuries suffered by J as reproduced above. In his cross examination, the doctor stated thus:-

***“It would appear she (J) had a problem with the eyes before the accident.”***

On re-examination, the doctor clarified that the eye problem that J had prior to the accident was as follows:-

***“The child (J) had a problem of scratching the eye before but the problem was aggravated by the traffic accident.”***

In my view, the problem of scratching eyes can hardly be equated to the injuries that the doctor found on J. The reduction of the award by the trial court is therefore not backed by evidential or medical evidence. Even if J had an inherent condition the respondent’s responsibility on the evidence tendered before the trial court did not diminish because of that condition. Lord Wilberforce in the case **Essex Area Health Authority** [1988] A. C. 1090 stated the following pertinent words:-

***“.....it is the creator of the risk who, ex hypothesis, must be taken to have foreseen the possibility of damage, who should bare its consequence.”***

I find that the respondent must bear the consequences of his actions and his wholly reliable for the injuries suffered by J. The principle upon which an appellat court would interfere with an award of damages were set out in the case **Coast Bus Service Ltd Vs. Sisco E. Murunga Ndanyi and 2 Others** Civil Appeal Case No. 192 of 1992 where the Court of Appeal stated thus:-

***“Those principles were well stated by Law, J.A. in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982 – 88] 1 KAR 1 at pg 5 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.....”***

I have considered the authorities cited before the trial court. In my considered view, the case cited by the appellat’s counsel, that is **Mercy Rongoma (minor) Vs. Patrick Maganga Muindi & Ano.** HCCC No. 491 of 1992 decided in September 1993 was more comparable to this case. The claimant in that case was 8 years old. J at the time of the accident was 4½ years old. The claimant in the cited case spent four days in hospital following her injury where she sustained a fracture of the left side of the scalp and laceration of the frontal part of the head. She was unconscious on admission to hospital. In the cited case, the award given was Kshs. 500,000/=. J was similarly unconscious when she was admitted. Comparing the injuries that J suffered with those of the cited case, I find that an award of Kshs. 500,000/= was the more appropriate award in this case. The amount of the award given by the trial court was far too low in my view. It is for that reason that it attracts the interference by this court. The judgment of the court is as follows:-

- 1. The judgment of the lower court in respect of the award of general damages is set aside and judgment is hereby entered in general damages for the appellat for Kshs. 500,000/= with interest from the date of the lower court’s judgment, that is, 25<sup>th</sup> June 1999 until payment in full.***
- 2. The appellat is awarded costs of this appeal.***

***Dated, signed and delivered at Meru this 17<sup>th</sup> day of March 2011.***

**MARY KASANGO**  
**JUDGE**