



EA (Minor suing through Mother and Next Friend EJ) v Ager (Civil Appeal E011 of 2023) [2025] KEHC 2594 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E011 OF 2023
DK KEMEL, J
MARCH 14, 2025**

BETWEEN

EA (MINOR SUING THROUGH MOTHER AND NEXT FRIEND EJ) APPELLANT

AND

JOHN OUMA AGER RESPONDENT

(Being an appeal from the judgment and decree of Hon. P J Nandi (S.P.M) in Bondo SPMCC No. E004 of 2022 delivered in April 2023)

JUDGMENT

1. The Appellant herein, a minor suing through her mother and next friend filed a plaint dated 24th January 2022 seeking general damages, special damages and future medical expenses for the injuries sustained in a road traffic accident that occurred on 21st August 2021 at Ndori-Luanda Kotieno junction along Bondo-Kisumu road at around 5.00pm involving the Respondent's motor vehicle registration number KAQ 567L Toyota Corolla and a motorcycle whereupon the Appellant was a pillion passenger.
2. After a full trial, the trial magistrate established that the Appellant had not prove her case on balance of probabilities and consequently dismissed the Appellant's suit with an order that each party was to bear their own costs.
3. Aggrieved by the said judgement, the appellant filed her Memorandum of Appeal wherein she raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and in fact by finding that the Appellant did not prove liability on the part of the Respondent on a balance of probability.



- ii. That the trial magistrate erred in law and in fact by failing to consider that the plaintiff was a minor hence could not testify in court.
- iii. That the trial magistrate erred in law and in fact by failing to consider the Appellant's evidence on the occurrence of the accident which was not challenged by the Respondent.
- iv. That the trial magistrate erred in law and in fact by finding that the Appellant did not discharge her evidential burden.
- v. That the trial magistrate erred in law and in fact by arriving at a decision which was against the weight of the evidence in court.
- vi. That the trial magistrate erred in law and in fact by concluding that the Respondent was not to blame for the accident even though the Respondent failed to prove that he was not to blame for the accident.
- vii. That the trial magistrate failed to consider the doctrine of *res ipsa loquitur* in his judgement.

Reasons wherefore the Appellant prays that the judgment and decree dismissing the Appellant's claim be set aside and substituted with a judgment allowing the Appellant's claim as per the plaint dated 24th January 2022 with costs.

4. Being a first appeal, this court's duty is to re-evaluate the entire evidence and subject it to a fresh exhaustive scrutiny so as to arrive at its own independent conclusion. The court also has to bear in mind that it did not have the opportunity to hear or see the witnesses and thus it must give an allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123; *Peters V. Sunday Post Ltd* (1958)EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000.(Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000.(Okubasi, Githinji & Waki JJA).
5. PW1 Prof. Okwacho testified and presented a medical report dated 21/12/2021. He stated that the plaintiff sustained head injury, mouth and teeth injury, neck injury, injury on the chin, chest left leg fracture and back injury. That the degree of injury was classified as harm. That he relied on the victim's narrative and physical examination. That the X-ray showed a fracture of the tibia fibular of right leg. That the medical report was produced as Exhibit 1a) and a receipt of Kshs 2000/- as exhibit 1 b).
On cross-examination, he stated that the plaintiff/appellant visited his office on 21/12/2021. The degree of injury was classified as grievous harm as it left permanent and lasting scars. That the appellant has since healed. That if she was wearing a helmet then she would not have sustained the injuries and required orthopedic attention on the fractured leg.
6. PW2 Jared Obiero a clinical officer produced a P3 form filed on 10/9/2022 for the Plaintiff/Appellant. On examination, he noted that she sustained tenderness and bruises on the anterior aspect of chest, compound fracture on the tibia bone with fractured dislocation tubular bone at knee joint on left leg. That the age of injuries was twenty days and that the degree of injury was grievous harm. He produced the P3 form as Exhibit 2. That he relied on the discharge summary prepared by Dr. Akomo whom he worked with. He produced treatment notes from pages 12-17 as exhibits 3 (i-v) including the receipts.
7. PW3 No. 235864 IP Sabastian Makobi the Base Commander Bondo Police station stated that the accident occurred on 21/8/2021 at 1845 hours at Ndori junction to Uyoma. That the plaintiff/Appellant was a pillion passenger. That the accident involved motor vehicle KAQ 567C Toyota Corolla driven by John Ouma Ager from Bondo to Kisumu. On reaching the said junction, he indicated to the right but the vehicle collided with an unknown motorcycle. She was rushed to Bondo



sub county hospital. She reported to the station and issued with the police abstract which was produced as exhibit 4. That he is not the investigation officer, did not have the police file and did not visit the scene.

On cross-examination, he reiterated the lack of police file. That he was not the investigation officer and that he didn't visit the scene and that he had no sketch map. That he could not tell if he had a valid driving license.

8. PW4 Eunice Akinyi Jaroma adopted her statement recorded on 24/01/2022 as evidence in chief. She produced the following documents: copy of ID (Exhibit -1), Statutory Notice-(exhibit 2), birth certificate -(exhibit 9) and letter from school -(exhibit 10). That the minor has not completely healed as she feels pained on the hip which swells when she walks.

On cross examination, she stated that she was not present during the accident, it was her daughter who was currently 17 years old. Her daughter informed her that she was the only passenger and that she was not sure whether she was wearing a helmet. That she did not know the rider, and whether he had a driving licence.

9. DW1 John Ouma Ager adopted his statement recorded on 26/04/2022 as evidence in chief. That the police have never contacted him over the accident.

On cross examination, he stated that he was coming from Bondo to Akala. That he was not on the right side of the motor vehicle and that he indicated that he was branching to the right. That the motorcycle was on high speed and that is why it hit him. That he stopped the vehicle to avoid the accident. That he was on slow motion when the accident occurred. That he was given an OB number and took the minor to hospital.

On re-examination, he stated that he slowed down and that the motor cycle hit his right side. That he took the minor to hospital and after discharge he took them home.

10. The appeal was canvassed by way of written submissions. The appellant submitted that it is the motor vehicle that caused the accident and that the owner is the Respondent. That liability must always follow fault and that it is incumbent upon the appellant to discharge the burden of proving the accident, and that it was due to the negligence of the Respondent. That the Respondent did not dispute ownership. Further, that the Respondent did not drive with due attention as per section 47 and 49 of the [Traffic Act](#).
11. On quantum, the Appellant enumerated the injuries suffered and prayed for special damages of Kshs 13 760/= and general damages of Kshs 700,000/=. As well as future medical expenses of Kshs 300,000/=.
12. On the other hand, the Respondent submitted that the burden of proof in civil cases is upon the claimant to prove his/her case on a balance of probabilities. He submitted that the Appellant did not adduce sufficient evidence to establish negligence of the Respondent. That the motorcyclist recklessness caused the accident and by extension the injuries on the minor. Further, that the rider was not a witness to corroborate the Appellant's evidence. He submitted that the Appellant failed to prove that the Respondent was negligent, thus the reliefs sought cannot be granted.
13. The Respondent submitted in conclusion that the trial court's decision was well- founded and based on the evidence presented. He thus prayed that the appeal be dismissed.
14. Having considered the lower court record, the rival submissions and authorities relied on, I find that the issue for determination is whether the Appellant proved negligence against the Respondent.
15. Section 107 of the [Evidence Act](#) Cap 80 Laws of Kenya provides as follows: The burden of proof.



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
16. It is trite that the burden of proof in civil cases is upon the claimant/plaintiff who should prove his claim on a balance of probabilities as by law required. (Tonui vs. Kuber Agency (2024) eKLR (Civil Appeal E015 of 2023); Mundia Vs. Kigo (2024) eKLR (Civil Appeal No. 153 of 2023).
 17. In the instant case, the minor was 16 years when the accident occurred and 17 years when the matter came up for hearing. The minor however did not testify as a witness in the matter. This means that the whole case was based on hearsay evidence as none of the witnesses was present during the accident. Even the police officer who testified confirmed in his evidence that he was not the investigation officer, did not visit the accident scene, did not have a sketch map of how the accident occurred. He produced a police abstract as exhibit 4. In the case of Peter Kanithi Kimunya V. Aden Guyo Haro [2014]eKLR the court stated that “A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station”
 18. The Appellant/plaintiff’s mother testified that her daughter informed her that she was the only pillion passenger and that she was not even sure whether her daughter wore a helmet. Even the rider did not come to testify as a witness. All her evidence was hearsay which cannot be relied upon in a court of law.
 19. All the evidence on record shows that it is the rider who was reckless and the one who was negligent and who caused the accident. However, he was not called to testify or enjoined even as a party to the suit. It is trite that there is no liability without fault. The Appellant was under obligation to prove negligence on the part of the Respondent so as to be entitled to the damages sought since she was obligated to prove that the Respondent owed her a duty of care and that he breached that duty and as a result she suffered damage and loss. The Appellant was a minor aged 17 years and that by all standards she was capable enough to testify and narrate how the accident took place. No reasons were given as to why she was not allowed to testify. Further, the evidence of the police officer did not help matters as he came out as a person who did not even visit the scene and was not the person who investigated the matter. Clearly, there was no way that the trial court could give judgement in favour of the Appellant with such scant evidence. In the circumstances, iam inclined to agree with the learned trial magistrate that the Appellant did not prove her case on balance of probabilities against the Respondent. The finding on liability was quite sound and must be upheld.
 20. Even though the Appellant’s case had failed to succeed, this court is also obligated to assess the damages had the suit succeeded. As regards special damages, the Appellant had pleaded the sum of Kshs 13, 760/ but availed receipts worth Kshs 13, 000/ and thus this sum would have been awarded had the case succeeded. On general damages, the Appellant had sustained several soft tissue injuries such as on the head, mouth, neck, chin, chest as well as a fracture of left leg. The injuries were assessed as grievous harm. Learned counsel for the Appellant proposed for pain and suffering a sum of Kshs 700, 000/ as general damages. However, in the lower court, a sum of Kshs 500, 000/ was proposed by the Appellant. In the case of Julie Akoth Onyango Vs Daniel Otieno Otieno & Another [2020] a sum of Kshs 500, 000/ was awarded for injuries involving fracture of tibia fibula of left leg. Iam of the view that the Appellant who sustained similar injuries would be awarded a sum of Kshs 650, 000/ as general damages for pain and suffering. I would thus have awarded the said sum had the suit succeeded. The claim for future medical expenses ought to have been specifically pleaded since it is a special damage claim and as such the same is rejected. Further, in the absence of recent evidence of medical intervention then the claim becomes speculative.



21. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 14TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence:

Okumu.....for Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant

