Tindi & another v BMW (Minor Suing Through Next Friend DWL) (Civil Appeal 116 of 2021) [2023] KEHC 21248 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 21248 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 116 OF 2021

G MUTAI, J

APRIL 24, 2023

BETWEEN

BARAZA TINDI & ANOTHER ..... APPELLANT

AND

BMW (MINOR SUING THROUGH NEXT FRIEND DWL) ..... RESPONDENT

JUDGMENT

1. This is an appeal that arises from the Judgment of C. Oluoch delivered on 16th June 2021 in Mavoko CMCC 221 of 2020. The Appellant were the defendants in the matters. The Court entered Judgment for the Respondent as follows: -

    a. 100% liability in favour of the Respondent.

    b. General damages -Kes.500,000/-

    c. Special damages – Kes.6,600/-

Pleadings

2. The Respondent filed suit on 22th April 2020 claiming damages against the owner and driver of motor vehicle registration number KBN 066Y and also against the beneficial owner. The injuries listed were the following: -

    i. Degloving wounds on the abdomen;

    ii. Blunt injuries on the anterior chest wall;

    iii. Multiple cuts on the lower back;

    iv. Degloving wound on the left thigh;

v. Multiple wounds on the shoulders;

vi. Multiple lacerations on the right knee; and

vii. Lacerations to the left hip region.

3. The appellant filed defence dated 15th October 2020. They gave particulars of negligence attributable to the respondent.

Duty of the appellate court

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the cases of Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

6. The above this principle was enunciated well by the Court of Appeal in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the stated: -

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

Appellant submissions

7. The appellant set out the duty of the Court in this appeal so succinctly. They questioned that Dr. Ndegwa report should not have been relied on as he is not an orthopedic surgeon.

8. They questioned the nature of the injuries as enumerated by Dr. Ndegwa and allegedly confirmed by Dr. Seth.The appellants question the compliance with order 21 rule 4 of Civil Procedure Rules by the court failing to contain reasons for determination.

9. The said Order 21, rule 4 of the of Civil Procedure Rules provides as follows: -

4. Contents of judgment [Order 21, rule 4.]

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Appellants submissions

10. The Appellants are of the view that given that there was no witness the case ought to have failed. They referred to an old case of Sally Kibii & another v Francis Ogaro [2012] eKLR. In that case, Justice M. K. Ibrahim relying on a decision read by Justice F. Azangalala, as then he was, stated as follows: -

> " To my understanding, "res ipsa loquitor" would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence. See Bikwatirizo v Railway Corporation[1971] E.A 82. To successfully apply this doctrine, there must be proof of facts that are consistent with negligence on the part of the defendant as against any other cause."

11. This is a case of two cars colliding. What facts have been proved by the Plaintiff to presume negligence on the part of the defendant as against the other vehicle" Can I safely presume that the mere fact that the two cars being KAK 746 J and KAG 331 K collided, negligence was on the part of the defendant's case and not the other" The Plaintiff must prove facts which give rise to what may be called the res ipsa loquitor situation. There cannot simply be an assumption in the Plaintiff's case in this case. If the deceased was in a self-involving accident as against a collision, then perhaps, such a presumption can be made against the owner of the car."(not necessarily the part relied on by the Appellant).

12. On quantum they posit that an award of Kes. 200,000/- is sufficient. They rely as authorities of Michael Okello v Priscilla Atieno Kisii Civil Appeal No. 107 of 2019 and Maseno College v Elizabeth Kerubo Mokaya [2021] eKLR.

Respondents submissions.

13. The respondent relied on the authority of Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] KAR (1 – 1981 KLR 349, where the Court of appeal stated as follows: -

> " It wound 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 guilt 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 precaution for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child ...."

14. On quantum, they rely on the medical reports and treatment note from various hospitals. They support the decision of the court since the minor underwent treatment for 4 days.

Evidence

15. Police officer testified and stated that the vehicle veered off the road and hit a pedestrian. This part of the testimony was not questioned. Dr. Titus Ndeti testified on the injuries and stated that he did not award any permanent disability. The grandfather testified on how the grandson was hit off the road. He also stated that the minor underwent treatment. The defence case was closed without calling any evidence.

Liability

16. Motor vehicle, where property driver on the public roads, do not leave the road. There were two people on the road that day. The driver and a 7-year old minors. The driver knows what happened. At least the police recorded what happened, that is the motor vehicle registration No. KBN 166U veered of the road and hit a pedestrian. Unfortunately, this pedestrian happens to be a 7-year-old.

17. As held in Bashir Ahmed Butt v Mwaisa Ahmed Khan (supra) a child of tender years may not be held to be contributory negligent. To worsen a bad situation, the one person who had special knowledge on the accident chose not to testify.

18. In Abdi Kadir Mohammed & Another v John Wakaba Mwangi [2009] eKLR where the court stated that:

> " It was similarly held in Butt versus Khan [1981] KLR that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. The test, as stated in Gough vs. Thorne [1966] 1 WLR 1387 (referred to in the Butt Vs. Khan decision) was whether the child was of such an age as to be expected to take precautions for his or her own safety and finding of contributory negligence can only be made if blame could be attached to the child. In the absence of an eye witness account in the present case and having found the investigating officer's evidence quite unreliable, it cannot be said with certainty whether or not the deceased in this case did actually run into the road as claimed. Despite that being the evidence tendered by the witness called by the respondent the same cannot be the basis for finding the minor 50% to blame. For the father to have allowed him to attend the show on his own despite his tender years, there is no doubt that the deceased, whom the respondent described as clever boy did possess."

19. In the case of K N v J M T [2018] eKLR, Justice L. N. Mutende, stated as follows: -

> " The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in Section 107(1)(2) of the *Evidence Act* that provides thus:
>
> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> " Section 112 of the *Evidence Act* provides thus: "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

20. In the circumstances, failure to testify should be construed against the person or party failing to testify. Further, the Defendant had particulars of negligence in the defence. Without testifying, they became surmises and suppositions. They are worthless as basis for finding negligence. Once the defence chose not to testify they left the evidence of the Appellant uncontroverted.

21. It remains that the course was correct that there is no challenge to liability without testimony, the court has no authority to apportion blame unless, the plaintiff admits such blame. In absence of any admission there is no basis for apportioning liability.

22. It is real irrelevant that eye witnesses were not called. This is because the police evidence provide the most proximate evidence. It is la so because, the only known eye witness and the Actor in chief, chose not to testify. We are also bound by the Court of Appeal decision of Bashir Ahmed Butt (supra).

23. The burden of proof is on a person who is to lose if no evidence is given either way. In this case, it happened to be the Appellant on the issue of contributory negligence. I uphold the 100% liability as entered by the court below.

On quantum

24. The minor suffered serious injury, the main ones being the degloving injuries to the left thigh and deploring wounds on the abdomen. Degloving injuries are severe injury where the top layers of skin and tissue are ripped from the underlying muscle, corrective tissue or bone. Though soft tissue, they are secure and life threatening. The accused is slightly right. It is not however, so high that it will be an erroneous estimate of damages.

25. The decision of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini versus A M Lubia and Olive Lubia [1982 – 88] 1 KAR 727 at p. 730 Kneller J A said: -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that I must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage." See also Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 and Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR).

26. The words of Lord Denning in the West (H) & Son Ltd (supra) at page 341 on excessive awards on damages important to replicate herein thus: -

> " I may add, too, that if these sums get too large, we are in damage of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national Health Service. But the health authorities cannot stand huge sums without impending their service to the community.
>
> The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than a fair compensation."

27. In the case Kitavi v Coastal Bottlers Ltd [1985] KLR 470) the court stated as doth: -

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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."

28. In the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294, the court was guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shepherd [1963] 2 ALL ER 625 Sykes J stated as follows: -

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite some time is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

29. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

30. I therefore need to look at the recent decisions related to similar cases. If the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so.

31. In the case of Martin Mutuku & Another v SN (Suing through his mother and next friend DC) 2021 eKLR, on 22/10/2021 Justice J.K. Sergon awarded Ksh. 300,000/= for deploring injuries on the left foot.

32. In the case of Easy Coach Limited v Emily Nyangasi [2017] eKLR in which the court upon considering injuries in the nature of facial injuries, injury to chest, injury to back, injury to right hand with cut wound and injury to right leg with cut wounds, awarded a sum of Ksh 700,000/= on general damages for pain and suffering and loss of amenities.

33. In my humble view, therefore, the respondent discharged the burden of proof and proved on a balance of probabilities, that the Appellant's driver was negligent. I find that there is no material to apportion liability between the plaintiff minor and the Appellant's driver. Appeal is dismissed on the aspect of liability.

34. I am satisfied that the award of Ksh. 500,000/= was proper in the circumstance in the circumstances.

Determination

a. The Appeal herein is dismissed with costs of Kes. 100,000/- to the Respondent;

b. The respondent to have costs in the court below; and

c. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF APRIL 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

.....

GREGORY MUTAI

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondent.

Winnie Migot - Court Assistant