



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 102 OF 2019

ZUMTEL COMMUNICATIONS LTD.....APPELLANT

VERSUS

DM (minor suing through the father and next friend of MMI.....RESPONDENT

(Being an appeal from the judgment of the Honourable Principle Magistrate, Hon Makila dated on 6th day of September, 2019 in the Chief Magistrate Court Civil Suit No 381 of 2018 at Kisii)

JUDGMENT

1. This appeal stems from the applicant's dissatisfaction with the judgment of the subordinate court dated 6th September 2019 where the trial magistrate found the appellant 100% liable for the accident and awarded the respondent Kshs 400,000/- and Kshs 29,200/- in regard to general and special damages respectively.

2. The respondent's case before the trial court involves a road traffic accident that occurred on 18th July 2017 along Kisii- Kilgoris road. The respondent alleged that the plaintiff was walking off the road at the county club area when the appellant's driver negligently drove Motor Vehicle Registration No. KCF 702H and lost control permitting the vehicle to veer off the road and hit the respondent minor. According to the plaintiff the respondent claims to have suffered deep cut wound of the frontal region, deep cut wound of both the right and left forearm and dislocation of the left knee and right shoulder.

3. The appellant denied driving the vehicle in a negligent manner and also denied the occurrence of the accident. It was pleaded in the alternative that in the event the accident occurred, then the same was as a result of the negligence of the minor or her next friend MMI who had no due regard to the minor.

4. The appellant has now filed a memorandum of appeal raising the following grounds of appeal:

1. The learned magistrate erred in law in making a finding of excessive damages against the defendant.

2. The learned magistrate erred in law and in fact in holding that the defendant was 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

3. The learned magistrate erred in law and in fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to General Damages of Kshs 400,000/- without concrete documentary evidence.

4. The learned trial magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs 29,200/- without concrete documentary evidence.

5. The learned magistrate erred in law and fact in failing to appreciate that there could be no liability without fault.

6. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs 429,200/-.

7. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.

8. The learned magistrate erred in law and in fact in failing to appreciate as follows: -

i. The plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.

9. The learned magistrate erred in law and in fact in entering judgment in favour of the plaintiff against the defendant inspite of the plaintiff's miserable failure to establish his case more especially on quantum.

10. The learned magistrate erred in law and in fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.

5. At the hearing of this appeal, I directed the parties to file written submissions and both parties have complied. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see **Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123**).

6. Pw1 adopted her witness statement dated 13th June 2018. She testified that the appellant's driver caused the accident while the child was in the company of his brother heading to school at around 8:00 a.m.

7. The appellant in its submissions have urged this court that it was incumbent on the respondent to the required standard and that the mere allegation of injuries will not shift the burden of proof. They cited **Stackpartk Industries v James Mbithi Nairobi Civil Appeal No 152 of 2003**; and **Muthuku Kiema v Kenya Cargo Haunting Service Ltd (1991), 2258** in support of its case.

8. The respondent on the issue of liability submitted that the police abstract produced indicate that it was the appellant's motor vehicle Reg No KCF 702 H that was involved in the accident. They advanced that the defendant did not testify to give its version of the events leading to the accident.

9. Having carefully considered the proceedings before the subordinate court, it is clear that the appellant on its part did not call any witness and closed their case without producing any evidence to controvert the evidence of the respondent. **Section 107 of the Evidence Act (Cap 80) Laws of Kenya** provides that *'whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'* In the case of **John Wainaina Kagwe v Hussein Dairy Ltd [2013] eKLR**, the Court of Appeal held as follows: -

"The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident...."

10. The appellant was therefore obligated to provide evidence that would have led the trial court to consider liability on the part of the respondent. However, with no evidence to controvert the respondent's case and Pw1's testimony, the trial magistrate cannot be faulted for finding the appellant 100% liable.

11. I now turn to consider the issue of quantum. The principles upon which this court should interfere with damages by a lower court were stated in the case of **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini vs A. M. M. Lubia & Another [1998] eKLR**:

"... It must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

12. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** 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."

13. The appellant has submitted that the amount awarded as general damages was inordinately high. It was argued that the injuries sustained were soft tissue injuries which were likely to heal. They proposed Kshs 90,000 as general damages and cited the cases of **Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others [2019] eKLR** and **Godwin Ileri v Franklin Gitonga [2018] eKLR**.

14. The respondent on the other hand urged this court to uphold the findings of the subordinate court on award of general damages. They further submitted that special damages were pleaded and proved as required.

15. The injuries sustained by the minor as pleaded have not been disputed. The plaintiff's injuries were also confirmed by the medical report of Dr. Morebu confirmed that the minor sustained knee and shoulder dislocation as well as other soft tissue injuries.

16. In this case the minor has suffered soft tissue injuries and dislocation of both the shoulder and knee with no fractures. In the circumstances, the award of Kshs 400,000 by the trial court was excessive.

17. In the end, I allow the appeal, and set aside the award of Kshs. 400,000.00/= by substituting it with Kshs. 250,000.00/=. Special damages were pleaded and proved. The appellant shall have the cost of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 16TH DAY OF JUNE, 2021.

R. E. OUGO

JUDGE

In the presence of:

Miss Kerubo For the Appellant

Respondent Absent

Ms Rael Court Assistant