SNM (A Minor Suing through his Next Friend and Mother ENW) v Muthoni & another (Civil Appeal E052 of 2022) [2025] KEHC 1359 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1359 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E052 OF 2022

MA ODERO, J

FEBRUARY 7, 2025

BETWEEN

SNM ..... APPELLANT

A MINOR SUING THROUGH HIS NEXT FRIEND AND MOTHER ENW

AND

NJORA WACHIRA LUCY MUTHONI ..... 1ST RESPONDENT

EPHANTUS NJORA WAWERU ..... 2ND RESPONDENT

(BEING AN APPEAL ARISING FROM THE JUDGEMENT DELIVERED ON 2ND DAY OF SEPTEMBER, 2022 BY HON. M.N. MUNYENDO PRINCIPAL MAGISTRATE IN OTHAYA CMCC NO. 21 OF 2021)

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 12th September 2022 by which the Appellant SNM (a minor suing through mother and next friend ENW) seeks the following orders:-

   "(1) That the appeal herein be allowed.

   (2) That the judgment on liability be set aside and this court do assess the same afresh.

   (3) That the cost of the trial court and of the appeal be awarded to the Appellant."

2. The Respondents Njora Wachira Lucy Muthoni and Ephantus Njora Waweru have opposed the appeal.

3. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 1st July 2024 whilst the Respondents relied upon their written submissions dated 24th July 2024.

Background

4. This appeal emanates from the judgment delivered on 2nd September 2022 by the learned Principal Magistrate sitting at the Othaya Law Courts.

5. The Appellant herein filed in the lower court a Civil Suit vide the plaint dated 30th September 2021 seeking the following prayers

> " (a) General damages for pain and suffering and loss of amenities.
>
> (b) Special damages of Kshs. 3,650/=
>
> (c) Costs and interest on (a) and (b) above
>
> (d) Any other relief this Honourable Court may deem just to grant."

6. The Respondents opposed the suit through their statement of Defence dated 29th March 2022.

7. The Appellants stated that on 12th September 2020 at about 4.00pm the minor appellant and his mother were pedestrians walking along the Othaya-Mukurweini Road at Kiaganda Area.

8. The 2nd Defendant was on the material date driving a motor vehicle Registration No. KCE XXXXF Mazda Station Wagon along the same road. That the said vehicle was registered in the name of the 1st Respondent.

9. The Appellants allege that the said motor vehicle was so negligently managed and/or controlled and being driven at a high speed veered off the road onto the pedestrian path hitting the minor and knocking him down as a result of which the minor sustained serious injuries.

10. The Respondents in their defence conceded to the occurrence of the accident involving their vehicle and the minor. However the Respondents denied the allegations of negligence made against the 2nd Respondent. According to the 2nd Respondent, the accident was caused by the child who suddenly ran into the road into the path of the oncoming vehicle. The driver braked and swerved to the right in an effort to avoid hitting the child. That the minor fell on the tarmac on the left lane thereby sustaining injuries. The driver denies that his vehicle came into contact with the minor at all.

11. The suit was heard interpartes. The trial court in the judgment delivered on 2nd September 2022 found that no liability for the accident attached to the Respondents. The Court found that the Appellants had failed to prove negligence on the part of the driver of the vehicle.

12. Notwithstanding the above finding the trial court proceeded to assess damages. This was in line with the case of Ngonze -vs- Nganga [2024] eKLR in which the Court of Appeal held as follows;-

> " 46. Assessment of damages is exercise in discretion. In the case of Butler -V- Butler (1984) KLR 225 the court held:- "The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision."
>
> 47. Nevertheless, the court is duty bound to assess damages even when the suit is dismissed. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court

noted as follows;- "It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum." [own emphasis]

13. The trial court therefore assessed damages as follows:-

    (i) General damages - Kshs. 400,000.00

    (ii) Special Damages - Kshs. 3,650.00

    (iii) Total Award - Kshs. 403,650.00

14. Being aggrieved by this judgment the Appellants filed this present appeal. As stated earlier the appeal was opposed.

Analysis and Determination

15. I have carefully considered the record of Appeal filed in court on 13th October 2023, as well as the submissions filed by both parties. This being a first appeal the High Court is obliged to re-evaluate the evidence adduced before the lower court and to draw its own conclusions on the same.

16. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the court held as follows;-

> "....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court.....is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

17. The Appellants have challenged the finding of the trial court on the issue of liability. In dismissing the suit the trial court found that the Appellants had failed to prove their allegations of negligence against the 2nd Respondent to the required standard.

18. It is trite law that he who alleges must prove. This principle is encapsulated by Section 107 of the *Evidence Act* Cap 21 Laws of Kenya. In dismissing the legal burden of proof in the case of Anne Wambui Ndiritu -Vs- Joseph Kirpono Ropkoi & Another [2005] E.A 334 the court held that

> "As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is placed upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

19. This is a Civil case thus the standard of proof required by law is 'on a balance of probability'. The question of what amounts to proof on a balance of probability was discussed in the case of William

Kabogo Gitau -Vs- George Thuo & 2 Others [2010] KLR 526, where Hon. Justice Luka Kimaru (as he then was) stated thus

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

20. In Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties.....are equally (un) convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

21. In the trial before the lower court the Appellants and the Respondents gave conflicting accounts of how the accident occurred. The Appellants case was that the driver of the vehicle approached at a high speed veered off the road and hit the minor on the side of the road where he was standing with his mother. That due to the impact the minor fell on the tarmac and as a result sustained a fracture to his right leg.

22. However the 2nd Respondent who was the driver of the vehicle in question contradicts the account given by the Appellants. According to the driver on the material date he was driving from Othaya toward Mukurweini. Upon reaching Kiaganda area, he came across a crowd of people who were coming from a funeral, standing by the side of the road.

23. The driver stated that due to presence of the crowd he slowed down. That suddenly a young boy ran into the road into the path of his vehicle. The driver stated that he hooted, braked and swerved to the right in an attempt to avoid hitting the child. That the child fell onto the road and injured his leg. The driver insists that there was no impact between his vehicle and the child. He then stopped and took the child to hospital.

24. I have perused the record of the evidence adduced before the trial court as well as the judgment prepared by the trial magistrate. Pw2 who was the victim's mother claims that the vehicle was being driven at a high speed when it hit the child. However I note that as per the inspection report dated 12th September 2020 upon inspection no damage was found on the body of the vehicle and no defects were noted.

25. If the vehicle had hit the child at a high speed then one would expect there to be at least a bump/dent on the vehicle. It is therefore unlikely that the vehicle was speeding.

26. There was only one eye witness to the accident who was the victim's mother. She told the court that she was on the side of the road standing holding her son's hand. That the vehicle veered off the road and hit the child.

27. Pw1 Corporal Sidi Chanzo was the officer who visited the scene and drew the sketch plan. Pexh1 Pw1 corroborated the evidence of Pw2 that the impact occurred off the road. The sketch plan clearly shows that the point of impact was on the far edge of the left side of the road.

28. Accordingly I find that the sketch map corroborated the evidence of the eye witness. In my view the sketch map was a crucial piece of evidence which showed that the minor was hit on the left side of the road, therefore for one reason or another the driver veered off the road and hit the child where he and the mother were standing.

29. The driver of the vehicle Dw1 told the court that there were many pedestrians on the road as they were coming from a nearby funeral. In light of these facts the driver had an obligation to take extra care and caution whilst driving in that area.

30. Indeed in the case of Re Estate of Esther Wakiini Murage -Vs- Attorney General & 2 Others [2015] eKLR, the court of Appeal observed that;-

> " well driven motor vehicles do not just get involved in accidents....."

31. In a court room situation, we deal with empirical evidence on what scenario is more probable than the other. In the case of Embu Road Services V Riimi (1968) EA 22, the courts held inter alia that;

> "Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence." See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

32. In the circumstances I find that the driver accident was largely to blame for this accident as he veered off the road in an area of high pedestrian population. I assess the liability of the driver at 70%.

33. The child who was being held by his mother contributed to the accident by not moving out of the way of the oncoming vehicle. The accident occurred at 4.00pm in broad day light and visibility was good. They could have taken steps to move out of the way of the vehicle. I assess his contributory liability at 30%.

34. The appellant did not challenge the assessment of damages made by the trial court and parties did not submit on quantum. I therefore allow this appeal and direct that the assessed damages be distributed at the rate of 70:30 in favour of the Appellant. The judgment of the lower court is hereby set aside in its place this court makes the following award

General damages - 400,000/=

Less 30% - 280,000/=

Special damages - 3,650/=

Total Award - 283,650/=

35. Finally I make an award of Kshs. 283,650 plus costs of this appeal and interest at court rates from the date of this appeal until payment in full.

DATED IN NYERI THIS 7TH DAY OF FEBRUARY, 2025

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MAUREEN A. ODERO

JUDGE