



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CIVIL APPEAL NO. 47 OF 2016**

**CALEB WAMBUGU MURAGE.....APPELLANT**

**VERSUS**

**SM (Minor suing through Mother and the next friend RWK...RESPONDENT**

**JUDGMENT**

1. The Respondent (minor) was injured in a road traffic accident on the 2/3/2012 along Kerugoya-Kutus road when the Appellants Motor Vehicle Registration No. KAY 224Z veered off the road hitting her. She sustained injuries for which the trial Magistrate awarded Kshs 350,000/- as general damages and Kshs 53,530/= in special damages. The driver and owner of the vehicle were found to be fully liable for the accident.

2. Being dissatisfied with both liability and quantum, the appellant brought this appeal seeking that the trial court's Judgment be set aside. The grounds for the appeal are stated as:

- 1. THAT the Learned Magistrate erred in both law and in fact when he held that the defendant was 100% liable to settle the Plaintiff's claim herein.**
- 2. THAT the Learned Magistrate erred in both law and in fact when he awarded a sum of Kshs 350,000/- as general damages which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of damages.**
- 3. THAT the Learned Magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the defendant on record and the authorities annexed therein in support of the defendant's case.**
- 4. THAT the Learned Magistrate erred in fact and in law by failing to follow rules of precedents in awarding general damages.**
- 5. THAT the Learned Magistrate erred both in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the Respondent as against the Appellant.**
- 6. THAT the Learned Magistrate erred both in law and fact in failing to find that the Respondent's pleadings and evidence tendered thereof were incapable of sustaining any award of damages.**

Both the Appellant and Respondent filed written submissions to urge the appeal.

3. This being the first appellate court, my duty is to reexamine and re analyse the entire evidence adduced before the trial court and come up with own findings and conclusion – Selle –v- Associated Motor Boat Co (1968) EA 123 and Kiruga –v-Kiruga & Another (1988) KLR 348.

4. The minor who was hit and injured by the Appellant's vehicle was nine (9) years old at time of the accident, who with other minors were walking home from school off the said road. The minor testified before the trial court. He was then twelve (12) years old. His testimony was that while walking off the said road. The minor testified before the trial court. He was then twelve (12) years old. Her testimony was that while walking off the road going back from school, a vehicle coming from Kutus direction heading to Kerugoya veered off the road and hit him. It was his testimony that he was not trying to cross the road.

5. The driver of the vehicle was charged in Traffic Case No. 182/2012 at the Senior Principal Magistrates Court at Kerugoya with the offence of careless driving. He pleaded guilty and was fined Kshs Five Thousand Shillings, in default to serve three months' imprisonment. The proceedings were produced before the trial court.

6. In his defence, the driver of the vehicle testified that he was trying to evade a pothole on the road when he knocked down the minor. It is upon the above evidence that the trial court 100% liable.

7. The Appellant by his submissions states that the Plaintiff's case was not proved as the Police Investigating Officer was not summoned to produce a sketch plan of the accident, and that the minor ought to have been held to have contributed to the accident as he was unsupervised on a busy road, nor was it stated that he was intelligent and responsible enough to cross the road.

8. I am persuaded by the holding of the Court of Appeal in Bashir Butt –vs- Uwais Ahmed Khan (1982 -88) I KAR (1981) KLR 349 that'

**“It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender years. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness ----- A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test would be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attained to the child -----“**

9. The court proceeded to render that each case must depend on its peculiar circumstances; and that the practice of Civil courts ought to be normally a person under the age of 10 years cannot be guilty of contributory negligence.

10. Law of Torts 9<sup>th</sup> Edition Salmond Heustone noted that,

**“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 which 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.”**

11. Negligence involves careless and heedless omission or commission that connotes the concept of duty, breach and damage suffered by the person to whom the duty was owing.

12. The Appellant's driver pleaded guilty to the offence of careless driving.

In Civil courts, it is necessary to ascertain the manner of driving of the Appellants' driver. It need not be always subject to indictment of a traffic offence for the provisions of Section 47 and 49 of the Traffic Act.

13. A Civil Court will look at the manner the offence was committed.

In this particular case, the appellant's driver stated to have hit pot holes that caused his vehicle to veer off the road when it hit the minor. Being a driver, he ought to have known that hitting a pot hole may cause the vehicle to veer off the road and hit pedestrians. He ought to have taken greater care and drive in a manner that he could control the vehicle to avoid veering off the road in view of the potholes on the said road.

14. The minor was rightfully walking off the road. In the circumstances there would be no justification whatsoever to attribute contributory negligence on the minor who was innocently and rightfully walking off the road when by the driver's carelessness, he was hit and sustained injuries. The driver failed to exercise the duty of care to other users of the road and pedestrian walkway. He called no evidence to show that the minor was trying to cross the road. His evidence was that

**“----- When I reached JMB I tried to swerve to avoid hitting pot hole. There were children on the left trying to cross. In the process I hit one of them by the left side of my car. I drove towards the left side. I swerved to the right side.”** The narrative above says it all, the drive was fully to blame.

15. I find no merit on the ground that the trial court erred in both law and fact when he held the Defendant (Appellant) 100% to blame. I dismiss that ground of appeal.

16. On quantum of damages, it is trite that assessment of damages is essentially an exercise of discretion, and the grounds on which an Appellate court will interfere with the manner in which a trial court assessed damages relates to issues of an error of principle – Asal –v- Muge & Another (2001) EKLR 202.

17. The court while re-assessing damages ought to look at the time the award was given, not the present time. The relevant period in this appeal is the date of the trial court's Judgment, the 16/9/2016.

The injuries sustained by the minor are shown in the medical report, produced as exhibit as:

- **Massive haematoma on the head.**
- **Multiple bruises on fore head and on right side of head.**

- **Fractured rib (confirmed by X-ray).**
- **Bruises on both elbows, both knees and on right hip.**

18. In his Judgment, the trial Magistrate considered authorities cited by both parties, and stated so, in their written submissions. He analysed the case Sokomo Saw Mills Ltd –v- Grace Nduta Ndungu (2006) and NBI Civil Appeal No. 21 of 2005 Kakuza Ltd –vs- Nancy Nyambura Mubaa (2010) @ KLR, cited by the appellant. The trial court found them to have been not comparable to the injuries sustained by the minor. The trial court found the case Civil Appeal 96/11 Jaldessa Diba T/A Dikus Transporters v- Joseph Mbithi Isike to have been persuasive and proceed to award Kshs 350,000/- to the Respondent.

19. I therefore find that the Appellant’s accusation that the trial Magistrate erred in law and fact in failing to consider and or adopt the written submissions and authorities annexed thereto to be misplaced.

The injuries sustained by the minor were serious. The Appellant in his submissions before the trial court proposed Kshs 80,000/- while the Respondent proposed Kshs 700,000/-.

20. I have considered comparable decisions during the relevant period, 2016. China Wu Yi Company -vs- Andrea Githinji Gitonga (2016 eKLR, Tajdin Shamshudin Tejpart & Others MSA HCCC NO. 89 of 1999, James Kimondiu –v- Ann Wahome & Another NBI HCCC NO. 472/1991 and Otieno Musa Ochieng –v- Bwana Mkuu Mohamed MSA HCCC NO. 958/1991.

21. In the above cases, the Plaintiffs had sustained fractures/dislocations of the clavicle and ribs. General damages ranged between Kshs 250,000/- to Kshs 340,000/-. The court awarded general damages of Kshs 300,000/- for pain and suffering.

22. In the China Wu Yi case (Supra) the court declined to disturb an award of Kshs 300,000/- when the Appellant failed to persuade the court of any relevant factor that the trial court failed to take into account. In the case Agility Logistics Ltd –v- John Wambua Musau & another (2017) eKLR, where the injuries are very comparable to the Respondents, the court awarded Kshs 500,000/- to the 1<sup>st</sup> Respondent in 2017.

23. For the Court to disturb the trial court’s award, it must be shown, as rendered in Butt –vs- Khan Civil Appeal No. 40 of 1997 that the Court’s award is so inordinately high or low as to represent an entirely erroneous estimate, and that the court proceeded on wrong principles or that it misapprehended the evidence in some material respect, see also Kemfrom Africa Ltd & Another –v- A.M. Lubia & Another (1982-88) KLA.

24. Looking at the injuries sustained by the Respondent, it is not true that they were merely soft tissue in nature as submitted by the Appellant. The X-rays taken at the Kerugoya District Hospital reveal a fracture of the 5th rib, a fact stated in the medical report of Dr. Gathuku M. James from the said hospital.

25. I have perused and considered, the decisions cited by the Appellant, Sokoro Saw Mills Ltd (supra) and Kakuza Ltd (supra). They are both not relevant to the injuries sustained. The sum of Kshs 25,000/- and Kshs 80,000/- respectfully awarded to the Plaintiffs then, they are not only old – 2006 and 2010 respectfully but injuries not comparable. The awards cannot and are not relevant to the matter under review.

26. In the case cited by the appellant, Kakuza Limited –v- Nancy Nyambura Mubag (2010) eKLR, the injuries sustained by the Appellant therein are not stated, only stated as soft tissue injuries for which a sum of Kshs 25,000/- in general damages.

The authority is of no help in the present circumstances.

27. The upshot is that the appeal lacks merit on both liability and quantum.

The appeal is dismissed with costs to the Respondent.

28. Orders accordingly.

**Dated, Signed and Delivered at Kerugoya this 8<sup>th</sup> day of December 2020.**

**J. N. MULWA**

**JUDGE**