



Kariuki v EOO (Minor Suing Through his Next Friend and Father WO) (Civil Appeal 480 of 2019) [2023] KECA 845 (KLR) (Civ) (6 July 2023) (Judgment)

Neutral citation: [2023] KECA 845 (KLR)

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

CIVIL

CIVIL APPEAL 480 OF 2019

CW MEOLI, J

JULY 6, 2023

BETWEEN

JOHN IRUNGU KARIUKI APPELLANT

AND

**EOO (MINOR SUING THROUGH HIS NEXT FRIEND AND FATHER
WO) RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. E.K. Usui,
CM, at Milimani Commercial Courts in CMCC No. 6029 of 2018)*

JUDGMENT

1. This appeal emanates from the judgment of E.K. Usui, CM in Milimani CMCC No. 6029 of 2018. In that case, Washington Otieno (hereafter the Respondent), in his capacity as the father and next friend of EOO (hereafter the Minor), sued John Irungu Kariuki (hereafter the appellant) for damages. The claim was based on the tort of negligence and arose from a road traffic accident.
2. In his plaint dated June 14, 2018 the Respondent averred that the appellant was at all material times the driver and registered owner of the motor vehicle registration number KBV 025J (hereafter the subject motor vehicle). That on or about April 16, 2016 the Minor was crossing the Southern Bypass at about 9.00am when the appellant so negligently drove the subject motor vehicle that it knocked down the Minor, occasioning him serious injuries. The respondent sought general and special damages.
3. Upon service of summons, the appellant entered appearance and filed a statement of defence in which he denied the key averments made in the plaint.



4. At the trial, the respondent testified and called two additional witnesses, while the Appellant testified for the defence. At the close of the trial, the trial court entered judgment on July 19, 2019 in favour of the respondent against the appellant in the following manner:

Liability - 100%

- a) General damages
 - i) Pain, suffering and loss of amenities - Kshs. 7,000,000/-
 - ii) Loss of earning capacity - Kshs. 1,000,000/-
- b) Cost of a wheelchair - Kshs. 400,000/-
- c) Cost of a helper - Kshs. 5,400,000/-
- d) Special damages - Kshs. 1,783,533/-

5. Aggrieved by the decision, the Appellant preferred this appeal through the memorandum of appeal dated August 16, 2019 containing the following grounds:

- i. "That the learned trial magistrate erred in law and in fact in finding the appellant 100% liable for the accident which occurred on April 16, 2016.
- ii. That the learned trial magistrate erred in law and in fact by awarding the Respondent excessive general and special damages contrary to the evidence adduced and comparable injuries.
- iii. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions on liability and quantum and wholly relying on the Respondent's submissions.
- iv. That the learned trial magistrate erred in law and in fact by failing to scrutinize the evidence produced in support of the prayer for special damages by the respondent and by considering irrelevant factors while leaving out relevant ones in arriving at the award on special damages.
- v. That the learned trial magistrate judgment was arrived at in a cursory and perfunctory manner without any legal and factual justification and the finding on liability together with the consequential award on both general and special damages is excessive and oppressive to the Appellant". (sic)

6. The court directed that the appeal be canvassed by way of written submissions. On his part, the appellant through his counsel faulted the Respondent for allowing the Minor to commute without any adult supervision or clear instructions, and further faulted the older minors who were in the company of the minor on the material date, and relying on his evidence tendered at the trial, asserted that the respondent ought to be held partially liable. According to the appellant, the trial court ought to have at the very least apportioned liability in the ratio of 60:40 between the appellant and the respondent, respectively. Citing inter alia *Odbiamba Dennis v E.O (Minor Suing through next Friend, S O A)* [2018] eKLR.

7. On quantum, counsel submitted that the award of Kshs. 7,000,000/- made in general damages was manifestly excessive and that an award between Kshs. 1,000,000/- and Kshs. 2,000,000/- would have



been reasonable. He relied on *West Kenya Sugar Company Limited v Luka Wafula Namasaka* [2020] eKLR where the court awarded general damages in the sum of Kshs. 2,000,000/- for a plaintiff who sustained severe head injury with resultant loss of consciousness, thoracic spine injury with compression collapse fracture of T4 vertebral body associated with incontinence of urine and stool and paralysis of both lower limbs, fracture of the middle third of the right femur, compound fragmented fracture of the right patella, marrow oedema of T3 and T5 vertebral bodies and anemia due to blood loss.

8. The court was also urged to set aside the award of Kshs 5,400,000/- awarded as the cost of hiring a caregiver, counsel citing absence of any sufficient evidence to necessitate such award.
9. The respondent's counsel on this part submitted in support of the findings on both liability and quantum as follows. Counsel contended that the trial court properly examined the evidence tendered at the trial and arrived at a correct finding on liability, upon taking into account the fact that the Minor was aged 6 years at the material time and hence the burden lay squarely with the appellant to disprove the particulars of negligence against him. Citing as authority the case of *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR. Counsel contended that there was no basis for liability to be apportioned here, since no contributory negligence was established.
10. On quantum, the court was urged not to disturb the award made by the trial court and was further urged to dismiss the appeal with costs.
11. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
13. This appeal challenges the trial court's findings on both liability and quantum. On the first limb of the appeal concerning liability, the key pleading of the respondent was that on the material date, the subject motor vehicle while being driven by the appellant collided with the Minor, causing him to sustain



serious bodily injuries. As earlier mentioned, the respondent attributed the accident to negligence on the part of the Appellant, as follows: -

“Particulars Of Negligence

- a. Drove at a very high speed in the circumstances.
- b. Failed to keep any or any proper look-out or to have any due regard for other road users.
- c. Failed to take any or any reasonable avoiding action.
- d. Failed to give way.
- e. Caused the accident by driving recklessly and or dangerously.
- f. Failed to exercise any or any effective control or lost control over the vehicle.
- g. Failed to take care of the minor plaintiff or to have due regard for his presence on the road.
- h. Knocking a minor on the road in broad day light”.

14. In his statement of defence, the Appellant denied the occurrence of the accident, pleading in the alternative that if an accident did occur, the same was wholly or substantially caused by the negligence of the Minor or the respondent. The appellant setting out the following particulars thereof:

“Particulars of negligence of the plaintiff and/or negligence of the next friend

- a. Allowing the minor to cross a busy dual-carriage highway unsupervised.
- b. Letting the minor to wander off unattended.
- c. Allowing the minor to suddenly and without warning walking into the path of motor vehicle registration number KBV 025J.
- d. Failing to keep a proper or any lookout and in particular for motor vehicle registration number KBV 025J.
- e. Failing to walk along the said road with care and attention as would be expected of a prudent person in his position.
- f. Failing to notice motor vehicle registration number KBV 025J in time or at all to avoid the said accident.
- g. Suddenly entering the road without ascertaining it was safe to do so when it was in fact dangerous to do so.
- h. Exposing the minor to needless peril.
- i. Allowing the minor to cross the road at an undesignated area without heeding to traffic rules.
- j. Failing to heed to hooting by the driver of the said vehicle.



k. Panicking.”

15. At the hearing, the respondent who was PW1 adopted his signed witness statement and further produced his bundle of documents as P. Exhibits 1-8 in his evidence-in-chief. The Respondent testified that the accident occurred along the Southern Bypass near Kibera area and that the Minor was aged 6 years at the time of the accident. In cross-examination, the Respondent stated that he did not witness the accident since he together with the Minor’s mother were at work at the time. That the Minor was at the time accompanied by one Molly who is the Respondent’s niece. It was his further testimony that while there was no zebra crossing in vicinity of the scene of the accident, there were road bumps.
16. During re-examination, the Respondent stated that while there existed an underpass situated near the scene of the accident but no foot bridge.
17. Dr. Washington Wokabi testified as PW2 concerning medical examinations and reports prepared in respect of the Minor. [Particulars Withheld] who was PW3 testified that she was aged 16 years old and that on the material date, the Minor who is her cousin, was in her company as the two of them were crossing the road from the place described as NHC to Sadili and that the accident occurred on the left side of the road. That she was crossing ahead of the Minor having instructed him to wait for her, when she heard a loud bang. Only to discover that the Minor had been knocked down by a speeding vehicle while on a footpath off the road.
18. Under cross-examination, it was her evidence that her family together with that of the Minor’s lived in Kibera area. That the Minor had been left under her care on the material date and that they were on their way to wash clothes when the accident occurred. That no one else was hit in the accident and that the scene did not have any zebra crossing or bump. She restated that she had left the Minor on a footpath while crossing and that following the accident, the driver of the vehicle stopped. That while she understood the dangers of the road, the Minor at his age could not himself comprehend the same. In re-examination, the witness testified that the accident vehicle was headed from Kikuyu towards Mombasa direction.
19. In his oral evidence, the appellant testifying as DW1 stated that he lived in Dagoretti and was a mechanic by profession. On the material date between 8.00am and 10.00am, he was headed towards Mombasa Road from Kikuyu area driving at 70kmph. And while approaching the National Housing area, he saw a lorry make a swerving motion ahead of him and he equally swerved. Presently he saw 3 girls and a child at the point where the lorry had swerved. That he tried to apply brakes but hit the Minor who was standing in the middle of the road. That he then reported the matter at Lang’ata Police Station.
20. During cross-examination, it was the appellant’s testimony that he was in the company of his employees on the date of the accident and that he had seen the children prior to the accident but the youngest who was the Minor jumped onto the road. That had the Minor not run into the road, he would not have been knocked down. In re-examination, the Appellant testified that he saw the children abruptly after the lorry which was ahead of him had swerved.
21. In its judgment, the trial court reasoned that upon taking into account the tender age of the Minor coupled with the expectation that the Appellant, who testified that he was familiar with the road in question, owed a duty of care to other road users, the Appellant ought to be found wholly liable for the accident.
22. Upon its re-examination of the pleadings and evidence, the court notes that it is not in dispute that an accident occurred on the material date involving the Appellant who was driving the subject motor



vehicle, and the Minor, the result of which was that the Minor sustained severe injuries. It is apparent that the appellant's ownership of the subject motor vehicle was similarly not controverted, and, in any event, the Respondent tendered a copy of records to show that the Appellant was at all material times the registered owner thereof. Moreover, the police abstract which was also tendered as an exhibit confirms this position.

23. From the evidence tendered, the court notes that on the one part, PW3 who was an eyewitness to the incident and a minor herself, testified that the Minor was knocked while standing on a footpath on the side of the road. The appellant on the other part testified that the Minor was knocked while in the middle of the road. However, despite stating in his evidence that he was accompanied by his employees, the Appellant did not call any of them to corroborate his testimony. Similarly, the investigating officer was not called to shed further light as to the manner of occurrence of the accident.
24. Nevertheless, it is apparent from the evidence tendered that the portion of the road in question had no bumps or pedestrian crossing. Consequently, it follows that all road users and especially motorists, were expected to exercise even greater caution while using the road to ensure the safety of other road users, and especially pedestrians expected to be on the road. The appellant stated that he was travelling at a speed of 70kmph which supports the evidence by PW3 that the motor vehicle which knocked down the Minor was speeding. Furthermore, given the impact and severity of the injuries sustained by the Minor, it is more plausible than not that the appellant was traveling at a high speed.
25. Regarding the question whether the trial court ought to have apportioned liability arising out of contributory negligence either on the part of the Minor or of the Respondent, it is not disputed that the Minor who was aged 6 years at the time of the accident, was a child of tender years. The court is not persuaded that a child of such age, without more, had the degree of maturity necessary to fully comprehend the risks or consequences associated with walking along or crossing the road. Courts have generally held that contributory negligence cannot be apportioned in respect of minors of tender years.
26. This position was elucidated by the Court of Appeal in in *Rabima Tayab & others v Anna Mary Kinanu* Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 where it was held that:

“The practice of the court 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 the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission... The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy.”
27. Furthermore, the court held as follows in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] 1 KAR 1; [1981] KLR 349:

“It would 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 guilty 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 precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child... Clearly each case must depend on its peculiar circumstances. In the instant case the learned Judge was right in finding that the defendant had been negligent, and that the plaintiff was struck when almost half-way across the road and that at the most the plaintiff had committed an error of judgement for which contributory negligence should not be attributed to him.”

28. A similar opinion was expressed by the Court of Appeal in *Nkudate v Touring & Sporting Cars Ltd and another* [1978] KLR 199; [1976-80] 1KLR 1333 as follows:

“The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these.”

29. The above authorities seem to place strict liability on motorists and hence shift the burden on the driver to demonstrate that a child was of such age and possessed the understanding and appreciation of the dangers associated with the use of a road and to take precautions for his or her own safety. In the present instance, the court is not persuaded that the Appellant demonstrated this and further, the Appellant did not tender any credible evidence to place negligence at the feet of the Respondent who was not in the company of the Minor and PW3 at the time of the accident. In view of the foregoing circumstances, the court sees no reason to interfere with the trial court’s finding on liability.

30. Turning to the second limb of the appeal which relates to quantum, the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

See also *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] 1 KAR 1; [1981] KLR 349; and *Tayab v Kinanu* [1983] KLR 114.

31. Regarding general damages for pain, suffering and loss of amenities, the Respondent’s evidence was that following his injuries, the Minor remained in ICU for 3 months and that to date, he has not recovered as he is unable to walk or attend school. His testimony was supported by that of the doctor, PW2. Referring to medical reports dated 19/12/2016 and 14/08/2017 earlier produced as exhibits, he stated that upon examining the Minor, he concluded that the Minor had sustained serious head injuries which left him mentally incapacitated, as well as a fracture of the right humerus and femur. That the Minor could no longer engage in conversation or make any voluntary movements. That the Minor will require constant care due to his physical and mental handicaps. The doctor assessed permanent disability at 100%.



32. At the submission stage, the respondent proposed a sum of Kshs. 8,000,000/- for general damages relying inter alia on *Patrick Kinaka Munyao v Cementers Limited* [2017] eKLR and *Alex Otieno Amolo & another v Hayer Bisban Singh & Sons Limited* [2016] eKLR where the respective courts each awarded the sum of Kshs. 6,000,000/-. The Appellant in contrast urged the trial court to award a sum of Kshs. 1,000,000/- citing the award of Kshs. 500,000/- made in *Tirus Mburu Chege & another v JK N (minor suing through the next friend and mother D W N & another* [2018] eKLR.
33. The trial court in this instance awarded a sum of Kshs. 7,000,000/-. In arriving at the award, the trial court noted the contents of medical reports confirming the injuries sustained by the Minor as pleaded in the plaint. The court also considered the severity of the injuries sustained as well as the degree of permanent disability assessed by the doctor upon examining the Minor on two (2) separate occasions.
34. Upon its own consideration of the injuries sustained by the Minor and attendant sequela, and the authorities cited before the trial, this court notes that the decisions cited by the Respondent were not readily comparable with the Respondent's case as the former did not relate to minors, while the authorities cited by the Appellant were in respect of less severe injuries in comparison to those suffered by the Minor herein.
35. The evidence tendered reveals that the Minor's life has been gravely impacted by the accident. First, the Minor must have experienced great pain both immediately following the accident and thereafter. The Minor was in ICU for an extended period of time and eventually suffered irreversible damage to the brain due to head injuries and other bodily injuries. The prospects of recovery appear remote, hence the assessment of 100% degree of permanent disability.
36. The trial court did not cite any guiding authorities in its assessment. However, upon considering the case of *J J (a minor suing through J K G and J M J; father and mother as next friends) & another v Akamba Public Road Services Limited & another* [2015] eKLR in which the minor plaintiff who had sustained injuries resulting in 100% degree of permanent incapacity was awarded the sum of Kshs.10,000,000/- , this court is satisfied that the award made by the trial court was reasonable in the circumstances.
37. The Appellant's submissions did not address damages awarded for loss of earning capacity. In any event, it is apparent that the trial court applied a global approach, and correctly so, given the age of the Minor. The court will therefore not disturb the award made therein.
38. Regarding the costs awarded in respect of purchasing a wheelchair and hiring a helper, PW2 testified that upon his assessment of the Minor, he had concluded that the Minor would not be able stand or walk, perform any personal tasks or care for himself, and that he would be dependent on others for all his needs. He stated that the Minor would require a wheelchair every 8 years of his life at the cost of Kshs. 80,000/- as well as a helper at the cost of Kshs. 15,000/- per month. In its judgment, the trial court applied a multiplier of 30 years on the costs of a helper, as follows:
- Cost of a wheelchair: Kshs. 80,000/- x 5 = Kshs. 400,000/-
- Cost of a helper: Kshs. 15,000/- x 30 x 12 = Kshs. 5,400,000/-
39. The Appellant particularly challenged the award made under the cost of hiring a helper. It is apparent that the trial court's application of the sum of Kshs. 15,000/- was guided by the doctor's medical report and which the court finds reasonable. However, this court, having considered the decision by the trial court to apply a multiplier of 30 years, notes that the trial court did not cite any guiding authorities in that regard.



40. On the persuasive authority of *EW (Suing As the Next Friend and Mother to BM (A Minor) v Kenya Power and Lighting Company Limited & another* [2015] eKLR where a multiplier of 20 years was applied in respect of a minor aged 5 years, this court is of the view that the use of 30 years by the trial court was on the higher side. The multiplier is therefore substituted with the figure of 25 years. The award is therefore calculated as follows:

Kshs. 15,000/- x 25 x 12 = Kshs. 4,500,000/-

41. On special damages, the trial court awarded the sum of Kshs. 1,783,588/- sought by the respondent upon its finding that the claim had been proved. The Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR stated:

“It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks by this court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sabbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;

“Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.

42. Further Chesoni, J (as he then was) stated in the case of *Ouma v Nairobi City Council* (1976) KLR 304 that:

“Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court’s view is as laid down in the English leading case on pleading and proof of damages, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen LJ said at pages 532, 533; -

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.” (Emphasis added)

See also *Hahn -v- Singh* [1985] KLR 716.

43. From its re-examination of the record, the court notes that while the Respondent sought damages in respect of payment regarding the copy of records, medical and related expenses, he only tendered receipts amounting to the sum of Kshs. 4,000/- in respect of the preparation of the medical reports, and a paid invoice in the sum of Kshs. 550/-. The medical documents tendered comprise a patient statement and invoices issued by Kenyatta National Hospital, which merely indicate the sums payable but do not constitute evidence of expenses actually incurred by the Respondent. On that basis, the



court finds that the trial court erred in awarding sums not proved. Consequently, the award under this head is substituted with an award in the sum of Kshs. 4,550/- only.

44. The upshot therefore is that the appeal fails regarding liability but partially succeeds on quantum. The awards made under the heads of cost of hiring a help and special damages are hereby varied to the extent indicated below. All other awards remain unchanged. The judgment of the lower court is therefore set aside and this court substitutes therefor judgment for the Respondent against the Appellant as follows:

- a) General damages
 - i) Pain, suffering and loss of amenities - Kshs. 7,000,000/-
 - ii) Loss of earning capacity - Kshs. 1,000,000/-
 - b) Cost of a wheelchair - Kshs. 400,000/-
 - c) Cost of a helper - Kshs. 4,500,000/-
 - d) Special damages - Kshs. 4,550/-
- Total - Kshs. 12,904,550/-

45. The Respondent shall have costs of the suit in the lower court with interest, but the parties will bear their own costs in the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6th DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: Mr. Kaburu

C/A: Carol

