New Pace Turners Limited v Nyambura (A Minor Suing through her Mother and Next Friend Hannah Waithira Kagiri) (Civil Suit E605 of 2023) [2024] KEHC 14135 (KLR) (Civ) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E605 OF 2023

MA OTIENO, J

NOVEMBER 6, 2024

BETWEEN

NEW PACE TURNERS LIMITED ..... APPELLANT

AND

FAITH NYAMBURA ..... RESPONDENT

A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND HANNAH WAITHIRA KAGIRI

(Being an appeal from the Judgement and Decree of Honourable Wendy Michemi (CM) delivered on 9th June 2023 in the Milimani CMCC No. 9457 OF 2017)

JUDGMENT

Introduction

1. This is an Appeal from the decision of the magistrate's court delivered on 9th June 2023 in the Milimani CMCC No. 9457 of 2017 in which the Respondent sued the Appellant seeking compensation for the injuries suffered on 1st August 2016, when the Appellant's employees who were working on an electric line, negligently handled a wooden pole, causing it to hit the plaintiff, thereby causing her grievous injuries.

2. In her plaint dated 29th December 2017, the Respondent (then a Plaintiff) pleaded that on the date of the accident, while she was lawfully within her school compound at Precious Academy, Kariobangi, Nairobi, the Appellant's employees in the course of their duties, negligently handled the pole, causing it to fall on the Respondent, resulting in serious bodily injuries to her.

3. On 9th June 2023, the trial court rendered its decision in the dispute and found the Appellant wholly liable in negligence for the accident. A sum of Kshs. 1,000,000/- was consequently awarded by the trial court in general damages with a further sum of Kshs. 35,549/- being awarded for special damages.

4. Costs of the suit was also awarded to the Respondent by the trial court.

The Appeal

5. Aggrieved by the decision of the trial court, the Appellant vide its memorandum appeal dated 7th July 2023 lodged an appeal to this court, raising three (3) grounds of appeal that; -

    i. The learned trial magistrate erred in law and in fact in the manner that she assessed the evidence on liability and reaching a conclusion that the Appellant was 100% to blame for the accident despite evidence tendered in court.

    ii. The learned trial magistrate erred in law and in fact in the manner that she assessed general damages and in awarding damages that were excessive in the circumstances considering the injuries sustained by the Respondent and the evidence that was presented.

    iii. The learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions on liability and general damages and in so doing she arrived at an erroneous decision.

6. The appeal was canvassed by way of written submissions. The Appellant's submissions is dated 22nd August 2024 whilst that of the Respondent is dated 13th September 2024.

Appellant's submissions

7. On liability, the Appellant submitted that the trial court, in reaching its finding on liability failed to appreciate that at the time of the accident, the minor was playing unsupervised and consequently, the blame ought not to have been assigned to the appellant in the manner that the trial court did.

8. The Appellant further submitted that both the minor's school and her mother are the ones who ought to have been held 100% liable in negligence. The school, for failing to supervise the child not to play at the scene of the accident (road) and the mother, for failing to ensure that she left the minor under good care and supervision.

9. According to the Appellant, the Respondent ought to have sued the minor's school for negligence for failing to supervise the minor and allowing her to play on the road where the accident happened. The Appellant asserted that had the minor been accompanied by an adult, and had the school not allowed the minor to play on the road, the accident would not have happened.

10. Relying on the decision in *Livingstone Otundo v Naima Mohammed (A minor suing through her next friend Mohamoud Ali (Civil Appeal No. 110 of 1986)*, the Appellant submitted that due to the fact that the minor in this case is over 5 years and that she understood that she was playing on the road, a place she ought not to have been playing at, then she should be equally found negligent and held 100% liable for the accident.

11. On the quantum of general damages awarded by the trial court, the Appellant submitted that the same was high and excessive in the circumstances considering the injuries sustained by the Respondent as a result of the accident.

12. Citing the decisions of *Arkipo Odhiambo Otieno v Kenya Bus service Limited (Nairobi HCCC No. 1304 of 2004)* and that of *Simon Mutisya Kavii v Simon Kigutu Mwangi (Nairobi HCCA No. 197 of 2007)*,

the Appellant submitted that an award of Kshs. 200,000/- in general damages would be sufficient to compensate the Respondent minor for the injuries suffered in the accident.

13. In the premises, the Appellant urged this court to make a finding that the Respondent failed to prove her case against the Appellant on liability. The Appellant therefore prays that the Respondent suit be dismissed and the trial court's judgment of 9th June 2023 be set aside in its entirety.

Respondent's Submissions

14. The Respondent in her submission supported the finding by the trial court, both on the issue of liability and on quantum of general damages awarded by the court for the injuries.

15. Referring to the testimonies of PW. 3 (Paul Gatenjwa) and that of the minor plaintiff (PW1) before the trial court, the Respondent submitted that the Appellant was outrightly to blame for the dangerous situation it created, both to its employees and to third parties, the minor herein included. According to the Respondent, the fact that the Appellant's employees did not cordon off the area where they were working, as well as the fact that there was no one to warn other people, the minor included, solely contributed to the occurrence of the accident.

16. In answer to the Appellant's submissions that liability ought to have been assigned to the plaintiff's mother and to the administration of the school where the minor was schooling, the Respondent submitted that the Appellant led no evidence before the trial court on the culpability of either the mother or the school administration and therefore, they cannot legally be allowed to advance the argument at appeal stage.

17. Finally, the Respondent submitted that by choosing not to testify before the trial court, the Appellant essentially admitted the Respondent's evidence on the circumstances under which the accident happened.

18. On quantum of damages awarded by the trial court, the Respondent submitted that the award of Kshs. 1,000,000/- for general damages was reasonable and commensurate with the injuries suffered by the Respondent and is also within range of awards in comparable injuries.

19. Referring to the authorities she submitted before the trial court as well as the case of Civil Appeal No. 320 of 2002- John Maseno Neala & another -versus - Dan Nyanamba Omare a minor suing through lsaac James Omare his next friend), the Respondent submitted that this court should not interfere with the award made by the trial court since the same was supported by evidence of the injuries suffered.

Analysis and determination

20. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion, keeping in mind that unlike the trial court, it did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

> " 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.....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..."

21. The court is equally aware that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses

testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial 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..."

22. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that: -

> " 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."

23. I have carefully reviewed the Appellant's memorandum of appeal filed herein, pleadings and proceedings from the lower court as well as the submissions by the parties in support of their respective positions. I note that the only two issues for determination in this appeal is whether the trial court's finding on liability was supported by law and evidence; and whether the quantum of damages awarded by the trial court was fair and reasonable in the circumstances, taking into account the injuries suffered as a result of the accident.

24. I will first deal with the issue of liability and thereafter proceed on the issue of quantum of general damages.

Liability

25. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same Act on both parties. See Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal stated that: -

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

26. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when it is clearly wrong and based on no evidence or on the application of wrong principle. This was the holding in Khambi and Another vs. Mahithi and Another [1968] EA 70, where the court stated that: -

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous,

and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

27. Regarding the Appellants' submissions that the trial court erred in finding its employees liable for the accident, I note that in her plaint dated 29th December 2017, the Respondent pleaded at paragraph 3 thereof as follows; -

> " 3. On or about the 1st day of August 2016, while the Plaintiff was lawfully in her school compound in Precious Academy, the employees of agents of the defendant company while in the course of their duties, working on the powerline passing in or near the school compound of Precious Academy, so carelessly and negligently caused an electricity pole to so violently fall and collide with the Plaintiff, who was lawfully in the said school compound and a result thereof, the Plaintiff who was in her good health sustained very serious bodily injuries and she had to be rushed to hospital by her teacher/s well-wisher/s and employee/s and or agents of the defendant company where she was treated and she has suffered a lot of pain loss and damage, all of which she hold the defendant totally liable."

28. From the proceedings, I note that the Respondent testified on 6th July 2023 as PW2 and adopted his Witness Statement of 28th June 2021 as his evidence in chief. In the witness statement, the Respondent stated as follows; -

> " I was lawfully and carefully crossing Forest road at a usual pedestrian crossing point after ascertaining that it was safe to do so with motorists having stopped to allow for the same when while I was about to finish crossing, motor vehicle registration No. KCS 039Q was so recklessly and carelessly driven that the driver.....knocking me down and as a result I sustained severe body injuries."

29. The appellant did not call any witness in support of its case neither did they produce any documents of the same.

30. It is settled that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

31. It is equally settled that the mere fact that a defendant has failed to call any witness and adduce any evidence in her favour does not in any way lessens the burden placed on plaintiff by law to prove her

case. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR the court stated as follows: -

> " I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not. (See Kirugi and Another v Kabiya and Others [1983] eKLR)."

32. It therefore follows that despite absence of evidence from the Appellant, the Respondent was still obligated to prove her case on a balance of probabilities and looking at the evidence adduced before the trial court I find that the respondent proved that the Appellant's employees were negligent and therefore 100% liable for the accident.

33. I have carefully reviewed the evidence tendered by the Respondent at trial and find that the Respondent proved her case to the standards required in law. it was not disputed that the Appellant's officers who were working on a power line next to the school did not cordon off the area neither did they have signs of or people guiding members of the public not to get close to their area of operation.

34. The Appellant attempted to blame both the minor's mother and school administration for failing to take good care of the minor. That they left the minor unattended hence exposed her to the accident. This in my view amounts to the Appellant claiming contributory negligence without any evidence being led on the same.

35. It is settled that when it comes to contributory negligence, the same must not only be specifically pleaded, but sufficient evidence must be led by the person claiming it to establish the elements of that negligence. See the decision of Nyakundi J in *Mashru v Odhiambo (Civil Appeal 21 of 2022*) [2023] KEHC 25389 (KLR) (14 November 2023) (Judgment).

36. In the circumstances, I hold, as the trial court did, that the Appellant was solely to blame for the accident. Liability is therefore assigned at 100% as against the Appellant.

Damages

37. On quantum, it is the Appellants' contention that the award of Kshs. 1,000,000/- awarded by the trial court for general damages is high and excessive in the circumstances. According to the Appellant, a sum of Kshs. 200,000 would have sufficed as adequate compensation in general damages.

38. The general rule is that assessment of damages is within the discretion of the trial court and that an appellate court should only interfere in instances where the trial court, in assessing damages, erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see Mbogo vs Shah (1968) EA 93 and Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727).

39. In the case of Catholic Diocese of Kisumu v Sophia Achieng Tele Civil Appeal No 284 of 2001 [2004] 2 KLR 55, the Court of Appeal 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."

40. In evaluating compensation for general damages, the Court has to evaluate the nature of the injuries and the awards given by other Courts. The general principle is that courts should endeavour to give reasonable compensation and to secure some uniformity in the general method of approach. The Court of Appeal observed in Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR stated that it is reasonably expected that so far as possible, comparable injuries should be compensated by comparable awards. The court stated that –

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

41. From the record, I note that in his amended plaint dated 29th December 2017, the Respondent pleaded that as a result of the accident, the minor suffered the following injuries; Fracture of right distal femur, traumatic injury to the right knee joint and a deep cut wound to the right knee.

42. The minor was treated for the injuries and later examined by Dr. A.K. Mwaura whose medical report dated 9th June 2017 was produced by consent at trial. The medical report confirmed that the minor suffered injuries as was pleaded in the Plaint.

43. The Appellant in proposing the sum of Kshs. 200,000/- as general damages relied on the case of *Arkipo Odhiambo Otieno v Kenya Bus service Limited (Nairobi HCCC No. 1304 of 2004* where a sum of Kshs. 150,000 was awarded in general damages for fractures of the right femur, fracture of the tibia and fibula and cut wound on the right thigh.

44. The Appellants also cited the case of *Simon Mutisya Kavii v Simon Kigutu Mwangi (Nairobi HCCA No. 197 of 2007*), where general damages of Kshs. 250,000/- was awarded in the year 2022 for right rib fracture, 8th right rib fracture, chest contusion, bruises on the face, blunt trauma to the lower back, right knee and left hand.

45. The Respondent on the other in urging the court to maintain the award of Kshs. 1,000,000/- made by the trial court on the other hand relied on the cases cited in the lower court. I note that in the lower court, the Respondent relied on among others the case of *Lee Mayani Kinyanjui & Anor v Charles Mwangi Mugi (Nakuru HC Civil Appeal No. 21 of 2019*) where an amount of Kshs.1,000,000/- was made in general damages where the Plaintiff suffered comminuted fracture of his right femur.

46. I have carefully reviewed the authorities cited by the parties in support on the respective submissions on the issue of quantum and note that the injuries suffered in this case are closely similar to those suffered in the case of *Lee Mayani Kinyanjui & Anor v Charles Mwangi Mugi (Nakuru HC Civil Appeal No. 21 of 2019*) where an award of Kshs.1,000,000/- was made.

47. The case of *Arkipo Odhiambo Otieno v Kenya Bus service Limited (Nairobi HCCC No. 1304 of 2004* and that of *Simon Mutisya Kavii v Simon Kigutu Mwangi (Nairobi HCCA No. 197 of 2007* relied on by the Appellant are quite old, having been made almost twenty years back and are certainly not relevant to the case at hand.

48. In the circumstances, I find no merit in this appeal and the same is hereby dismissed with costs in favour of the Respondent.

49. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 6TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses Court Assistant

Ms Kariuki..... for the Appellants

Kamata.....for the Respondent