Kabue v NCB (Suing Through Mother and Next Friend NCK - Minor) & another (Civil Appeal E010 of 2023) [2025] KEHC 1922 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL E010 OF 2023

E OMINDE, J

FEBRUARY 5, 2025

BETWEEN

SIMON MAINA KABUE ..... APPELLANT

AND

NCB (SUING THROUGH MOTHER AND NEXT FRIEND NCK - MINOR) ..... 1ST RESPONDENT

UFRA MOTORS BAZAAR ..... 2ND RESPONDENT

JUDGMENT

1. The appeal is both on quantum and liability. In the trial Court the 1st Respondent had sued the Appellant and 2nd Respondent claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 4/12/2021, wherein it is alleged that the 1st Respondent was a lawful passenger on board of motor vehicle registration number KDC 635B when the said motor vehicle was involved in a road traffic accident and as a result of which the 1st Respondent sustained injuries.

2. In opposing the claim, the Appellant filed his Amended Statement of Defence dated 27/4/2022, denying the occurrence of the accident but instead pleaded volenti non fit injuria. Alternatively, he blamed the 1st Respondent for being negligent.

3. After trial Judgment was delivered on 28/10/2022 and the Appellant and the 2nd Respondent were found 100% liable and damages assessed as hereunder: -

    a. General Damages..... Kshs.180,000/=

    b. Special Damages..... Kshs.6,550/=

    c. Plus, costs and interests

4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (5) grounds: -

    1. The Learned Trial Magistrate erred in fact and in law in holding and finding that the Respondent herein proved that she had sustained the injuries alleged following the suit accident despite the 1st Respondent's failure to prove injuries by way of adducing treatment notes.

    2. The Learned Trial Magistrate misdirected himself in fact and in law, when he failed to properly or at all evaluate and/or analyse the evidence on record as to proof of injuries allegedly sustained cumulatively and or exhaustively, thus the Learned Trial Magistrate reached am erroneous conclusion insupportable by the evidence on record as to the alleged injuries sustained.

    3. That the Learned Trial Magistrate erred in law and fact by disregarding and failing to appreciate the judicial authorities on failure to adduce treatment notes cited by the Appellant in his written submissions thereby reaching a decision that is erroneous in the circumstances and connotes an erroneous analysis in view of the failure by the Respondent, to adduce treatment notes in proof of alleged injuries.

    4. That the Learned Trial Magistrate misdirected himself by failing to take into account the well-established principle requiring comparable awards to be made for comparable injuries sustained thereby falling into an error by awarding Kshs.180,000/= which award is manifestly excessive.

    5. That the judgments and/or decision of the Learned Trial Magistrate is contrary to the weight of the evidence on record.

5. The appeal was canvassed vide written submissions. Both the Appellant and the Respondent filed their respective submissions on 4/11/2024.

The Appellant's Submissions

6. The Counsel for Appellant's submitted that the 1st Respondent failed to adduce any evidence as proof of the alleged injuries either orally or by way of documents in the form of treatment chits/notes or by testifying on the alleged treatment administered and the injuries sustained. He referred to the provisions of Sections 107, 108 and 109 of the *Evidence Act* CAP 80 Laws of Kenya.

7. Counsel referred the Court to the proceedings of 19/1/2022 where the he states that the plaintiff chose not to adduce as exhibits from Eldama Ravine County Hospital the documents that she identified and which were marked as PMFI-2. Counsel further contended that the 1st Respondent failed to prove that the injuries were as a result of the accident.

8. Counsel in submitting that in a tort of negligence, the onus is upon the claimant to prove his claim, relied on the case of Stephen Kanjabi Wariari v Dennis Mutwiri Muriuki & another [2022] eKLR, where the Court held that:

> The Court has analyzed the pleadings and evidence before the trial Court, and has considered the grounds of appeal filed herein and the appellant's written submissions. As I have already noted, the appellant's case (as was before the trial Court) was premised on the tort of negligence. That being the case, the appellant had a duty to prove that the accident was caused by the negligence of the respondents herein. In so doing, the appellant had a duty to prove the elements of negligence. The elements of the tort of negligence which must be

proved for an action in negligence to succeed are (a) there was a duty of care owed to him, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage (See Donoghue v Stevenson (1932] A.C.562.)"

9. Counsel further relied on;

   a. Timsales Ltd-vs-Wilson Libuywa NKU HCC No. 135 of 2006, Buds & Bloons Ltd-vs-James Sawani Sikinga Nku HCCA No.126 of 2005

   b. Eastern Produce (K) Ltd-vs-James Kipketer Ngetich Eldoret HCCA No. 85 of 2002

   c. Kesi Jindwa Karuku v Steel Makers Ltd [2019] eKLR

10. Guided by the above authorities, Counsel urged this Court to hold that the trial Court erred in the judgement and proceed to find that their Appeal has merit and uphold the same and dismiss the 1st Respondent's suit with costs for want of proof.

11. On the damages awarded at Ks. 150,000/- Counsel reiterated that the 1st Respondent failed to adduce treatment documents as proof of the injuries sustained. He further submitted that the injuries sustained were soft tissue injuries. He faulted the trial Court for not citing any precedent in support of its decision to award Ks. 150,000/- as general damages.

12. Counsel further submitted that even as the 1st Respondent is alleged to have sustained soft tissue injuries, in their submissions they relied on the holding in Elizaphen Mokaya Bogonko vs Fredrick Omondi Ouna [2022] eKLR, and prayed for the award of Ks. 600,000/- yet the Plaintiff in the cited precedent suffered more severe injuries being head injury with loss of consciousness, fracture of the right zygoma (facial bone), multiple facial lacerations and multiple blunt injuries. That in this regard, this precedent was not applicable to the case herein.

13. Counsel further submitted on the authorities cited by the Appellant to wit

   a. Manase & another v Muga (Civil Appeal E040 of 2020) [2022] KEHC 10487 (KLR) (28 July 2022)

   b. Edward MMutevu Maithya & another v Edwin Nyamweya [2022] eKLR

   c. ; LNK (A Minor Suing Through CNK As Next Friend) & 2 others v Simon Gatuni Njukia [2022] eKLR

   d. Losagi Insurance Brokers Limited & another v Josephat Achesa Chumbali [2022] eKLR

   e. Francis Omari Ogaro v IAO (minor suing through next friend and father GOD [2021] eKLR,

14. He urged the Court to consider that in all these case that involved soft tissue injuries that were more severe that the ones sustained by the 1st Respondent herein, the Court reduced the initial awards given to amounts that range between Ks. 100,000/- to Ks. 80,000/-.

15. Counsel therefore submitted that all these precedents were applicable to the 1st Respondent's case bearing in mind that the nature of injuries in these cases are similar to those allegedly sustained by the 1st Respondent and that further, the court should note that the precedents were very recent.

16. Counsel therefore submitted that in the unlikely event the Court agrees that the injuries allegedly sustained by the 1st Respondent were proven, then an award of Kshs.80, 000/ would suffice. He placed reference on the following precedents;

a. Makami v Obong'o (Civil Appeal E062 of 2021) [2023] KEHC 922(KLR) where the Court substituted the award of Kshs.100,000/-with Kshs.80,000/-for marked swelling and bruises on the forehead, marked neck and chest pain, cut wound on the right elbow joint and right knee joint

b. Rege *v LA (Minor suing through her father and next friend GAA) (Civil Appeal E111 of 2021*) [2022] KEHC 16634 (KLR) where an award of Ks.400,000/- was substituted with that of Kshs.80,000/-for bruises on the right hand, blunt trauma to the right hand and chest contusion,

c. Manase & another v Muga (Civil Appeal E040 of 2020) [2022] KEHC 10487 (KLR) where an award of Kshs. 200,000/= was substituted with an award of Kshs.100,000/- for a cut wound on the forehead, ttenderness of the neck, chest, back, left elbow and left hand and bruises on both knees.

d. Edward Mutevu Maithya & another v Edwin Nyamweya [2022] eKLR where an award of Kshs.550,000/- was reduced to that of Ks.100,000/= for cut wounds on the scalp (head region), bruises to the back, right upper limb and the left lower limb.

The Respondent's Submissions

17. Counsel for the 1st Respondent submitted that the 1st Respondent aptly and adequately proved her case to the required evidentiary standards, being that of a balance of probabilities. That the 1st Respondent's case was that she suffered personal injuries as a result of road traffic accident occasioned by the negligence of the Appellant and the 2nd Respondent herein.

18. That at the hearing, she availed witnesses who testified in her favor and that further, she produced documentary evidence to wit, treatment chits, medical report, receipts for special damages, demand letter, P3 and police abstract which uncontrovertibly proved the occurrence of the said accident and the resultant injuries suffered by the 1st Respondent.

19. Counsel maintained that the learned trial Magistrate was rightfully guided by the evidence on record which was uncontroverted by the Appellant and the 2nd Respondent during the trial in the lower Court. Additionally, Counsel submitted that the treatment chits were not the only proof that the 1st Respondent herein suffered personal injuries as a result of the accident. He submitted that the 1st Respondent also produced a P3 Form which indicated the injuries that she sustained and that in itself a P3 is a Medical Examination Report which is valid.

20. Counsel further submitted that in proving the injuries suffered by a person, the evidence need not be in the form of documents only but may also take the form of oral or object evidence. Counsel relied on the holding in the case of Carolyne Indasi Mwonyonyo v Kenya Bus Service Ltd (2012) eKLR in which the Court held as follows:

> The Black Law Dictionary defines the term evidence as:
>
> > Any species of proof, or productive matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete object etc for the purpose of inducting belief in the minds of the Court or jury as to their contention ..... It is clear from the above definition that evidence can be by way of oral, documents or objects. I do find that the trial Court erroneously dismissed the Appellant's suit for no apparent reasons. The trial Court's suspicions on the injuries sustained by the Appellant

> blinded its objectivity and corrupted its mind.....The oral evidence was sufficient to find in favour of the Appellant. There is no written rule that injuries suffered by a victim of a road traffic accident must be formed by documentary evidence by way of treatment notes"

21. As such, Counsel urged that the Appellant failed to adequately disapprove the oral and documentary evidence adduced by the 1st Respondent and that save for the treatment notes, he did not move to impeach the credibility of the witness statements and P3 form. Counsel submitted that the Appellant's defence remained mere allegation/denials not proved by an iota of evidence as required under Sections 107 and 108 of the *Evidence Act* and thus the trial Court's decision was just and right having been informed by the evidence on record.

22. In regard to general damages awarded to the 1st Respondent, Counsel submitted that the assessment of damages is an exercise of discretion by the Trial Court. It has been restated from time to time that for an Appellate Court to interfere with Trial Court's finding, it must be proved that the Trial Court took into account irrelevant factors or gave an inordinately high/low amount as was held in the case of Kemfro Africa Limited-vs-Lubia & Another (No.2) [1987] KLR 30 as follows;

> " 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 judge were held by the former Court of Appeal for Eastern Africa to be that it 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 wholly erroneous estimate of the damage".

23. Counsel maintained that the nature and/or severity of injuries sustained by the 1st Respondent should be the primary consideration and/or guide to the Court in determining the quantum of damages for pain and injuries sustained. Counsel submitted that the general damages awarded by the Learned Trial Magistrate indeed corresponded with the severe injuries sustained by the Plaintiff/Respondent. Counsel added that as it can be noted from the 1st Respondent's pleadings and documents/exhibits/evidence, the 1st Respondent sustained the following injuries which were confirmed by Doctor Sokobe's medical report;

    a. Blunt injury to the back

    b. Blunt injury to the neck

    c. Blunt injury to the both lower limbs

24. Counsel submitted that the above injuries were also supported by the P3 form, treatment notes and the Medical Report tendered as the 1st Respondent's evidence. Counsel added that the 1st Respondent relied on the case of Elizaphen Mokava Bogonko vs Fredrick Omondi Ouna (2022) eKLR where the plaintiff was awarded Kshs. 500,000 for injuries similar to the 1st Respondent's herein.

25. That the learned Trial Magistrate did not misdirect himself therefore when he awarded general damages of Kshs. 150,000/=, since the same was in fact, based on the nature and severity of injuries sustained. That the award was indeed on the lower side considering recently decided and/or comparable cases on quantum and high inflation. Counsel further submitted that the 1st Respondent herein proposed a figure of Kshs. 500,000/- as compensation for general damages but the trial Court having considered the pleadings, the oral testimony, the documents and exhibits produced and bearing in mind the high

inflationary rates and the nature of the grievous injuries sustained by the 1st Respondent rightly held that an award of Kshs.150,000/= would be adequate compensation for general damages.

26. Counsel further added that in the assessment of damages, comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the correct levels of awards in similar cases as was observed by Court of Appeal in the case of Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR.

27. Counsel submitted that an Appellate Court is not justified in substituting a figure of its own different from that awarded by the Trial Court simply because it would have awarded a different figure if it had tried the case at the first instance. This Counsel submitted is a well-established legal principle as was pronounced in the case of Kisumu-vs-Sophia Achieng Tete, Civil Appeal No. 284 of 2001[2004]2KLR 55 and Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR HCCA No.72 of 2019

28. To further buttress his submissions, Counsel for the 1st Respondent also relied on *Otieno v Mwea County Medical Centre Ltd & 2 others (Civil Appeal 49 of 2021*) [2023] KEHC 22474 (KLR) and George & another v Babu (Civil Appeal E130 of 2023) [2024] KEHC 5986(KLR)

Analysis & Determination

29. Being a first appeal the Court is alive to the age-old principle as set out in the case of Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123 as follows:

> "...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 into account of particular circumstances or probabilities materially to estimate the evidence."

30. As stated above the two limbs to this appeal are on quantum and liability and I will deal with the issue of liability first.

Liability

31. The appellant has argued that the trial Court misdirected itself at apportioning liability against the Appellant at 100% despite overwhelming evidence to the contrary. At the point of filing suit, by dint of Section 107(1) and 108 of the *Evidence Act* CAP 80 Laws of Kenya, the burden of proof lay with the Plaintiff who had sought the relief of this Court. She then tendered her evidence and blamed the Appellant for the accident. The burden of proof then shifted to the Appellant to rebut the plaintiff's case.

32. From a perusal of the pleadings, the facts are that an accident did occur on 4/12/2021, involving motor vehicle registration number KDC 635B belonging to the Appellant and the 2nd Respondent was its driver. The 1st Respondent was a lawful fare paying passenger in the said motor vehicle. That as a result of the accident, the 1st Respondent sustained injuries.

33. The Hon Magistrate in his judgement noted that despite the denials as averred by the defendant in his defense denying ownership of the accident motor vehicle and that the accident occurred and the plaintiff sustained injuries, at the trial, the defendants did not avail any witnesses. The Hon Magistrate further observed that apart from the plaintiff testifying orally she also availed documentary evidence

to prove her case to wit copy of a police abstract dated 8th December 2021- see PExh9 and evidence of ownership of the motor vehicle-see PExh6.

34. The Hon Magistrate was of the finding that the said evidence was not controverted in any way and it proved without question the twin issues of the occurrence of the accident and the ownership of the motor vehicle in favor of the plaintiff. I have considered the record of proceedings. It shows that the plaintiff testified by adopting her witness statements and List of Documents and closed her case and the defendant called no witnesses as stated in the Hon Magistrates judgement. In this regard, the Appellant's Statement of Defense remained as mere allegations-see Janet Kaphiphe Ouma & another v Maries Stopes International (Kenya), Kisumu HCCC No 68 of 2007

35. Further, the averment by the 1st Respondent that she was a fare paying passenger in the accident motor vehicle has not at all been denied and or controverted by the Appellant and the 2nd Respondent. As a passenger who was merely sitting in the car being transported from one point to another for a fee paid as fare, it is clearly apparent that the 1st Respondent was a passive participant in the occurrence of the accident.

36. This being the case, I do not see how she can be blamed for causing the accident by apportioning liability to her in any way or at all. I therefore find the holding of the Trial Court on liability at 100% as proper, I see no justifiable reason for disturbing the same and it is now hereby upheld.

Quantum

37. On whether the award of Ks.150,000/- was excessive in light of the injuries sustained as herein above summarized to warrant the Court to interfere with the same, the Court is guided by the decision of the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR (supra) wherein it stated that "comparable injuries should attract comparable awards".

38. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial Court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors- see Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] (Supra)

39. In this case, the injuries suffered by the 1st Respondent in this case and as listed in the treatment notes, the P3 form and the Medical report by Dr. Joseph Sokobe are as already herein above indicated. The Court is alive to the fact thatone person's injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible the injuries are comparablee.

40. From Dr. Joseph Sokobe's medical report it is clear that the Respondent herein sustained soft tissue injuries which she was recovering well. While appreciating that money cannot renew a physical frame that has been shattered or battered, the 1st Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards and of course with the emphasis that an award of damages is not meant to enrich the victim but to compensate them for the injuries sustained.

41. In the trial Court, the Appellant proposed Kshs.80,000/= while the 1st Respondent proposed Kshs.600,000/= for the award of general damages, with each party citing authorities in support of their proposal as already herein summarized.

42. In Considering the injuries sustained by the 1st Respondent and keeping in mind the fact that that no injuries can be completely similar, I note that the Appellant has cited the case of Francis Omari v JAO (Minor suing through next friend and father GOD) [2021 eKLR wherein the Court substituted an award of Ks. 230,000/- with Ks. 180,000/- for injuries comparable to the ones sustained by the plaintiff

herein even though just slightly more widespread but soft tissue nonetheless and has urged that the Court finds this authority and others cited by him applicable bearing in mind that the nature of the injuries are similar to those sustained by the 1st Respondent and further, that the authorities are fairly recent.

43. Given this submission by the Appellant and relying on the authority cited by the said Appellant, I am satisfied that the Trial Magistrate too was properly guided by the authorities cited before him in arriving at the award of Ks. 150,000/- which in my opinion is a fair and reasonable compensation to the 1st Respondent. It is neither too low nor too high in the circumstances and I see no reason to disturb this finding. The same is accordingly upheld

44. On special damages, Ks. 9,600/- was pleaded and but only Ks. 6,550/=- was strictly proved through receipts this being money spent on the motor vehicle search and medical report and P3 form.

45. As was held in the case of Hahn vs. *Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, by the Court of Appeal;

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

46. In this regard, Special Damages are now hereby upheld as awarded at Ks. 6,550. In light all the above, the upshot is that I am of the finding that the Appeal lacks merit and the same is dismissed in its entirety with costs to the 1st Respondent.

READ DATED AND SIGNED AT ITEN ON 5TH FEBRUARY 2025

E. OMINDE

JUDGE