



**St Bakhita Day Care & Kindergarten School & another v SBO (Minor
suing through his mother as next friend NO) (Civil Appeal 732 of 2017)
[2023] KEHC 712 (KLR) (Civ) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 712 (KLR)

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

CIVIL

CIVIL APPEAL 732 OF 2017

JN MULWA, J

FEBRUARY 9, 2023

BETWEEN

ST BAKHITA DAY CARE & KINDERGATEN SCHOOL 1ST APPELLANT

GEORGE OUMA OBUNGA 2ND APPELLANT

AND

**SBO (MINOR SUING THROUGH HIS MOTHER AS NEXT FRIEND
NO) RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Chief Magistrates Court at Milimani
in CMCC No. 6911 of 2016 delivered by Hon. D. A. Ocharo (SRM) on 8th December 2017)*

JUDGMENT

1. This appeal arises from Milimani CMCC No. 6911 of 2016 in which the respondent sued the Appellants for general and special damages arising from a road traffic accident that occurred on October 11, 2013 along Swara Drive in Nairobi West Estate involving a minor, the Respondents son who was playing in the estate court yard, and the 1st Appellants motor vehicle registration number KBQ 130H, that ran over him. As a result, the Respondent's son sustained serious.
2. By consent of the parties, judgment on liability was entered in favour of the respondent as against the Appellants in the ratio of 90:10. Thereafter, the matter proceeded to hearing on the issue of quantum of damages only. Upon conclusion the trial court awarded the Respondent Kshs. 1,700,000/- for general damages and Kshs. 172,668/- for special damages, less 10% contribution.
3. Aggrieved by the award of damages, the appellants lodged the instant appeal which is based on the following five grounds listed in their amended memorandum of appeal dated March 29, 2018: -



1. That the learned magistrate erred in law in making such a high award on damages as to show that the magistrate acted on law wrong principle of law.
 2. That the learned magistrate's award on damages was so high to be entirely erroneous.
 3. That the learned magistrates award was made without considering the medical evidence before the court and failed to be guided by authorities on the comparable awards and hence ended up making an excessive award in view of the medical evidence.
 4. That the learned magistrate erred in law and fact by failing to consider the appellants submissions and authorities in arriving at his decision.
 5. That the whole judgment on quantum and liability was against the weight of evidence before court.
4. The appeal was canvassed by way of written submissions which this court has carefully considered.
 5. The only issue that falls for determination is whether the damages awarded by the trial magistrate are too high as to amount to an erroneous estimate, thus calling for the court's interference.
 6. It is well settled that an award of damages is an exercise of discretion by the trial court and thus an appellate court will not interfere with such discretion unless there are good grounds to do so. In *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, the Court of Appeal stated thus:

“An appellate court will not disturb an award for general damages unless it is so 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..”
 7. Further, an award of damages for personal bodily injuries should be commensurate to the injuries suffered and comparable to those made in past similar cases. In *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR, Majanja J. stated thus:

“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”
 8. In their submissions filed herein, the appellants contend that the damages awarded were not commensurate with the nature of injuries sustained and the evidence tendered by the Respondent. They fault the trial magistrate for failing to consider the contents of the medical report by Dr. Ashwin Madhiwalla which is annexed to the written submissions. It is argued that the medical report by Dr Ashwin Madhiwalla showed that the Respondent did not suffer any permanent incapacitation from the injuries sustained. It was also their contention that the trial magistrate did not consider their written submissions and the cited authorities when writing the impugned judgment. In their view, had the trial court considered all these, it would have made a lesser award on account of general damages.
 9. According to the respondent however, the trial court applied its mind judiciously to the evidence adduced and had the discretion to make its own independent decision on the amount of damages awardable.
 10. The court notes that at paragraph 9 of the Amended Plaintiff filed in the lower court, the respondent pleaded that he suffered a compound fracture of the right femur and injury to the pelvis. According



to the Medical Report of Dr. Okere dated June 12, 2017, the Respondent suffered a fracture of the right acetabulum and fracture of the head of the right femur. The doctor noted that the Respondent was treated at the Nairobi hospital with pelvic support and was still complaining of recurrent pains on the right hip in addition to walking with a limp, almost four years after the accident. The doctor opined that the Respondent's hip joint may develop osteoarthritis in future and assessed the degree of permanent incapacity at 30%.

11. The record shows that the appellants tendered in evidence a separate medical report by Dr. Ashwin Madhiwalla. However, the said medical report was not filed or included in the Record of Appeal filed. As such, this court has not had the benefit of perusing the said medical report for purposes of appreciating its contents. However, in the impugned judgment, the trial court noted that the medical report by Dr. Ashwin Madhiwalla was not different from that of the plaintiff's Doctor Okere. Having failed to place the said report before this court, it would be safe to assume that the trial magistrate analyzed it correctly, and the appellants deemed it fit not to place it before the appellate court.
12. In arriving at the decision to award the respondent general damages in the sum of Kshs. 1,700,000/-, the learned trial magistrate took note of the fact that the appellants had proposed an award of Kshs. 500,000 while the respondent proposed Kshs. 2,800,000/- citing authorities from where the court sought guidance, among them *Florence Hare Mkaba v Michael Thuo & another* [2013] eKLR, where the victim suffered related injuries but which were more serious and was awarded Kshs. 2,500,000/- in general damages.
13. In *Cold Car Hire and Tours Limited & 2 others v Elizabeth Wambui Matheri* [2015] eKLR, the High Court upheld the lower court award of Kshs 1,400,000/= for Comminuted fracture of the right acetabulum and dislocation of the right hip joint resulting in total hip replacement. In *Kennedy Ouma Dachi v Joseph Maina Kamau & another* [2018] eKLR an award of Kshs. 1,000,000/= made by the lower court for a comminuted fractured acetabulum was enhanced to Kshs. 1,400,000/= on appeal. The court noted that:

“A fracture of the tibia or femur for instance, is very different from a hip fracture, especially in terms of long term consequences to the victim's health, and especially mobility... the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteoarthritis.”
14. The court finds that the injuries in the above cited cases are almost comparable to those suffered by the Respondents. The cited decisions were made around the same period as the trial court's judgment in the instant case. The appellants have not sufficiently persuaded this court to interfere with the court's awards on general damages in the sum of Kshs. 1,700,000/-.
15. As regards special damages, the appellants submitted that the pleaded amount was not recoverable as PW1 testified that the hospital bill was paid by an Insurance company. They urged that awarding the Respondent the special damages in the circumstances amounts to double compensation.
16. As a matter of principle, special damages must be specifically pleaded and strictly proved. In the instant case, the respondent pleaded for special damages in the sum of Kshs. 172,668.82 in the amended plaint. PW1 testified that the same was on account of hospital bills incurred at Nairobi Hospital and settled by her Insurance Company. She produced an invoice from Nairobi Hospital detailing how the said amount was arrived at and a letter dated October 22, 2013 from Jubilee Insurance undertaking to pay



the respondent's inpatient bills. The minor, without a doubt, was a beneficiary in the Insurance policy taken by his mother, the respondent.

17. In the court's considered view, the respondent cannot claim for reimbursement of the amount paid by insurance under the Insurance Policy since she did not personally incur the costs. All PW1 did was pay premiums under the Medical Insurance Policy that she took up with the Insurance Company, which premiums are obviously much less compared to what the Insurer paid. Whereas the court agrees that the appellant as the negligent party is indeed liable to reimburse the amount incurred by the Respondent on account of the hospital bill, the court finds that the same can only be claimed under the doctrine of Subrogation by the Insurance Company that paid it.

18. To allow the respondent to be paid the stated special damages that she did not pay herself for her son would be unjustified in the circumstances of the case, in my considered view. The Court of Appeal in *Forwarding Company Limited & another v Kisilu; Gladwell (Third party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) (4 February 2022) (Judgment) held that:

“In this case, the respondent's father (PW2) testified that that his insurer paid a sum of Kshs. 5,318,755.00 towards the doctor's fees and hospital bill for the respondent. PW2 testified that he was claiming this money as the respondent's father and that he was entitled to the same although the money was paid was by his insurance company. The trial court after in its judgment stated as follows:

...

19. We agree with the finding of the trial court on this issue. It is PW2 who paid premiums to the insurance company and not the respondent and therefore it is PW2 who could have claimed for reimbursement of the same. PW2 was not a party to the suit but a witness of the respondent. Therefore, there could not have been any basis for the trial court to award the entire sum of Kshs. 5,318,755.00 paid by PW2's insurer.

...In this case, it is not the respondent but his father who took out the insurance and paid the relevant premiums. Therefore, in the present case even if the respondent's father would have been entitled to any form of reimbursement, the court could not have had any legal basis of awarding the same as he was not named as a party to the suit. We accordingly make the finding that the respondent is not entitled to the sum of Kshs. 5,318,755.00 paid by his father's insurance company.”

20. Likewise, in very similar circumstances as appertaining in the decision, it is this court's finding that the Respondent's mother through whom he sued the Appellant's is not entitled to the special damages paid by her Insurance Company. However, had the Insurance Company instituted a suit for the recovery of the special damages it paid, through a recovery suit under the doctrine of subrogation, the court would not hesitate to order for the payment of the sums paid by the Insurance Company to itself, not to the Respondent.

21. The principle of subrogation applies where there is a contract of insurance. If the insured risk takes effect and the Insurer settles the Insured's claim, then the Insurer is entitled to diminish the loss suffered by the Insured by seeking compensation from the party who caused the loss. See *Leli Chaka Ndoro v Maree Ahmed & Another* [2017] eKLR.

22. For the above reasons:

a. The court finds that the appeal succeeds partially to the extent that the award on special damages made by the trial court is hereby set aside.



- b. The court upholds the trial court's award of Kshs. 1,700,000/- in general damages. The said award shall attract interest from the date of the trial court's judgment being 8th December 2017 at court rates until payment in full.
- c. There shall be no order as to costs on the appeal.

Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

J.N. MULWA

JUDGE.

