



IKM (Suing through Next Friend and Father DMG) v Kamau & another (Civil Appeal E440 of 2021) [2023] KEHC 60 (KLR) (Civ) (17 January 2023) (Judgment)

Neutral citation: [2023] KEHC 60 (KLR)

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

CIVIL

CIVIL APPEAL E440 OF 2021

DAS MAJANJA, J

JANUARY 17, 2023

BETWEEN

IKM (SUING THROUGH NEXT FRIEND AND FATHER DMG) ... APPELLANT

AND

DAVID GIKIMA KAMAU 1ST RESPONDENT

VIRGINA WAITHERA 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. G. Gitonga, RM/Adjudicator dated 9th July 2021 at the Nairobi Small Claims Court, Milimani in SCCC No. 181 of 2021)

JUDGMENT

1. This is an appeal against the judgment and decree of the Small Claims Court finding the Respondents liable for an accident involving the Appellant and the Respondents' motor vehicle registration number KCB 728U on March 11, 2019. The court apportioned liability in the ratio 70:30 in favour of the Appellant and awarded the Appellant Kshs 350,000.00 as general damages for pain and suffering and Kshs 17,165.00 as special damages.
2. The Appellant's appeal is grounded on the Memorandum of Appeal dated July 23, 2021. Both parties have filed submissions in support of their respective positions. In their submissions, the Appellant challenges the decision of the Subordinate Court's finding on liability and quantum of damages. I shall deal with the issue of liability first.
3. The Appellant argues that the trial court erred in apportioning liability at 30% against the Appellant who was a minor at the time despite the evidence that the 2nd Respondent was the sole cause of the accident and against the weight of evidence. He argues that there was no basis in the evidence or otherwise for apportioning liability at 30% against the minor who was 9 years old.



4. Whether and to what extent the Respondents were liable for the Appellant's injuries is a question of fact. In determining this appeal, the first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal bearing in mind that it never heard or saw the witnesses testify (see *Selle and Another v Associated Motor Boat Co. Ltd and Others* [1968] EA 123).
5. The fact that the accident took place was not in dispute. In the Complaint dated September 10, 2019, the Appellant claimed the 2nd Respondent drove motor vehicle registration number KCB 728U negligently by, inter alia, driving at an excessive speed in the circumstances, failing to keep a proper lookout, driving off the road and on the pedestrian path thereby knocking the Appellant who was walking along the road. In their Amended Statement of Defence dated April 22, 2021, the Respondents pleaded contributory negligence against the father and next friend of the child. They stated that he exposed the Appellant to a busy road and failed to use the pedestrian walk/path, that he failed to hold the child's hand and guide him while walking on a busy road, that he authored the Appellant's misfortune by acting unreasonably in the circumstances and allowing the Appellant to walk on a busy road while knowing or ought to have known it was dangerous.
6. At the hearing, the father and next friend, Daniel Mose Gekonge (PW 1) and the Appellant (PW 2) testified. While PW 1 was not at the scene of the accident, PW 2 stated that on the material day she was coming from school with her friends when a car which was overtaking hit her. She explained that she was following her friends when the vehicle hit her. She recalled that other vehicles had stopped to let them cross when a speeding vehicle came from behind a matatu and hit her.
7. The 2nd Respondent (DW 1) recalled that on the material day, there were a lot of matatus when a matatu came ahead of her. As she swerved to avoid it, the Appellant came from the left and was hit by her car. She stopped the vehicle, got out and took the Appellant to Hospital. In cross-examination, DW 1 stated that she was driving at about 20kph, the Appellant suddenly came from the left and she applied emergency brakes. She stated that she checked before overtaking and that she hit the Appellant by mistake.
8. The Appellant's case is that a child ought not be held liable for contributory negligence. This issue has been the subject of decisions of the Court of Appeal including *Bashir Ahmed Butt v Uwais Ahmed Khan* [1981] KLR 349 where Law JA., stated as follows:

Indeed, I am of the opinion the practice of the civil courts ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission.

9. On the basis of the evidence and in apportioning liability against the Appellant, the Court found that the Appellant should have been in the company of an adult and that;

Parents should be responsible enough to ensure that a child of tender years is not left to take care of themselves in a busy road. The parents of the claiming minor owed a duty of care to their child in that they ought to accompany the child from school and guide her as she crossed the road. If that would have been the case, high are the chances the accident that occurred on 11th of March 2019 would have been avoided. However, the respondents in this case also owed a duty of care to other road users to ensure their lives are not endangered. The 2nd respondent should have taken all measures to ensure the accident was avoided.'



10. I agree with the Appellant that the finding on apportionment of liability by the trial court is not supported by the law and evidence for several reasons. First, the claim for contributory negligence as pleaded by the Respondents was against the father and next friend and not the Appellant. Although the suit was being prosecuted by the father and next friend, he was not a party to the suit in his own capacity. He was merely acting on behalf of the Appellant as a child who did not have capacity to prosecute the suit on her own behalf. Since the father and next friend was not a party to the suit, the court could not have made findings against him or impute his negligence to the Appellant.
11. Second, a claim for contributory negligence must be pleaded against the party. In this case, there is no claim for contributory negligence against the Appellant. Thus, having found the Respondents jointly and severally liable, the Adjudicator could not proceed further to apportion liability against the Appellant in absence of a plea to that effect. In the circumstances, the appeal against apportionment of liability succeeds to the extent that the Respondents are fully liable to the Appellant for the accident.
12. Turning to the issue of quantum of damages, the Appellant complains that the award of general damages was inordinately low in view of the grievous injuries sustained and that the Adjudicator failed to consider conventional awards for general damages in cases of similar injuries which were inordinately low. The Respondents supported the decision of the trial court contending that the Appellant did not sustain serious injuries or any permanent incapacity to warrant any increase in the award as claimed by the Appellant.
13. According to the Amended Complaint dated March 26, 2021, the Appellant sustained a fracture of the right maxilla, fracture of the right zygomatic bone, fracture of the right orbit, oral dental injuries with the loss of 2 upper incisors bleeding into the sinuses and blunt injuries on the face. In support of his case, the Appellant produced a radiology report dated March 11, 2019 prepared by Dr Divya Gandhi of Prime Teleradiology Solutions confirming the injuries sustained by the Appellant. The Radiologist noted that there was a fracture of the maxillary antrum, zygomatic arch and lateral wall of the orbit on the right with haemorrhagic changes in the sinus. According to the Discharge Note from PCEA Kikuyu Hospital, the Appellant was admitted on March 11, 2019 and discharged on March 25, 2019. The Appellant was examined by Dr Wokabi on April 9, 2019 who prepared a report dated April 15, 2019 confirming the injuries as pleaded by the Appellant. He observed that the right side of the face as well as the right zygomatic area was swollen and tender and that two central incisors were missing. He concluded that while the Appellant suffered multiple major head injuries, they would heal on their own and given her age, she would not be expected to suffer serious complication. He opined that the missing incisors could be replaced with a 2 teeth permanent bridge at a cost of Kshs 50,000.00.
14. Before the trial court, the Appellant proposed Kshs 2,000,000.00 as general damages on the basis of *Kenya Wildlife Service v Geoffrey Kimimi Mwiti* MBT HCCA No. 12 of 2017 [2018] eKLR where the claimant sustained multiple facial fractures and loss of teeth and the Court of Appeal awarded Kshs 2,000,000.00 as general damages. In this appeal, the Appellant submits that a sum of Kshs 3,000,000.00 would be sufficient recompense based on the same decision. The Appellant submits that the case the trial court relied on; *Patrisia Adhiambo Omolo v Emily Mandala* SYA HCCA No. 19 of 2019 [2020] eKLR was not relevant as the claimant sustained a fracture of the left forearm radius and ulna bones, colles fracture of the left forearm, swollen deformed distal aspect of the left forearm, multiple bodily injuries and injuries on the left forearm with swelling.
15. The Respondents support the decision of the trial court and cite the decision in *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna* SYA HCCA No. E016 of 2021 [2022] eKLR where the court set aside an award of Kshs 850,000.00 and awarded Kshs 500,000.00 as general damages where the claimant sustained comminuted fractures of the facial bones, the zygoma and maxillary sinus.



16. The extent to which an appellate court may interfere with an award of damages has been settled. It must be shown that the trial court, in awarding of the damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan* (Supra)).
17. This appeal concerns the award of general damages which are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
18. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards which must be avoided, the court must ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982]eKLR and *Jabane v Olenja* [1986] KLR 661).
19. I agree with the Appellant that the decision cited by the Adjudicator as a basis for award of damages to did not bear any relationship to the injuries sustained by the Appellant. In this case, the Appellant sustained mainly head injuries while in *Patrisia Adhiambo Omolo v Emily Mandala* (Supra) the claimant sustained injuries to the forearm. In the case cited by the Appellant; *Kenya Wildlife Service v Godfrey Karimi Mwiti* (Supra), the respondent sustained a left zygomatic bone fracture, left ethmoidal bone fracture and maxillary fracture, nasal septum fracture, lower orbital floor fracture, loss of teeth, 6 on upper and 3 on lower jaw and a distal left radius fracture. The doctor assessed permanent incapacity at 25% and indicated that the respondent requires further surgery to remove the implants in his facial bone and the left wrist. Furthermore, a further medical examination revealed that the claimant had double visions on the left eye, deformity of the left thumb, he could not lift or carry heavy objects with the left upper limb and could not grip or grasp tightly with the left hand.
20. From a cursory look at the decision cited by the Appellant, the claimant in that case sustained far more serious injuries that those sustained by the Appellant. There was a level of permanent disability while Dr Wokabi's prognosis was that the Appellant would heal fully from the injuries. In summary, the proposal by the Appellant before the trial court and this court was inordinately high and could not guide the court in reaching a reasonable award even bearing in mind the pecuniary limits of the Small Claims Court. In the case cited by the Respondents; *Elizabeth Mokaya Bogonko v Fredrick Omondi Ouna* (Supra), the claimant bore closely related injuries as the Appellant.
21. I have considered the injuries and submissions in light of the principles I have outlined above. While it is correct that the court ought to be guided by the principle that similar cases attract similar awards, the obligation on the parties is to furnish the court with appropriate and relevant decisions to guide the court in making an appropriate award. It is not enough to cite a single case, as the Appellant did before the Subordinate Court and this court as the court's duty is to analyse similar cases in order make an appropriate award. On the whole therefore, I cannot say that the Appellant has demonstrated the award of general damages is inordinately high or inordinately low to attract interference by this court.
22. This appeal succeeds to the following extent and on the following terms:



- a. The finding on liability be and is hereby set aside and substituted with a finding that the Respondents are fully, jointly and severally, liable for the accident.
- b. The Appellant's costs of the appeal are assessed at Kshs 50,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2023.

D.S. MAJANJA

JUDGE

Mr Ongeru instructed by Robert Case and Partners Advocates for the Appellant.

Ms Ochieng instructed by Tindi Munyasi and Company Advocates for the Respondents.

