



REPUBLIC OF KENYA



KENYA LAW
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Njau v MW (Minor suing through mother and next friend HMM (Civil Appeal E032 of 2021) [2023] KEHC 1060 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E032 OF 2021
RN NYAKUNDI, J
FEBRUARY 14, 2023**

BETWEEN

PAUL GICHECHE NJAU APPELLANT

AND

**MW (MINOR SUING THROUGH MOTHER AND NEXT FRIEND
HMM RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Magistrate E.
Kigen in Eldoret CMCC No. 1089 of 2018 delivered on 12th March 2021)*

JUDGMENT

Coram: Hon Justice R. Nyakundi

Kagae Advocate for the Defendant

Opinde & Co. Advocates for the Respondent

Mose, Mose & Mose, Advocate

1. The appeal arises from Eldoret CMCC No 1089 of 2018 where the Respondent instituted a suit in the trial court seeking general damages, special damages and costs of the suit. The cause of action was the claim that on September 8, 2018, the plaintiff-minor was along Nakuru-Eldoret road at Makutano area when the defendant or his driver/agent, while driving motor vehicle registration no KCG 802A knocked down the minor causing her to sustain severe injuries.
2. The appellant entered a statement of defence and the matter proceeded to full hearing. Upon consideration of the pleadings, the testimonies of the witnesses and the evidence tendered in court, the trial court entered judgment against the appellant as follows;
 1. General damages – Kshs 2,700,000/-



2. Special damages – Kshs 33,920/-
3. Cost of prosthesis – Kshs 350,000/-
3. Being aggrieved with the judgment and decree of the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated April 7, 2021. The appeal is premised on the following grounds.
 1. The learned trial magistrate erred in Law and Fact in failing to appreciate the reasonable and sufficient evidence tendered in court and submissions made on behalf of the Appellant and treating the same superficially and consequently coming to a wrong conclusion on apportionment of liability.
 2. The learned trial magistrate erred in Law and Fact in failing to appreciate the reasonable and sufficient evidence tendered in court by the Appellant/Defendant hence without basis held that the Defendant/Appellant be held 10% liable for the occurrence of the accident.
 3. The learned trial magistrate erred in Law and Fact in awarding general damages that was excessive in the circumstance.
 4. The learned trial magistrate erred in exercising her discretion on award of general damages which was not supported by reason, facts and evidence hence arriving at an erroneous, excessive and inordinately high award as to amount to a miscarriage of justice.
 5. The learned trial magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellant.
 6. The learned trial magistrate failed to exercise her discretion judiciously in awarding damages and failed to apply the settled principles.
 7. The learned trial magistrate failed to, generally, judicially apply and to adequately evaluate the evidence tendered and thereby arrived at a decision unsustainable in law.
4. The parties were directed to prosecute the appeal by way of written submissions.

Appellant's Case

5. Counsel for the applicant submitted that the trial court erred in its apportionment of liability against the appellant as the respondent failed to discharge the burden of proof. It was his case that from the record of the proceedings, the minor emerged from behind a stationary lorry when crossing the road and a 13-year-old school going minor was reasonably expected to have knowledge on crossing of the road. Further, that the minor admits having seen the suit motor vehicle overtaking another and still proceeded to cross the road and it shows negligence on the part of the minor. He urged the court to apportion liability on the part of the minor to a tune of not less than 30% contribution.
6. The appellant contended that the award of Kshs 2,700,000/- was excessive in the circumstances. According to the medical report of Dr Sokobe dated September 19, 2018, the minor sustained a crushed right lower limb which was amputated above the knee and permanent disability was assessed at 45%. He contends that an award of Kshs 2,500,000/- suffices as general damages. He cited various authorities in support of this submission



including *Crown Bus Services Ltd & 2 others vs BM (Minor suing through his mother and next friend) SMA* (2020) eKLR, *Josee Mwangi vs Davis Nyakenyanya Onsare* (2019) eKLR and *Amref Kenya vs Mary Awino Obonyo* (2019) eKLR. He urged that the trial court's award was not commensurate to the awards made by competent courts of law for injuries with a similar nature. He prayed that the court set aside the award of the trial court and substitute it with a proper finding on liability and quantum.

Respondent's Case

7. There were no submissions on record for the respondent.

Analysis & Determination

8. In *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

9. Upon considering the memorandum of appeal and the submissions thereto, the following issues arise for determination;
 1. Whether the trial court erred in apportionment of liability
 2. Whether the trial court erred in its award for damages

Whether The Trial Court Erred In Apportionment Of Liability

10. The question I ask myself is whether contributory negligence is justifiable in the circumstances of this case? In response I find the explanation given by the court in the case of *Jackson Appellant v Murray and Another* 2015 UKSC 5 relevant in the following language:

“.....Either the did not look to the left before proceeding across the road, or having done so, she failed to identify and react sensibly to the presence of the defender's car in close proximity. On either scenario, the overwhelmingly greater cause of this unhappy accident was the movement of the pursuer into the path of the defendants car at a time when it was impossible for him to avoid collision”

One has therefore, in my opinion, a situation in which the pursuer bears responsibility for having committed an act of reckless folly, and the defendant bears responsibility for having failed to tie reasonable care for the safety of a person such as the pursuer whom might commit an act of reckless folly. In that situation, I consider that a very large proportion of the overall responsibility rest upon the perpetrator of the act.”

11. This same guideline was given by Lord Drummond Young. His Lordship noted that it had been said in *Porter vs Strathclyde Regional Council* 1991 where he held as follows in relation to apportionment that:
 - (1) “In the first place, we are of opinion that insufficient regard was had to the circumstances of the pursuer. The pursuer was only 13 at the time of the accident.



While at 13 she was old enough to understand the dangers of traffic, a 13 year-old will not necessarily have the same level of judgment and selfcontrol as an adult. Moreover, in assessing whether it was safe to cross, she was required to take account of the defender's car approaching at a fair speed, 50 mph, in very poor light conditions with its headlights on. The assessment of speed in those circumstances is far from easy even for an adult, and even more so for a 13 year-old.”

- (2) “In the second place, we are of opinion that greater stress should have been placed on the actings of the defender. He was found to have been driving at excessive speed and not to have modified his speed to take account of the potential danger presented by the minibus. The danger was obvious because the minibus had its hazard lights on. The Lord Ordinary inferred that as he approached the minibus the defender did not address his mind to the risk that a person might emerge from behind it and attempt to cross the road. In all the circumstances we consider that the defender's behaviour was culpable to a substantial degree, and that that is a factor which should be taken into account.”
- (3) “In the third place, we are of opinion that the Lord Ordinary was wrong to describe the actings of the pursuer as ‘an act of reckless folly’. Those actings were clearly negligent, but recklessness implies that the pursuer acted without caring about the consequences. We do not think that such a description of the pursuer's conduct is justified on the facts found by the Lord Ordinary.”
- (4) “In the fourth place, the causative potency of the parties' actings must be taken into account. Two factors are relevant in this connection. First, in apportioning responsibility account must be taken not only of the relative blameworthiness of the parties but also the causative potency of their acts. As is pointed out in *Eagle [v Chambers]* [2003] EWCA Civ 1107; [2004] RTR 115] and *Smith [v Chief Constable Nottinghamshire Page 7 Police]* [2012] EWCA Civ 161; [2012] RTR 294], a car is potentially a dangerous weapon, and accordingly the attribution of causative potency to the driver must be greater than that to the pedestrian. Secondly, the Lord Ordinary held that the pursuer would have escaped the accident had she had an additional 1.12 seconds available. That suggests that the defender's excessive speed was causally significant.”

12. In the context of this review questions abound in relation to the law of contributory negligence and the facts of this Appeal towards apportionment of quantum as a key limb of the claim. In view of the court there is a minimal scale tilt towards the issue of contributory negligence on the part of the claimant which is measured against an objective standard of reasonable contract at the time of the accident.
13. I note that the minor was 13 years old at the time of the accident. The question that therefore arises is whether given his age, he could be found liable for the accident. In the case of *Gough vs Thorne* (1966) WLR 1387 and submitted that Lord Denning stated that:

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 elder. He or she is not to be found guilty unless he or she is blameworthy.”

14. In the case of *Bashir Ahmed Butt vs Uwais Ahmed Khan* (1982 – 88) IKAR 1 (1981) KLR 349 the Court of Appeal held that:

It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness...A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child....

15. In the case of *Rabima Tayab & Others vs Anna Mary Kinanu* (1983) KLR 114 & I KAR 90:

The practice of the court 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 the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission....

The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. 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 and therefore cannot be found negligent unless he or she is blameworthy.”

16. I have considered the age of the minor at the time of the accident and her witness statement where she acknowledges that she saw the suit motor vehicle on the verge of overtaking another vehicle. It is my considered view that at the age of thirteen years she had the presence of mind to recognize the danger posed by the oncoming vehicles. It is on this ground that I choose to interfere with the award on liability. I set aside the same and apportion 10% liability on the part of the plaintiff.

Whether The Trial Court Erred In Its Award Of Damages

17. The basic principle governing the assessment of general damages for pain and suffering and loss of amenities can be deduced from the passage of *Mayne & McGregor on Damages* on 12th Edition at Page 650.

The broad principle has indeed been established for a long time and was propounded by the Lord Black in *Livingstone –vs Rawyard Co Company*

The passage cited was quoted with approval by Early Jowitt in a modern leading case on personal injuries”



18. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of Butt v Khan {1981} KLR 470 where the court pronounced itself as follows;

An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

19. It is trite law that when awarding damages, courts should be guided by comparable awards for similar injuries. In Shabani vs City Council of Nairobi (1985) KLR 516 the Court of Appeal had the following to say regarding the paramount need for Courts to attempt to give comparable awards in like cases:

There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is...to have regard to recent award in comparable cases in the local courts.

20. The respondent sustained the soft and bony tissue injuries, and a crushed right lower limb which was amputated above the knee and permanent disability was assessed at 45%. In the respondent sustained an amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury with 50% permanent disability. The court awarded the respondent Kshs 2,500,000 as general damages. In Wellington Odhiambo Owara & another v Isaac Konye Muiruri [2021] eKLR the respondent sustained crush fractures of the left lower limb, small multiple wounds on the upper limbs, lateral right scapula- clavicular joint subluxation which deformed the joint with swelling still visible. The report also indicated that the respondent’s lower limb was amputated above the knee at the middle 1/3 of the thigh and he was assessed to have suffered 45% degree of incapacity. The court upheld the award of Kshs 2,000,000/- as general damages.

21. There is no medium of exchange of happiness. In my experience I also find no market for quantifying expectation of life. What courts do in exercising discretion in assessing both pecuniary and non pecuniary damages is a philosophical and policy exercise based on precedence and is therefore more than legal or logical dichotomy. More often than not in determining the amount of compensation for pain and suffering the court has a duty to consider psychological, traumatic, loss of amenities as an approach incorporated in the final quantification of the claimant’s diminution in quality of life. Although the Appellant came out strongly against the word of 2.7 million by the trial court, on Appeal considering the question one needs to contemplate in practical terms the extreme serious scarring and disfigurement of a limb. The severalty of a claimant’s non-economic loss for purposes of the law is neither scientific nor normative it is difficult to discern a similar or identical case when it comes to a measure of damages. Applying the principle of past awards, I am therefore not persuaded that the Appellant has made a case with compelling reasons for this court to interfere with the quantum.

22. I have considered the injuries sustained by the respondent, the comparable awards for similar injuries and it is my considered view that the trial court did not error in its award of damages. In the premises, the appeal succeeds partly on apportionment of liability where the findings of the trial court is substituted with one of 90% : 10% as against the appellant. On account



of the above findings, the Appeal on quantum be and is hereby dismissed save for the 10% apportionment of the final decree. The cost of this Appeal be shared equally to the parties.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 14TH DAY OF FEBRUARY 2023

R. NYAKUNDI

JUDGE

