



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 14 OF 2017**

**RAMA MAZIKO RAI.....1<sup>ST</sup> APPELLANT**

**ELEMECH ENGINEERING KENYA LTD.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**NAS (Suing thro' father and next Friend AS).....RESPONDENT**

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mwingi (Hon. Sambu (Esq) S.P.M. delivered on or about the 26<sup>th</sup> April, 2017 in Mwingi SPMCC No. 128 of 2015)

**JUDGEMENT**

1. The respondent minor NA, through his father and next friend AS by a plaint dated 3<sup>rd</sup> December 2015, filed on the even date a suit against the defendant, Rama Maziko Rai, Elemech Engineering Kenya Ltd and ASL Credit Limited, jointly and severally seeking for general damages for pain, suffering and loss of amenities, special damages, costs and interest.
2. The suit arose out of a traffic road accident which had occurred on or about the 2<sup>nd</sup> May 2015, along Mwingi – Garissa road within Mwingi township involving the respondent minor, a pedestrian at the material time and motor vehicle registration number KBQ 651P, jointly owned by the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant and driver by the 1<sup>st</sup> defendant respectively whereupon, the respondent minor as a consequence whereof had sustained bodily injuries.
3. The appellants' wholly blamed the 1<sup>st</sup> appellant for causing the accident and set out the particulars of the negligence attributable on the part of the 1<sup>st</sup> defendant under paragraph (6) there under and the particulars of injuries and special damages under paragraphs (8) and (9) thereof.
4. The respondent further under paragraph (10) of the filed plaint averred that the 1<sup>st</sup> defendant following the unfortunate accident was charged with the offence of careless driving contrary to section 47 of the Traffic Act Cap. 403 Laws of Kenya in Mwingi SPMCC No. 213 of 2015, where he was convicted on his own plea of guilty and fined Kshs.5,000/- and in default to serve three (3) months imprisonment.
5. The respondent, in compliance with Order 11 of the Civil Procedure Rules filed a verifying affidavit, witnesses' statements and list of documents to be relied upon to accompany the filed plaint.
6. The defendants, in a joint written statement of defence dated 6<sup>th</sup> January 2016, filed on the 7<sup>th</sup> January 2016 generally denied the respondent's claim in total and invited the respondent to strict proof thereof. The defendant under paragraph (7) of the filed joint written statements of defence averred that the alleged accident was solely caused and/or contributed by the respondent's minor. Negligence and had or his father and set out the particulars of negligence attributable hereunder.
7. After full hearing the trial court made decision to the effect that:

- **Liability 100% against appellants.**
- **General damages Kshs.450,000/-**
- **Special damages Kshs.38,722/-, plus**
- **Costs and interest.**

8. The appellant was aggrieved by the said decision and thus lodged instant appeal in which appellants set 3 grounds of appeal namely:

**(1) The learned magistrate erred in law and in fact by failing to ensure that its order directing the respondent/plaintiff to be re-examined by the defendants' doctor was complied with.**

**(2) The learned magistrate erred in law and in fact by failing to allow the defendants to re-open its case for the production of its intended medical report and the filing of its submissions to assist the court on arrive at a just and balanced finding on quantum of damages.**

**(3) The learned magistrate erred in law and in fact by granting the respondent a manifestly excessive award of general damages of Kshs.450,000/- contrary to the law and to current awards for similar injuries.**

9. The parties were directed to canvass appeal by way of submissions.

#### APPELLANTS' SUBMISSIONS:

10. The learned magistrate erred in law and in fact by failing to ensure that its order directing the plaintiff/respondent to be re-examined by the defendant's doctor was complied with.

11. Appellant submit that, on 19th October 2016 the defendants made an application under certificate of urgency seeking to re-open the defence case and for the plaintiff/respondent to be referred for re-examination to the defendants' doctor. The court delivered its ruling on 8th February 2017 directing that the plaintiff/respondent be re-examined and the defendants proposed plaintiff/respondent's medical report would be admitted to form part of the defendants' evidence.

12. The appellants/defendants submit that the same was not done despite the defendant/appellants making the necessary payments towards facilitating the plaintiff to see the doctor. Instead the defence case was on 12th April 2017 closed without regard to the outstanding court order to have the plaintiff/respondent re-examined by the defendants/appellants' doctor. They submit that the honourable magistrate erred by failing to compel the plaintiff to be re-examined in accordance with its orders of 8th February 2017 before making an order dismissing the defence case. The defendants/appellants were therefore condemned unheard.

13. The learned magistrate erred in law and in fact by failing to allow the defendant to re-open its case for the production of its intended second medical report and the filing of its submissions to assist the court arrive at a just and balanced finding on quantum of damages.

14. Due to the aforementioned circumstances, the defendants/appellants never got an opportunity to file their submissions or to put up a defence and therefore the plaintiff's/respondent's evidence remained uncontroverted. For this reason, the courts assessment on general damages was solely based on the plaintiff's/respondent's evidence which offends the defendants'/appellants' constitutional right to be heard.

15. The learned magistrate erred in law and in fact by granting the respondent/plaintiff a manifestly excessive award in general damages of Kshs.450,000/- contrary to the law and to current awards for similar injuries.

16. The appellants submit that it is dissatisfied with the quantum of damages awarded to the respondent/plaintiff. In its view, the award of general damages of Kshs.450,000/- is inordinately high and not commensurate with previous judicial awards for similar injuries and therefore should be disturbed by this court. The respondent/plaintiff according to Dr. Wagura's medical report is said to have sustained a blunt injury to the head that caused multiple bruises on the scalp and face, fracture of the occipital bone, boggy swelling on the right side of the head.

17. It is noteworthy that the said doctor makes no award for permanent incapacity. It is also noteworthy that he makes an observation that on examination, the minor's general condition was good and that his vital signs were normal. Further from the minor's guardian testimony, he said that the minor had been pulled out of school to attend court on the day of the hearing which means that he had resumed his normal activities. There were no future complications anticipated.

18. The appellants propose an award of Kshs.300,000/- is reasonable for the injuries sustained by the respondent/plaintiff.

19. In the case of *China Wuyi Co. Ltd vs Ann Akale Akore – Nakuru HCCA No. 193 of 2011*, the plaintiff herein sustained; cut wound occipital head 5cm long above posterior neck 5cm, and right ear lobe 5cm, bruises on the left knee joint area and non-displaced fracture occipital bone-fracture. General damages were assessed at Kshs.300,000/-. The decision was made on 21st April 2016.

20. In *Eldoret Civil Appeal No. 23 of 2015 – Wilfred Okemwa Mwamba vs Total Security Surveillance*, the plaintiff herein sustained; a crack skull fracture; and a fracture of the proximal phalanx of the middle finger. General damages were assessed at Kshs.300,000/-. The decision was made on 9th February 2016.

21. In conclusion, the appellants submit that they were never granted an opportunity to be heard on his defence. His case was closed prematurely as there was a court order directing the plaintiff/respondent to be re-examined by the defendant's/appellant's doctor which order was never complied with.

22. The second medical report was crucial in bringing objectivity to the nature of the plaintiff's/respondent's injury and the same would be a useful guide to the court in making its assessment on the general damages reasonable to compensate the plaintiff/respondent for his injuries.

23. In the absence of the said second medical report, the court only relied on the evidence of the plaintiff's/respondent's doctor which was uncontroverted leading to it making an excessive assessment of the general damages payable to the plaintiff/respondent.

#### RESPONDENT'S SUBMISSIONS:

24. In their memorandum of appeal dated 24/5/2017, the appellants' main complaint appears to be that the trial court did not afford them an opportunity to have the respondent subjected to a second medical examination and to adduce evidence of the examination before arriving at its judgment.

25. With due respect, the respondent submits that this line of argument cannot hold and it is not available to the appellants. Firstly, the order of the trial court that closed the appellants' case was made on 12/4/2017 when the appellants failed to attend court for the hearing of their defence and their case was closed for want of prosecution. If it were available for the appellants to challenge that order, the appeal herein was filed on 25/5/2017 by which time the 30 days window had lapsed.

26. Secondly, the order closing the appellants' case for want of prosecution after their failure to attend court was made pursuant to Order 12 of the Civil Procedure Rules that deals with hearing and consequences of non-attendance. Order 12 rule 2 empowers the court to proceed ex parte where only the plaintiff attends. Thirdly, the appeal herein is against the judgment of the trial court delivered on 26/4/2017. The appeal should therefore be limited to the judgment and not any orders made during the course of the trial. The appellants could have under Order 42 rule 27 of the Civil Procedure Rules sought to have the evidence they claim the trial court locked out admitted in this appeal but have opted not to and instead are seeking to have a retrial.

27. On 7/1/2016 the appellants did not turn up for a pre-trial conference and the case was certified ready for hearing.

28. On 18/5/2016, the case came up for hearing and the appellants through their advocate sought and were granted an adjournment on the ground that they needed to subject the respondent/plaintiff to a second medical examination.

29. On 13/7/2016 after hearing the respondent's/plaintiff's case to its conclusion, the trial court adjourned the case to enable the appellants subject the respondent/plaintiff to a second medical examination and to tender their defence.

30. By 31/8/2016 when the case came up for defence hearing, the respondent/plaintiff had not yet been subjected to a second medical examination and despite protests from the respondent/plaintiff, the court allowed an adjournment for the second medical examination to be carried out.

31. On 5/10/2016 the appellants and their advocate did not turn up for the hearing of the defence case and their case was marked closed for want of prosecution.

32. On 19/10/2016 the appellants filed an application seeking for an order for the re-opening of the defence case primarily on the ground of the need to have the respondent/plaintiff be subjected to a second medical examination. The application was heard on 2/11/2016 and in its ruling delivered on 8/2/2017 the trial court allowed the application and set the matter down for defence hearing on 8/3/2017.

33. On 8/3/2017 when the case came up for defence hearing, the appellants sought more time to have the respondent/plaintiff re-examined by their doctor and the trial court noted the lack of keenness by the appellants in having the respondent/plaintiff re-examined by their doctor but nonetheless granted the appellants one last chance.

34. On 12/4/2017 the appellants and their advocate failed to attend court for the hearing of their defence and the trial court ordered their case closed.

35. The trial court went on to deliver its judgment on 26/4/2017 in the presence of the advocate for the appellants who had filed an application dated 25/4/2017 seeking to yet again re-open their case. After the delivery of the judgment, the advocate withdrew the application and instead opted to file the appeal herein.

36. From the foregoing chronology of events before the trial court, it is evident that the appellants were given atleast 6 chances to have the respondent/plaintiff re-examined by their doctor and to tender evidence of the re-examination but failed to do so.

37. The requirement that a party be granted a chance to file their documents and be heard does not extend ad infinitum. At some point, litigation must come to an end. Parties should not be allowed to abuse the court process under the guise of being granted an opportunity to be heard. The conduct of the appellants before the trial court is simply put an abuse of the court process.

38. For the appellants to blame the trial court which had bent so far backwards to accommodate their lethargy is the height of indifference which this court should in their respective view not countenance. The case of William Koross (Legal personal representative of Elijah C.A. Koross) vs Hezekiah Kiptoo Komen & 4 Others [2015] eKLR is instructive on this point.

39. The appellants do not seem to challenge the trial court's finding on liability but are discontented with the award of general damages. They have in ground 3 of the memorandum of appeal sought to have this court interfere with that award.

40. An appellate court will normally not interfere with an award of damages merely on the grounds that it would probably have awarded a different sum. To warrant an interference of what is otherwise an exercise of discretion, it must be demonstrated that the trial court in awarding the damages either proceeded on a wrong principle of law or that the amount awarded is so inordinately high as to constitute an injustice. The Court of Appeal in *Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR* discusses this point in details.

41. In this case, the trial court in its decision took into account the injuries sustained by the respondent as stated in the medical report of Dr. Wagura which had been produced as Pexhibit 1. The report indicates that the respondent had sustained head injuries and also injuries to the left thigh. His observation was that the respondent exhibited symptoms indicative of brain damage.

42. The trial magistrate was guided by his assessment of damages by the cited decision of *Sila Tiren & Anor vs Solomon Ombati Odhiambo [2014] eKLR* in which the injuries were comparable to those sustained by the respondent.

43. In this regard, it cannot be said that the trial magistrate proceeded on a wrong principle of law or that the damages are inordinately high as to constitute an erroneous award.

44. The respondent's minor father and next friend (PW3) AS in his adduced evidence confirmed the fact that he is the father of the respondent's minor, who was involved in a road traffic accident and wholly relied on his recorded statement dated 3<sup>rd</sup> December 2015 as his evidence in chief. He further, relied on the list of documents same for the medical report which documents were all admitted in evidence in further corroboration of the respondent's minor case.

45. He on cross examination stated that his son, the respondent minor as at the time of the accident was aged four (4) years and was crossing the road at the time of the accident in company of other children aged between eight to ten years, after attending Madarassa classes. He on further cross examination conceded that he had no employee to escort the respondent's minor across the road to attend the Madarassa classes at the material time.

46. PW4 Alex Muimi Mwendwa and Benson Hamisi Mwangangi (PW5) called as independent witnesses in their respective testimonies wholly relied on their recorded statements as their evidence in chief. They all confirmed the occurrence of the subject motor vehicle accident which had hit the respondent's minor while cross the busy Mwingi – Garissa road after attending the Madarassa classes.

47. PW6 Stephen Kili the Court Executive Officer, in his evidence as the custodian of court documents in his evidence produced certified copies of the proceedings in Mwingi SRMCC No. 213 of 2015, confirming that the 1<sup>st</sup> appellant Rama Maziko Rai, following the accident was charged and convicted for careless driving and fined Kshs.5,000/- and in default to serve three (3) months imprisonment, which proceedings were produced and admitted as Pexh 2.

48. PW2 PC (W) Jackline Mugambi a traffic officer based at Mwingi Traffic Base at the time of her testimony produced in evidence a police abstract report issued in respect of an accident or victim NAS, following a reported accident which had occurred on 2<sup>nd</sup> May 2015, involving motor vehicle registration number KBQ 651P a pickup jointly owned by the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and driven by the 1<sup>st</sup> appellant, which accident occurred along Mwingi – Garissa road.

49. PW1 Dr. Lawrence Wagura, a medical practitioner in Mwingi town confirmed in his evidence examining the minor NAS on the 16<sup>th</sup> October 2015, following a traffic road accident which had occurred on 2<sup>nd</sup> May 2015. He had established during his physical examination that the respondent minor, following the reported accident had sustained severe bodily injuries and had relied on the respondent's initial treatment notes obtained from Mwingi District Hospital and the x-ray films obtained from Mutunga Diagnostic Services in Thika. He had observed during his physical examination that the respondent minor was hyperactive and had a pronounced right sided walking gait while walking upstairs visa viz downstairs. Some inner marks of the last thigh measuring 4cm x 6cm. it was his considered medical opinion that it was difficult to assess the degree of incapacitation at the time of examination. He produced a medical report compiled by himself on the respondent's minor sustained injuries and a receipt of Kshs.5,000/= admitted as Pex 1(a) and (b) respectively.

50. He on cross examination stated that he had examined the respondent minor, five (5) months after the occurrence of the reported accident. He conceded that he was unable to assess the degree of incapacitation as the respondent minor was still in the process of healing, requiring medical follow ups by a neurologist. He stated that the hyper activity of the respondent minor in his considered view was excessive suggesting that he had a brain damage.

51. He on further re-examination conceded that he could not make any assessment on the degree of incapacitation of the respondent minor which assessment could only be done by a neurologist expert. The appellants through their advocate on record intimated to the court that they intended to have the respondent minor re-examined by a doctor of their own choice and a report to be filed before court, and which report by a neurologist would form part of the defence.

52. From the record, although granted an opportunity to have the respondent minor re-examined by a doctor of their own choice, a neurologist failed to do so, and their case consequently closed for want of prosecution on 1<sup>st</sup> April, 2017.

#### ISSUES, ANALYSIS AND DETERMINATION:

53. After going through proceedings and the submissions on record, I find the issues are; **whether the appellant was unfairly shut out from presenting defence and examining the respondent via their doctor? Whether respondent case proved his case on liability and quantum on balance of probabilities? And what is the order of costs?**

54. The appellants in their memorandum of appeal dated 24/5/2017, their main complaint appears to be that the trial court did not afford them an opportunity to have the respondent subjected to a second medical examination and to adduce evidence of the examination before arriving at its judgment.

55. The court has perused record and noted, the order of the trial court that closed the appellants' case was made on 12/4/2017 when the appellants failed to attend court for the hearing of their defence and their case was closed for want of prosecution. If it were available for the appellants to challenge that order, the appeal herein was filed on 25/5/2017 by which time the 30 days window had lapsed.

56. Secondly, the order closing the appellants' case for want of prosecution after their failure to attend court was made pursuant to Order 12 of the Civil Procedure Rules that deals with hearing and consequences of non-attendance. Order 12 rule 2 empowers the court to proceed *ex parte* where only the plaintiff attends.
57. There is no automatic right of appeal against a decision to proceed *ex parte*. Rather, Order 12 rule 7 provides for setting aside of *ex parte* judgments as the primary recourse. An order made pursuant to Order 12 rule 7 is then appealable as of a right under Order 43 rule 1(h) of the Civil Procedure Rules.
58. If a party wishes to appeal against a decision to proceed *ex parte* without first applying to set aside the consequential judgment, then the party would have to seek leave of court under Order 43 rule 2 of the Civil Procedure Rules.
59. No such leave has been sought or obtained herein and any attempt to challenge the merits of the order of the trial court of 12/4/2017 by which the court proceeded to close the appellants' case *ex parte* through this appeal is incompetent.
60. Thirdly, the appeal herein is against the judgment of the trial court delivered on 26/4/2017. Thus the appeal will be limited to the judgment and not any orders made during the course of the trial. The appellants could have under Order 42 rule 27 of the Civil Procedure Rules sought to have the evidence they claim the trial court locked out admitted in this appeal but have opted not to and instead are seeking to have a retrial.
61. On 7/1/2016 the appellants did not turn up for a pre-trial conference and the case was certified ready for hearing.
62. On 18/5/2016, the case came up for hearing and the appellants through their advocate sought and were granted an adjournment on the ground that they needed to subject the respondent/plaintiff to a second medical examination.
63. On 13/7/2016 after hearing the respondent's/plaintiff's case to its conclusion, the trial court adjourned the case to enable the appellants subject the respondent/plaintiff to a second medical examination and to tender their defence.
64. By 31/8/2016 when the case came up for defence hearing, the respondent/plaintiff had not yet been subjected to a second medical examination and the court allowed an adjournment for the second medical examination to be carried out.
65. On 5/10/2016 the appellants and their advocate did not turn up for the hearing of the defence case and their case was marked closed for want of prosecution.
66. On 19/10/2016 the appellants filed an application seeking for an order for the re-opening of the defence case primarily on the ground of the need to have the respondent/plaintiff be subjected to a second medical examination. The application was heard on 2/11/2016 and in its ruling delivered on 8/2/2017 the trial court allowed the application and set the matter down for defence hearing on 8/3/2017.
67. On 8/3/2017 when the case came up for defence hearing, the appellants sought more time to have the respondent/plaintiff re-examined by their doctor and the trial court noted the lack of keenness by the appellants in having the respondent/plaintiff re-examined by their doctor but nonetheless granted the appellants one last chance.
68. On 12/4/2017 the appellants and their advocate failed to attend court for the hearing of their defence and the trial court ordered their case closed.
69. The trial court went on to deliver its judgment on 26/4/2017 in the presence of the advocate for the appellants who had filed an application dated 25/4/2017 seeking to yet again re-open their case. After the delivery of the judgment, the advocate withdrew the application and instead opted to file the appeal herein.
70. From the foregoing chronology of events before the trial court, it is evident that the appellants were given at least 6 chances to have the respondent/plaintiff re-examined by their doctor and to tender evidence of the re-examination but failed to do so.
71. The requirement that a party be granted a chance to file their documents and be heard does not extend *ad infinitum*. At some point, litigation must come to an end. Parties should not be allowed to abuse the court process under the guise of being granted an opportunity to be heard. The conduct of the appellants before the trial court was simply an abuse of the court process.
72. For the appellants to blame the trial court which had bent so far backwards to accommodate their lethargy is the height of indifference which the court can not countenance. See the case of ***William Koross (Legal personal representative of Elijah C.A. Koross) vs Hezekiah Kiptoo Komen & 4 Others [2015] eKLR***.
73. The appellants do not seem to challenge the trial court's finding on liability but are discontented with the award of general damages. They have in ground 3 of the memorandum of appeal sought to have this court interfere with that award.
74. An appellate court will normally not interfere with an award of damages merely on the grounds that it would probably have awarded a different sum. To warrant an interference of what is otherwise an exercise of discretion, it must be demonstrated that the trial court in awarding the damages either proceeded on a wrong principle of law or that the amount awarded is so inordinately high as to constitute an injustice. The Court of Appeal in ***Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR*** discusses this point in details.
75. In this case, the trial court in its decision took into account the injuries sustained by the respondent as stated in the medical report of Dr.

Wagura which had been produced as Pexhibit 1. The report indicates that the respondent had sustained head injuries and also injuries to the left thigh. His observation was that the respondent exhibited symptoms indicative of brain damage.

76. The trial magistrate was guided by his assessment of damages by the cited decision of ***Sila Tiren & Anor vs Solomon Ombati Odhiambo [2014] eKLR*** in which the injuries i.e. fractures of occipital bone of the skull and bruises on the face and the knee. The respondent herein sustained same kind of injuries thus were comparable to those sustained by the respondent i.e. one fracture of occipital region.

77. In above case the claimant award of Ksh. 560,000/- was reduced to Ksh. 360,000/-. That was in in 2014 6 years ago.

78. In this regard, it cannot be said that the trial magistrate proceeded on a wrong principle of law or that the damages are inordinately high as to constitute an erroneous award.

79. Thus this court finds no merit in appeal and makes the following orders;

*(i) Appeal is dismissed with costs to the respondent.*

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**