RCL v EW (A Minor Suing through the Mother and Next Friend TMB) (Civil Appeal E272 of 2024) [2025] KEHC 5825 (KLR) (Civ) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5825 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E272 OF 2024

TW OUYA, J

MAY 8, 2025

BETWEEN

RCL ..... APPELLANT

AND

EW ..... RESPONDENT

A MINOR SUING THROUGH THE MOTHER AND NEXT FRIEND TMB

(An Appeal from the Judgment of the Honourable SRM Mr. Rawlings Liluma delivered on 10th July 2023 in Nairobi CMCC No. E475 of 2022 EW (A minor suing through the mother and next friend TMB) v Rale Chege Lari)

JUDGMENT

1. Through an Amended Memorandum of Appeal dated 1st March 2024 [originally dated 26th February 2024] and filed before the Court on 29th May 2024, the Appellant is seeking that judgment to be entered as against the Respondent for the following Orders:

> " 1A. That the appeal be allowed.
>
> 2. That the Honourable Court do evaluate and access the evidence on record in respect to the issues in dispute independently and makes its own findings in that respect thereto.
>
> 3. That costs be in the cause.
>
> 4. Any other relief the Honourable Court may deem fit and just."

2. Through the instant appeal, the Appellant is challenging the decision delivered by the trial Court on 10th July 2023 in Nairobi CMCC NO. E475 OF 2022. The suit before the trial court was commenced by the Respondent herein [then Plaintiff] through a plaint dated 19th August 2021 which was supported by the verifying Affidavit sworn by the Respondent's mother and next friend Teresia Muthoni Benson on 19th August 2021, the Plaintiff before the trial Court being a minor aged about seven [7] years at the time of lodging her suit.

3. At the trial Court, the Plaintiff [now Respondent] claimed that on 21st January 2021, the Defendant [now Appellant] drove his motor vehicle registration number KCY 876P so negligently, recklessly and carelessly and caused it to veer off the road and knocked down the Respondent from the pavement. According to the medial report supplied by the Respondent before the trial Court, it was stated that as a result of the accident caused by the Appellant, the Respondent suffered compound fracture-right distal tibia/fibular injuries. The Respondent sought general damages for pain, suffering and loss of amenities in the sum of Ksh.1,500,000 as against the Appellant.

4. The Appellant resisted the suit before the trial Court through a Statement of Defence dated 10th March 2022 and subscribed to the position that the Respondent came running into the road in an attempt to cross, causing the Appellant to immediately swerve and slam on his breaks to avoid running over the Respondent, resulting in injury to the Respondent's leg. It was the Appellant's contention that the Respondent failed to pay attention to the presence of the Appellant's motor vehicle on the road.

5. The suit before the trial Court proceeded for hearing on 18th May 2023 whereby the next friend testified as PW1 and Police Constable Jesse Mwololo testified as PW2. The Appellant testified as DW1. Thereafter, the parties filed their written submissions before the trial Court. vide the impugned decision dated 10th July 2023, the trial Court determined that it could not legally apportion any liability upon the Respondent with regard to the accident occurring on 21st January 2021 upon as she was then aged seven [7] years. Accordingly, the Court found and held that the Appellant was 100% liable for the accident in question. Reliance was sought in the reasoning of the Court in the case of Butt v Khan [1981] 1 KAR 1982-1988 to buttress the foregoing position.

6. On the question of damages, the trial Court referenced the holding of the Court in the cases of Savco Store Limited versus David Mwangi Kimotho HCCA No. 12 of 2005; Hussein Abdi Hashi versus Hassan Noor 550 of 2000; and, Kornel Kweya Ebitchet versus C& P Shoe Industries Limited [2008] eKLR and awarded the Respondent Ksh.1,200,000 being compensation for the injuries of the tibia and fibula which she suffered and taking to account both inflation and passage of time.

7. The subject appeal is anchored on the following six [6] grounds:

    1. The trial Court erred in law and in fact by holding that the cause of action attracted an award of Ksh.1,200,000 which in the circumstances is egregious.

    2. The trial Court erred in law and in fact by disregarding the evidence presented by the Appellant demonstrating negligence on the part of the Respondent which solely caused the accident.

    3. The trial Court erred misdirected itself by failing to appreciate that the Respondent fell short of the burden of proof required in establishing negligence on the part of the Appellant.

    4. The trial Court erred in law and in fact by disregarding in toto the submissions filed by the Appellant dated 16th June 2023 while drafting the Judgment.

    5. The trial Court erred misdirected itself by not appreciating that the Appellant was not at fault and liability must always follow fault.

6. The trial Court erred misdirected itself by failing to take cognizance of the fact that the Respondent failed to prove the special damages as pleaded."

8. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

9. The Appellant filed written submissions dated 29th May 2024 through his counsel who raised the following four [4] issues for determination by the court:

> " 1. Whether the trial Court erred in finding the Appellant 100 percent liable?
>
> 2. Whether the trial Court misdirected itself by awarding Ksh.1,200,000 as general damages.
>
> 3. Whether the trial Court erred by disregarding the Appellant's submissions.
>
> 4. Whether the trial Court erred by finding that the Respondent had proved her case on a balance of probabilities."

10. Guidance was placed on the holding of the Court in the following cases: Jumula hotel v SN & JCO 9 suing as the Legal Representative in the estate of Can – Deceased] & another [2021] eKLR: Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR; Joseph Mwnagi Thuita v Joyce Mwole [20180 eKLR; Jitan Nagra v Abidnego nyandusi Olgo [2018] eKLR; Tirus Chege & Another v JKN & Another [2018] eKLR; and, David Ogol Alwar v Mary Atieno Adwera & Another [2021] eKLR.

The Respondent's Submissions

11. The Respondent filed written submissions dated 22nd July 2024 through their counsel raising three issues for determination by the Court namely:

> 1. Whether the Court erred in its finding on liability.
>
> 2. Whether the damages awarded to the Respondent was inordinately high.
>
> 3. Whether special damages were properly awarded.

12. The Respondent submitted that this Court lacks jurisdiction to entertain the subject appeal as the Appellant failed to extract attach the Decree or Order appealed against. Reliance was placed in the holding of the Court in the cases of Chege v Suleiman *CA No. 12 of 1987* and; Nancy Wamuyu Gichobi v Jane Wawira Gichobi CA appeal No. 15 of 2013, in support of the preceding submissions.

13. On the question whether the Respondent was liable for negligence, it was submitted that pursuant to the reasoning of the Court in the cases of Butt v Khan [1978] eKLR; HKM v Francis Mwongela Ncebere [2017] eKLR; Kiganja Karanja Kiganja v James Njoike Kariuki & Another [2018] eKLR; Bashir Ahmed Butt v Uwais Ahmed Khan [1982-1988] 1 KAR 1 [1981] KLR 349, a minor cannot be blamed for contributory negligence in the context of an accident.

14. The Respondent upheld the trial Court's award of Ksh.1,200,000 for general damages as a proper estimate of the damages for the injuries suffered. Guidance was placed in the holding of the Court in the case of Catholic Diocese of Kisumu v Tete [2004] 2 KLR 55; Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR; and, Kimathi Muturi Donald v Kelvin Ochieng Aseso [2021] eKLR in support of the foregoing submissions.

Analysis

15. Having carefully considered the grounds of appeal and the parties rival written submissions together with all the authorities cited, I find that the issues arising for my determination revolve around Whether the appeal is merited and Who shall bear the costs of the appeal.

16. This being a first appeal, the Court is guided by the jurisprudence developed by the Court in Selle v Associated Motor Boat Co. [1968] EA 123 where it was proclaimed as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. The law in cases related to children of tender years within the context of an accident involving a motor vehicle, such as in the present cause, was reiterated by the Court of Appeal in Rahima Tayab & Others v Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 as follows:

> " The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission... The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

18. In the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] 1 KAR 1; [1981] KLR 349, the Court expressed itself as hereunder:

> " It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness. A young child cannot be guilty of contributory negligence although an older child might be depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child... Clearly each case must depend on its peculiar circumstances. In the instant case the learned Judge was right in finding that the defendant had been negligent, and that the plaintiff was

struck when almost half-way across the road and that at the most the plaintiff had committed an error of judgement for which contributory negligence should not be attributed to him."

19. In the earlier case of Nkudate v Touring & Sporting Cars Ltd and Another [1978] KLR 199; [1976-80] 1KLR 1333 the Court declared that:

> " The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these."

20. In the case of HKM v Francis Mwongela Ncebere [2017] eKLR, which was relied upon by the Respondent in his written submissions, it was held that:

> " As a general rule, presence of a child or children along the road should awaken an intuitive signal of the high possibility that the child or children may enter or crossing the road without notice. That realization should make the driver to be extremely careful and to take such preemptive actions as slowing down considerably or moving away from their position at the time or making an abrupt stop if need be. From his statement, the driver had a clear immediate vision of the deceased child. At the time he saw the boy running, he ought to have been put on notice that he must exercise particular care and anticipate that the child would cross the road without looking. According to his statement, the driver saw the boy emerging from the vehicle he had passed, but it seems he did not give the presence of a child any or appropriate significance; had he acted properly he would have taken more decisive steps in dealing with the scenario that was unfolding fast. So his testimony that he tried ''to swerve and brake but was too close'' is not anywhere close to proper care and control of the vehicle in the circumstances of the case".

21. In the case of Patrick Muli v EM [Minor suing through her Mother and Next Friend WG] [2021] eKLR, the Court reasoned as follows:

> " The law when it comes to accidents involving children of tender years seem to place strict liability of the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety."

22. The Court has carefully considered the pleadings, totality of the evidence of the supplied by the parties before the trial Court as well as their rival submissions filed before this Court.

23. It is not in dispute that at the time of the accident in question, the Respondent was a minor aged between 6 and 7 years or, was below 10 years of age. In the circumstances, the Court is persuaded that it is the Appellant who bore the responsibility to take extra care to avoid hitting the Respondent who was crossing the road.

24. As regards quantum, the Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 elaborated on the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of

damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, [as by taking into account some irrelevant factor leaving out of account some relevant one] or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

25. Similarly, in the case of Jane Chelagat Bor v Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal proclaimed as follows:

> "In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

26. In the subject appeal, the Court holds and finds that the Appellant failed to lay out any basis for the Court to interfere with the trial Court's award of general damages to the Respondent, apart from urging the court to interfere with the quantum. This Court will therefore not interfere with the trial Court's award

27. Having regard to the foregoing, this court finds that this appeal is unmerited and is hereby dismissed. The Respondent being the successful party in the appeal is awarded the costs of the appeal as well as the costs before the trial Court.

Determination

i. This appeal is hereby dismissed.

ii. Judgement/decree entered in Nairobi CMCC E475 of 2022 is hereby upheld.

iii. Costs to the Respondent.

DATED, SIGNED AND DELIvERED vIRTUALLY THIS 8TH DAY OF MAY, 2025.

HON. T. W. Ouya

JUDGE

For Appellant....Ng'ang'a

For Respondent.....Kisiang'ani

Court Assistant...Jackline