National Industrial Credit Ltd & 2 others v MNO (Minor Suing Thro' Next of Friend and Mother FNM) (Civil Appeal E035 of 2023) [2024] KEHC 3824 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3824 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E035 OF 2023

WA OKWANY, J

APRIL 18, 2024

BETWEEN

NATIONAL INDUSTRIAL CREDIT LTD ..... 1ST DEFENDANT

MIDAS AUTO SERVICES CENTRE LTD ..... 2ND DEFENDANT

DABIEL MAINA GITHU ..... 3RD DEFENDANT

AND

MNO (MINOR SUING THRO' NEXT OF FRIEND AND MOTHER FNM) ..... RESPONDENT

(Being an appeal from the Judgment/Decree in Keroka SPMCC No. 33 of 2019 delivered by Hon. C. Ombija on 14th June 2023 Senior Resident Magistrate)

JUDGMENT

1. The Respondent herein, a minor suing through her mother and next of friend FNM, sued the Appellant before the trial court seeking the following reliefs: -
    1. General Damages
    2. Special Damages
    3. Costs of the suit
    4. Interests of (a), (b) & (c) above
    5. Any other relief that the court would deem just and fit to grant.
2. The Respondent's case was that she was, on 25th June 2018, a lawful passenger in the Appellant's motor vehicle Registration No KCB 697J traveling along Keroka-Sotik road when at or near Riensune area, the driver of motor vehicle Registration No KCK 217C drove it so negligently and/or carelessly

thereby allowing it to collide with motor vehicle Registration No KCB 697J as a result of which, the Respondent sustained serious injuries.

3. The trial court heard the case and, at the end, rendered a judgment in favour of the Respondent as follows: -

   Liability at 100% against the Appellants

   a. General Damages – Kshs 300,000/=

   b. Special Damages – Kshs 7,900/=

   c. Total Net Award - Kshs 307,900/=

   d. Costs and interest at current rates

4. Aggrieved by the said judgment, the Appellants instituted the present Appeal in which they listed the following grounds of appeal: -

   1. The Learned Trial Magistrate erred both in fact and in law when the same entered judgment in favour of the Respondent whereas the Respondent failed to discharge the burden of proof to the requisite standard.

   2. The Learned Trial Magistrate failed to properly evaluate evidence tendered before him thus arriving at an erroneous decision.

   3. The Learned Trial Magistrate erred in law and in fact by awarding the Respondent general damages in the sum of Kshs 300,000/= which damages were excessive in the circumstances and not proved at all.

   4. The Learned Trial Magistrate erred in law and in fact by holding the Appellant liable at 100% whereas the evidence on Record did not disclose any negligence or breach of any duty of care on the part of the Appellant and neither was the same proved at all.

   5. The Learned Trial Magistrate erred in law and in fact by failing to dismiss the Respondent's suit with costs to the Appellant.

5. The Appellants seek orders for the dismissal of the Respondent's suit in Keroka SPMCC No 33 of 2019 with costs. They also pray for the costs of the appeal.

6. The Appeal was canvassed by way of written submissions which I have considered.

7. The duty of the first appellate court is to subject the entire evidence presented before the trial court to a fresh analysis in order to arrive at its own independent findings. This is the position that was taken in *Selle v Associated Motor Boat Company* (1968) EA 123, where Sir Clement held thus: -

   > This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally."

8. I have carefully considered the Record of Appeal and the parties' rival submissions. I find that the main issue for determination is whether the Appeal is merited. I note that the Appeal is over the twin issues of liability and quantum.

9. It is trite that he who alleges must prove. The *Evidence Act*, Cap 80 provides as follows on burden of proof in civil matters: -

> 107. 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.
>
> 108. Incidence of burden.
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact.
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

10. In *East Produce Kenya Limited v Christopher Astiado Osiro* Civil Appeal No 43/01 the court held:-

> " It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence. It is not enough to say that the motorcyclist was also to blame without adducing evidence of his blameworthiness."

11. The Respondent's mother (PW1) adopted her witness statement dated 26th October 2019 as her evidence in chief. She produced the Treatment Card and Discharge Summary (P.Exh 1 [a] and [b]); Police Abstract (P.Exh 2); P3 Form (P.Exh3); Medical Report by Dr. Morebu and receipt for payment of the Report (P.Ex 4 [a] and [b]); KRA Records and receipts (P.Exh5 [a] and [b]); NTSA Receipt for Kshs 550 (P.Exh6); and Demand Letter (P.Exh7).

12. The Defendants (Appellants) did not call any witnesses before the trial court.

13. The Respondent produced a Police Abstract dated 18th July 2018 (P. Exh 2) which confirmed that indeed an accident occurred on 25th June 2018 involving Motor Vehicle Registration No KCK 217C and Toyota Matatu Registration No KCB 697J. The Respondent was listed in the Police Abstract as one of the injured passenger. The Respondent further produced a copy of Motor Vehicle Records (search) dated 30th September 2018 which showed that the owners of motor vehicle Reg. No KCK 217C were the 1st and 2nd Appellants.

14. My finding is that the Respondent proved her claim, on a balance of probabilities. I find that, as a lawful passenger in one of the vehicles that was involved in the said accident, the Respondent could not have had any control over the said motor vehicles for purposes of apportionment of liability. I find

guidance in the decision in *Rosemary Mwasya v Steve Tito Mwasya & 2 others*, Civil Appeal No 100 of 2017, (2018) eKLR, where it was held that: -

> "Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident."

15. I note that the owner of the motor vehicle in which the Respondent was a passenger was not made a party to this suit and find that liability falls squarely on the Appellants at 100%. I find that the decision by the trial court in this regard was well founded and I uphold it.

16. On quantum, I note that the principles governing whether or not an appellate court can interfere with the trial court's assessment of damages were outlined by the Court of Appeal in the case of *Arrow Car Ltd v Elijah Shamalla Bimomo & 2 others* (2004) eKLR thus: -

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor 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 the damage. ..."

17. It was the Appellants' case that the award of Kshs 300,000/= general damages is inordinately high. They proposed an award of Kshs 100,000/=. They relied on the cases of *Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi* (2013) eKLR, *Ndung'u Dennis v Ann Ndirangu Wainaina & another* (2018) eKLR and *Godwin Ireri v Franklin Gitonga* (2018) eKLR where the courts made awards of between Kshs 70,000/= to 100,000/=.

18. On her part, the Respondent argued that the award of Kshs 300,000/= was not high. She cited the case of Francis Ochieng & Another v Alice Kajimba (2015) eKLR where the court awarded the claimant Kshs 350,000/= for general damages.

19. I note that the Respondent sustained the following injuries: -

    a. Chest Contusion

    b. Cut wounds on the left knee

    c. Blunt trauma to the scalp

    d. Blunt trauma to the neck

20. In *Derrick Munroe v Gordon Robertson* {2015} JMCA CIV 38 it was held: -

> "There are established principles and a process to be employed in arriving at awards in personal injury matters. In determining quantum Judges are not entitled to simply phial a figure from the air. Regard must therefore be had to comparable cases in which complainants have suffered similar injuries." (See *Denshire Mutei v KPLC Ltd* {2013} eKLR) (see also *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR).

21. I have taken the liberty to compare the Respondent's injuries with the injuries sustained by claimants who suffered similar injuries as follows:-

a. In *Patel v Mose & another* (Civil Appeal 45 of 2019) [2022] KEHC 11109 (KLR) (29 July 2022), the High Court at Naivasha substituted an award of Kshs 700,000/= in damages with Kshs 300,000/= where the 1st Respondent had suffered multiple soft tissue injuries and loosening of three lower teeth.

b. In *Justine Nyamweya Ochoki & another v Prudence Anna Mwambu* [2020] eKLR, the High Court at Malindi reduced an award of Kshs 650,000/= in damages to Kshs 300,000/= where the claimant had sustained loss of upper front incisor tooth, deep cut on the chin, cut on the lips, loosening of the upper teeth, blunt trauma, injury to the right forearm and loss of consciousness.

c. In *Matunda (Fruits) Bus Services Ltd v Agnes Chemngeno Tuiya* [2021] eKLR, the High Court at Nakuru reduced an award of Kshs 390,000/= in general damages to a sum of Kshs 250,000/=. The claimant in that case had sustained the following injuries: deep cut wound on the scalp, cut wound on the right temporal region of the scalp, deep cut wound on the right shin, blunt injuries to the neck, loose two upper incisor teeth, loose two lower incisor teeth and cut wound on the lower lip.

22. In the above cited cases, the claimants who suffered soft tissue injuries similar to the injuries suffered by the Respondent got awards ranging from Kshs 250,000/= to 300,000/=. I therefore find no justification for interfering with the trial court's assessment of general damages. I find that the trial court's award falls within the range of awards made by other courts for the same type of injuries.

23. Special damages were not contested by the Appellant. I also note that the Respondent specifically pleaded and proved the same at the hearing. I therefore uphold the same.

24. In the final analysis, I find that this Appeal is devoid of merit and I hereby dismiss it with costs to the Respondent.

25. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH APRIL 2024.

W. A. OKWANY

JUDGE