



REPUBLIC OF KENYA



Angelica v SM (Suing on behalf of next friend AM) (Civil Appeal E007B of 2021) [2023] KEHC 17329 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E007B OF 2021
EM MURIITHI, J
MAY 11, 2023**

BETWEEN

MUKOMUGA ELIUNGU ANGELICA APPELLANT

AND

SM RESPONDENT

SUING ON BEHALF OF NEXT FRIEND AM

(Being an appeal from the Judgment of Hon. P.M Wechuli (SRM) delivered on 1/12/2020 in Tigania PMCC No. 30 of 2017)

JUDGMENT

1. The Respondent herein, the Plaintiff in the trial court, sued the Appellant vide a plaint dated 24/4/2017 seeking Special damages, General damages for pain, suffering and loss of amenities and costs of the suit plus interests. The Respondent pleaded that on 28/7/2015, he was walking along Meru-Muriri road in the company of the minor herein when the Appellant negligently and carelessly drove Motor Vehicle Registration No KBJ 006 G that it knocked down the minor occasioning him several injuries, loss and damages.
2. The Appellant denied the claim through his statement of defence dated 26/7/2018, and prayed for its dismissal with costs.
3. The parties recorded a consent judgment on liability at the ratio of 80:20 in favour of the Respondent against the Appellant and upon full hearing on quantum, the trial court awarded general damages of Ksh 500,000 (less 20% contribution) = Ksh 400,000, special damages of Ksh 5,000 = Ksh 405,000 together with costs and interest.



The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 15/1/2023 set out 3 grounds of appeal as follows:
 1. The learned trial magistrate award on general damages in the sum of Kshs 500,000/- is inordinately excessive considering the injuries sustained by the Respondent.
 2. The learned trial magistrate erred in law and fact by failing to take into consideration the fact that the Respondent had fully recovered from the injuries and thereby arrived at an award that is inordinately excessive in the circumstances.
 3. The judgment of the trial magistrate is against the law and weight of evidence on record.

Duty of the Court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1, SMM, the Respondent herein adopted his statement as his evidence in chief. He further testified that, "I am a vehicle conduct...I am a next friend of the minor. The child got injured as per paragraph 4 of the plaint. He bleeds to date. He had a head injury. He has not healed. We take him to clinic to date. I don't have documents to that effect. I have list of documents. (PEX 1, 2, 5) (MFI 3, 4). It is the owner of the vehicle who caused the accident. He was walking off the road on the left side. The driver was reckless. It is not true that it is the person who accompanied the child who was at fault. It is like the driver was drunk. The child was not crossing the road. The mother had held the child's hand. The child did not step on the tarmac. There was no horn."
7. On cross examination, he stated that, "The mother MW was holding the girls hand. Its not me who was holding the child's hand. (Statement of witness read). Its not me who was in the company of the girl. I witnessed the accidents from far. Like 200 m away. Yes teeth of the child were knocked out. He bleeds from the nose. He is now 8 years old. I usually take him to a dentist at Kianjai. Yes I have medical documents from 2015. I don't have current treatment documents or receipts. I was on the right side of the road facing Meru. It's not true that a pedestrian is supposed to walk on the right side of the road. Now he is at school. He has healed."
8. On re-examination, he stated that, "Whoever wrote in the statement that I was with the child made a mistake. He was with the mother."
9. PW2 Julius Manyara, adopted his witness statement written on 18/6/2019 as part of his evidence in chief. He went on to state that, "I know AM the son of SM. The child was off the road. The vehicle left the road and knocked him off the road. It did not stop."
10. On cross examination, he stated that, "The vehicle left I did not see its registration number. Yes the date I wrote is 2/6/15. That was the date of the accident. Yes my statement says I saw MW jump from the tarmac but that's not what happened. I saw the mother holding the child. They were headed to Muthara. I was from Muthara."



Submissions

11. The Appellant submits that since the medical report by Dr Macharia confirmed that the Respondent suffered a head injury which had fully healed, the award of Ksh 500,000 was excessive. He urges the court to reconsider the evidence on record and revise the award downwards to Ksh 200,000, and cites *Mbaka Nguru and Another v James George Rakwar* (1998) eKLR, *FM (Minor suing through mother and next friend MWM) v JDK & Another* (2020) eKLR, *Michael Odiwuor Obonyo v Clarice Odera Ogunde* (2021) eKLR, *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD)* (2021) eKLR and *Lilian Anyango Otieno v Philip Mugoya Ogila* (2022) eKLR.
12. The Respondent submits that the minor suffered head injuries together with bleeding profusely as a result of which he was admitted in hospital for more than one week and bed ridden for more than a month. He urges that those injuries were life threatening and the doctor classified them as grievous harm which endangered his life acutely by 80%. He submits that the award was fair and urges the court to dismiss the appeal with costs. He relies on *John Kamore & Another v Simon Irungu Ngugi* (2014) eKLR and *Katheri Dairy Co-op Society & Another v M'Marete M'Guatu* (2014) eKLR to fortify his submissions.

Analysis and Determination

13. Since the parties consented on liability, the sole issue for determination is whether the award of general damages of Ksh 500,000 was excessive in view of the injuries sustained by the minor.
14. This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v British Columbia Electric Railway Co Ltd* (1951) AC 601, 613 and applied in East Africa by Sir K O'Connor (with whom Sir Alastair Forbes, V-P and Newbold, JA agreed) in *Henry H Ilanga v M Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 KB), approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601.”

15. The Respondent testified that, “The child got injured as per paragraph 4 of the plaint. He bleeds to date. He had a head injury. He has not healed. We take him to clinic to date. I don't have documents to that effect.” He however admitted on cross examination that the minor had made a full recovery.
16. The injuries noted by Dr John K Macharia in his medical report dated 6/7/2020 are loss of consciousness which was regained while in hospital, bruises or lacerations on the right side of the forehead, laceration on the right knee and the head CT Scans were normal. The Respondent's complaints at the time of examination were back pains and nasal bleeds. The doctor opined that the minor sustained a head injury with a brief loss of consciousness, with no internal head lesions noted



and he had fully recovered. The minor also sustained soft tissue injuries which were managed and had healed leaving scars.

17. It is agreed that although the minor sustained a head injury together with soft tissue injuries, he had since made a complete recovery. The Respondent produced a discharge summary from Meru level 5 Hospital showing that the minor was admitted at that facility on 28/7/2015 and discharged on 13/8/2015. This court is therefore satisfied that the award of Ksh 500,000 as general damages was justified in view of the period the minor was hospitalized.

Orders

18. Accordingly, for the reasons set out above, this court finds the appeal to be without merit and it is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Kariuki, Advocate for Appellant.

Ms. Kaume, Advocate for the Respondent.

