



REPUBLIC OF KENYA



KENYA LAW
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**MW ((Minor suing through his mother and next of kin RNC)) v Kabucho & another
(Civil Appeal 172 of 2019) [2023] KEHC 710 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 172 OF 2019
HK CHEMITEI, J
FEBRUARY 9, 2023**

BETWEEN

**MW (MINOR SUING THROUGH HIS MOTHER AND NEXT OF KIN
RNC) APPELLANT
(MINOR SUING THROUGH HIS MOTHER AND NEXT OF KIN RNC)**

AND

**JOSEPH NGANGA KABUCHO 1ST RESPONDENT
PETER GATONYE NGANGA 2ND RESPONDENT**

JUDGMENT

1. This appeal stems from an accident that occurred on January 23, 2017 involving motor vehicle registration number KBH 043R along Elburgon-Njoro road at Chibonde area, where the 2nd appellant's driver so negligently drove the said motor vehicle that it lost control, rolled and landed on a ditch and as a result the appellant (minor) sustained serious injuries.
2. The appellant filed a suit against the respondent claiming inter alia general damages, special damages and costs plus interests. The matter proceeded to its conclusion and the learned trial magistrate found that the appellant had not proved her case on a balance of probability thus dismissed the same with costs.
3. Aggrieved by the said judgement, the appellant filed this appeal against the lower courts' Judgement based on the following grounds; -
 - a. That the finding of the trial magistrate on dismissing the appellant's suit be set aside, be reviewed and/or revised and/or be substituted with the judgment of the honourable court.
 - b. That general damages be assessed accordingly to a figure that corresponds with the injuries suffered by the appellant based on comparable past decisions.



- c. That this honourable court do make such orders as it may deem fit.
 - d. That this appeal be allowed with costs to the appellant.
4. When the matter came up for hearing the court ordered that the same be canvassed by way of written submissions, which both parties have complied.

Appellant's Submissions

5. The appellant in his submission did not challenge the lower court decision on liability. She however challenged quantum and submitted that the learned magistrate in the trial court erred in law and facts in ruling that she had not proved her case on a balance of probability thereby dismissed the case. The appellant submitted that the learned trial magistrate misapprehended the evidence submitted by the plaintiff/appellant in trial court. She cited the case of *Sumaria & Another v Allied Industrial Limited* [2007] 2 KLR, where the court held that an appellate court could only reverse the trial court's findings of fact if it was satisfied that they were based on no evidence or on a misrepresentation of the evidence or if they were based on wrong legal principles.
6. The appellant submitted that she had testified during trial that his son who was a minor was involved in an accident and was injured on the head, face, chest, legs and hands. That she reported the said accident to the police and she was issued with a P3 form which was filled at Elburgon hospital.
7. Further, that the treatment card from Elburgon hospital was produced by consent as PExhibit 3 and the same showed that the minor sustained soft tissue injuries as a result of the accident. In addition, that Dr Omuyoma examined the minor, prepared a medical report dated March 10, 2017 where he indicated that he utilized the P3 form and treatment card from Elburgon hospital to prepare the said report.
8. It was therefore the appellant's submission that the said report was enough evidence that the minor was injured as a result of the accident. She placed reliance on the case of *Timsales Limited v Stanley Njibia Macharia* Nakuru HCCA No 148 of 2005 and *Henry Binya Oyala v Sabera O Itira* [2011] eKLR.
9. The appellant went on to submit that the minor was also examined by Dr Jenipher Kahuthu on behalf of the respondent who prepared a second report dated July 10, 2017 and the same was produced as DExhibit 1. That the said report confirmed that the minor sustained soft tissue injuries as a result of the accident. Further, that the information as set out in the initial treatment card and both medical reports were sufficient for the court to assess general damages.
10. She urged the court to set aside the trial court's judgment of dismissing the suit on quantum and proceed to make an appropriate award on damages which in her estimate should be Kshs 350,000/=. She placed reliance on the case of *Catherine Wanjiru King'ori & Others v Gibson Theuri Gichubi* [2005] eKLR.

Respondent's Submissions

11. The respondent in his submissions placed reliance on his written submissions filed in the trial court. The respondent submitted that Dr Omuyoma's report dated March 10, 2022 listed the same injuries as those that are in the plaint. That however the P3 listed the same injuries but it clearly showed that the minor was referred to Dr Birech for medical examination on February 21, 2017 and the treatment notes from Elburgon Sub-district hospital indicated that the minor sustained soft tissue injury on the left arm not any other injury.



12. The respondent submitted further that the trial magistrate dismissed the case as the appellant had not discharged the burden of prove. That the minor had only sustained a single soft tissue injury on the left arm yet the same was not one of the injuries pleaded in the plaint.
13. Further, that as per the treatment note the minor sustained injury on the arm and the same was key in determining the nature and degree of injury sustained by the claimant. She placed reliance on the cases of *Timsales Ltd v Wilson Libuywa* [2008] eKLR and *Power Lighting Company Limited & Another v Zakayo Saitoti Naingola & Another* [2008] eKLR as was cited in the case *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR.
14. The respondent urged the court to be guided by the decisions in the case of *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR and award the appellant Kshs. 60,000/= as the same would be sufficient and adequate compensation to the injury sustained. He also prayed for costs of the appeal based on section 27 (1) of the *Civil Procedure Act*.

Analysis and Determination

15. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co Ltd* (1968) EA 123 where Sir Clement De Lestang (V P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.
16. Having carefully perused the proceedings, the judgement and the record of appeal as a whole including both parties' submissions I note that the issue of liability was settled vide a consent and the only issue for determination is on quantum.
17. In the instant appeal it is not disputed that the appellant's son who is a minor was involved in an accident and liability on a ratio of 10:90 is equally admitted by both parties. From the documents produced by the appellant in the trial court specifically the medical report from Elburgon Sub-county hospital, it is noted the minor sustained soft tissue injury on the left arm as a result of the accident and final diagnosis being soft tissue injury.
18. The report from the respondent's witness who is a doctor confirmed the same and upon conducting an X-ray no fractures were seen. This was also confirmed by the radiological report dated July 10,2017 annexed to the plaintiff's supplementary documents at the trial court.
19. On the other hand, the medical report by the plaintiff witness Dr Omuyoma contradicts the treatment records from Elburgon hospital where the minor was first examined and the radiological report. The sum total of these is that the same cannot be relied on by this court in making its determination.



The said report indicates that the minor sustained several injuries and fracture but no evidence was presented in the lower court or before this court proving the same.

20. Having established that the minor in this case sustained soft tissue injuries on the left arm with no fracture, this court has to ascertain the general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. The appellant on her part has urged this court to be awarded Kshs 350,000/= as damages while the respondent has suggested an award of Kshs 60,000/= would be sufficient in this case.
21. In *FM (Minor suing through mother and next friend MWM v JNM & another* [2020] eKLR, the court held that from the evidence adduced by the Appellant it was clear that the minor had suffered soft tissue injuries with no resulting disability and has healed completely from the injuries she sustained. It set aside the award of Kshs 60,000.00/= by substituting it with Kshs 100,000.00/=, taking into account the element of inflation as an additional factor.
22. In *Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018] eKLR*, the court reduced general damages for soft tissue injuries from Kshs 300,000/= to Kshs 100,000/=.
23. In *Gideon Ireri vs Franklin Gitonga* [2018] eKLR the court made an awarded of Kshs 90,000/- after finding the amount awarded by the trial court to inordinately high for soft tissue injuries.
24. In *Dickson Ndungu v Theresia Otieno & 4 Others* [2014] eKLR, the court reviewed the award of Kshs 250,000/- to Kshs 127,500/= for soft tissue injuries which produced no complains.
25. In view of the above decided cases, the nature of the soft tissue injuries sustained by the minor herein and considering inflation an award of kshs. 110,000 less 10% contribution would be adequate and reasonable compensation.
26. On special damages it is clear that it was only Doctor Omuyoma's bill that was claimed and proven. The same totals kshs. 37,000 as per exhibit 8(b) and (c).
27. Consequently, the appeal is allowed as follows;
 - a The trials court judgement is set aside and substituted with an award of general damages of kshs 110,000 less 10% liability.
 - b Special damages of kshs 37000
 - c The above shall attract interest at courts rate from the date of the judgement at the lower court till payment in full.
 - d Each party shall bear its own costs at the lower court and this court.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 9TH DAY OF FEBRUARY 2023.

H K CHEMITEI.

JUDGE

