



**Jasper & another v MK (Suing thro the Father and Next Friend NNJ) (Civil Appeal 82 of 2021) [2024] KEHC 1344 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1344 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 82 OF 2021  
PN GICHOHI, J  
FEBRUARY 15, 2024**

**BETWEEN**

**NYANG’AU JASPER ..... 1<sup>ST</sup> APPELLANT**

**MOTOROLOGY KENYA LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MK (SUING THRO THE FATHER AND NEXT FRIEND NNJ) .. RESPONDENT**

*(Being an appeal from the judgment and decree in Kisii CMCC 349 of 2019 by Hon. D.O. Mac’Andere (SRM) on 05th March, 2021)*

**JUDGMENT**

1. MK (Suing thro’ the father and next friend NNJ) (Respondent) filed suit on 9<sup>th</sup> May 2019 against Nyang’au Jasper and Motorology Kenya Limited (1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively). She sought damages for bodily injuries she pleaded to have suffered on 15<sup>th</sup> June, 2018 when she was knocked down by Appellants’ motor vehicle KCP 359X. She attributed the accident to the negligence of the 1<sup>st</sup> Appellant.
2. In their defence dated 15<sup>th</sup> October 2019, the Defendants denied all the averments in the plaint and blamed the plaintiff for the accident.
3. At the hearing, NNJ (Plaintiff) testified that he did not witness the accident in which his daughter was injured but stated that the accident involved her daughter and motor vehicle KCP 359X (subject motor vehicle).
4. Even though Appellants denied the Respondent’s claim, they did not tender any evidence at the hearing.



5. After the trial, the learned magistrate rendered her judgment on 5<sup>th</sup> March 2021 where she found the Appellants liable at 100% and Respondent was awarded damages as follows:
  1. General damages Kshs. 3,000,000/=
  2. Special damages Kshs. 18,880/=
6. The Appellants have appealed both liability and quantum and have listed a total of nine grounds on the two main issues and urge and pray that :-
  - a. The Appeal be allowed with costs.
  - b. The judgment by the trial court be set aside and a judgment be entered dismissing the suit against the Appellants with costs.
  - c. Without prejudice to prayer (b) above, the Court re- assesses the apportionment of pain and suffering , loss of expectation of life and loss of dependency and reduce the same.
  - d. The costs of this appeal and that of the trial court be awarded to the Appellant.
  - e. Such further orders may be made by this Court as deemed fit to grant.
7. On liability, the Appellants submitted that the trial court’s finding on 100% against them was flawed , not based on any tangible evidence as even during cross-examination, the Plaintiff’s father could not tell who was to blame for the accident. While relying on the case of *Benter Atieno Obwanyo v Anne Nganaga & another* [2021]eKLR and *Lakhamishi v Attorney General* [1971]EA 118 , 120 ( as quoted in *Calistus Juma Makhanu v Mumias Sugra Co. Ltd & another* [2021]eKLR , the Appellant urged the Court to disturb the award on liability and set is aside.
8. Lastly, the Appellants urged this Court to apportion liability equally in the event that it finds the Defendant had any part to play in the accident despite their arguments.
9. On general damages, the Appellants submitted that the award was inordinately high considering that the injuries suffered were soft tissue injuries in nature. They therefore urged the Court to substitute the award of Kshs. 3,000,000/= with an award of Kshs. 500,000/=. In support of that proposal, the Appellants placed reliance on several cases among them being the case of *Jitan Ngara v Abidnego Nyandusi Oigo* [2018]eKLR and *Zachariah Mwangi Njeru v Joseph Wachira Kanoga ( as quoted in Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019]eKLR.
10. In conclusion, the Appellants urged the Court to award them costs of the appeal.
11. On his part, the Respondent submitted that since the Appellants did not call any witnesses to mitigate on the issue of liability, the evidence on record was uncontroverted and the trial court reached the correct finding that the appellants were 100% liable for the accident. Reliance was placed on *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra and Another v Raju Govindji*, HCCC No. 548 of 1998 stated that:

“ Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the



Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

12. Respondent also relied on the case of *CMC Aviation Ltd. v Cruisair Ltd. (No. 1)* [1978] KLR 103; [1976-80] 1 KLR 835, where Madan, J (as he then was) expressed himself as follows:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

13. On quantum, it was submitted that this was not a mere accident as the Respondent sustained grievous harm that is, fracture of superior public rami bilaterally and on the inferior public rami. He therefore urged this court to uphold the decision of the trial court.

### Determination

14. This being a first appeal, this Court is mindful of its duty as set out in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 that is, to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
15. Further, this Court will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* (1968) EA 93.
16. In this case, the victim who was a minor did not testify. Her father adopted his recorded statement dated 4<sup>th</sup> April 2019 as his evidence. In that statement, he stated that on or about 15<sup>th</sup> day of June 2018, his daughter was a pedestrian on her rightful side of the road which is Kisii - Nyamira Road when near Getare area the driver of motor vehicle registration number KCP 359 X drove carelessly and knocked her down causing her severe injuries.
17. He testified that the minor was sent to buy groceries and when walking along the road, the suit motor vehicle came from behind, hit her and passed on top of her. He however told the court that he did not witness the accident.
18. In cross examination, he told the court that he could not tell who was really to blame for the accident.
19. In their statement of defence, the Appellants denied this claim including occurrence of this accident. In regard to the Respondent’s claim that the accident was caused by utter negligence of the driver, the Appellants denied and put the Respondent to strict proof and further pleaded that absolutely without prejudice to the foregoing and in the alternative, if the accident did occur and which they denied, and which the Responded may prove, then it was caused solely and/or substantially contributed to by his negligence.
20. The Appellant then proceeded to plead particulars of the Respondent’s negligence thus:-
- a. Failing to take any or any adequate precaution for own safety.



- b. Failing to have regard to other road users and particular motor vehicle registration number KCP 359X.
  - c. Stepping onto the road when it was unsafe to do so.
  - d. Failing to observe traffic regulations.
  - e. Failed to walk with due care and attention.
  - f. Failing to step aside to avoid the accident.
  - g. Crossing the road in a negligent and careless manner.
21. There was a reply to this defence and the Respondent termed the defence mere denials and put the Appellant to strict prove. The Appellants did not call any witness in this case despite listing three of them, that is the Base Commander – Nyamira Police Station, the driver and Dr. Kahuthu.
22. The Police Abstract produced herein confirmed that the accident did occur involving the pedestrian (the minor herein) and the said motor vehicle being driven by the 1<sup>st</sup> Appellant. It may not show who was to blame for the accident.
23. However, the Respondent was a child aged 14 years while the 1<sup>st</sup> Appellant is an adult driving the said motor vehicle. Whereas the Respondent called only the father who did not witness the accident, it was also upon the 1<sup>st</sup> Appellant to prosecute his averments in the defence by way of evidence. A defence should not be drawn for the sake of it as appears in this case.
24. The Respondent did not plead that she was crossing the road. It was therefore upon the driver to demonstrate how this minor was negligent or contributed the occurrence of this accident. The court record shows that despite several adjournments sought by Counsel for the Appellants so as to call the witness, they never availed any and to be specific, the driver was also not keen on coming to testify as it transpired on 25<sup>th</sup> January, 2021 and Counsel for the Appellants stated:-
- “I had contacted my witness the driver who was to come and testify. We even spoke this morning but I cannot see him. Considering the submissions counsel made last time in court, I am closing my case.”
25. In the circumstances, there is no reason why this Court should interfere with the finding of liability by the trial court.
26. On quantum, the Respondent produced the P3 Form, and medical reports as exhibits. In particular, the medical report by Dr. Alunga Consultant Radiologist at Moi Teaching and Referral Hospital and dated 19/06/2018, the Respondent sustained Comminuted fractures of the superior public rami bilaterally, right lung collapse and a cavity on the left lower lung lobe.
27. Further, the discharge summary by Dr. Kurgat at Moi Teaching and Referral Hospital and dated 14/08/2018 shows that the Respondent sustained Comminuted of fracture of the superior public ram bilaterally, Sternoclavicular and Veiomioclavicular dislocations and frictional burns on the abdomen shoulder and back.
28. The medical report by Dr. Morebu also show that the Respondent sustained grievous harm, that is: Pelvic fracture, chest injury, multiple degloving injuries, and shoulder dislocation with severe bodily injuries that were in the process of healing with lagresdisfigurities permanent ugly scars. The doctor opined that the recovery was to take a very long time and the dislocations were likely to complicate later with post traumatic chronic osteoarthritis and that permanent disability.



29. As earlier stated in this judgment, the Appellants did not produce any documents and their doctor did not testify. Further, though the record shows that the Appellants undertook to file their submissions, none appear to have been filed.

30. On the principles set for the award of general damages, the Court of Appeal in the case of *Stanley Maore v Geoffrey Mwenda* (2004) eKLR stated: -

“...Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

31. No doubt the injuries sustained in the authorities cited by the Appellant are not comparable to the injuries sustained by the Respondent in this case.

32. In the judgment, the trial court relied on the cases cited by the Respondent in support of the Respondent’s proposal for an award of Kshs. 3,000,000/=. In *Gabriel Mwashuma v Mohammed Sajjad & Another* [2015] eKLR the injuries suffered therein were femur shaft spiral wedge fracture left thigh, pilon tibial comminuted fracture left ankle joint, fibula shaft fracture, abrasive fractures on left patella and femur condyle median, soft tissue injuries on left knee, distinct haematoma especially on the left leg, state of shock through polytrauma and blood loss and psychogenic stress.

33. In *Macharia Francis Mundui & Another v Joel Wanje* [2017] eKLR where the Plaintiff sustained amputation of one leg and other injuries including a complete fracture of the left femur and extensive avulsion wound on the right thigh. In both cases, the court awarded Kshs. 3,000,000/= as general damages.

34. As guided by principles of awarding damages, the issue is whether this Court should disturb the award herein. The Court of Appeal in the case of *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others* Civil Appeal Case No. 192 of 1992 stated:-

“Those principles were well stated by Law, J.A in *Bashir Ahmed Butt v Uwais Ahmed Khan*, By *M. Akmal Khan* [1982-88] I KAR 1 at pg 5 as follows-

“An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded “on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ....”

35. In *Michael Murage v Dorcas Atieno Nduala* [2019] eKLR, the Respondent sustained fracture of the right femur fixed with K-nail, compound fracture of left tibia, compound fracture left fibula, massively swollen left leg and had 12% permanent disability. On appeal, High Court did not disturb the award of Kshs. 2,000,000 awarded as general damages.

36. It is a fact that no injuries are exactly the same for any given case and an award of damages is within the discretion of the trial court. Further, the Court of Appeal in *Catholic Diocese of Kisumu v Tete* [2004] eKLR, had this to say:-

“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 difference 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 or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”

37. Considering the seriousness of the injuries sustained by the Respondent herein and the effect the injuries have on her at such an age of 14 years, this Court is satisfied that the award of Kshs.3,000,000/ = is neither inordinately low nor arrived at erroneously. There is no reason to disturb it.
38. In conclusion, this court makes the following orders:-
1. The Appellant’s appeal is devoid of merit and therefore dismissed.
  2. The Respondent is awarded costs of this Appeal.

**DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 15<sup>TH</sup> DAY FEBRUARY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:-

N/A for Appellant

Ms Mogeru for Respondent

Laureen Njiru/ Aphline , Court Assistant

