REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 2 OF 2016

SAMUEL NDUNGU.....APPELLANT

VERSUS

MK (Minor suing through next friend BNA).....RESPONDENT

(Being an Appeal from the whole of the Judgment delivered by the Honourable E. G. Nderitu,

Senior Resident Magistrate on the 8th February, 2016)

JUDGMENT

1. The Court has before it "*an Appeal from the whole of the Judgment in the suit delivered by the Honourable E. G. Nderitu Senior Resident Magistrate on 8th February 2016*". The Appeal was filed shortly after the delivery of the Judgment, but for various reasons the Appellant failed to demonstrate a willingness to proceed with the appeal until the Respondent made an application for dismissal for want of prosecution.

2. Over the life of the Appeal there were various applications made. The Appellant obtained a stay pending hearing and determination of the suit on condition of payment of part of the decretal sum and the deposit of the remainder in an interest earning account. The Respondent filed an application for dismissal for want of prosecution, there was dismissal followed by an application for reinstatement. The Appeal was dismissed by the Court and reinstated following an Application by the Appellant and a consent entered into by the Parties on 27th November 2019 which was filed in Court on 3rd July 2020. Thereafter the Parties agreed to proceed by way of written submissions. The Appellant's written submissions were filed on 13th December 2019 and the Respondent's on 6th March 2020.

3. This matter comes before the Court on the Appeal of the Defendant in the Court below. The Appellant appears to be appealing against liability and quantum, however, the written submissions deal only with quantum, liability being conceded.

4. The Trial Court found the Appellant liable and awarded the Plaintiff: KShs.650,000.00 for pain and suffering and the costs of the suit. The Judgment was delivered on 8th February 2016. The Appellant filed it Memorandum of Appeal on 9th March 2016. The Memorandum appeared to suggest that the Appellant was appealing against the whole judgment.

5.The Memorandum of Appeal dated 9th March 2016 sets out the grounds of appeal relied upon, namely that:

> "1. The learned Magistrate erred in fact and in law in finding that the Plaintiff was entitled to general damages that were excessive as to amount to a wrong estimate.
>
> 2. The learned Magistrate erred in fact and in law in failing to fully consider the medical evidence and reports tendered in evidence and thereby made a wrong finding as to the injuries suffered by the respondent.
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> 3. The learned Magistrate erred in law and in fact by failing to consider the medical report tendered by the Appellant witness which demonstrated that the Respondent did not suffer fracture of the pelvic.
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> 4. The learned Magistrate erred in law and in fact by failing to consider the evidence of the Appellant witnesses who were expert witnesses.
>
> 5. The learned Magistrate erred in law by awarding general damages for pain and suffering for injuries which the respondent failed

to prove.

It is proposed to ask the Court for the following **Orders that**:

a. This Appeal be allowed with costs

b. The Judgment on quantum delivered by Honourable E.G. NDERITU, SENIOR PRINCIPAL Magistrate on the 8th February 2016 in VOI CIVIL SUIT NO. 166 OF 2014 and the decree arising thereof be set aside.

c. This Honourable court do re-assess the damages commensurate with the proved injuries sustained by the Respondent and enter judgement accordingly.

d. That cost of this appeal be borne by the Respondent.

6. The suit was commenced by a plaint dated 19th September 2014 the Plaintiff alleged as follows:

"3. At all times material to this suit, the Defendant was the registered and or insured and or beneficial owner of motor vehicle registration number KBU 094U make Isuzu Bus insured by Messrs Direct line Assurance Co. Ltd.

4. On or about the 28th day of August 2014, the minor Plaintiff was lawfully travelling as a passenger aboard motor vehicle registration number KBU 094U make Isuzu Bus which was moving along Mombasa-Nairobi road whereupon reaching near Ndii area, the same was so negligently driven, managed and or controlled that it lost control, started zigzagging veered of the road and overturned as a result whereof the plaintiff sustained serious injuries and has suffered great loss and damages.

PARTICULARS OF PAIN, SUFFERING AND INJURIES

(a) Bilateral acetabulum fracture

(b) Fracture 5th digit (small finger)

(c) Bruises around right iliac region

(d) Was admitted at Moi Hospital Voi for 8 days

- Both legs were put on traction

- Plaster cast was applied to the right hand

(e) Walks with support of crutches

(f) Inability to use her right hand

(g) Will suffer osteoarthritis of both hip joints *in future*

5. The Plaintiff avers and maintains that the accident was caused by the Defendant or his authorized driver, servant and or agents and the Defendant is therefore liable and or vicarious liable.

PARTICULARS OF NEGLIGENCE OF THE DEFENDANT AND OR HIS AUTHORIZED DRIVER, SERVANT AND OR AGENT

a. Driving at a very excessive speed without any regard to the nature of the road and available traffic.

b. Failing to heed the presence of other road users on the said road.

c. Failing to exercise due care and skills in managing the motor vehicle.

d. Failing to keep any or any proper look out or to have any sufficient regards for other road users.

e. Failing to apply brakes in sufficient time or at all to avoid the said accident.

f. Driving without due care and attention thereby causing the accident.

g. Failing to steer in a clear and proper course.

h. Driving a defective motor vehicle.

i. Failing to employ a competent driver.

j. Overtaking when it was unsafe to do so.

PARTICULARS OF SPECIAL DAMAGES

(a) P3 form and consultation Kshs. 500.00

(b) Treatment & drugs Ksh. 7,527.00

(c) Medical report ..... Kshs. 3,000.00

T o t a l ***Kshs. 11,027.00***

7. The Plaintiff further also pleads that the Defendant/Appellant's insurer, Directline Insurance Co Ltd was served with the requisite notice under the Insurance Motor Vehicle Third Party Risks) Act, and that the Defendant was served with a formal demand.

8. The Suit was brought by the Plaintiff's guardian ad litem/next friend because she was a minor at the time of the incident and the suit. In his Defence, the Defendant denied the claim and its particular, the injuries and the special damages. In addition, it was alleged that the injuries occurred as a result of the next friend leaving the minor in the road.

9. From its Written Submissions, it appears as if the Appellant is asking the Court to review the decision of the lower court. This impression comes first from the Submission that the Appellant relies on written submissions dated 28th December 2015 and filed in the lower court on 7th January 2016. In the Respondent's Submissions, the Appeal is opposed.

10. The substance of the appeal is described by the Appellant in the Written Submissions thus: "Further, although the Appellant has raised five (5) grounds of appeal in the Memorandum of Appeal, the same can be coalesced into one (1) main issue namely quantum". The issue of Quantum has two (2) different limbs which the Appellants shall address separately in these submissions. The said issues are (i) **Proof of injuries** and the award on **General Damages**.

11. However, the Grounds of Appeal appear to raise the issue of liability too and therefore it is worth putting that issue to rest. The Plaintiff told the Court that the driver was speeding. The vehicle became unstable and rolled. Some passengers were thrown out. The driver was charged with causing death by dangerous driving in a criminal court. The driver was found guilty. The evidence of the investigating officer was that; "*The bus driver on Donald Mwaki Katu alias Ndurutu was charged with six counts of causing death and driving unauthorized motor vehicle and unroadworthy motor vehicle. He was convicted on own plea of guilty on all the charges*.". In the circumstances, before the civil suit, there was a criminal trial the outcome of which found the driver of the vehicle guilty of death by dangerous driving and dangerous driving.

12. The Appellant complains that "the Learned Trial magistrate made a finding on quantum without due consideration of the injuries suffered by the Respondent; the Appellants' (sic) evidence and submissions on record; judicial authorities comparable and/or commensurate to the injuries and as such arrived at an erroneous decision/finding". The Appellant claims that the Learned Trial Magistrate did not consider the evidence before her. At paragraph 22 of the Respondent's Written Submissions, it is argued; "In the upshot your Ladyship the appellants failed to demonstrate that the learned trial magistrate misapprehended the evidence on record, applied wrong principles of law and or misdirected himself or the award is inordinately high therefore the appeal should be dismissed with costs.".

13. On the issue of injuries/quantum, the Learned Trial Magistrate heard the oral evidence of the Plaintiff and Dr Hanif in support of the Plaintiff's case and Dr Leah Wainana and Dr Umara in support of the Defendant's Case. The Learned Trial Magistrate heard oral evidence from all three. Dr Hanif had also prepared a report. In it he indicates that he examined the Plaintiff. During his examination he noticed that the Plaintiff had difficulty walking; was using elbow crutches and suffered an inability to use her right hand. More specifically that she had "*severe pain on Abduction and Adduction*". Also that on her hand she had an above the wrist plaster cast. In his report Dr Hanif recorded the injuries MK suffered, being Bilateral fracture of the acetubelum.

14. This Court must therefore consider the evidence that was before the Trial Court. On behalf of the Plaintiff/Respondent, the Court heard the evidence of the Plaintiff minor who described her injuries, as well as Dr Hanif who was called by the Plaintiff. The record shows that the Plaintiff said that she was involved in an accident on 28th August 2014. She said that the vehicle left Mombasa travelling towards Eldoret. When it got to Ndia area "the vehicle started moving in unstable manner. The vehicle was at high speed. The passengers were complaining telling the driver to drive at a slower speed. Soon the vehicle lost control and rolled severally. We were threw outside the vehicle. I got fractures on the hip and finger. I got lacerations on the hip and legs.". Thereafter the injured passengers were taken to Voi District Hopital. There she says "I was injected, I was washed and stitched. I was x-rayed on the hand, finger and hip. I was admitted in ward No. 7. I was treated for 2 days as an inpatient. I was put on traction with a plaster on the legs and hip. I was in hospital at Moi for 8 days. I have treatment notes marked Pexh 4.1. I was discharged on crutches. My parents paid kshs.7,527/-.". The crutches were also purchased.".

15. To corroborate her evidence the Plaintiff produced her treatment notes as well as the P3. The treatment notes are stamped as having been

received by the Court Civil Registry on 27th July 2015 and therefore form part of the record. Notably, they are omitted from the Record of Appeal. It states clearly that the Respondent was admitted on 28th August 2014 and "discharged (D.O.D) on 3rd September 2014. It states clearly that there was a diagnosis of "#Bilateral Acetabulum, #right small finger (8th digit). It also records that the investigations undertaken were a pelvic X-ray. The treatment was said to include painkillers and bilateral traction. The Remarks record that the Plaintiff was discharged through the orthopedic team which explains the inconsistency between the date of discharge being 4 days after admission and her evidence that she was in hospital for 8 days. In the circumstances the Respondent's evidence was consistent. The P3 records the same injuries. What is surprising is that the doctors employed by the Defendant insurer were unable to find those details in the records they too saw.

16. The Plaintiff also called the next friend, her uncle. He gave evidence that when he came to Voi the day after the accident, he found the Plaintiff in a plaster cast and on traction. She had injuries on the hip, leg and finger. She was in hospital for 8 days. She was prescribed crutched and these were purchased. No questions were asked in respect of those injuries during cross-examination.

17. In addition, the Plaintiff called the doctor who examined the Plaintiff shortly after her discharge from hospital. Dr Hanif was called as PW-1. By way of background, he said that he saw Mitchel Kanario on 19th September 2014 for the purposes of preparing a medial report. His evidence was that she had two major injuries, bilateral fracture of the hip joint and the fracture of the right small finger. She also had minor injuries around the right hip region. He said she was admitted for 8 days and a plaster cast was administered. She was discharged on crutches for out patient treatment. In addition to examining the Plaintiff, Dr Hanif stated that he relied on the treatment notes, P3 and prescription notes. He observed the patient to be on crutches on that day. He prepared a medical report. In his medical report Dr Hanif listed the documents he saw as "*Hospital Notes/P3 and X-ray Reports were seen*". He listed the injuries as fractures of the Bilateral Hip Joint Acetabulum and of the right small finger – proximal phalanx. Of his own observation he saw that she had difficulty in walking and was walking with the support of crutches. She also had an inability to use her right hand. The difficulty in walking was recorded as severe pain on abduction and adduction on both hip joints. The Doctor gave an opinion that a full recovery was expected but there could be the onset of osteoarthritis of both hip joints in later life. He also recommended further examination. He noted that her outpatient treatment was to be carried out from Coast Provincial Hopital in Mombasa. Notwithstanding the prognosis of osteoarthritis, at the Hearing the Plaintiff was said to have made a complete recovery.

18. Three months later the Plaintiff was examined by a Dr. Eric Mungai. According to the witness called to introduce his report into evidence (Dr Wanaina), he saw the same documents as Dr Haniff. She said that he saw the treatment records dated 3rd September 2014 from Moi district hospital as well as the medical report prepared by Dr Hanif. He also conducted a clinical examination and commissioned fresh x-rays from Jamu imaging. Dr Mungai did not attend Court to be cross-examined.

19. The Court was informed that he had left the employment of the Defendant's insurer. Instead evidence was given by a Dr Leah Wainaina who introduced the report. In her evidence Dr Wainanina gave evidence that she was employed by Directline Assurance Company. She introduced the report of Dr Erik Mungai who was a co-worker. She said that the report confirmed soft tissue injuries to the right hip and a fracture to the right fifth digit. She said that Dr Mungai relied on the treatment notes from Voi District Hospital dated 3/9/14, the Medical report of Dr Hanif and the x-ray report dated 14th November 2014 from Jamu Imaging. She stated that the (undefined) x-ray films were taken to Jamu Imaging for reading. The outcome of the physical examination was that the pelvis was normal. No fracture was confirmed. Then as a gloss to the written report she said that there were two x-ray reports done by Jamu Imaging. The first was a (further) report on the original x-ray of the pelvis, which stated the pelvis was normal. The repeat x-ray confirmed the same. The repeat x-ray of the finger confirmed the fracture. In her evidence, Dr Wainaina stated that the author of the report relied on the treatment notes from Voi District Hospital dated 3rd September 2014 and Dr Hanif's Medical Report as well as the x-ray films taken by Jamu Imaging together with the report dated 14th November 2014. She also said on oath that:

1. Dr Mungai conducted a physical examination of the Plaintiff

2. The physical examination confirmed that the pelvis was normal and that the finger was fractured

3. The x-ray already taken was re-read and showed the pelvis "was normal"

4. The repeat x-ray showed that the finger was fractured and the pelvis was not

5. Dr Wainaina had a copy of the P3 form

6. At the time the Plaintiff was seen by Dr Hanif/Dr Mungai she had a normal gait with no limping and no complaint.

7. That she saw the same documents as Dr Mungai was given.

20. Under cross-examination Dr Wainaina confirmed that the P3 stated that there was a bilateral fracture of the acetabulum. She also confirmed that a P3 is usually completed using the treatment notes but in this case she was not sure whether that happened. She also confirmed that traction is the appropriate treatment for fractures. She also confirmed that it would not be normal for someone who had only a fractured thumb to be required to use crutches.

21. The Defendant/Direct Line Insurance also called a second doctor, A Dr Peter Umara Marenya who called himself a medical doctor and consultant radiologist. He said he re-read the original x-ray and conducted a second "verification"x-ray. He then prepared a single report. He did not see any sign of a fracture in either x-ray. He accepted that, it there had been a fracture, it would have healed by the time he, and Dr Mungai prepared their reports. He did not agree that traction was the correct treatment for a fracture of the acetabulum. He did not extend his explanation to why the Plaintiff was admitted in hospital for 8 days. Therefore, the Court was presented with the evidence of five different doctors. Firstly, there was the initial treating doctors. They prepared medical notes from which a P3 was prepared. The P3 stated

clearly that there was a bilateral acetabulum fracture. That situation was confirmed by Dr Hanif. However, Dr Mungai and Dr Umara did not see the facture on the first x-ray. He did not see the fracture – or any sign of it on the second x-ray. Dr Umara confirmed his findings with his opinion that such a fracture is rare.

22. However, from his report it is very clear that Dr Mungai did not consider the P3. It is stated that the treatment notes did not mention a fracture. However, the fact that it is included in the P3 together with the record of treatment, namely a plaster cast, hospital admission for 8 days followed by release to a second hospital closer to her home (Coast General) together with the prescription of elbow crutches are all strong circumstantial evidence of a fracture. The evidence of Dr Wainaina was contradictory and inconsistent. She said she saw the P3 and Dr Mungai saw the P3 however, the Report prepared by Dr Mungai to support his employer's case makes no mention whatsoever of a P3. Dr Umara did not in his evidence demonstrate that he gave any consideration of the circumstances of the accident nor the severity of the injuries, in particular that the Plaintiff was thrown out of a speeding vehicle. Other passengers were not fortunate enough to survive.

23. The evidence of that injury was corroborated by the evidence of Dr Hanif. The doctors called by the Defendant were not able to explain the discrepancies and said only that their professional opinions varied from those of the treating doctors. The Court therefore had to choose which it found more plausible on a balance of probabilities. The Learned Trial Magistrate has recorded clearly which she found believable.

24. The Appellant's Written Submissions now argue that it is the initial treatment notes that are fundamental. However, the Defendant did not question any of the medical witnesses on how far their opinions were based on the initial treatment notes and how far on the P3. Even the Defence witnesses accepted that the treatment notes must be read with the P3. The P3 recorded the presence of a bilateral fracture (ie both sides) of the acetubelum.

25. It is without doubt that the Learned Trial Court was entitled to consider the evidence cumulatively and come to its own conclusions as to the veracity of each of the witnesses. In relation to Dr Umara's evidence the Learned Trail Magistrate recorded in her judgment that he could not recall if the patient he saw was an adult or not. He accepted that the fracture would have healed when he examined the Plaintiff and therefore his examination would not have been conclusive of whether an historical fracture had existed. The Plaintiff argued that the Learned Trial Court should evaluate Dr Umara's evidence in light of his evidence showing he could not differentiate between the components of the hip/pelvis in particular the fact that the acetabulum was the joint.

26. The Trial Court clearly preferred the evidence of the Plaintiff's witnesses, in particular on the question of a bi-lateral fracture of the acetabulum. The Appellant has not demonstrated to this Court that she was misdirected in doing so. The Appellant, in its Written Submissions in the Lower Court filed on 7th January 2016 accepts that the standard of proof is on a balance of probabilities.

27. Moving onto the question of proof of negligence, the Appellant argued at trial that there was no proof of negligence. The Learned Trial Magistrate heard evidence that the motor-vehicle in which the Plaintiff was a passenger was travelling at an excessive speed. The driver lost control. The vehicle rolled and several passengers were thrown out. The Plaintiff suffered injuries others were killed. The driver was charged with causing death by dangerous driving. The driver pleaded guilty. In the circumstances, it defies logic for the Appellant to argue that there was no negligence. There was de facto negligence to the point of criminality. The Judgment sets out that the evidence relating to the accident was not controverted by the Defence.

28. On the issue of quantum. In its Written Submissions, the Defence argued that the correct award was Kshs.120,000/= was sufficient and adequate for the injuries accepted by the Defendant as proved, namely the fracture of the finger. The authority relied upon was the case of ***Festus Ngei Munywoki -v- Mohamed H.P). Kanduara Transporters HCCC No 4800 of 1992 Nairobi*** . The Defendant did not attach a copy of that 20 year old authority to his Submissions. By contrast, the Appellant now puts forward, in his Written Submissions 12 authorities on quantum which were not placed before the Trial Court. In relation to each of those authorities the Defendant looks only at the injury.

29. However, in the Appellant's Submissions for the Appeal there are numerous authorities listed and summarised for the Court. The assessment of damages includes an assessment of all the circumstances and an exercise of discretion. An Appellate Court does not interfere with an assessment unless it is wrong in principle. Damages were awarded for the physical injury as well as pain and suffering. The facts are that the Driver of the vehicle was speeding and was not moved by the pleas of his fearful passengers. The vehicle rolled. Some were injured, others were killed. That suggests a violent force. Of those thrown out of the vehicle, the Plaintiff was injured and not killed. The particulars of pain and suffering the Plaintiff pleaded in the plaint were :

i. Bilateral acetabulum fracture. The Court was satisfied on a balance of probabilities that such injury was suffered

ii. Fracture of small finger of right hand – that was conceded

iii. Bruises around the iliac region – that was conceded

iv. Admitted in hospital for 8 days – the Defence denied that but the Court found for the Plaintiff

v. Both legs were put in traction – the Court believed the Plaintiff and that is what is recorded in the treatment notes on the file

vi. At the time of the Plaint the Plaintiff was using crutches – that was corroborated by Dr Hanif

vii. At that time (shortly after the accident) she could not use her right hand

viii. Will suffer osteoarthritis – the trial court was not convinced that was more that a possibility given that there was a full recovery.

30. The Learned Trial Magistrate incorporated into her award a discount for the consideration that although the injuries were severe, there was little possibility of permanent disability. In the circumstances, the Appellant has failed to demonstrate that the award was wrong in principle. Nor is it shown that the award is manifestly excessive. In relation to the authority of Mwavita Jonathan v Silvia Onunga [2017] eKLR where there was a single fracture (not bi-lateral) and dislocation of the knee with a sprain of the parts of the spine consistent with a whiplash injury, the Appellate Court reduced the award to KShs.400,000/=. In this case the Plaintiff was thrown out of the vehicle and therefore the violence of the initial injuries would be greater than a passenger who remained in the vehicle.

31. For those reasons the Appeal is dismissed with costs.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at KAKAMEGA and online on this the 8th day of February 2021

In the Presence of:

Court Assistant: Fred Owegi

No Appearance for the Appellant

Mr Kazungu for the Respondent

Dated 15th January 2021