



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 55 OF 2019

BAHARI PARENTS ACADEMY.....APPELLANT

VERSUS

LBZ (Minor suing through his father and next friend) BNZ.....RESPONDENT

(Being an appeal from the Judgment delivered by Senior Resident Magistrate Honourable L. N. Juma in Kilifi SPMC, Civil Suit No. 38 of 2015 on 12th day of July 2019)

BETWEEN

LBZ (Minor suing through his father and next friend) BNZ..... PLAINTIFF

VERSUS

BAHARI PARENTS ACADEMY.....DEFENDANT

CORAM: Hon. Justice R. Nyakundi

C. B. Gor & Gor Advocates for the Appellant

Atancha Advocates for the respondent

JUDGMENT

The appellant **Bahari Parents Academy** has appealed against the Judgment and consequential orders made by **Hon. L. N. Juma (SRM)** in **SPMCC NO. 38 OF 2015 on 12.7.2019**. The Learned trial Magistrate had made the following findings:

- (a). Liability apportioned at 100% jointly and severally against the appellants.**
- (b). The plaintiff (respondent) is awarded Kshs.600,000/= as general damages.**
- (c). The plaintiff is awarded costs and interest of the suit.**

Being aggrieved with both orders liability and quantum, the appellant filed this Memorandum of Appeal dated 30.7.2019 modelled as follows:

- (1). That the Learned Senior Resident erred in holding the defendant wholly to blame for the accident on 21st October 2014 contrary to the evidence before him.**
- (2). That the Learned Senior Resident Magistrate erred in relying on the evidence of PW2 Eric Matuma since it is clear from his evidence that he was not the investigating officer, he had not carried out the investigations, had not visited the scene of accident after the accident had occurred, had not prepared the sketch plan of the accident scene and had also not produced in evidence the police file.**
- (3). That the Learned Senior Resident Magistrate ought not to have given any credence to Eric Matuma's evidence**

considering all the circumstances.

(4). That the Learned Senior Resident Magistrate erred in failing to hold that the plaintiff has failed to discharge his burden of proof when he failed to prove the negligence of the defendant's agent, servant, driver and employee in driving managing and controlling motor vehicle Registration No. KBC 322M.

(5). That the Learned Senior Resident Magistrate erred in not dismissing the plaintiff's suit with costs to the defendant considering the totality of the evidence before him on the aspect of liability.

(6). That the Learned Senior Resident Magistrate erred in awarding a sum of Kshs.600,000.00/= to the respondent (hereinafter referred to as the plaintiff) as general damages.

(7). That the said award of Kshs.600,000.00/= is, in the circumstances of this case is so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the plaintiff considering the injuries suffered by him and the opinion of Dr. Udayan Sheth, a consultant orthopedic surgeon that the plaintiff has fully recovered from his injuries with no deformity and no permanent incapacity.

(8). That the said award of Kshs.600,000.00/= is altogether disproportionate to the injuries sustained by the plaintiff and is not in keeping with other comparable awards made in respect of similar injuries.

(9). The Learned Senior Resident Magistrate failed to give any or any adequate or credible reasons of how he arrived at the figure of Kshs.600,000.00/= general damages which he awarded to the plaintiff on the basis of 100% liability.

(10). That the Learned Senior Resident Magistrate erred in failing:

(a). To appreciate the significance of the various facts that emerged from Dr. Udayan Sheth's medical report dated 12th October 2016.

(b). To consider or properly consider all the evidence before him and/or

(c). To make any or any proper findings on the aspect of quantum of damages on the evidence before him.

Background

On or about 21.10.2014 the respondent (minor) was lawfully walking as a pedestrian along Mtwapa – Jumba Road when the appellant's agent, servant, driver or employee negligently drove, managed or controlled the said motor vehicle registration number KBC 322M thereby permitting the vehicle to violently veer off the road and hit the minor occasioning him serious injuries.

In the plaint its averred that the minor sustained cut wound on the right lower limb and fracture of the right femur. All these was blamed on negligence of the appellant's agent, servant or employee as pleaded in paragraph 4 of the plaint.

The appellants joint statement of defence filed in court on 10.4.2015 admitted occurrence of an accident involving the minor and ownership of motor vehicle registration KBC 322M but denied that it was wholly to blame for the accident. In that denial, the appellant alleged that the accident was substantially contributed to by the negligence of the respondent as specifically stated in paragraph 4 of the statement of defence. These recital of pleadings formed the basis of the trial.

It is necessary at this stage to go into the evidence which was presented before the Learned trial Magistrate. The trial comprised of the evidence by **PW1 BNZ**, the mother to the injured minor testified that she learnt of the accident after its occurrence. In relation to the accident, the victim was taken to Coast General Hospital for treatment as supported with the treatment notes, and the P3 Form. She was also to follow up with the police who issued her with a police abstract. She prayed for compensation with regard to the injuries suffered in the accident.

PW2 – PC Marina of Mtwapa Police Station testified to confirm occurrence of an accident and identification of the minor, a pedestrian aged fourteen (14) years at the time to have suffered injuries. He produced the P3 Form and police abstract as exhibit 1 and 2 respectively. The subsequent Judgment of the trial court was based on these facts and evidence.

Analysis

In the instant appeal, the court's guidance on critical appeal questions are as to the specific principles in **Ephantus Murungi & another v Duncan Mwangi Wambugu {1982 – 88} 1KAR 278** where the court observed that:

“A first appellate court is entitled to reappraise the evidence but it would hesitate before reversing the decision of a trial Judge on his or her findings of fact and would only do so if (a) it appeared that he had failed to take account of a particular demeanor of a material witness was inconsistent with the evidence in the case generally.” (See also Odunga's Digest on Civil Law and Procedure Volume 7 at Page 5788 – 88 – 2 at paragraph E)

In the context of this appeal from the submissions of both counsels and the trial history I see the following issues as being pertinent to the determination of the entire appeal.

(1). Whether, the collision between the pedestrian minor and the appellant motor vehicle was solely caused by the appellant's agent, driver, servant or employee or was it substantially contributed to by the pedestrian (minor) if so what was the probable contribution between the pedestrian and the appellants, driver, agent, servant or employee.

(2). What was the nature of injuries suffered by the minor.

(3). Whether, the respondents evidence on injuries justified an award of Kshs.600,000.00/= for pain and suffering and loss of amenities.

As regards the issue on negligence its settled that the evidence to proof that any party is guilty of negligence has material bearing in common Law and statutory. What was expected of the trial court from the onset? In my view was to answer the question on vicarious liability. The Law as to the scope of vicarious liability of a master in tort for acts of a servant is well founded in as stated by **Sir Charles Newbold P in Muwonge v Attorney General of Uganda {1967} EA at Pg 17** as follows:

“An act may be done in the course of a servant’s employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently or criminality, or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable.”

It was further stated in **Canadian Pacific Railway v Lockhart {1942} ALL ER 464** cited with approval by the Court of Appeal in **Patel v Yafesi & Others 1972 EA 28 at Page 31** that:

“A master is liable even for acts which he has not authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them. In other words, a master is responsible not duly for what he authorizes a servant to do, but also the way in which he does it.”

The court in the instant appeal ruled that from the evidence rendered by the respondent but not controverted by the appellant negligence has been proved on a balance of probabilities. As regards that finding impliedly it gave the impression of a prima facie case on account of the witness statement and oral testimony of the respondent notwithstanding anything else contained in the Judgment of the Learned trial Magistrate. The following position is the Law on proof of negligence in Kenya. In **Kiema v Kenya Cargo Hauling Services {1991} KLR 464** the court held inter alia:

“That the onus of proof is on he who alleges and where negligence, is alleged, the position is that there is as yet no liability without fault and a plaintiff must prove some acts of negligence against the claim is based on negligence.”

In reviewing the applicable **Law Salmond and Heuston on the Law of Torts 9th Edition** noted:

“Negligence is a conduct, not state of mind – conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do.”

Until the primary tort of negligence in Law has been proved there could be no recovery of money paid voluntarily by the defendant. Indiscriminate application of the principles on causation and proximate cause in a traffic accident claim could operate inequitably and prejudicial to the adverse party.

The **Loctgelly Iron Coal Co. Ltd v Mcmillan Case {1934} A. C.** has greatly clarified and marshalled definition on negligence in the following terms:

“In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.”

I have had the advantage of appreciating Learned counsel expound the case for the appellant in his submissions on liability. The respondent counsel also joined in opposing the appeal that no sufficient evidence has been provided so that an appeal can lie on liability.

With respect as its noted from the pleadings and record all issues to the claim were up for proof by the respondent on a balance of probabilities. I think in relation to particulars supplied the Learned trial Magistrate ought to have made a definitive finding, in her Judgment on vicariously liability.

Secondly, the claim and value of the evidence by the respondent is substantially if not wholly hinged on the tort of negligence i.e. must be shown that the driver at the material time of the accident he was acting on the owner's behalf as his agent or servant or authorized employee. The fact that the Learned trial Magistrate's Judgment never alludes to this issues for purposes of establishing vicariously liability in my conceded view would be a misdirection manifest on the record.

Thirdly, the circumstances which the defendant's, driver, agent or servant can be held liable for negligence are also now well settled in the case of **Quamil v Holt {2009} EWCACIV 1625** is one of the authorities for this proposition where **Rix LJ** stated as follows:

“That was a case of a kind arises as is the case before us today, where a collision occurs between a driver and a pedestrian in circumstances where the pedestrian gave the driver very little time to stop or to avoid an accident. Those are always very troublesome cases and courts are required to look very carefully at the facts of those individual cases, to see whether there was some breach of duty on the part of the driver, such as travelling at an excessive speed for the circumstances, and of course, depending on the busyness of a man through care, particularly, with school children about and such things (possibly elderly pedestrians). That may be a speed which is well within the speed limit – even that may be an excessive speed in the circumstances, or the court is asked to consider whether the driver in those cases was keeping a proper look out especially if the driver should have known from the people on the streets or his familiarity with the locality, that children (possibly elderly pedestrians) would be about, and other such considerations such as elderly pedestrians.”

This is almost in the same principles by **Davis L. J.** in the **English Court of Appeal in Birch** (A protected party by his litigation **Friend John Birch v Paulson {2012} EWCA 487** in that case the court explained in this way:

“The Judge found, that by this time, the defendant would have been some 7 of 8 seconds away from the point at which in the event the collision occurred. As the Judge found, she was at this time travelling at around 40 miles an hour. The defendant, as the Judge found, did not at this stage, when she saw, the man standing on the edge of the kerb, reduce her speed further below around 40 miles per hour, nor did she steer her car towards the center of the road. When her car was no more than about 27 metres from the claimant, he moved out into the road it was far too late, as the Judge found, for her at that speed to react to the danger or to take emergency braking or steering action. Mr. Wilems stressed that it would have been very easy indeed for the defendant, as she approached this man on the kerb, either to have taken her foot off the accelerator, or to have steered towards the centre of the road or both. No doubt, it would have been relatively easy but as the Judge rightly said the right test is not a question of the counsel of perfection using hindsight of course it is not, and drivers are not required to give absolute guarantees of safety towards pedestrians. The yardstick is by reference for reasonable case. I accept that some cautious drivers might well have eased their foot off the accelerator or as they came closer to the claimant, but I do not consider that it would have been negligence not to do so....”

The claimant in this case, approached the court vide a plaint for recovery of both general and special damages arising out of the accident. In the particulars of negligence he wholly blamed the appellant’s driver, agent or servant for loss and damage. On the other hand, the appellant pleaded contributory negligence in terms of paragraph 4 of the statement of defence.

The Learned trial Magistrate does not appear to have made a decisive finding either way as to who between the claimant and the appellant driver or agent facilitated occurrence of the accident. The respondent evidence on oath alluded to circumstances on the collision but can best be described as ‘hearsay’ because he was neither an eye witness nor did he visit the scene immediately the incident took place.

There was no prima facie evidence that he could attribute acts of negligence favorably or unfavorably as between the claimant and the offending driver of motor vehicle registration KBC 322M, it also evident from the testimony of PW2, **PC Eric Maruna** did not turn on any specific finding from the investigations carried out by the base commander Mtwapa Police Station. For reasons not reflected in the record, the Learned trial Magistrate never laid a basis as to the competence of PW2 to testify in the ensuring trial. Why do I say so, its apparent PW2 was never the investigating officer nor did he visit the scene to draw sketch plan around the center line of the road to put the point of impact in perspective for the court. Therefore, the truth on falsify of the evidence adduced by PW1 and PW2 on the occurrence of the accident and proximate cause was of no relevance to the trial court in the facts it contained and assertion made on oath. The basis of their evidence to that extent was inadmissible, **(See Teper v R {1952} AC 378)**.

Applying these strands of evidence at hand all of it from PW1 and PW2 on causation is of no probative value because it was obtained directly in breach of the Law **(See Section 62,63 of the Evidence Act Cap 80 of the Laws of Kenya)**. Additionally, the aim of a trial court is try facts where the fair and just application of both the procedural and substantive Law as provided for in Section 1A of the Civil Procedure Act and Article 159 (2) (D) of the Constitution culminates in a just outcome.

While I accept that we are in an adversarial system of litigation, judges are not fence seaters in the context of adjudicating cases under Article 50 (1) of the Constitution, on the core values of judicial independence and impartiality. Indeed in the new dispensation where cases are dealt within the conceptual litmus test on overriding objective and substantive justice; there is a paradigm shift that Judges must manage, control and shape litigation in terms of issues to render justice fairly and efficiently. Whatever the reason from material assessment made of the trial court record a number of issues were left untouched. The first part of it being the clear of provisions of Section 47 on reckless driving and Section 49 on driving without due care and attention under the Traffic Act Cap 403 of the Laws of Kenya. It is necessary to ascertain the manner of driving of the defendants driver in a civil proceedings set up. It need not be always subject to indictment of a traffic offence for it to apply.

In my view, this case was most unsatisfactorily managed under Order 11 of the Civil Procedure Rules on pretrial conference, tried, prosecuted and defended that it resulted in a mistrial and failure of justice at the end of it all.

I believe one of the hallmarks of a Judge in adjudication of disputes is to invoke the jurisdiction of the court that exercises control over the legal process that renders the adjudicatory process to avoid legal gamesmanship and making obtaining a just outcome the goal.

I am of the considered view that it is proper for courts to give the fullest possible expression to all constitutional rights having regard to the broader principle on substantive justice in Article 159 (2) (D) to the factual context of the dispute. Related to this is the recognition of competing rights scenario existence which has found itself to the court. In the instant case, the respondent engaged the court to assert his right to proof negligence against the appellant. With regard to this element the hearsay evidence alluded to be admitted by the trial court mischaracterized it as such. Whatever the case procedural justice is the ideal fairness of the game of adjudication of different cases in different processes that resolves the disputes.

An important aspect of this case has to do with the procedural justice on what evidence to admit and exclude to resolve the conflict and

divide the burdens. The well-established evidence rules and regulations and the criteria of admission are well known, but within the trial there was a misdirection to intercept the metrics and rule against hearsay evidence.

One of the points of Law apparent on the face of the record, is that the Learned trial Magistrate first evaluated hearsay evidence to support the findings on liability. This was a wrong approach; as much as the burden of proof is on the plaintiff throughout the trial of a civil case and is not discharged merely by accepting his or her evidence. The courts have a role too to play in the administration of justice.

In the confusion that must have prevailed and in this connection, I refer to Section 78 (1) of the Civil Procedure Act which reads:

“Subject to such conditions and limitations as may be presented an appellate court shall have power:

- (a). To determine case finally.**
- (b). To remand a case.**
- (c). To frame issues and refer them for trial.**
- (d). To take additional evidence it to require the evidence to be taken.**
- (e). To order a new trial.**

I am satisfied on the evidence and the final Judgment delivered by the trial court that there are such wide ranging issues that the appellant cannot just be left scot-free by allowing this appeal to signify that there was no negligence on the part of the driver of the offending motor vehicle. The occurrence of the accident is not denied nor the injuries suffered by the respondent. What I agree with the appellant counsel are the circumstances under which the trial Magistrate admitted hearsay evidence as a basis of the findings on liability. That I have said already was an application of wrong principles of Law.

In this case, I have no doubt the power of this court as stated in Section 78 (1) of the Act has to apply in remedying the situation. This proper procedure is to be found in the case of **Ladd v Marshall 1954 1 WLR 489** and **K. Tar Mohammed v Lakhani 1958 EA 567** where the court stated that:

“To justify the reception of fresh evidence, or a new trial, three conditions must be fulfilled; first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Secondly, the evidence must be such that if given, it would probably have been an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible. Though it need not be incontrovertible.”

It follows from the foregoing this appeal in substance otherwise succeeds with the following orders in place:

- (1). That the trial court Judgment dated 12.7.2019 be and is hereby set aside together with the decree.**
- (2). That the case be remanded with an order that a retrial be initiated before another presiding Magistrate besides Hon. L. N. Juma to proceede with expediency within this context:**
 - (i). Hear and determine the matter bearing the following issues in mind;**
 - (a). Summons be issued to procure attendance of the investigating officer at Mtwapa Police Station reference accident report OB/4/22/10/2014 to produce the investigation report and any documentary evidence to that effect.**
 - (b). That the issue of contributory negligence be one of the decisive factor as between the pedestrian and the driver of motor vehicle KBC 322M.**
 - (c). Costs of this appeal be borne equally by both the appellant and respondent, although it has to abide the outcome of the new trial.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL,2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atiang holding brief for C. B. Gor for the appellatant
2. Mr. Ogeto holding brief for Areba for the respondent