REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL APPEAL 38 OF 2017

GEOFFREY KAMUKI.....1ST APPELLANT

ROBINSON KABIARO.....2ND APPELLANT

VERSUS

RKN (Minor suing through her late father and next friend ZKN.....RESPONDENT

(Being an appeal arising from the judgment of the Hon. M. Wambani (Chief Magistrate) dated and delivered on 21st February, 2017 in ELDORET CMCC NO. 146 OF 2014)

J U D G M E N T

1. The respondent herein RKN filed Eldoret CMCC 146 of 2014 in which she sued the appellants Geoffrey Kamuki and Robinson Kabiaro for both General and Special Damages with respect to a Road Traffic Accident that occurred on 6th January 2014. It was her claim that the 1st appellant, an employee/agent of 2nd appellant, the owner of motor vehicle registration number KBR 372 Isuzu Canter drove the same so negligently that it hit the plaintiff, a minor causing her damage.

2. Liability was compromised at 80%:20% in favour of the plaintiff.

3. The learned trial magistrate in determining the General Damages, considered the injuries that were sustained by the plaintiff viz;

a) Blunt trauma to the scalp, which was tender with bruises.

b) Blunt trauma to the periorbital region, which was tender.

c) Blunt trauma to the right eye, which was tender and could not see clearly.

d) Blunt trauma to the chest, which was tender.

e) The right forehead was swollen and tender.

f) She sustained a dislocation of the wrist joint.

g) She sustained fractures of the right radius and ulna.

h) Blunt trauma to the right leg, which was tender.

4. The learned trial magistrate made an award of Kshs. 600,000/= General Damages, Kshs. 100,000/= future medical expenses, Kshs. 33, 583/= Special Damages less contribution of 20%, it all came to Kshs. 586,866/40. For these awards she relied on the following cases ;

i) **Muraya vs Mwangi [2004] eKLR**

ii) **Caleb Omunga Namboya vs Strabag Bau Lima Ltd HCCC No. 2660 of 1994**

iii) **Pamela A. Odero vs Victor Otiato HCCC No. 175 of 1994**

5. The appellant was aggrieved and filed this appeal via Memorandum of Appeal dated 20th March 2017 on the grounds:-

1. THAT the learned trial magistrate misdirected herself by failing to apply or applying wrong principles on the assessment of quantum on damages awardable to the respondents thus awarding damages which were manifestly excessive in the circumstances.

2. THAT the learned trial magistrate erred in law and in fact by failing to consider the evidence of the appellants.

3. THAT the learned trial magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous judgment.

4. THAT the learned trial magistrate erred in law and fact in failing to consider relevant authorities and submissions by the appellants.

5. THAT the judgment of the learned trial magistrate is against the law and weight on the evidence on record.

6. THAT the judgment of the learned magistrate is in the circumstances unfair and unjust.

6. In their submissions for the appellant Kamau & Lagat Advocates, first explained this court's jurisdiction as the 1st appellate court. Relying on the persuasive authority of ***Justice C.W Githua*** in **Suluenta Kennedy Sita &Another vs Jeremiah Ruto (Suing as the legal representative of the Estate of Joyce Jepkemboi [2017] eKLR** they submitted that it was the dusty oft this court to re evaluate the evidence presented before the subordinate court and to draw its own conclusions, always keeping in mind that it never saw or heard the witnesses.

7. Counsel relying on **Eastern Produce (K) Ltd (Savani Estate) vs Gilbert Muhunzi Makotsi [2013] eKLR**, drew the court's attention to the general rule that an appellate court ought not to interfere with the findings or decisions of the lower court unless it was demonstrated that in reaching its decision that court had made an error in law, or taken into account irrelevant considerations or ignored relevant considerations or based its decision on no evidence or on a misapprehension of the evidence. Let me point out that this was also the position taken by the counsel for the respondents.

8. It was further argued for the appellant that no amount of money could restore the respondent to her original physical frame hence in determining general damages the court was bound by well settled principles, that general damages ought not to be excessive but within the limits of decided cases. The court was referred to **Joseph Musee Mua v Julius Mbogo Mugi & 3 Others [2013] eKLR**, **Ramadhan Kamora Dhadho vs John Kariuki & Another Civil Appeal No. 27 of 2015 [2017] eKLR** and **Philip Musyoka Mutua vs Leonard Kyalo Mutisya [2018] eKLR** where **Edward Muriithi J** held;

"In view of the above principle, it is this court's opinion that since money cannot renew a physical frame that has been shattered or battered the respondent is only entitled to what in the circumstances, is fair compensation on the principle that comparable injuries should be compensated by comparable awards. The court finds that an award of Kshs 300,000/= would be adequate compensation for the injuries sustained, and taking into account the inflationary trends."

9. It was argued for the appellant that the respondent had sustained relatively minor injuries and that the award for general damages of Ksh 600,000 was on the higher side. It was urged on behalf of the appellant that the award be set aside and be substituted with an award of Ksh 250,000. The appellant quoted *Majanja J* in **Paul Karimi Kithinji v Joseph Mutai Kireria [2018] eKLR** where the judge stated:

"the respondent was admitted to Meru General Hospital for 3 days for minor lacerations on the face and the segmental fracture of the right ulna. The fracture was managed by plaster of paris. At the time of examination, the respondent was complaining of pain. He was of the opinion that the respondent would fully recover without any disability and the pains would subside.

Taking the nature of the relatively minor injuries into account and decisions cited, I find and hold that the sum of Kshs. 250,000/- was excessive and I reduce it to Kshs. 150,000/=."

10. Regarding the award for future medical expenses, counsel for the appellant further urged the court to find that this was unjustified and set it aside. This was based on two reasons; firstly, that it was not pleaded and proved and secondly, that the medical evidence did not support it. For this the court was referred to **Susan Kipturu vs Susan Chepkatam Limarus [2019] eKLR** where ***Justice Edward M. Muriithi*** held**;**

"I respectfully agree with the Court of Appeal decision in Kenya Bus Service Limited vs Gituma [2004] EA 91, *which is cited in* Edwin Otieno Japaso vs. Easy Coach Bus Company Ltd (2016) eKLR (Majanja J) that, future medical costs are in the nature of special damages "a fact that must be pleaded if evidence thereof is to be led and the Court is to make an award in respect thereof."

In that case, the judge had also pointed out that since the plaintiff had not pleaded the operation charges and there was no evidence by the doctor who made the assessment, the award that was made was without legal basis and was set aside.

11. The appellant also relied on **Equity Bank Limited vs Gerald Wang'ombe Thuni [2015] eKLR** where the court stated that the trite rule

that special damages must not only be specifically pleaded, but also specifically and proved; and could ***not be awarded on the basis of speculation and conjecture.***

12. For the respondent Keter Nyolei Advocates argued through their submissions that the awarded damages were proper and there was no room for interference. Having cited the relevant principles under which an appellate court can interfere with the award of the lower court as stated in **Kemfro Africa Limited t/a Meru Express Limited vs A M Lubia & Another [1985] eKLR**, the respondent argued the learned trial magistrate had not erred in any way, but had arrived at the judgment after taking into consideration all the relevant factors, the authorities cited by counsel on both sides, the passage of time and inflationary trends.

13. It was submitted for the respondent that the learned trial magistrate had considered the cited case of **Ismael Mohammed Ahamed vs Edwin Odhiambo MSA HCCA 122 of 2011** the respondent had suffered comparable soft tissue injuries to the respondent herein. The trial magistrate made an award of Kshs. 700,000/= which was upheld on appeal. Hence, her estimate of Kshs. 600,000/= could not be faulted.

14. Addressing the issue of the award of future medical expenses, it was submitted that the two grounds put forward by the appellant were not tenable. First because the plaintiff had pleaded the same at paragraph 10 of the plaint. That even though the plaintiff/respondent had not pleaded a specific sum, the plaintiff/respondent had put the appellant respondent on notice that she would be leading evidence on the claim for future medical expenses. The court was referred to the court of appeal decision in **Tracom Limited & Another vs Hassan Mohammed Adan [2009] eKLR.** In that case the plaintiff had set his claim for special damages and future medical expenses thus:

> **"And at paragraph 6 of the same plaint, the respondent went on and stated:-**
>
> **"PARTICULARS OF SPECIAL DAMAGE**
>
> **(a) Medical Report Kshs. 1,500/=**
>
> **(b) Police Abstract Kshs. 100/=**
>
> **(c) Full particulars to be supplied at the hearing hereof.**
>
> **(d) Cost of future medical expenses to be ascertained after professional consultation with his doctors.**
>
> **And the Plaintiff claims damages."**

The trial court proceeded to make awards, which when challenged on similar grounds the Court of Appeal had this to say:

> **"Thus in our view, the respondent clearly pleaded that he would claim future medical expenses and he stated that the quantum of that claim would be availed after it was ascertained. The purposes of requiring certain claims to be pleaded is to forewarn the defendant that there are other claims to be made which may not be necessary and immediate consequence of the wrongful act as those claims are in respect of losses which the law does contemplate as arising naturally from the infringement of the plaintiff's legal right."**

15. With regard to the special damages, it was urged that the same were pleaded and proved. Counsel urged that court to uphold the decision of the trial magistrate.

16. The issue then is whether there is ground to upset the decision of the trial magistrate. I must answer the questions whether there was error in the exercise of her discretion, whether the future medical expenses were pleaded, and proved and what reliefs to give.

17. The record shows that plaintiff's father testified that at the material time she was aged eight (8) years old. When he received the call that his daughter had been in an accident he went to the Webuye District hospital where she had been taken. He found that she had sustained severe injuries and was unconscious. He took her to the Moi Teaching and Referral Hospital where she was admitted from 9th January to 30th January 2014. He produced the discharge summary from Moi Teaching and Referral hospital. He told the court that the child's eye had been okay before the accident but after wards 'it was rolling freely'. The court observed that she appeared to have a squint eye' and 'her head is not proper'. No other oral evidence was given as parties agreed on liability.

18. The plaintiff/respondent produced medical reports that were not challenged by the defendant/appellant in any way.

The medical report by Dr. S. I Aluda dated 11th February, 2014 indicated that the plaintiff was seven (7) years old girl. That on examination he ascertained that the child sustained the following: there was; tenderness on the scalp, face, right eye, chest, right forearm, and right leg, fractures of the right radius and ulna at the wrist joint, and pains in the injured areas. His opinion was that,

> **"The injuries sustained were very severe and are continuing to heal with the use of analgesics. The fractures are continuing to heal and a proper prognosis will be made at a later stage."**

19. In the P3 filled a week earlier the examining doctor found that the plaintiff was unable to see from the right eye and was unable to open the affected eye. He noted dislocation of left wrist and abnormal gait of the right leg. He assessed the degree of injury as grievous harm.

20. The discharge summary dated 30th January 2014 indicated among other things on Discharge Diagnosis was that there was ***'mal-union of the right distal radius and ulna Salter Harris II'***. In the clinical and management summary, it was indicated that ***'patient will require osteotomy later'***. The Discharge care plan included '…to monitor and plan later for osteotomy'.

21. There is no doubt on the face of it that this child sustained serious injuries. Neither doctor testified so I had to do some self-help to find out what some of the terms they used meant. Looking it up on Google I found that ***malunion*** means:

> **After a bone is broken (fractured), the body will start the healing process. If the two ends of the broken bone are not lined up properly, the bone can heal with a deformity called a malunion. A malunion fracture occurs when a large space between the displaced ends of the bone have been filled in by new bone. With fractures in the hand, wrist and forearm, a certain amount of angulation, or bend, occurs when the bone heals. Doctors determine if the position of a fracture will allow for functional use of the hand or arm after it heals. In many cases, when a fracture heals in a position that interferes with the use of the involved limb, surgery can be performed to correct it** (*https://www.uofmhealth.org/conditionstreatments/cmc/fracture/malunion (30/11/2020 at 14:24)*

22. I also found that the term ***osteotomy*** means some form of surgery:

> **An osteotomy is any surgery that cuts and reshapes your bones. You may need this type of procedure to repair a damaged joint. It's also used to shorten or lengthen a deformed bone that doesn't line up with a joint like it should.** *https://www.webmd.com/osteoarthritis/what-is-osteotomy(30/11/2020 at 14:31)*

23. The discharge summary showed that the fracture to the child's hand on the wrist healed with a deformity. This deformity would require surgery to correct. The P3 also indicated a problem with the child's eye. The father testified that the eye had developed problems after the accident. The trial magistrate also made her observations. I am satisfied from the uncontroverted evidence given by the child's father, and the medical reports and my search from the internet that the child herein suffered serious injuries, though healing well, would take time, and require surgery to correct.

24. Did the plaintiff plead future medical expenses? I noted that at **paragraph 10** of the plaint stated:

> **"The plaintiff claims both special and general and future medical expenses against the defendant."**

25. Clearly therefore it is not factually correct that the plaintiff did not plead the future medical expenses. On the strength of the holding in the ***Tracom*** case, this pleading was sufficient to warn the defendant that the plaintiff would be leading evidence on the need for future medical expenses.

26. Was this claim supported by the medical evidence? In the ***Tracom Case,*** the court observed that the respondent did not testify and relied on the medical reports that were produced as evidence. These are what the learned trial Judge had used to determine the future medical expenses. In the present case, I have demonstrated herein above that the medical evidence clearly indicated that the plaintiff would need surgery due to the malunion of the fracture to the wrist. In addition, she had an eye problem resulting from the accident that would also need attention. The question whether the plaintiff/respondent proved the claim for future medical expenses can only be in the affirmative. There is the medical evidence, factual basis for this claim. In addition, in his testimony the father of the plaintiff testified that the child had sustained a head injury. Lost consciousness and was in hospital from 9th January 2014 to 30th January 2014. She suffered from headaches, and her eye was not ok since the Road Traffic Accident. He said he would still need to take her to hospital for treatment.

27. The difference between this case and the Tracom case is that in that case one of the medical reports indicated an estimate of the cost of the future medical expenses. There was no such indication in this case. However reading the Tracom case, there the Court had to deal with two apparently conflicting medical reports; one giving the estimate, the other suggesting no need for future medical care. Still, the court determined that the plaintiff therein would require care and only interfered with the sum that the learned trial judge had awarded.

28. I have considered the submission by the respondent with respect to *Justice E M Muriithi's* holding in ***Susan Kipturu*** *(supra) in light of the* ***Tracom case*** and the cited Court of Appeal decision in **Kenya Bus Service Limited vs Gituma [2004] EA 91**. To my mind, the import of the Court of Appeal's holding was that what the plaintiff was required to do was to plead the fact of future medical expenses to lay the basis for tendering the evidence upon which the court would base its decision. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. Is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it.

29. It is my humble view that the future expense was not only pleaded but was supported by medical evidence and proved accordingly.

30. Having found that the same was pleaded, and evidence led in support of the same, the question for my determination is whether the amount of Kshs. 100, 000/= was excessive. In his report, Dr. Aluda suggested that there would be a future prognosis on the fractures. The discharge summary said the child would require surgery. There is therefore no doubt that there was going to be an expense to correct the deformity of the child's hand and to deal with the eye. It was left to the trial magistrate to determine, on the available evidence, an amount that would be sufficient to cater for these expenses.

31. Considering that there was no specific recommendation by the doctor on the sum required, and considering that it would be surgery, and treatment for the eye, no reason to interfere with the sum of Kshs. 100,000/=

32. On General Damages for pain and suffering, the case the plaintiff relied on, **Ismael Mohammed Ahamed** above, and which the learned trial magistrate considered, the plaintiff therein sustained;

- Fracture of the skull
- Head injury with brain contusion
- Fracture of the left femur
- Multiple cuts on the lower limb
- Admitted to hospital for 56 days.
- Metal implants in the left femur which would require Kshs. 100,000/= to remove.

Clearly, these injuries were far more serious than the injuries sustained by the plaintiff herein. The actual award was made in 2011, and upheld by the High Court in 2013.

33. The judgment herein was delivered in 2017. The learned trial magistrate in her judgment indicated that she had taken into consideration inflationary factors before making the award of Kshs. 600,000/=. However, she ought to have taken into consideration the fact that the injuries were not comparable. It is to that extent only that I find the assessment of general damages to be erroneous.

34. In view of the foregoing I find the sum Kshs. 450,000/= would suffice for general damages for pain and suffering and in view of that the lower court's award of Kshs. 600,000/= is substituted with an award of Kshs. 450,000/=, special damages remain at Kshs. 33,583/= cost of future medical expenses at Kshs. 100,000/=. At 80%, the award comes to Ksh 466, 866.40.

35. Judgment is entered for the respondent against the appellant at Ksh 466, 866.40. plus costs below and interest at court rates from the date of the judgment in the lower court.

36. The appellant will have half the costs of this appeal.

Right of Appeal 30 days.

Dated and delivered virtually this 7th day of December 2020.

Mumbua T. Matheka

Judge

In the presence of:

CA Edna

For the Appellant N/A though notified

For the Respondent: Mr. Keter