



**Mungai & another v KN (Civil Appeal 102 of 2021)
[2023] KEHC 17402 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 102 OF 2021**

SM GITHINJI, J

APRIL 24, 2023

BETWEEN

FRANCIS GACHANJA MUNGAI 1ST APPELLANT

GITHINJI MWANGI 2ND APPELLANT

AND

KN RESPONDENT

*(An Appeal from the judgment of the Learned Magistrate Hon. N. C. Adalo (SRM)
delivered on 12th November, 2021 in SPMCC No. E034 of 2020 at Mariakani)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mogaka Omwenga & Mabeya Advocates for the Appellants.

Gichira JW & Co. Advocates for the Respondent.

1. The respondent sued the appellants for damages following an accident caused by the appellant's motor vehicle registration No Kxx xxxE which was said to have been carelessly and negligently driven by the appellants on the January 4, 2020.
2. The appellants filed their statement of defence denying occurrence of the accident or negligence on the part of its driver. They attributed negligence to the respondent and stated that if an accident ever occurred, it was solely caused by and/or substantially contributed to by the negligence of the plaintiff and her guardian. In its judgment dated November 12, 2021, the trial court apportioned liability in the ratio of 80%:20% in favour of the plaintiff against the defendants for the accident and awarded the respondent general damages of Kshs 950,000 and special damages of Kshs, 2,550/-



The Appeal

3. The appellants being aggrieved with the judgment on quantum, filed a memorandum of appeal dated on December 7, 2021, raising the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact in awarding excessive quantum on damages in the sum of Kshs 950,000/- which is manifestly excessive and inordinately high in the circumstances and not commensurate with the injuries sustained by the respondent.
 2. That the learned magistrate erred in law and in fact in failing to consider all the evidence and defendants' submissions on record.
 3. That the learned trial magistrate misdirected herself on the applicable principles of law by failing to take into consideration and appreciate the authorities submitted to the court by the appellant.
 4. It was their contention that the judgment and the decree of Hon N.C Adalo made on November 12, 2021 be varied and/or set aside.

Summary Of The Evidence

5. PW1 MMT the minor's mother told the court that she recorded a statement of which was adopted as her evidence in chief. It is her testimony that on January 4, 2020 while her daughter was in the company of her aunt going to fetch water at Somali area, and while walking off the road along the Nairobi-Mombasa highway, a motor vehicle registration No Kxx xxxE make Hino veered off the road and hit her; she fell on the ground off the road and was seriously injured.
6. She stated that since her home is near the road, she witnessed the accident and immediately rushed to the scene and found her daughter bleeding on the right side of the head and immediately rushed her to Mariakani Sub County Hospital where she was referred to Jocham Hospital for a head scan and afterwards to Coast General Hospital. She further told the court that the accident was later reported at Rabai Police Station and was issued with a P3 form which was filled at Coast General Hospital and returned to the Police Station. She also told the court that the minor was examined by Dr Ajoni Adede who prepared a medical report.
7. On cross examination by Miss Kerubo, she informed the court that on the date of the accident, she was standing outside her house and her child was with her aunt. That they were on the left side of the road as one heads from Nairobi and the minor was off the road. She stated that the driver veered off the road and hit her daughter confirming that she witnessed the accident. She confirmed that the victim did not cross the road while vehicles were moving and that there is no zebra crossing at that point. She told the court that the minor occasionally gets lucid moments.
8. PW2 No xxx3 PC Edna Chelagat from Rabai Police Station told the court that on January 4, 2020 one Erick Wainaina Njoroge was driving motor vehicle registration number Kxx xxxG make Hino from Nairobi heading to Mombasa and on reaching Somali Area, he hit a pedestrian who was crossing the road from left to right direction as one faces Mombasa. That the victim sustained injuries and was rushed to Mariakani Sub County Hospital for treatment.
9. That marked the close of the plaintiff's case after which the defence also closed their case without calling any witnesses.



The trial court's judgment.

10. The trial court upon hearing the parties, considered that the report by the police indicated that the minor was in the company of an adult and had been crossing the road at the time of the accident and that the police abstract indicated as much. According to the trial court, the minor was in the company of an adult who ought to have been on the lookout for her as they intended to cross the road. That the facts as presented requires consideration and a call to adults accompanying minors to always be careful when intending to cross the road and as such, she proceeded to apportion liability at 80:20 in favour of the plaintiff as against the defendant.
11. On the issue of general damages, the trial court awarded a sum of Kshs 950,000.00 relying on the cases of *Mbaka Nguru and another v James George Rakwar* and that of *Kigaraari v Aya* [1982-88] 1 KAR 768, *Ugenya Bus Service v Gachoki* [1982] eKLR.
12. The appellant preferred an appeal against the said judgment on the grounds that the learned trial magistrate erred in awarding quantum on damages which is manifestly excessive and inordinately high in the circumstances and not commensurate with the injuries sustained by the respondent. Further, that the magistrate misdirected herself on the applicable principles of law by failing to take into consideration and appreciate the authorities submitted by the appellants.

Analysis and Determination

13. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. This court is alive to the duty of the first appellate court which is to re-evaluate, re-assess and reconsider the evidence presented before the trial court to reach at its own determination bearing in mind that unlike the trial court, this court does not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage as was held in *Selle v Associated Motor Boat Co Ltd* [1968] EA 123.
14. This court has carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by both parties together with the authorities cited. Having done so, I am of the view that the only issue for determination is whether the trial magistrate erred in arriving at her decision on quantum of damages.
15. I wish to rely on the Court of Appeal's decision in the case of *Gitobu Imanyara & 2 others v Attorney General* 2016) eKLR, where the Court of Appeal held that –“...it is firmly established that this court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was extremely high or very low leading to an erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that: ‘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 at a figure which was either inordinately high or low.’”
16. It is my considered view that an award for general damages should be comparable to awards in similar cases. In the case of *Stanley Maore v Geoffrey Mwenda* Nyr CA civil appeal No 147 of 2002 [2004] eKLR the Court of Appeal held: “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.”

17. I have had an opportunity to go through the authorities availed by both parties to the trial court supporting their respective proposals on quantum. I note that the injuries sustained by the respondent were a fracture of the skull and mild head injury with loss of consciousness. I further note that learned trial magistrate in her judgment clearly indicated that she had considered the submissions made by each of the parties, the nature of the injuries sustained and effects of inflation in awarding Kshs 950,000/= as sufficient compensation for the injuries sustained.
18. Given the evidence on record, I find no ground to fault the learned trial magistrate’s award of Kshs 950,000/= as general damages, given the injuries sustained by the respondent in the instant case. I am of the considered view that the finding of the learned magistrate was well within the acceptable limits that reflected the nature and gravity of the injuries sustained by the respondent.
19. In the end, I find no merit in the appeal and is hereby dismissed with costs to the respondent.

It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF APRIL, 2023.

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S.M. GITHINJI

JUDGE

In the presence of; -

1. Mr Mayieka for the Appellant
2. Mr Gichira for the Respondent (absent)
3. Mr Mayieka;-I pray for 30 days stay and for a copy of the Judgement.

Court; - 30 days stay is granted to the appellant.

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S.M. GITHINJI

JUDGE

24.4.2023

