



REPUBLIC OF KENYA



KENYA LAW
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**Third Engineering Bureau of China City Constructions Ltd v Okoth & another
(Civil Appeal 75 of 2021) [2023] KEHC 2121 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 75 OF 2021
KW KIARIE, J
MARCH 21, 2023**

BETWEEN

**THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTIONS
LTD APPELLANT**

AND

DANIEL NDEDE OMOLLO 1ST RESPONDENT

MILLICENT OKOTH 2ND RESPONDENT

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No. 183 of 2019 by Hon. Celesa Okore–Principal Magistrate)*

JUDGMENT

1. The appellant herein, was the defendant in Oyugis Principal Magistrate's SPMCC No. 183 of 2019. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCP 103R owned by the appellant. The deceased was a pedestrian who was hit by the said motor vehicle and was fatally injured. The learned trial magistrate delivered judgment dated 29th July, 2021. She held the appellant 100% liable and awarded Kshs.1, 120,000 .00 in general damages and Kshs. 35,000.00 special damages in favour of the respondent.
2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Omay & Company Advocates. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and in fact in finding that the defendant was liable at 100%.
 - b. That the learned magistrate erred in awarding the plaintiff the sum of kshs.1,055,000/- as general damages



- c. That the learned magistrate erred in law and fact in awarding an amount of damages that is so high as to be an erroneous and an unjust estimate.
 - d. That the learned trial magistrate erred in law and fact by totaling disregarding the submissions of the defendant and thereby arriving at a wrong decision.
3. The appeal was opposed by the respondent through the firm of Khan & Associates Advocates.
 4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 5. The driver of motor vehicle registration number KCP 103R conceded that he did nothing before the accident to avoid collision with the minor. He said during cross examination that he did not attempt to apply emergency brakes. He said he did so after he had hit the child.
 6. The deceased was a girl aged 6 years at the time of her death. *Bashir Ahmed Butt vs. Uwais Ahmed Khan*, Civil Appeal No. 40 of 1977, Madan J.A. (as he then was) said:

Indeed, I am of the opinion that the practice of 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 capacity to know that he ought not to do to the act or make the omission.

From the evidence on record and the fact that the deceased was a child under the age of ten years, I find that the finding on liability by the learned trial magistrate cannot be faulted.

7. The appellant has argued that the award in general damages was inordinately high. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt vs. Khan* [1981] KLR 349 at page 356 Law JA stated:

...an appellate court will not disturb an award of 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 a figure which was either inordinately high or low.

8. I have had the benefit of looking at similar cases where the minors died out of accidents. These cases include *Daniel Mwangi Kimemi & 2 others v JGM & another (the personal representatives of the estate of NK (DCD))* [2016] eKLR, *GKN & another (suing as Personal Representatives of the Estate of GNL (Deceased) v Civiscope Limited* [2021] eKLR and *SMK v Josphat Nkari Makaga* [2017] eKLR. The trend has been for an award of Kshs. 1,000,000.00 in respect of minor of about the same age with the deceased in this case. The award by the trial magistrate was therefore informed by this trend. It cannot be described as inordinately high.
9. I therefore find that the appeal lacks merit. I dismiss it with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

