



**Wahome v Kombo (Civil Appeal E144 of 2023)
[2024] KEHC 10958 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E144 OF 2023
BK NJOROGE, J
JULY 5, 2024**

BETWEEN

MICHAEL NJOGU WAHOME APPELLANT

AND

SIMON ONYANCHA KOMBO RESPONDENT

JUDGMENT

1. This is an Appeal arising out of the decision of Hon. J. Were (SPM) emanating from Ruiru Civil Case No. e436 of 2022. This is a running down claim.
2. In its judgment, the trial Court allowed the Respondent's suit and made the following award:
 - a. General damages for pain and suffering - Kshs.2,000,000.00.
 - b. Future Medical expenses - Kshs.900,000.00.
 - c. Damages for diminished earnings - Kshs.300,000.00.
 - d. Special damages - Kshs.12,880.00.Total Kshs.3,212,880.00
Costs and interest were also awarded to the Respondent.
3. The award has triggered this Appeal. The Appellant has filed a Memorandum of Appeal with 8 grounds of Appeal. In a nutshell, the Appellant is aggrieved by the manner in which the trial Court appreciated the facts of the case, evaluated the evidence and applied the law. He also challenges the trial Court's, decision on liability and quantum.



Background Facts

4. The suit is brought on behalf a minor who sustained severe injuries from a road accident. The minor was walking home while crossing the road at the Masaku area of Ruiru. He was knocked down by the Appellant's Matatu. The minor sustained injuries for which he received prolonged treatment. The minor's father filed suit blaming the Appellant for the negligent driving of the Respondent's driver.
5. That the accident occurred does not appear to be seriously challenged. What was challenged was the liability and quantum. The Appellant maintains that the minor was contributory negligent or at least his father.
6. The Respondent presented three witnesses, the minor's father, the Police Officer and he Doctor who prepared the Medical Report. The Appellant did not call any witnesses. The Defendant's Medical Report was produced by consent. At the end of the trial, the trial Court found in favour of the Respondent.
7. This matter was flagged for the Rapid Results Initiative (RRI) for the Month of June, 2024. Directions were made on 6/5/2024 by the Court that the Appeal be disposed of by way of written submissions. Each party had thirty (30) days to file their submissions.
8. The parties appeared in Court on 4/6/2024 when only the Respondent had complied. The Appellant sought and was granted two (2) days to file their submissions. The matter was fixed for a mention on 6/6/2024. Come 6/6/2024, the Appellant' Advocate did not appear and had not filed his submissions.
9. The Court proceeded to reserve the date for Judgment in this matter.

Issues for Determination

10. The Court sets out two issues for determination namely:
 - a. Whether the Appeal is meritorious?
 - b. What Orders should be as to costs?
11. This is a first Appeal. Hence the Court is bound to re-evaluate the evidence presented before the trial Court and reach its own independent conclusion. This is a retrial with the Court warning itself that it did not have the benefit of seeing or hearing any witnesses who appeared before the trial Court. See *Selle –vs- Associated Motor Boat Company* [1966] EA 123.
12. Where the Appellate Court is called upon to interfere with the exercise of discretion of the trial Court, it has to exercise caution. It will not interfere unless the trial court misdirected itself or acted on matters it should not have acted upon or failed to take into consideration some matters it should have. The Appellate Court should be convinced that the exercise of discretion was plainly wrong and lead to an injustice. See *Mbogo & Another –vs- Shah* [1968] (E.A) 93.
13. The Court proceeds to consider the evidence and the relevant law in answering the two issues.

a. Whether the Appeal is meritorious?

14. The Appellant having failed to file submissions, the Court is left to look at the Memorandum of Appeal and the Record of Appeal. As earlier stated, the Appellant challenged both liability and quantum.



On Liability

15. The trial Court did not have the benefit of the evidence of an eye witness to the accident. trial Court relied on the testimony of one Traffic Police Officer.
16. He testified that from the Police investigations, the Appellant's motor vehicle was being driven from Kiambu towards the direction of Ruiru. The Matatu was overtaking a motor vehicle ahead and in the process hit a minor pedestrian.
17. The Appellant did not call any witnesses to rebut this evidence. The trial Court therefore proceeded to pose a question whether a child could be held contributory negligent in a Road Traffic Accident as a pedestrian. The trial Court applied its mind to the Court of Appeal decision in *Rahima Tayab and Anor –vs- Anna Mary Kinanu Civil Appeal NO. 29 of 1982 [1983] eKLR 114; I KAR 90*. The finding of the Court of Appeal being that a minor cannot be expected to have the mind of an adult and exercise the same care, while using the road.
18. In absence of any testimony to show that the minor aged 10 years was capable of comprehending the dangers on the road, the Court would hesitate to find the minor contributory negligent.
19. In the circumstances the Court will not interfere with the trial Court's findings on liability. The Court follows the decision in *HKM –vso Francis Mwongela Ncebere [2017] eKLR*.

On Quantum

20. The Court is alive to the care to be taken before the Court interferes with the decision of the Trial Court on quantum. See *Catholic Diocese of Kisumu –vs- Sophia Achieng Tete Civil Appeal No. 24 of 2001 (2004) eKLR 55* and *Jane Chelagat Bor –vs- Andrew Otieno Onduu [1988-92] eKLR 288; [1990-1994] E A 47*.
21. In absence of any submissions filed by the Appellant, the Court is unable to appreciate the manner in which the awards were excessive.
22. The Court observes that the minor sustained the following injuries:
 - i. Compound (open) fracture of the Left tibia.
 - ii. Compound (open) fracture of the left fibula.
 - iii. External skin loss of that leg.
23. The treatment was prolonged requiring skin grafts and the minor could not be able to go to school. He suffers a permanent disability.
24. On general damages for pain and suffering, the Respondent at the trial Court proposed a sum of Kshs.3,000,000/-. They cited *Regina Mwikali Wilson –vs- Stephen Gichubu Peter Muinde [2015] eKLR*, *Crown Bus Services & Others of BM (Minor suing through mother and next friend SMA) 2020 EKLR* and *Board of Trustees Anglican Church of Kenya of Marsabit –vs- Chukulisa Roba Halakhe [2019] eKLR*.
25. The Appellant submitted for sum of Kshs.350,000/- and cited *Daniel Otieno Owino & Another –vs- Elizabeth Atieno Owuor [2020] eKLR* and *Juma Mutisya Kavii –vs- Simon Kiguta Mwangi [2013] eKLR*.



26. The trial Court noted the severity of the injuries, their lifelong effect on the minor. It awarded Kshs.2,000,000/-. The Court sees no sufficient reasons or comparables advanced to warrant an interference with this award.
27. The same goes to the award of future medical expenses. The Respondent's Doctor proposed Kshs.1,069,000/- to cater for future medical expenses including weekly physiotherapy treatment payments at Kshs.69,000/- and future surgery at Kshs.1,000,000. The Appellant's Doctor proposed Kshs.700,000/- based on treatment at public hospital rates. The Court noted that in as much as the medical expenses were cheaper in public hospitals, there were other medical and recovery costs. The trial Court awarded Kshs.900,000/-. The Court sees no reason to interfere with the award.
28. The same applies to the award of Kshs.300,000 for diminished earnings, which the Court notes as moderate. The Respondent had proposed Kshs.900,000/-and the Appellant rejected the claim in its entirety. The injuries are bound to have a lifelong effects and limitations to the minor's future adult life.
29. The Court awarded special damages of Kshs.12,880.00 as the only sum proved. The Court is not persuaded to interfere with this award.

What orders should be as to costs

30. Costs follow the event and are awarded at the discretion of the Court. The successful party is entitled to costs of the Suit.

Determination

31. The Appeal is unsuccessful and is hereby dismissed with costs to the Respondent.
It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 05TH DAY OF JULY, 2024.

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NJOROGE BENJAMIN K.

JUDGE

In the presence of:

No appearance for Kimondo Gachoka for the Appellant.

Faith Ndwiga for the Respondent.

