Ondieki & another v EO aka E (Minor Suing through other and Next Friend EAO) (Civil Appeal E274 of 2024) [2025] KEHC 12139 (KLR) (7 July 2025) (Judgment)

Neutral citation: [2025] KEHC 12139 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E274 OF 2024

F WANGARI, J

JULY 7, 2025

BETWEEN

EVANS ONDIEKI ..... 1ST APPELLANT

EVANSON CARRIERS LIMITED ..... 2ND APPELLANT

AND

EO AKA E ..... RESPONDENT

MINOR SUING THROUGH OTHER AND NEXT FRIEND EAO

(Being an appeal from the Judgment and Decree of Hon. Lewis Gatheru, SRM delivered in Mombasa SRMCC No. 847 of 2022 on 10/09/2024)

JUDGMENT

1. The Plaintiff/ Respondent instituted the suit in the lower court vide a Plaint dated 18/05/2022. She claimed damages for an accident that occurred on 15/03/2022 involving Motor Vehicle Registration Number KDA 104Y owned by the 2nd Appellant/ 2nd Defendant while the 1st Appellant/ 1st Defendant was the insured/ beneficial owner, and the minor who was riding his bicycle along Kengeleni Road at Mshomoroni area.

2. It was pleaded that the Respondents' authorized driver negligently drove his motor vehicle knocking down the minor, causing him to sustain serious injuries. The minor suffered a compound (open) fracture of the tibia/ fibula bone. Special Damages being Medical expenses amounting to Kshs. 100,999/= and Medical Examination Report fees of Kshs. 2,000/= was pleaded. Future Medical Expenses of Kshs. 158,000/= was also pleaded.

3. The Respondents entered appearance and filed their Statement of Defence dated 15/06/2022 denying the particulars of negligence and injuries pleaded in the Plaint. They blamed the minor for contributing to the accident as he failed to properly control his bicycle in a manner to avoid the accident, failing

to keep distance, attempting to overtake when it was not prudent to do so and colliding with the Defendants motor vehicle.

4. At the hearing, only the Plaintiff and her witness, the Traffic Police Officer testified. The Defence did not call any witness. The Trial Court proceeded to render judgement as hereunder;

    a. Liability in favour of the Plaintiff against the Defendant on 20:80 basis

    b. Special Damages of Kshs. 102,999/=

    c. Future Medical Expenses of Kshs. 120,000/=

    d. General Damages of Kshs. 750,000/=

5. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal dated 12/09/2024, hence this Appeal. The appeal is on liability and quantum. The Appellants prayed that the Judgment on liability against them be set aside and the suit in the lower court be dismissed with costs.

6. In the alternative, the Future Medical Expenses and General Damages be set aside and thereafter be assessed downwards and Special Damages be awarded as proved. They also prayed for costs of the appeal.

7. The Appeal was canvassed by way of written submissions. Both parties complied by filing their rival submissions in support of their positions.

Analysis

8. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

9. In the cases of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

10. In Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

11. I have perused the Record of Appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. The issues for determination are;

    a. Whether the appeal has merits

b. Who bears the costs

Liability

12. The Appellant submitted that the trial Magistrate erred in law by shifting the burden of proof to the Defendant, after the court found that the Defendants had failed to proof their case as they did not call any evidence. The Appellant faulted the court for relying on hearsay evidence yet the Plaintiffs witnesses did not witness the accident. It was further submitted that the Magistrate failed to appreciate that cases involving children of tender age are not cases of strict liability where a party is found liable without fault.

13. The Appellant faulted the court for holding that negligence had been proved. It was stated that there was no evidence to proof negligence on the part of the Defendant. It was not known how the accident occurred for the Magistrate to imply liability under the doctrine of Res ipsa loquitor.

14. The Respondent submitted that the Defendant's driver had full control of his vehicle thus causing it to hit the minor. It was submitted that the driver had a duty of care owed to the minor and the other road users hence he ought to have driven carefully and be on the lookout. He was therefore liable for the accident.

15. I note that the minor involved in the accident was not called to testify though nothing barred the Plaintiff from doing so. The mother gave evidence on behalf of the minor. She was not an eye witness. The traffic police officer. Cpl. Richard Cheruiyot have evidence that the collision occurred on the right near side of the tyre. The Defendant did not call any witness to testify. I agree with the analysis of the trial court on the failure of the driver to testify while relying on the case of Rahab Wanjiru Nderitu v Daniel Muteti & 4 others [2016] eKLR. It was held that where both drivers fail to testify, the could would hold that they were both to blame. There being no evidence on the part of the defence, I find no reason to disturb the apportionment of liability between the minor and the Defendant's driver.

Quantum

16. The minor suffered a compound fracture of the tibia/ fibula bone. He had to undergo surgery where metal implants were inserted. Estimated disability was given at 6%. Kshs. 750,000/= was awarded as general damages. the Appellant submits that the award was too high and prayed to be assessed downwards.

17. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 a wholly erroneous estimate of damages."

18. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.

19. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in Job Obanda v Stage Coach

International Services Limited & Another Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

20. The Appellant proposed an award of Kshs. 100,000/= while the Respondent submitted that the award by the trial court was just and reasonable.

21. In EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR the Plaintiff sustained a fracture of the right mid shaft femur with tibia fibular fracture and facial injuries with bruises. The court upheld the award of Kshs. 800,000/= in general damages in 2018.

22. Further, in the case Thomas Mwendo Kimilu v Annne Maina & 2 others [2008] eKLR and Jacinta Wanjiku v Samson Mwangi [2006] eKLR of the Court awarded Kshs. 700,000/= for the Plaintiff who sustained fracture of the right tibia and fibula, fracture of the humerus and amputation of the finger in 2006.

23. The minor suffered lesser injuries than the Plaintiffs in the cases cited herein above. An award of Kshs. 500,000/= in General Damages would in my view be adequate compensation.

24. On the award of Future Medical Expenses and Special Damages, the same were pleaded and proved. I find no reason to disturb the awards as granted.

25. On costs, the appeal is partially successful. Under the circumstances, thus court exercises its discretion and direct that each party to bear its costs.

Determination

26. In the upshot, I make the following orders: -

    a. The Appeal has got merits only to the extent that the award on General Damages is hereby set aside and substituted with an award of Kshs. 500,000/=.

    b. That the other awards remain as granted.

    c. Each party shall bear its own costs in the Appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 7TH DAY OF JULY, 2025.

.....

F. WANGARI

JUDGE

In the presence of;

Mr. Kioko Advocate for the Appellant

Mr. Otieno Advocate for the Respondent

Ms. Getrude, Court Assistant