



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 184 of 2000

RACHEL BESSIE DZOMBO.....APPELLANT

VERSUS

ROBERT OTIENO WAGORO (Suing through the mother and next friend)

MIRIAM WAGORO.....RESPONDENT

J U D G M E N T

Robert Otieno Wagoro a minor, (hereinafter referred to as the respondent), initiated a suit in the Chief Magistrate's Court at Nairobi, through his mother and next friend Miriam Wagoro, seeking general and special damages from Rachel Bessie Dzombo (hereinafter referred to as the appellant).

The respondent's claim arose from injuries suffered by him as a result of an accident in which the respondent was knocked down by the appellant's motor vehicle Registration No.KAE 515D. The respondent contended that the accident was caused by the negligence of the appellant in the management and control of the motor vehicle.

The appellant filed a defence in which she denied the particulars of negligence attributed to her. She contended that the accident was caused by the respondent's action of running across the road when it was not safe to do so. The appellant also denied that the respondent suffered injuries as alleged.

During the trial, Dr. Cyprianus Okoth Okere, who examined the respondent and prepared a medical report, produced the report in evidence. Dr. Okere explained that the respondent's injuries resulted in poor attention and memory, lacerated scars on the forehead and temporal regions, transversal operation scars on the left abdominal wall, hypertrophic scars on the right hand, fracture of the left humerus, and lacerated scars on the thigh. He assessed the respondent's permanent incapacity at 25%.

The respondent's mother also testified. She confirmed that the respondent was as at the time of giving evidence 10 years old having been born on 24th February, 1990. The respondent's mother did not witness the accident but found her son at Nairobi Hospital having learnt of the accident. The appellant visited the respondent at the hospital, where she met and talked with the respondent's mother, expressing regret about the accident. The respondent's mother, produced receipts for Kshs.217,895/= being medical costs incurred, she also claimed 100/= for police abstract report and Kshs.5,000/= for doctor's court attendance.

The appellant did not call any evidence at the trial. However counsel for the appellant made submission urging the court to find the respondent's suit not proved. He contended that the negligence alleged against the appellant had not been established.

In his judgment the trial magistrate found that it was not disputed that the respondent was hit and injured by the appellant's motor vehicle and that the question was whether the appellant was negligent or not. The trial magistrate further found that the respondent having been a child aged 7 years at the time of the accident, he was only expected to exercise the care expected of a child of his age. He found that there was no evidence that the respondent was negligent or that he contributed to the accident. The trial magistrate therefore found the appellant fully liable. The trial magistrate awarded the respondent Kshs.180,000/= as general damages and Kshs.217,985/= as special damages, costs of the suit and interest at court rates.

Being dissatisfied with the judgment, the appellant has lodged this appeal raising 7 grounds as follows: -

- (i) The learned trial magistrate erred in law in holding the appellant liable against the weight of evidence produced.
- (ii) The learned trial magistrate misdirected himself and hence came to the wrong conclusions on the principle of the rebuttable presumptions.
- (iii) The learned trial magistrate misdirected himself and come to the wrong conclusion on the concept of evidence not produced by a party in whose possession it is in.
- (iv) The learned trial magistrate erred in law by removing blame from the injured minor's adult guardian, who, from evidence adduced, was wholly to blame for exposing the minor to foreseeable danger.
- (v) The learned trial magistrate erred in law in not apportioning part of the blame to the minor's adult guardian.
- (vi) (On general damages) the learned trial magistrate erred in law in awarding excessive damages where, from evidence adduced, the minor has recovered fully, losing not even learning time.
- (vii) The learned trial magistrate erred in law in awarding Kshs.217,885/= as special damages whereas the same had not been specifically pleaded.

In support of the appeal counsel for the appellant submitted that the respondent's suit was not proved as no police officer was called to establish how the accident occurred nor was any eye-witness called to testify. It was further submitted that the special damages awarded to the respondent were excessive.

Finally, it was submitted that there was no basis for the award of special damages of Kshs.217,885/= as the same were not pleaded in the plaint.

For the respondent it was submitted that in cases of negligence involving children there is a rebuttable presumption of negligence on the part of the defendant (tortfeasor). It was therefore contended that the burden was upon the appellant to prove that the child failed to show the amount of care reasonably expected of a child of his age. In support of this position counsel cited the following cases:

- (i) *Musisi vs National Water Sewerage Corporation (1974) EA 282.*
- (ii) *Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-1988) 1 KAR 1.*

With regard to the issue of general damages counsel for the respondent relying on the case of *Bashir Ahmed Butt* (Supra), submitted that the appellant had not shown that the circumstances in which an appellate court can interfere with an award of damages was obtaining in this case to justify such interference. Counsel further relied on the following authorities in support of that position: -

- (i) *Julius Kihumba Kireru vs John Aseneka & another HCCC No.776 of 1993.*

(ii) *Agnes Makinya vs Stephen Njuguna Gatuar HCCC No.2422 of 1990.*

With regard to the award of special damages it was maintained that an oral application for amendment to include the special damages was made and the respondent could not be held responsible if the trial magistrate failed to record the same.

I have reconsidered and evaluated the evidence as I am expected to do in this first appeal.

From the pleadings which were before the trial magistrate, it was evident that there was no dispute that a road traffic accident occurred involving the appellant's motor vehicle and the respondent. What was essentially in issue is whether the accident was caused by the negligence of the appellant or that of the respondent, and whether the respondent can be held contributorily negligent. To the extent that there was no eye-witness who was called to testify and upon whose evidence the issue of negligence could be determined, this case was similar to that of *Musisi vs National Water & Sewerage Corporation* (Supra). The following direction by Allen J. provides an appropriate guide in determining the issue of negligence in such circumstances:

"With regard to contributory negligence by the boy Yosefu, the position as I see it is that in order to make a child liable, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age."

This direction is consistent with the decision of the Court of Appeal in *Butt vs Khan (1982-1988) 1 KAR 1* wherein it was stated;

"The test was whether the child was of such an age as to be expected to take precaution for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child."

The respondent having been a child of only 7 years at the time of the accident, it was necessary for the appellant to lay evidence before the trial magistrate upon which a finding of contributory negligence could be made. The appellant having failed to call any evidence in support of the allegations raised in her defence of contributory negligence the trial magistrate cannot be faulted for rejecting that defence and finding for the respondent on the issue of liability.

With regard to the quantum of general damages, the respondent was awarded a sum of Kshs.180,000/=. Given the injuries suffered by the respondent as testified to by Dr. Cyprianus Were, the award was neither excessive nor was it based on wrong principles as to justify the intervention of this court.

With regard to special damages, it is trite law, that special damages must not only be specifically pleaded but also proved. In this case the particulars of the special damages given in the plaint were 100/= for a police abstract, and *"medical expenses to be given at the hearing"*. It was therefore necessary that at the very least, the amount claimed as special damages be particularized before the hearing of the suit.

I have carefully and anxiously perused the record of the lower court. I do note that on the 6th January, 2001, an indication was given to the court that the respondent will be seeking leave to amend the plaint to include special damages. This was however, not done as the court was of the view that the claim would exceed its pecuniary jurisdiction. I do not find anywhere else where such an application was made for amendment of the plaint to include the figure of special damages claimed by the respondent. I have noted that the original plaint bears a handwritten amendment including the sum of Kshs.217,205/= for medical expenses in the particulars of special damages and Kshs.217,985/= in the prayers for special damages. It is not however clear who made that amendment or when the amendment was made. I do note further that the plaint found at pages 3 – 5 of the record of appeal has no amendment in the particulars of special damages but has a handwritten figure of Kshs.217,885/= with a date of 17th January, 2000 next to the handwritten figure. However, there is no record of any proceedings for 17th January 2000 in the record of appeal.

Regrettably, I come to the conclusion that the sum of Kshs.217,885/= claimed as medical expenses was not properly pleaded and therefore ought not to have been allowed. The trial magistrate having failed to consider the appropriate legal principle relating to pleading of special damages, this court must interfere with the judgment of the lower court and set aside that award.

The upshot of the above is that I dismiss the appeal with regard to liability and general damages, but allow the appeal partially to the extent of setting aside the award of Kshs.217,885/= in respect of special damages and substitute it thereof with special damages of Kshs.100/= and a further sum of kshs.5,000/= for the doctor's court attendance. To this extent only does the appeal succeed.

Dated and delivered this 5th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Momanyi for the appellant

Advocate for the respondent absent