Shajanand Holdings Limited v CMN (A Minor Suing Through His Father and Next Friend MNK) & another (Civil Appeal E012 of 2022) [2024] KEHC 5317 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5317 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E012 OF 2022

DK KEMEI, J

MAY 17, 2024

BETWEEN

SHAJANAND HOLDINGS LIMITED ..... APPELLANT

AND

CMN (A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND MNK) ..... 1ST RESPONDENT

ALPHAXARD MUCHAI RUGA ..... 2ND RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. Mogute, Senior Principal Magistrate's Court at Bungoma in CMCC No. 198 of 2020 delivered on 19th January, 2022)

JUDGMENT

1. The Appellant Shajanand Holdings Limited appeals to this Court on Liability and quantum awarded from the Judgement of Honourable Mogute (SPM) delivered on 19th January 2022, in Bungoma CMCC No. 198 of 2020, in which he apportioned liability at 100% against the Appellant and proceeded to award the Respondent Kshs. 100,000/= under general damages for pain, suffering and loss of amenities, Kshs. 17, 260/= under Special damages and costs of the suit plus interest.

2. The principal claim in the Plaint dated 5th August 2020, for the award of damages arising out of an accident which occurred on or about 15th June 2020, when the Plaintiff (now 1st Respondent) was lawfully walking as a pedestrian along Mabanga-Kasosi Murram road when at Kasosi area the Defendant(now Appellant's) driver or agent so negligently drove, managed and or controlled motor vehicle registration number KAZ 094A causing the same to knock him thereby causing him to sustain severe injuries.

3. At the end of the trial, the learned magistrate entered judgement for the 1st Respondents as follows: liability against the Appellant apportioned at 100%; General damages awarded at Kshs. 100,000/=; Special damages at 17, 260/=, costs of the suit and interest.

4. Aggrieved by the decision of the trial Court on liability and quantum, the Appellant appealed to this Court putting forth the following grounds:

   i. That the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.

   ii. That the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

   iii. That the learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.

   iv. That the learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.

   v. That the learned trial magistrate erred in finding the Appellant liable for the accident when the evidence adduced pointed ownership of the suit motor vehicle registration KAZ 094 A to the 2nd Respondent.

   vi. That the learned trial magistrate proceeded on wrong principles (if any) when assessing the damaged to be awarded to the Respondent and failed to apply precedents and tenets of law applicable.

   vii. That the learned trial magistrate erred in awarding damages as against the Appellant.

   viii. That the learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

5. The Appellant prays for this appeal to be allowed, the judgement of the trial Court to be set aside with costs and costs of this appeal.

6. The appeal was canvassed by way of written submissions. Both parties failed to file and exchange their written submissions.

7. It is imperative to analyze the evidence tendered before the trial Court. It was the evidence of PW1 (MN) that CM is his son and that he wished to adopt his recorded statement dated 24th July 2020 as his evidence in chief. He further wished to rely on his list of documents also dated 24th July 2020. He testified that the minor herein, C, was involved in an accident on or about 15th June 2020 and that he did not witness the same but the events were reiterated to him by an eye witness. According to him, his son was knocked down by a motor vehicle registration number KAZ 094 A which veered off the road to knock him on the side of the road. His son lost consciousness and was rushed to Bungoma County Referral Hospital where he was admitted until 18th June 2020. He told the Court that his son incurred injuries on his head, forehead, face, lower lip, left elbow, joint and both knees. He blamed the driver of the motor vehicle registration number KAZ 094 A for the accident for over speeding and careless driving among other reasons. He produced the following documents in Court: invoice for Kshs. 550/ = as Exhibit 3; copy of records as Exhibit 4, receipt for Kshs. 200/= as Exhibit 6, Copy of the Plaintiff's

baptism cars as Exhibit 9, copy of the Plaintiff's next of friend identity card as Exhibit 11, receipts as Exhibits 12, 13,14,15,16,17 and demand notice as Exhibit 19.

On cross-examination, he told the Court that his son talks alone during the night, he feels pain on his knees and experiences headaches at times. He clarified that prior to the incident, his son never talked during the night.

On re-examination, he reiterated that he does not have an N.H.I.F card and that his son talks at night stating how he is in pain.

8. PW2 was Emmanuel Sikuku Wekesa, who testified that he wished to adopt his recorded statement dated 24th July 2020 as his evidence in chief. According to him, on 15th June 2020, at about 2.30 pm while walking along Mabanga-Kasosi Murram road at Kasosi Market on the left side of the road facing Kasosi Market from Mabanga direction coming from Kasosi Primary School heading towards Kasosi Market, he noticed that there were two motor vehicles ahead of him on the left side and it was a tractor and a canter. The tractor was behind the canter and were were both stationary. When he got to the motor vehicles, there were people fixing tires on the tractor which were aboard the canter and that there were children playing off the road not far from the canter on the left side of the road but ahead of the canter. He told the Court that he passed the canter and on looking back he saw the canter being driven towards Kasosi Market and it lost control, veering off the road and moving towards where the children were playing. The canter knocked a child in the process and that the driver of the canter sped off. He testified that the canter bore a motor vehicle registration number KAZ 094 A and that the accident occurred on the left side of the road. He blamed the driver of the motor vehicle registration number KAZ 094 A for careless driving, over speeding and for knocking the child in broad daylight.

   On cross-examination, he testified that he was walking on the road when he witnessed the accident. According to him, the children were playing off the road and that the said motor vehicle hit one of the children. He rushed to the scene only to find the child injured. He testified that the driver did not stop at the scene as he passed him, proceeding to drive off. He told the Court that he did not recall the registration number of the motor vehicle.

   On re-examination, he told the Court that he recorded a statement on how the accident occurred and that he did witness the accident.

9. PW3 was No. 72685 Corporal Bernard Kiboi who testified that he is stationed at Bungoma Traffic Base and that he had the Police Abstract in this case. He told the Court that he was not the investigating officer as the one who investigated the incident retired from the force and that he could not be able to trace the police file. He testified that he was unable to get the OB but that the accident did occur on 15th June 2020 along Mabanga Kasosi Murram road. According to him, the accident involved a motor vehicle registration number KAZ 094 A and one C N. The owner of the motor vehicle is the 2nd Respondent (then 2nd Defendant) and that it was insured by Kenindia Insurance Company Limited. He testified that he worked with the retired investigations officer and that he could confirm that he was the author of the Police Abstract which he produced in Court as Exhibit 8.

   On cross-examination, he testified that he was not the author of the said Police Abstract and that the investigations officer retired in September 2020. He testified that the matter is still pending investigations and that the 2nd Respondent is the owner of the motor vehicle that caused the accident.

   On re-examination, he told the Court that the 2nd Respondent is the owner of the motor vehicle as per the Police Abstract report.

10. PW4 was Dr. Mulianga Ekesa who testified that he is a consultant surgeon based in Bungoma town and that he wished to produced before the Court the Plaintiff's medical report dated 1st July 2020 which he

signed himself. According to him, after thorough medical examination of the minor, 1st Respondent herein, he observed that the boy suffered: head injury, soft tissue injuries and psychological trauma. It was his prognosis that the complaints he had are accident related and that the nightmares can be managed vide counselling as the aches will heal with time. He noted that some of the lacerations will leave permanent scars. He charged Kshs. 4000/= for the medical report and produced the receipt in Court as Exhibit 1.

On cross-examination, he told the Court that the discharge summary was from Bungoma District Hospital and it was not his authored document.

On re-examination, he told the Court that he made reference to the discharge summary from Bungoma District Hospital.

11. At the defence hearing, DW1, Godfrey Otieno, told the Court that he works as a Human Resource and Marketing Manager at the Appellant's company. He adopted his recorded statement dated 7th July 2021 as his evidence in chief and proceeded to produce a copy of records as DEX1. According to him, the Appellant is based in Kisumu and it deals in transport and manufacturing. He testified that his copy of records indicates that the Appellant is not the owner of the motor vehicle as a copy of the records from the National Transport & Safety Authority shows that the aforementioned motor vehicle is registered in the name of the 2nd Respondent (then 1st Defendant).

On cross-examination, he testified that he never saw the Police Abstract and that the postal address on the abstract was that of the Appellant but he never visited the Police Station to find out why the name of the Appellant's company was indicated on the Police Abstract.

On re-examination, he told the Court that he did a search and which showed that the motor vehicle in question belongs to Muchai, the 2nd Respondent herein, and that the search vide VISA confirmed the ownership of the same.

12. I have given due consideration to the appeal herein, the evidence before the trial court, the grounds of appeal and the submissions by the Appellant in this appeal as well as the parties' submissions in the lower Court. In my humble view, i find the only issues for consideration are whether the trial Court's apportionment of liability for the accident was proper and whether this Court should interfere with the award of damages by the trial Court.

13. It is trite that this is a first appeal to this Court and as provided in the well settled principles, i am entitled to rehear the dispute, but must remember that the learned trial magistrate had the advantage of hearing and seeing witnesses testify before him, that advantage is not availed this court (See Peters Vs Sunday Post Limited [1958] EA 424.)

14. The Court also in the cases of Bundi Murube V Joseph Omkuba Nyamuro [1982-88]1KAR 108 had this to say; -

> " However, a court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did."

15. And also, in Rahima Tayabb & Another V Ann Mary Kinamu [1982-88] 1KAR 90 Law JA also stated; -

> " An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him."

16. On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws from the Latin phrase "Onus Probandi" and when we talk of burden we sometimes talk of onus.

17. Burden of proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

18. Section 107 of *Evidence Act* defines burden of proof as– of essence the burden of proof is proving the matter in court. Subsection (2) refers to the legal burden of proof.

19. Section 109 of the *Evidence Act* exemplifies the rule in section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

20. The question therefore is whether the 1st Respondent herein discharged the burden of proof that the Appellant was liable in negligence for the occurrence of the accident.

21. Perhaps the best place to start is by considering section 8 of the *Traffic Act*. This section is in the following terms:-

> " The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

22. A long line of Court's decisions has recognised that the presumption of ownership of a vehicle, under section 8, is rebuttable. In the case Nancy Ayemba Ngana Vs. Abdi Ali (2010) eKLR it was held that:-

> " There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.
>
> And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in

the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership.

Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question..."

23. It is my humble view that, due to availability of evidence to corroborate that of PW1, lack of contradicting evidence from DW1 on the events of the accident and the availability of evidence in form of a Police Abstract showing that the motor vehicle registration number KAZ 094 A was owned by Appellant and insured by Kenindia Insurance Company. This simply showed that the Appellant was the beneficial owner/owner in possession of the said motor vehicle but the copy of the official search certificate from NTSA indicated the 2nd Respondent as the registered owner. The Police Abstract indicates the name, address, insurance of the motor vehicle and that the Appellant failed to explain to the lower Court how the same information made its way into the Police Abstract Report. The trial magistrate exhibited aptness and made a conscientious decision in holding both the Appellant and 2nd Respondent vicariously liable for the accident and hence liability ought to be shouldered jointly as there was a nexus between the 2nd Respondent and the motor vehicle. I therefore, do not find anything on which to interfere with the apportionment of liability by the trial Court. The appeal on liability fails and is dismissed.

24. On the issue of quantum, according to the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR: -

> " An appellate court will not disturb an award for general 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..'

25. In the celebrated case of Kemfro Africa Limited t/a Meru Express Services (1976) & Another V Lubia & Another (No. 2) (1985) eKLR, the Court of Appeal expressed itself as follows; -

> " 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 to be that; it must be satisfied that either that 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..."

26. In Mariga V Musila (1984) KLR 251 the same Court also stated as follows:

> " The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles..."

27. It is the law in Kenya that general damages must be compensatory. When one looks at the impugned Judgment, it must be fair in the sense of what the claimant suffered. In my view whether at the trial court or on appeal, claimants should not aspire to a perfect compensation. This is because no amount of damages will replace or restore lost or damaged body parts of a claimant and that the damages awarded are merely to try and assuage the victim to some degree.

28. I wish to note that the discretion to award damages by a trial court is always unfettered and that the same must be exercised judiciously in accordance with the law considering the relevant facts and circumstances of each case.

29. Guided by the above principles, i now proceed to determine whether the learned trial magistrate erred in the assessment of general damages awarded to the 1st respondent in view of the evidence on record.

30. The trial magistrate awarded Kshs. 100,000/= as general damages and Kshs. 17,260/= as special damages; the Appellant regards the general damages awarded as inordinately high.

31. According to the record, the medical report by Dr. Mulianga Ekesa prepared on 1st January, 2020, the 1st Respondent sustained the following injuries: -

    a. Head injury

    b. Lacerations on the forehead

    c. Swollen painful face

    d. Lacerated lower lip

    e. Bruises and lacerations on left elbow joint

    f. Lacerations on both knee joints

32. The 1st Respondent in the medical report is said to have been treated at Bungoma County Referral Hospital where he got painkillers, antibiotics and x-rays were also taken. He still complained of headaches, nightmares at night, dizziness and less activity from his side.In conclusion, the doctor formed an opinion that the 1st Respondent sustained head injury, soft tissue injuries and psychological trauma. He further noted that the nightmares can be managed through counselling, the aches should ease with time but some of the lacerations will leave permanent scars.

33. I have considered the medical report of Dr. Mulianga Ekesa as to the nature of the injuries sustained and the award on damages proposed. I have further considered the authorities cited by the parties herein in the trial Court as no submissions were tendered in in this appeal.

34. The trial Court in assessing the general damages had been invited to consider the case of Michael Okello vs Priscilla Atieno (2021) eKLR and submitted that the award of Kshs. 500,000/= under this head was appropriate.

35. On special damages, it was submitted that the 1st Respondent pleaded and proved Kshs. 17, 260/= and urged the trial Court to award the same.

36. The Appellant on the other hand, submitted that the 1st Respondent only proved Kshs. 4,550/= out of all he pleaded under special damages and urged the trial Court to award the same.

37. General awards for pain and suffering is determined in the light of its own peculiar circumstances. This Court must ensure that in re-assessing the quantum of damages, the same should not to be too generous to be ridiculous or too meagre so as to not meet the needs of the victim.

38. Having considered the authority relied by the 1st Respondent, i am of the view that it didn't have similar injuries to those sustained by the 1st Respondent herein and should not attract a kind award.

39. I have considered the authorities cited and the one close to the instant case was that of Masinga Ndonga Ndonge vs Kualam Limited (2016) eKLR where the Appellant sustained crush injury and fracture

on his big toe and soft tissue injuries. The appellate Court awarded the Appellant Kshs. 150, 000/= as general damages for pain and suffering. Judgement was however delivered on 4th day of November, 2015 which was five years later. Considering the inflationary tendencies, this award will however be inordinately low for this Court to consider. It is noted that the said authority was made over five years ago and that the incidence of inflation ought to be factored. It is also noted that the 1st Respondent suffered mainly soft tissue injuries unlike the above authority and hence the award of Kshs 100,000/= by the trial Court was reasonable in the circumstances. Nothing has been shown to the effect that the learned trial magistrate considered irrelevant factors in assessing the damages for pain and suffering, and loss of amenities. Hence, the appeal on this ground must fail.

40. As of special damages, the 1st Respondent pleaded:

    a. Kshs. 550/= for the copy of the records.

    b. Kshs. 4000/= for the medical report.

    c. Kshs. 12,710/= for theater expenses.

41. He availed receipts showing the amount as captured above. The 1st Respondent was therefore able to prove special damages in the sum of Kshs.17, 260/=. The same is hereby upheld and shall remain undisturbed. Again, the appeal on this ground must fail.

42. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the 1st Respondent.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY 2024.

D.KEMEI

JUDGE

In the presence of:

Fundi for Appellant

Wekesa for Bw' Onchiri for 1st Respondent

No appearance for 2nd Respondent

Kizito Court Assistant