



Sai Mobile Limited & another v RMM (A Minor Suing Through his Next Friend and Mother FMM) (Civil Appeal E224 of 2023) [2024] KEHC 4961 (KLR) (Civ) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E224 OF 2023

WM MUSYOKA, J

MAY 14, 2024

BETWEEN

SAI MOBILE LIMITED 1ST APPELLANT

CHRISPINUS NYONGESA BULUMA 2ND APPELLANT

AND

RMM (A MINOR SUING THROUGH HIS NEXT FRIEND AND MOTHER FMM) RESPONDENT

(An appeal arising from the judgement of Hon. MW Murage, Senior Resident Magistrate, SRM, delivered on 7th March 2022, in Milimani CMCCC No. 2762 of 2020)

JUDGMENT

1. The suit, at the primary court, was initiated by the respondent, against the appellants, for compensation, arising from a road traffic accident, which allegedly happened on 20th January 2020, along Enterprise Road, Nairobi, involving the minor respondent and a motorcycle. The motorcycle bore registration mark and number KMEA 225Q, which allegedly belonged to or was operated by the appellants. It was alleged that the minor respondent was a pedestrian, when that accident motorcycle knocked him down, occasioning on him severe injuries. Negligence was attributed on the appellants. The appellants filed a defence, in which they denied liability, and attributed negligence on the major respondent.
2. A hearing was conducted. 2 witnesses testified for the respondent, and 1 for the appellants. In the end, judgement was delivered, on 7th March 2022. Liability was apportioned at 100%, on the basis that the minor respondent was a child of 4 years. Damages were awarded at Kshs. 700,000.00, for pain and suffering; and Kshs. 6,500.00, for special damages. The total was Kshs. 706,500.00.



3. The appellants were aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 14th March 2023, revolve around the trial court erring in holding the appellants liable for the accident when the evidence pointed to the contrary; failing to find that the respondent might have been equally liable; failing to consider the defence by the appellants, together with their evidence and submissions, and to analyse the evidence; awarding damages that were excessive in the circumstances; and awarding special damages that had not been proved.
4. Directions were given on 19th April 2023, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
5. The appellants have submitted only on liability and quantum. On liability, the appellants submit from 2 fronts. One, that the minor respondent, although a child of tender years, could be held to have contributed to the accident, and MJ (a minor suing through his father and next friend JM) & 2 others vs. Swaleh O. Shabiby [2019] eKLR (PJ Otieno, J) is cited. Two, that contributory negligence could be attributed to the major respondent, the mother of the minor, and Multiple Hauliers (EA) Ltd vs. DMK (a minor suing through a next friend and father DMK) [2015] eKLR (Meoli, J), WK (a minor suing through a next friend and mother LK) vs. Ghalib Khan and another [2011] eKLR (O’Kubasu, Githinji & Onyango-Otieno, JJA), and LWK (a minor suing through his father and next friend SKD) vs. Kirigu Stanley & another [2019] eKLR (Odunga, J) are cited. It is proposed that the court should have found the mother of the minor respondent 100% liable for the accident.
6. On quantum, it is submitted that the minor respondent suffered soft tissue injuries, and, therefore, the award of Kshs. 700,000.00 was excessive. It is proposed that the trial court should have awarded no more than Kshs. 100,000.00. Elizabeth Wamboi Gichoni vs. JOO (minor suing through mother and mother VAA) [2019] eKLR (Aburili, J), George Kinyanjui t/a Climax Coaches and another vs. Hussein Mahad Kuyale [2016] eKLR (Kimondo, J), Hantex Garments (EPZ) Ltd vs. Haron Mwasala Mwakawa [2017] and George Mugo and another vs. AKM (minor suing through next friend and mother AMK) [2018] eKLR (N. Mwangi, J) are cited. On special damage, it is submitted that only Kshs. 550.00 was proved, and Christine Mwigina Akhonya vs. Kairu Chege [2017] eKLR (J. Ngugi, J) is cited, on when special damages are to be awarded.
7. In his written submissions, the respondent largely supports the judgement of the trial court. He relies on Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) 1 KAR 1 (1981) KLR 349 (Madan, Wambuzi & Law, JJA), to submit that liability does not usually lie against a child of tender years. Al Samah Enterprises Ltd. & Another vs. Derrick Mugambi (minor suing through mother and next friend) Caroline Gacheru Kibiti (HCCA No. 15 of 2014) [2016] eKLR is cited on the argument that parents cannot be held liable for the negligence of their children. On quantum, Anthony Nyamweya vs. Dorca Gesare Mounde [2022] eKLR (Ougo, J) and John Njoroge Murigi vs. DMK [2022] eKLR (Kasango, J), are cited to support the award of Kshs. 700,000.00 general damages. He urges that the claim for Kshs. 150,000.00 was wrongly dismissed, as the respondent still needed to have the damaged root of the lost teeth repaired, and pleads that the decision of the trial court on that claim ought to be reversed.
8. Let me start with liability. The minor respondent was a child of 4 years. That made him a child of tender years. Liability, whether in civil or criminal cases, hardly ever attaches on children of such tender years. In civil matters, liability is only considered for children who are a little older, at least old enough to have the requisite intellectual capacity to take precautions for their own safety. The general principle is that a child can only be found guilty of negligence if he is old enough to be expected to take precautions. When confronted with a minor of tender years, as a party to alleged negligence, the trial court has to



consider whether that particular child was old enough to be expected to take precautions for his own safety.

9. There is ample case law on this. In *Attorney-General and another vs. Vinod and another* [1971] EA (Duffus P, Law & Mustafa, JJA), it was said that: “In dealing with contributory negligence on the part of a young boy ... his ability to understand and appreciate the dangers involved have to be taken into consideration.” Citing *Gough vs. Thorne* [1966] WLR 1387 (Lord Denning), it was said: “A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.” In the end, a child of 8½ years was said to have had contributed to the accident by his negligence, to the extent of 10%. *Attorney-General and another vs. Vinod and another* [1971] EA (Duffus P, Law and Mustafa, JJA) was followed in *Tayab vs. Kinanu* [1983] eKLR (Law, Potter & Hancox JJA), where it was said: “In the instant case, the trial judge held in clear terms that the plaintiff had the requisite road sense. Her failure to see the approaching car was in my view blameworthy. In the case of a grown-up person, the proportion of blame would have been substantial, but having regard to the plaintiff’s tender years I would follow the precedent of Vinod’s case, and assess her degree of liability at 10%.”
10. No negligence was attributed to a child of 6, in *Esther Nkudate vs. Touring & Sporting Cars Ltd & another* [1979] eKLR (Platt, J), where it was observed: “The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these.” In *NM & another (Suing as Representative of the Estate of LN (deceased) vs. Ndungu Isaac* [2020] eKLR (Odunga, J), it was observed that a child of 5 could not contribute, by way of negligence to a road traffic accident. It was observed: “In my judgement, it is clear that the learned trial magistrate did not take into account, the age of the deceased and whether in those circumstances she could be deemed to have negligently contributed to the accident or negligently caused the accident. The law when it comes to accidents involving children of tender years seem to place strict liability on the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety”, and “In my view the failure to take into account the age of the deceased in arriving at his decision amounted to a failure on his part to take account of particular circumstances or probabilities material to an estimate of the evidence. That entitles the court to interfere with his findings.”
11. On the face of the decisions that I have discussed above, there can be no doubt at all, that the trial court properly exercised discretion in assessing liability at 100% against the appellants.
12. On whether the parents of a child of tender years can be held liable for the negligence of the child, I am not aware of any law that holds that parents are vicariously liable for the negligent acts of their children, and none has been cited here. The principle of vicarious liability only applies with respect to a servant and master relationship. In any case, in civil proceedings, where a suit is brought in the name of the parent, that parent is not, strictly speaking, the principal party. The principal party remains the minor. The parent comes in to lend a name for the purpose of the litigation, for the minor lacks capacity and standing to sue in his or her own name. There would be no basis for holding such a nominal party, as a next friend of the minor, liable, when he or she is strictly not a party to the dispute. I associate myself fully with the position stated in *Al Samah Enterprises Ltd. & Another vs. Derrick Mugambi (minor suing through mother and next friend) Caroline Gacheru Kibiti* (HCCA No. 15 of 2014)



- [2016] eKLR and LMM (minor suing through mother and next of kin RMN) vs. Kenya Ferry Services Limited [2017] eKLR (N. Mwangi, J), in that regard.
13. On quantum, the minor suffered multiple injuries, according to the plaint, being injuries to the forehead, with loss of consciousness; loss of several teeth; lacerations to the face, scalp and foot; and preorbital oedema on both eyes. Mr. Wokabi put the injuries into 2 categories. The first being head and dental injuries, that is blunt and abrasion injuries on the face, and loss of 8 teeth. The second being blunt soft tissue injuries to both legs. Dr. Wambugu classified them as blunt trauma to the mouth with loss of primary upper incisors and left lateral canine teeth (total 8); right occipital laceration; and blunt trauma both legs. The trial court awarded Kshs. 700,000.00 general damages for the pain and suffering occasioned by those injuries
 14. I find the decisions in Anthony Nyamweya vs. Dorca Gesare Mounde [2022] eKLR (Ougo, J) and John Njoroge Murigi vs. DMK [2022] eKLR (Kasango, J) as useful guides, being more recent. The injuries in Anthony Nyamweya vs. Dorca Gesare Mounde [2022] eKLR (Ougo, J) are lesser to what was sustained by the minor respondent herein. The injuries, in that case, were loss of 6 teeth, bruises on the left neck and a swollen knee joint tender on touch, and an award of Kshs. 600,000.00 was made. In John Njoroge Murigi vs. DMK [2022] eKLR (Kasango, J), the injuries were loss of 6 teeth and 2 more were broken, with a broken jaw, and Kshs. 1,500,000.00 was awarded. There is also Joseph Mutua Nthia vs. Fredrick Moses M. Katuva [2019] eKLR (Odunga, J), where there was loss of 2 teeth and loosening of 3 others, with an injury to the face, blunt chest injury and blunt back injury, and the court awarded Kshs. 400,000.00. I am persuaded that the Kshs. 700,000.00 awarded by the trial court was within range.
 15. Parties submitted on future medical expenses, as suggested by Mr. Wokabi, for dentures, which Dr. Wambugu discounted. The trial court papered to agree with Dr. Wambugu, and did not award the same. The opinion of Dr. Wambugu was that the teeth lost were primary, and the respondent was yet to grow secondary and permanent teeth, hence there was no need for dentures, for in due time there was bound to be a natural replacement of the lost teeth. I agree. In any event, the respondent has not cross-appealed on that point, and the same cannot be introduced into these proceedings through written submissions.
 16. The other ground is on special damages. The argument is that although the amount pleaded was Kshs. 6,550.00, and the court awarded Kshs. 6,500.00, on the basis that the same was supported by receipts, the special damage of Kshs. 6,500.00 had not been specifically proved. It is pleaded, in the memorandum of appeal, that what was proved, at trial, was Kshs. 3,050.00, and, in the written submissions, Kshs. 550.00. At the trial, the major respondent did not give an outlay of her special or financial loss. She relied on her witness statement, and produced the documents that were in her list, excluding the police abstract. In that list were only 2 receipts, one from the National Transport and Safety Authority, for Kshs. 550.00, and another from Mr. Wokabi, for Kshs. 2,500.00. That meant that only Kshs. 3,050.00 was specifically proved, and the minor respondent was not entitled to the total amount awarded to him by the trial court.
 17. In the end, this appeal succeeds only on the aspect of special damages, and I hereby set aside the award of Kshs. 6,500.00, and substitute the same with an award of Kshs. 3,050.00. The appeal on liability and quantum on general damages is dismissed. There shall be no order on costs. The appeal herein is disposed of in those terms. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 14TH DAY OF MAY 2024

W MUSYOKA



JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Awuor, instructed by Okwach & Company, Advocates for the appellant.

Ms. Ombura, instructed by Robert Case & Partners, Advocates for the respondent.

