



TOO t/a Victorian Academy v LG (Minor Suing Through her Parents and Next Friend DK & FM) (Civil Appeal E093 of 2022) [2024] KEHC 418 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEHC 418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E093 OF 2022
EM MURIITHI, J
JANUARY 23, 2024**

BETWEEN

TOO T/A VICTORIAN ACADEMY APPELLANT

AND

LG (MINOR SUING THROUGH HER PARENTS AND NEXT FRIEND DK & FM) RESPONDENT

*(Being an appeal from the Judgment of Hon. Tito Gesora (CM)
delivered on 21/6/2022 in Maua CMCC No. 184 of 2016)*

JUDGMENT

1. The Respondents herein, the Plaintiffs in the trial court, sued the Appellant vide a plaint dated 28/12/2016 seeking Kshs. 17,000/=, General damages for pain, suffering and loss of amenities and costs of the suit plus interests. The Respondents pleaded that on 10/8/2016, the minor was a lawful passenger aboard motor vehicle Registration No. KAY 260 X when the driver thereof so negligently and/or carelessly drove and/or controlled it that it veered off the road and crashed thus occasioning the minor massive injuries, loss and damage.
2. The Appellant denied the claim through his statement of defence dated 20/1/2017, and prayed for its dismissal with costs.
3. Upon full hearing, the trial court found the Appellant to have been 100% liable for the accident and awarded general damages of Ksh. 700,000, special damages of Ksh. 27,960 = Ksh. 727,960 together with costs and interest.



The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 21/7/2022 set out 6 grounds of appeal as follows:
 1. The Learned Magistrate erred in law and fact in awarding the Respondent 100% as against the Appellants; Kshs. 700,000 as general damages, and Kshs. 27,960 for special damages which amount was exorbitantly high in the circumstances and injuries suffered by the respondent.
 2. The Learned Magistrate erred in law and fact in holding that the Respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
 3. The learned magistrate erred in law and fact when he failed to consider the appellant's evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondents.
 4. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 5. The learned magistrate erred in law and fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
 6. The learned magistrate erred in law and fact in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.

Duty of the Court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1, Domitila Karimi, one of the Respondents herein adopted her witness statement dated 28/12/2016 as her evidence in chief together with the documents filed therewith as exhibits 1 to 7. She further testified that, "I am a farmer and petty business. LG is my daughter. She still nose bleeds and back pains. During the cold season it is too much."
7. The Appellant and his counsel were absent, with notice, when PW1 testified, and therefore, there was no cross examination.

Submissions

8. The Appellant contests the apportionment of liability at 100% as no eye witness was called in the matter, and cites *Karugi & another v Kabiya & 3 others* (1983) eKLR. He urges that since the only major injuries allegedly sustained by the minor are soft tissue injuries, the award of Ksh. 700,000 ought to be considerably reduced to Ksh. 60,000. He urges that it is trite law that awards must be within



consistent limits and cites Michael Okello v Priscilla Atieno (2021) eKLR, Godfrey Wamalwa Wamba & another v Kyalo Wambua (2018) eKLR, PF (Suing as next friend of SK (Minor) v Vicotr O Kamadi & another 92018) eKLR and Blue Horizon Travel Co Ltd v Kenneth Njoroge (2020) eKLR. He urges the court to set aside the trial court's decision and allow the appeal with costs.

9. The Respondents urge that since the minor was a passenger aboard the Appellant's school bus, the minor was not in any way to blame for the accident and cite Masembe v Sugar Corporation and Another (2002) 2 EA 434, ALA (Suing as the Next Friend and Father to ZM) v Philip Obonyo Oluoch (2021) eKLR, Susan Kanini Mwangangi & another v Patrick Mbithi Kavita (2019) eKLR and Polytanks Limited v Everlyne Wanza Musau and Mary Mutheu Sila & 2 others (2020) eKLR. They urge that the award of Ksh. 700,000 was reasonable and adequate since the accident left the minor with a scar of about 6x4 cm, thus severely affecting her self esteem and beauty. They pray for the dismissal of the appeal with costs and cite Butt v Khan Nairobi HCCA No. 40 of 1997, West (H) and Sons v Shepherd (1964) AC 326, Njeru Jim Kennedy v Stephen Ngururu Karanja (2021) eKLR, Easy Coach Limited v Emily Nyangasi (2017) eKLR, Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N (2018) eKLR, Rent Works East Africa Limited v SMM (Suing through SMH as Next Friend) (2022) KEHC 9969 (KLR) in support of their submissions.

Analysis and Determination

10. The issues for determination from the grounds of appeal are whether the apportionment of liability at 100% was proper; whether awards of Ksh. 700,000 as general damages and Ksh. 27,960 were excessive and whether the Appellant's submissions and decisions cited thereon were considered.

Liability

11. The evidence on record is that the minor was travelling aboard the Appellant's school bus when the accident happened. There is therefore nothing the minor could have done to avoid the accident, and thus she cannot shoulder any contributory negligence.
12. This court finds that the Appellant and/or his driver were wholly to blame for the accident because they failed to exercise care and take reasonable steps to avoid the accident, and the minor did not contribute in any way.
13. In apportioning liability at 100%, the trial court ruled that:

“The plaintiff was a student at the defendant's school and were on a school trip when the accident occurred. While the plaintiff was in the school bus, the defendant was in – loco-parentis and cannot attribute any negligence to the guardian. He does not blame any 3rd party for the accident and must therefore bear the responsibility. Liability is set at 100%.”

14. There is no cause to interfere with the trial court's finding on liability.

Excessive Damages

15. This court has previously considered the principles for appellate interference with an award of damages by a trial court in Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA) [2020] eKLR as follows:
16. “The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in Nance v. British Columbia Electric Railway Co. Ltd. (1951) A.C. 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, V.-P. and Newbold,



J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”

17. PW1 testified that, “LG is my daughter. She still nose bleeds and back pains. During the cold season it is too much.”
18. The injuries noted by Dr. Githu Wachira in his medical report dated 3/1/2016 are a large facial wound, soft tissue injury to the right shoulder, right leg, left thigh, left forearm and the chest. When he examined the minor, he noted that she was in stable condition and the wound on the face had healed leaving behind an area of hyper pigmentation about 6cm by 4cm.
19. It is agreed that the injuries the minor herein sustained were soft tissue in nature. This court has considered the various soft tissue injuries the minor sustained together with the constant nose bleeding and the facial scar she still has and it feels that the award of Ksh.700,000 was on the higher side. The absence of a discharge summary must be construed to mean that the minor was never hospitalized.
20. In *Simon Taveta v Mercy Mutitu Njeru* (2014) eKLR, the Court of Appeal expressed itself thus “On our part we note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries.”
21. This court notes the case of *George Njenga & another v Daniel Wachira Mwangi* (2017) eKLR which was relied upon by the trial court in awarding general damages of Ksh. 700,000. In that case, the Respondent sustained a pelvic fracture, an unstable left knee joint, an unstable left ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterolateral aspect of the left leg. Those injuries are distinctly dissimilar to the ones sustained by the minor herein.
22. In *Francis Omari Ogaro v JAO* (minor suing through next friend and father GOD [2021] eKLR, the court (E.N. Maina J.) substituted the trial court’s award of Ksh.230,000 with Ksh.180,000 for a minor who sustained multiple cut wounds on the right lower limb, bruises on the right lower limb, bruises on both elbows, bruises on the right iliac region, bruises on the frontal region, bruises on the temporal region, lacerations on the frontal region, cut wounds on the left iliac region, cut wounds on the frontal region, cut wounds on the temporal region and blunt trauma to the abdomen.
23. Taking into account the current depreciation in the value of the shilling and the economy, this court finds that an award of Ksh.300,000 would be a fair compensation for the pain and suffering the minor underwent.
24. The special damages pleaded by the Respondent totalled to Ksh.17,000 being hospital fees of Ksh. 7,000 and medical report fees of Ksh.10,000. The award of special damages of Ksh. 27,960 was thus erroneous and unsupported by evidence.

Consideration of the Appellant’s submissions and decisions

25. This fault is manifestly unfounded because the trial court duly considered the Appellant’s submissions and authorities when it rendered thus, “Defendant submits that Kshs. 60,000/- would be adequate in



general damages and has cited the case of HB (Minor suing through mother and next friend DKM) – VS – Josephat Nchonga Magari & Anor (2021) eKLR where Kshs. 60,000/- was given the soft tissue injuries, KIPKERE LTD – VS – PETERSON ONDIEKI TAI (2016) eKLR where the injured was awarded Kshs. 30,000/- for soft tissue injuries and 2 other cases. The defendant in all these cases has not considered that the injuries suffered were multiple soft tissue injuries that have had a residual effect of nose bleeding and has back pains especially during the cold season.”

Orders

26. Accordingly, for the reasons set out above, this court finds the appeal to have partially succeeded on the following terms:

1. The award of general damages of Ksh.700,000 is hereby set aside and substituted with an award of Ksh.300,000.
2. The award of special damages of Ksh.27,960 is hereby set aside and substituted with an award of Ksh.17,000.
3. Consequently, this court makes an award of Ksh.317,000/- in general and special damages, together with costs in the trial court with interest on the awards at court rates until payment in full.

27. The Appellant shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & Co. Advocates for Appellant.

M/S Gikonyo & Ngugi Advocates for the Respondent.

