



**JPA (Minor suing through next friend Brenda Adinda) v Mbithi (Civil Appeal E010 of 2023) [2024] KEHC 15335 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E010 OF 2023  
A. ONG'INJO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**JPA (MINOR SUING THROUGH NEXT FRIEND BRENDA ADINDA) ..... APPELLANT**

**AND**

**WILSON MBITHI ..... RESPONDENT**

*(Being an Appeal arising from the judgment and decree of Hon. S. N. Mutava (SRM) at Rongo dated 23rd January 2023 in Rongo PMCC No. 56 of 2021)*

**JUDGMENT**

**Background**

1. By way of a plaint dated 15<sup>th</sup> June, 2021 the appellant sought for the following prayers against the Respondent;
  - a. Special damages aforesaid.
  - b. General damages for pain, suffering and loss of amenities.
  - c. Interest on (a) and (b) above at court rates.
  - d. Costs of the suit and such other or further relief the court may deem fit to grant.
2. The gist of the appellant's claim before the trial court as pleaded in the plaint is that on or about the 7<sup>th</sup> March, 2021, the Appellant/Plaintiff was aboard a motor cycle registration number KMEL 349G along Rongo-Homabay road together with David Orato when near Nyarach area the Respondent's driver, agent, servant, employee or assigns so negligently drove, managed, controlled the Respondent's motor vehicle that he caused or permitted the same to collide with the motor cycle thus causing her to



sustain injuries. The minor appellant averred that the Respondent should be held liable vicariously or otherwise for the tortuous acts and omissions committed on him.

3. The appellant pleaded particulars of negligence as follows;
  - a. Failing to keep any or any proper look-out or to have any or any sufficient regard for the plaintiff.
  - b. Failing to steer the said motor vehicle in time sufficient enough to keep the same from colliding with the motorcycle which the plaintiff was aboard.
  - c. Failing to give any or any adequate warning of his hazardous approach.
  - d. Failing to heed the presence of the plaintiff off the verge of the said road.
  - e. Failing to exercise or maintain any or any proper or effective control of the defendant's said motor vehicle.
  - f. Driving at a speed which was excessive in the circumstances.
  - g. Blocking the path of motor cycle, the plaintiff was riding on.
  - h. Failing to prevent the said motor vehicle from colliding with the motor cycle which the plaintiff was aboard.
  - i. Failing to brake, stop, slow down, swerve or in any other way manage or control the said motor vehicle as to prevent the same from colliding with the motor cycle which the plaintiff was aboard.
4. The appellant pleaded that as a result of the accident he suffered injuries of Bruises on the left lower limb, Blunt trauma to the right arm, Blunt trauma to the back, Chest contusion, Blunt trauma to the right forearm and Bruises on the right leg. The appellant also pleaded special damages on treatment and transport expenses, costs of preparation of Medical report Kshs. 6,500/= and Motor vehicle search of Kshs. 550/=.
5. In response, the Respondent filed a statement of defence dated 7<sup>th</sup> October, 2021. In the said statement of defence he denied the occurrence of the accident on 7<sup>th</sup> March, 2021 involving the appellant, motor cycle registration No. KMEL 349 G and motor vehicle registration No. KAG 061N in the manner and place as alleged in the plaint. The Respondent denied that the appellant sustained severe injuries and suffered loss and damage.
6. The Respondent pleaded particulars of negligence as follows;  
Particulars of negligence on the part of the appellant/Pillion passenger as follows;
  - a. Falling to take any adequate precaution for her own safety.
  - b. Engaging the rider in unnecessary folks
  - c. Advising the motor cyclist to over speed
  - d. Falling to heed the instructions on safety and precaution when traveling.
  - e. Falling to heed to traffic rules.
  - f. Falling/Refusing/neglecting to follow Traffic Rules
  - g. Failing to wear a helmet and reflector jacket



- h. Jumping from motor cycle onto motor vehicle Reg. No. KAG 061N
- i. Riding on motor cycle without reflectors and side mirrors
- j. Being an excess passenger on a motor cycle
- k. Dangling from motor cycle while in motion
- l. Attempting to board the motor cycle while in motion.
- m. Causing the accident

Particulars of negligence on the part of the Rider of motor cycle Registration No. KMEL 349G as follows;

- a. Riding the said motor cycle at an excessive speed.
- b. Riding without due care and attention to other road users especially motor vehicle Reg. No. KAG 061N which was on the main road.
- c. Riding a defective motor cycle.
- d. Falling to ascertain whether the road ahead was clear before proceeding on.
- e. Riding the said motor cycle in total disregard to the traffic rules and common prudence.
- f. Failing to swerve, evade and/or take action so as to avoid colliding with the said motor vehicle
- g. Riding motor cycle when he knew he didn't have any riding skills or know how
- h. Riding the motor cycle on the wrong side of the road
- i. Intentionally hitting motor vehicle Reg. No. KAG 061N
- j. Riding in an uninsured motorcycle
- k. Riding the motor cycle without a helmet
- l. Riding the motor cycle without a valid driving licence
- m. Riding the motor cycle without reflectors, side mirrors and lamps
- n. Riding the motor cycle without a valid insurance
- o. Riding on the motor cycle in a zig zag manner
- p. Riding while talking on a cell phone
- q. Riding on the motor cycle while intoxicated
- r. Causing the accident

Particulars of negligence on the part of the owner of the motor cycle Registration No. KMEL 349G as follows;

- a. Allowing un-insured motor cycle to be rode on a public road
- b. Failing to keep and or observe proper terms of the Highway Code and [Traffic Act](#)



- c. Allowing a defective motor cycle on a road
  - d. Employing an unqualified driver/rider
  - e. Failing to maintain ad or regular service of the said motor cycle
  - f. Failing to effect ad or maintain al insurance policies as is by Low require
  - g. Failing to heed to traffic rules
  - h. Failing/Refusing/neglecting to follow Traffic Rules
  - i. Causing the accident
7. The Respondent denied the appellant’s claim in its entirety and averred that the appellant is not entitled to any reliefs sought. The Respondent pleaded that the appellant’s suit is poorly pleaded, ambiguous and unclear.
  8. The matter proceeded for hearing on 1<sup>st</sup> August, 2022. PW2-Brenda Adinda in her testimony stated that she is a Teacher at Kakuro Primary and lives in Kakuro village. She stated that she knows Jane Pauline Akinyi is her daughter. She is 17 years. She recorded a statement dated 15<sup>th</sup> June, 2021 which she adopted in evidence in chief. It was her evidence that her daughter was involved in an accident and suffered bruises on the left lower limb, trauma to the back, trauma on the right fore arm, trauma to the right arm, chest contusion and bruises on the right arm. She was treated at Rongo hospital but still has some chest problem. She stated in her testimony that she spent Kshs. 19,600/= for the treatment of the minor. The bundle of receipts of Kshs. 19,600/= marked as exhibit 3.
  9. On cross examination she stated that she produced a birth certificate and hospital report. She spent Kshs. 19,600/= on treatment. She was not present at the scene so she could not tell what side of the road she was at. She took her to hospital after the accident. The treatment notes do not state that there was chest injury. The minor has gone back to school and has recovered but she complaints of chest problems.
  10. PW 3-Lilian Nyboke in her testimony stated that she is a Clinical officer attached to Rongo sub county hospital. She fills reports and examine patients. On 7<sup>th</sup> March, 2021, she attended to the patient, Jane Pauline who went with a history of having been involved in a road accident at Nyakach area. She gave treatment to her anti-biotics injunction, she did cleaning and dress. The P3 form has the same history as the treatment notes. She produced treatments notes as exhibit 4 and P3 form as exhibit 5.
  11. PW4-Dr. Peter Moretu a Senior medical officer filled Medical report for minor aged 16, Jane Akinyi involved in an accident on 7<sup>th</sup> March, 2021. He stated that she suffered bruises on the right leg, blunt injuries, back, chest and right upper limb. She was treated at Rongo subcounty. He used the treatment notes and P3 form in preparing the medical report. She charged the patient Kshs. 6,500/= which he sought to produce as evidence. Medical report marked as exhibit 6(a), Special receipt exhibit 6(b) and special receipts for Kshs. 6,000/= marked as exhibit 6(c).
  12. On cross examination, it was his evidence that he did not treat the patient and did not conduct any x-rays on her chest. He relied on the P3 form and treatment notes/discharge summary to compile the medical report. He could not confirm the discharge summary because he did not have the document with him. He examined her on 31<sup>st</sup> March 2021 three weeks after the accident
  13. The trial Court upon hearing the evidence delivered its judgment dated 23<sup>rd</sup> January, 2023 which judgment and decree is now the subject of this appeal herein.



## **The Appeal**

14. The appellant being dissatisfied with the judgment and decree of the trial court preferred an appeal before this court vide a Memorandum of Appeal dated 21<sup>st</sup> February, 2023 setting forth the following grounds of appeal;
  1. The Learned Trial Magistrate erred in Law and fact in apportioning liability between the third party and the defendant.
  2. The Learned Trial Magistrate erred in Law and fact in apportioning liability for negligence yet the evidence was conclusive that the defendant was blame for the accident and was convicted on plea of guilt.
  3. The Learned Trial Magistrate erred in Law and fact by failing to connect the Appellant's submissions and judicial authorities on quantum the arriving at an erroneous figure on quantum.
  4. The Learned Trial Magistrate erred in Law and fact by failing to con conventional awards for general damages in cases of similar injuries awarded general damages for pain and suffering which is inordinately low.
  5. The Learned Trial Magistrate erred in law and in fact when making in by failing to consider inflation and passage of time.
15. The appellant urged this court for the following ORDERS that
  - a. This Appeal be allowed with costs.
  - b. A declaration that the Respondent in 100% liable based on evidence and his own plea of guilt.
16. This appeal proceeded by way of written submissions. The appellant's submissions are dated 30<sup>th</sup> May 2024 whereas the Respondent's submissions are dated 28<sup>th</sup> November 2023. I will proceed to consider these submissions in my analysis and determination.

## **Analysis and Determination**

17. I have carefully considered the grounds of Appeal by appellant reanalyzed as well as the Judgment of the trial magistrate and together with respective submissions and authorities relied upon and I find the following issues arise for determination;
  - i. Whether the trial court was right in apportioning liability.
  - ii. Whether the trial magistrate considered the Appellants submission and authorities in assessing the quantum damages
  - iii. Whether the award of damages was inordinately law in the circumstances
18. This being the first appellate Court, it has an obligation to re-analyze, re-evaluate and re-consider the evidence adduced before the trial court and draw its own conclusions. This position was enunciated in Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR where the court held as follows;

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

### **Whether the trial court was right in apportioning liability.**

19. In determining liability the trial magistrate established that the minor plaintiff was a pillion passenger on motor cycle registration KMEL 349G on 7.3.21 when at around 2:20p.m along Rongo – Homabay road she was involved in a road traffic accident with motor vehicle registration KAG 061N and she suffered injuries to her body. The driver of the motor vehicle registration KAG 061N was charged in Traffic Case No 34 of 2021 and convicted on his own plea of guilty. A police abstract exhibit 4 was produced showing that the said driver was fined Kshs. 50,000/=. The trial magistrate acknowledged that having been a pillion passenger the plaintiff could do nothing to prevent the accident as she had no control of the motor cycle. She also relied in the holding of the Court of Appeal in *Nandwa vs. Kenya Kazi Ltd (1988)* eKLR in which the court observed:-

In an action for negligence, the burden is always on the Plaintiffs to prove that the accident was caused by the negligence of the Defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the Defendant the issue will be decided in the Plaintiffs favour unless the Defendants evidence provides some answer adequate to displace that inference.”

20. The trial Magistrate also referred to Section 47 A of the *Evidence Act* where applicability of a criminal conviction in Civil suit is provided for as follows”-

A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the of the decision of any appeal therein whichever is the latest shall be taken as conclusive evidences that the person so convicted was guilty of that offence as charged.”

21. The trial magistrate found that a person convicted for an offence involving negligence in relation to particular accident is not necessarily the only one negligent for such an accident. She said that in this case the plaintiff was similarly to blame for the accident. It is acknowledged that the driver of motor vehicle DW1 confirmed he saw the on coming motor cycle which had the right of way. In trying to establish who was to blame on the accident the trial magistrate observed that the point of impact was on the lane of the rider whom she refers to as PW2 (Although PW2 according to the proceedings is the mother of pillion passenger). She also observed that in the circumstances the rider had a right of way. The trial magistrate however infers that since the rider testified that he did not have a driving license and that it was not established if he had protective gear and that the motor cycle belonged to his friend he was not a qualified rider and this could have contributed partly to the accident. Due to the said inference the trial magistrate said that it was difficult to hold the driver of the motor vehicle 100% liable. She therefore apportioned liability at 70:30% against the defendant and 3<sup>rd</sup> party respectively.
22. This court needs to point out from the onset that PW2 Brenda Adinda was the mother of the pillion passenger Jane Pauline Akinyi aged 17 years and not the rider of the accident motor cycle as it appears in the Judgment of the trial magistrate. The said rider was also not a witness in the proceedings in the trial court although he was cited as a third party in the said proceedings. The circumstances under which the accident occurred were very clear and there was no need to make inferences as to who was to blame for the accident. The respondent herein merely said that he blamed the rider for the accident but did not give particulars of the said blame he acknowledged that the motor cycle had the right of way that when he charged in a traffic case for the accident he pleaded guilty and was fined Kshs. 50,000, There



is also evidence that the accident happened on the riders lane. This court finds that it was erroneous for the trial court to make a finding against the motor cycle rider based on inference when there was no doubt as to the circumstances of the accident. The finding of the trial magistrates on liability is therefore set aside and substituted thereof with a finding that the respondent is 100% liable for the accident and injuries suffered by the Appellant.

**Whether the trial magistrate considered the Appellants submission and authorities in assessing the quantum of damages and Whether the award of damages was inordinately law in the circumstances;**

23. It is settled principle that an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the Judge or Magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect". (See Kimoth & Others "vs- Vesters and Another Civil Appeal No.4 of 1984.)

24. In the Case of Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001 (2004) 2KLR55, the Court held thus:

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 difference 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 or leaving out of account some relevant one) or misapprehending the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate”

25. Further in Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR the Court held thus:

An appellate court will not disturb an award for general 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...”

26. The Appellants counsel in their submissions in the trial court proposed an award of Kshs. 500,000 and relied on the case of Francis Njunge Karano vs, Rose Dinda Kitema 2021 eKLR where an award of Kshs. 500,000 was made. They also prayed for an award of Kshs. 19,600 for special damages together with costs and interest.

27. The Defendant on the other hand proposed an award of Kshs. 60,000/= for general damages and relied on the case of Eastern Produce (k) Ltd (Chemoni Tea Estate) vs Inea Avutu Shitakwa 2019 EKLR where the plaintiff sustained soft tissue injuries and the court made an award of Kshs. 60,000= . The defendant argued the court not to award special damages because the plaintiff did not produce receipts.

28. The trial magistrate however found that the plaintiff had proved her case on a balance of probability that she sustained the injuries pleaded in the plaint and that there was no evidence in the first instance when she sort medical attention that she also suffered chest injuries as shown by the medical report produced by PW4. The trial magistrate assessed general damages at Kshs. 40,000/=.

29. In consideration of the authorities cited by the Appellant and Respondent’s counsel in the lower court and the authorities referred to by trial magistrate in her judgment and guided by the principles that damages must be within the limits set out by the decided case and the limit of Kenyan Economy can



afford as well as inflationary factors this court finds that the award of general damages at Kshs. 40,000/= was inordinately low in the circumstances as similar injuries suffered more than 10 years ago as in case in Kapsabet Magistrates Court in Civil Case No. 128 of 2011 Eastern produce (k) Ltd vs. Inea Shitakwa where on appeal judgment an award of Kshs. 60,000/= was upheld on 6.12.2018. It would not be logical to find that the plaintiff herein who suffered similar injuries would be awarded a lesser amount.

30. In the circumstances, the award of general damages made by the trial court is set aside and substituted thereof with an award of Kshs. 150,000/=. The award of special damages of Kshs. 6,500/= is upheld. The cost of this appeal to be borne by the Respondent.

31. It is so ordered.

**DELIVERED DATED AND SIGNED AT MIGORI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. ONGIJO**

**JUDGE**

In the presence of:

Mr. Ouma Advocate for Appellant

Mr. Kamau Advocate for Respondent

Court Assistant Lola / Victor

