Devika v NMB (A Minor suing through mother and next friend Faith MK) (Civil Appeal 191 of 2015) [2024] KEHC 6852 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6852 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 191 OF 2015

FROO OLEL, J

JUNE 7, 2024

BETWEEN

PATEL DEVIKA ..... APPELLANT

AND

NMB ..... RESPONDENT

A MINOR SUING THROUGH MOTHER AND NEXT FRIEND FAITH MK

(Being an appeal from the judgment and decree in Machakos CMCC no. 818 of 2021 delivered by Hon. Mwangi Karimi Mwangi (SPM) ON 30/10/2015)

JUDGMENT

A. Introduction

1. This appeal presents another sad and unacceptable statistic of matters, which have been in the court corridors for far too long and leaves the litigants with a bitter taste in the mouth due to the slow grinding nature of wheels of Justice. The respondent filed the primary suit in March 2012, Judgement was entered in her favour in October 2015, the appeal file immediately thereafter, but record of appeal filed in 2022 and the final submissions filed in October 2023. Without pointing fingers, we must in all sincerity do better.

2. The Appellant was the Defendant in the primary suit, where she had been sued for compensation arising from a Road Traffic Accident which occurred on 01.01.2011. It was alleged that on the said material day, the respondent herein was a lawful pillion passenger on motor cycle registration Number KMCH 067Z,(Hereinafter referred to as the suit motorcycle) which was being driven along Nairobi -Mombasa Road at Devki area, when the Appellant, lawful driver, agent and/or employee negligently and carelessly drove her motor vehicle registration Number KAQ 555F (hereinafter referred to as the suit Motor vehicle), that he/she caused it to violently collide with the said suit motor cycle, and as a result caused the respondent to suffer severe soft tissue injuries for which she claimed damages.

3. The Appellant did file her Amended statement of defence denying all the averments made in the plaint, but admitted to owning the suit motor vehicle. She further averred that on the said accident date, her son was driving the said motor vehicle along a rough stretch road within Athi River area, when he was accosted by armed gangster's, who commandeered and took control of the said suit motor vehicle, while forcing him onto the back seat. It was one of the robbers who was in control of the said suit motor vehicle, when the accident occurred. The said robbers were not her agents or servants and/or employee, and therefore she could not be held vicariously liable for the said accident. The Appellant further denied that as a result of the said accident the respondent suffered the injuries as pleaded and therefore prayed that this suit be dismissed with costs.

4. After hearing , the learned magistrate in his judgment delivered on 30th October, 2015 apportioned Liability at 100% as against the Appellant and proceeded to award the respondent general damages at Ksh.250,000/= plus costs and interest of the suit.

5. The Appellant being dissatisfied by the judgement both on liability and quantum awarded, filed her memorandum of Appeal on 27th November, 2015 raising six (6) grounds of appeal namely: -

    a. That the learned trial magistrate erred in law and fact by holding the appellant wholly liable which finding was against the weight of evidence tendered.

    b. That the learned trial magistrate erred in both fact and in law by ignoring the evidence of DW2 (police officer) which demonstrated that the accident was caused by carjackers.

    c. That the learned trial Magistrate erred in both law and fact by ignoring the authorities cited in the Appellant's written submissions on the question of liability.

    d. That the learned trial magistrate erred in both fact and in law by failing to appreciate that the burden of proof was at all times upon the plaintiff.

    e. The learned trial magistrate erred in fact and in law by completely ignoring the Defendants written submissions and all authorities cited whose copies were availed.

    f. The learned trial Magistrates award of general damages to the Respondent is so manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent.

6. The Appellant whereof prayed that the said judgment/decree be set aside and be substituted by an award exonerating her from any blame and further dismissing the respondents claim with costs.

B. Facts of the case

7. PW1 Faith Mumbua Kiio, confirmed that the minor was her daughter who was aged 6 years at the time of the accident. On the said accident date, she and her daughter boarded the suit motor cycle and before reaching Devki stage, they were knocked down by the suit motor vehicle which was, being driven recklessly and at a high speed. The accident occurred while the suit motor vehicle was overtaking another vehicle and knocked them down, while on the suit motor cycle path. As a result of the said accident the minor sustained serious injuries on the legs, face, head and they were rushed to Athi River Medical clinic by good Samaritans.

8. She produced her claim supporting documents and further stated that the Appellants allegation that the suit motor vehicle had been stolen was not true as no such report had been made as at the time of reporting the accident. In cross examination she confirmed that she was also a pillion passenger on the suit motor cycle and that her child did not have a helmet nor was she wearing a reflective jacket. The

accident occurred on Mombasa road and it was caused by the Appellants driver negligence/carelessness as he was overtaking when it was not safe to do so. She reiterated that the suit motor vehicle entered the suit motor cycle path, while overtaking a bus and in the process of overtaking knocked them down.

9. PW2 Cpl James Kathurima attached to Athi River Police Station- Traffic Base, confirmed that an accident did occurred on 01.01.2011 along Nairobi – Mombasa Road involving the suit motor vehicle and motor cycle at Devki Area of Mombasa road and as a result three persons were injured. The accident was reported as a hit and run, but the motor vehicle license plate fell off and they were able to trace its driver, who they discovered was one Shamir Patel. He was charged in court, convicted and fined Ksh.3000/=. There was no report of robbery of the suit motor vehicle on the material day.

10. In cross examination, PW2 confirmed that he was not the investigating officer, did not have any witness statements in court and/or the accident sketch map in court. One of the injured passenger's was the minor and his evidence was accurate as he had extracted that information from the OB. He conformed that after the accident, the suit motor vehicle did not stop. DW1 Davika Patel also testified and confirmed that she was the owner of the suit motor vehicle. On the said accident date, it was her son Shamir Patel, who was driving the said vehicle with her permission and further stated that as at the time she was testifying her son had relocated to the USA.

11. On the said accident date, her son came back home and reported that he had been carjacked along Mombasa road early in the morning, abandoned and later the suit motor vehicle was recovered by the police. They reported the said carjacking incident at spring valley police station and were issued with a police abstract, but her son did not report the accident incident to the police nor was she was aware of how the accident occurred as she was not present. In cross examination she confirmed that the car jacking was reported on 02.01.2011 but they did not report any accident and got to know about it when served with court summons.

12. DW2 Ip Raphael Kioko confirmed that on 02.11.2011 at 2.20hours, a report was made at Spring Valley police station of a carjacking incident and he produced the OB extract. The report was made by one Shamir Patel, who reported that he was carjacked along Mombasa road at 6.00am and had lost his credit cards and National Identity Card during the carjacking incident. The said Shamir Patal further confirmed that he had recovered the suit motor vehicle and no instigations were carried out. He confirmed that the report to their police station was about carjacking and they had no clue on traffic accident that had occurred earlier.

C. Submissions

i. Appellants Submissions

13. The appellant submitted that, while indeed an accident did occur involving the suit motor vehicle, it was the suit motor cycle which was on the wrong as confirmed by PW2, who stated that the suit motor cyclist was in the process of entering the main road, from a minor road, when the accident occurred. This too was confirmed by PW1 in her witness statement filed in support of their claim. It was therefore clear that the suit motor cyclist had thrown caution to the wind in the manner in which he drove and liability ought to have been placed on him. Further as per the police abstract produced by PW2, it had been recommended that the driver of the motor cycle be charged and this confirmed that indeed he was liable and had caused this accident.

14. The appellant also submitted that as at the time of the accident, it was not the appellant's son who was in control of the suit motor vehicle, as he had been carjacked and this incident was reported to the police. It was therefore not right for the trial court to summarily dismiss this evidence and if properly reevaluated, this court would be justified to interfere with that finding.

15. Finally, if the court were to find otherwise on the issue of liability, the quantum awarded was still excessive based on the soft tissue injuries sustained and the same ought to been reduced to Kshs 100,000/=. Reliance was placed on Josphat Kaliche Ambani Vrs Farm Industries Ltd, ELRC No 11 of 2015 at Kisumu, George Mugo & Another Vrs AKM (2018) eKLR, Christine Kalama Vrs Jane Wanja Njeru & Ano (2021) eKLR.

(ii) Respondents Submissions

16. The respondent on the other hand opposed this Appeal and confirmed that the trial magistrate finding on liability was proper and justified. The appellant had admitted that indeed the accident did occur and her son pleaded guilty and was convicted of the traffic offence, he was charged with. It went without doubt that such conviction was conclusive proof that he was to blame for causing the accident. Secondly the respondent had only to prove on a balance of probability that it was the appellants agent who was driving as at the time of the Judgment, which they did. The evidence of carjacking as narrated by the Appellant in response was farfetched hearsay which the trial court rightly rejected.

17. Finally, on the quantum awarded, it had not been shown that it was an erroneous estimate of the award which the respondent was entitled too or that it was based on wrong legal principles or misapprehension of the evidence in some material respect. Reliance was placed on Francis Ochieng & Another Vs Alice Kajimba (2015) eklr & Isaac Katambani Iminya Vrs Firestone East Africa (1969) Ltd (2015), where for similar injuries similar awards were awarded.

18. The respondent therefore prayed that this Appeal be dismissed with costs to them.

D. Analysis & Determination

19. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

20. A first appeal offers a valuable right to the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

21. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316.

22. The issues raised in this appeal are; whether there was ample evidence on record to prove ownership of the suit motor vehicle and if indeed the Appellant was liable and/or substantially contributed to the accident, which occurred on 01.11.2011 along Nairobi- Mombasa Road at around Devki area and secondly if the quantum awarded was adequate or awarded in excess of what would be awarded for similar injuries.

i. Burden of Proof

23. Section 107 (1) of the *Evidence Act* , Cap 80 provides that;

> " 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."

24. Section 108 of the *Evidence Act*, Cap 80 further provides that;

> " The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

25. I also refer to The Halsbury's laws of England, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties' case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
>
> The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

26. The Question then is what amounts to proof on a balance of probabilities. This was discussed by Kimaru J in William Kabogo Gitau Vs George Thuo & 2 others (2010) 1 klr 526 stated that;

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleased in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.

27. I also refer to Palace Investments Ltd Vs Geofrey Kariuki Mwendwa & Another (2015) Eklr , Where the judges of Appeal referred to "Denning J in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;

> " That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other

which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained."

28. As regards the question of liability concerning road traffic accidents, the Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...'

29. The appellant admitted in her Amended statement of Defence and also in her evidence that indeed she owned the suit motor vehicle and it was prove by the evidence of PW1 and PW2 that the said suit motor vehicle knocked down the suit motor cycle on 01.01.2011 along Mombasa road around Devki area and as a result the front Number plate fell off and it was used to trace it. PW2 also confirmed that one Shamir Patel, the drive of the said motor vehicle was charged with failing to report an accident, he pleaded guilty and was fined Ksh.3,000/=. In response the Appellant alleged that the said motor vehicle had been carjacked as at the time of the accident, and it was not in the control of her agent or servant and therefore she could not be held vicariously liable. Further it was the driver of the motor cycle who was wrong as he did not give way while entering the main road.

30. The Appellants allegation that her son Shamir Patel was carjacked and it was the said robbers who were driving when the accident occurred, "is pure hot Air". If indeed this was true, he would not have pleaded guilty of failing to report an accident and would have put up a good defence to being a victim of a carjacking incident. This he did not do. Secondly DW1 and DW2 did not witness the carjacking, and/or explain at what point did DW1 son gain recovery of the carjacked motor vehicle and how it was still in his possession when he went to report this incident the following day at 2.20hrs. It was also for the said Shamir Patel to come and explain the gaps in the defence raised but failed to do so. The evidential burden therefore remained on the Appellant to give better particulars and prove the carjacking theory, but they failed to discharge the same.

31. Further, the appellants line of submissions that it was the motor cycle rider to blame for entering the main road, without giving a proper out look too cannot hold as PW2 was not at the accident scene nor did he produce the accident sketch Map to prove his allegation. Finally, the Appellant also failed to institute third party proceeding as against the driver of the said motor cycle and lead evidence in their defence to prove this allegation. There is therefore no basis to so hold him partially liable for the accident. In short based on a balance of probability, the respondent, primary uncontroverted evidence as to how the accident occurred was not disapproved and therefore the trial magistrate was right to hold the Appellant 100% liable.

ii. Quantum

32. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> " 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 different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors 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 represent an entirely erroneous estimate".

33. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, if the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

34. It is also a principle of law that awards must be reasonable and comparable to awards in similar cases. In the case of Tayab v Kinanu [1983] eKLR, the court stated as follows: -

> " I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd v Shephard [1964] AC 326 at 345:"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

35. The respondent suffered multiple injuries described as; multiple contusions and deep cut wounds on the head, deep cut wound on the right knee, deep cut wound on right shin interiorly and bruised left ankle joint. The said injuries were confirmed by the medical report by Dr Mutuku P.N, treatment notes from Athi River medical services clinic and the P3 form. The Appellant submitted that this award should be reduced to Ksh.100,000/=, while the respondent urged the court to maintain the same.

36. In, West(H) and Sons Limited vs Shepherd [1964] AC 326 at 345 it was appreciated that ;-

> " The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of

the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously".

37. Also in Cecilia Mwangi & another Vs Ruth Mwangi CA 251 of 1996 cited in the case of Nancy Oseko Vs Board of Governors Masai Girls High School (supra) where Lord Morris stated:-

> " But money cannot renew a physical frame that has heed battered and shuttered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be endeavor to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed with moderation. Furthermore it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it must be that amounts which are awarded are to a considerable extent conventional."

38. I do find that given the comparable awards awarded for soft tissue injuries and inflationary rates, this award was reasonable and was not inordinately high. The nature of injuries suffered especially the deep cuts and multiple contrition on the head would also justify the award. Also similar injuries' have attracted similar awards. See Francis Ochieng & Another Vs Alice Kajimba (2015) eklr & Isaac Katambani Iminya Vrs Firestone East Africa (1969) Ltd (2015), where for similar injuries similar awards were granted.

39. The trial magistrate obviously did exercise his discretion judiciously and there in no basis to justify any interference of the award by the appellate court.

Disposition

40. The upshot is that this Appeal is not merited and the same is dismissed with costs to the respondent.

41. The judgment/decree dated 30th October 2015 issued in Machakos CMCC No 818 of 2011 is upheld and shall be paid with interest at court rates from 30th October 2015, until payment in full.

42. The costs of this Appeal is hereby assessed at Ksh.150,000/= all inclusive.

43. It is so ordered

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 7TH DAY OF JUNE, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant