REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 16 OF 2017

ZC (Minor suing through Guardian *Ad Litem*) RK.....APPELLANT

VERSUS

SAMMY NG'ANG'A.....1ST RESPONDENT

(Being An appeal from the Judgment and Decree of Hon. N. Moseti, Resident Magistrate, delivered on 31 January 2017 in Eldoret CMCC No. 197 of 2015)

JUDGMENT

[1] This is an appeal that was filed RK (hereinafter "the Appellant") on behalf of a minor **ZC,** a minor. The Appellant had sued the Respondent, **Sammy Ng'ang'a**, before the lower court in **Eldoret Chief Magistrate's Civil Case No. 197 of 2015: ZC vs. Sammy Ng'ang'a,** for General and Special Damages, interest and costs in respect of injuries sustained by the minor on **27 December 2014** when he was knocked down by the Respondent's **Motor Vehicle Registration No. KBU 258U,** Subaru Legacy. It was the contention of the Appellant that the minor was lawfully walking along the Nakuru-Eldoret Road at the time of the accident when he was knocked down on account of the negligence of the Respondent, who was then driving the motor vehicle aforementioned.

[2] The Learned Trial Magistrate was not satisfied that the Plaintiff's case had been established and accordingly dismissed the same with costs. He added that, had he found for the Appellant, he would have awarded him General Damages of **Kshs. 200,000/=** along with Special Damages of **Kshs. 203,240/=.** Being dissatisfied with that decision, the Appellant preferred this appeal contending that:

> **[a]** The Learned Trial Magistrate erred in law and in fact in awarding the Appellant less General Damages despite the gravity of the injuries and the authorities adduced;
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> **[b]** The Learned Trial Magistrate erred in law and in fact in awarding the Appellant less Special Damages than those proved;
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> **[c]** The Learned Trial Magistrate erred in law and in fact in failing to address himself to the evidence adduced by the Appellant together with the submissions;
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> **[d]** The Learned Trial Magistrate erred in law and in fact in arriving at the entire Judgment on wrong principles of law;
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> **[e]** The Learned Trial Magistrate misdirected himself in awarding less general damages after being guided by authorities not relevant to the cause of action.

[3] Accordingly, the Appellants prayed that the appeal be allowed and that the whole of the Judgment and decision of the lower court on quantum in **Eldoret CMCC No. 197 of 2015** be set aside and be substituted with a Judgment of this Court in such terms as the Court may deem fit. It was also prayed that the costs of the appeal and the lower court suit be provided for, and in any event be borne by the Respondent.

[4] Pursuant to the directions issued herein on **17 September 2018**, the appeal was canvassed by way of written submissions. Thus, the Respondent's written submissions were filed on **2 November 2018**, while Appellant's written submissions were filed on **7 November 2018**. In his written submissions, Counsel for the Appellant contended that there was sufficient evidence placed before the lower court to prove that the subject accident occurred as a result of the negligence of the Respondent or his agent in managing the **Motor Vehicle Registration No. KBU 258U;** and that he caused the motor vehicle to veer off the road, thereby knocking the Appellant and occasioning him severe injuries.

[5] The Court was referred to pages 15-17, 59 and 85 of the Record of Appeal for the evidence that the Appellant was rushed to Moi Teaching and Referral Hospital by a sympathetic motorist; that the accident was reported to the Police and investigations done, which resulted in the arrest and prosecution of the Respondent. The case of **Baker vs. Market Halborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472** was cited for the proposition that proof of collision is sufficient to call on the Defendants for an answer. Similarly, it was the submission of Counsel for the Appellant, on the authority of **Farah vs. Lento Agencies and Multiple Hauliers Ltd vs. Ralids Muthomi Kimani [2015] eKLR**, that where there is no concrete evidence to determine who is to blame between two drivers, both should be held liable equally or proportionately to the degree of contributory negligence as based on the circumstances the court may find appropriate.

[6] On quantum, Counsel for the Appellant proposed an award of **Kshs. 1,000,000/=** in General Damages for the injuries sustained by the minor. He premised his proposal on the following authorities:

> **[a] Mombasa HCCC No. 3 of 2002 Ali Abdalla Mbarak vs. Jagdish Udani**, in which the Plaintiff suffered fractures of the right femur with deep haematoma of the right upper thigh and facial cuts. He was awarded **Kshs. 450,000/=** as General Damages for pain, suffering and loss of amenities.
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> **[b] Meru HCCC No. 18 of 2016: David Kimathi Kaburu vs. Dionisius Mburugu Itira**, in which the Plaintiff was awarded **Kshs. 630,000/=** for fragmental fracture of the right femur.

[7] As regards Special Damages, Counsel for the Appellant conceded in his submissions that, although the Appellant asked for **Kshs. 207,971/=** in his Plaint, only **Kshs. 203,240/=** was proved; and that the trial court was right in awarding that sum of **Kshs. 203,240/=.** He reiterated the legal position that Special Damages must not only be specifically pleaded but also strictly proved with as much particularity as the circumstances permit. In this regard, he cited **National Social Security Fund Board of Trustees vs. Sifa International Limited [2016] eKLR, Macharia & Waiguru vs. Muranga Municipal Council & Another [2014] eKLR** and **Kisumu Civil Appeal No. 179 of 1995: Provincial Insurance Co. EA Ltd vs. Mordekai Mwanga Nandwa;** and prayed that the appeal be allowed with costs.

[8] Counsel for the Respondent, on the other hand was of the posturing that the allegations of negligence were not proved by the Appellant before the lower court as reliance was placed on the hearsay evidence of witnesses who did not witness the occurrence. Counsel accordingly relied on **Eastern Produce (K) Limited vs. Christopher Atiado Osiro [2006] eKLR** to support his submission that the onus of proof was on the Appellant to prove all aspects of his case to the requisite standard and not leave anything to conjecture. Counsel added that it was not enough for the Appellant to rely on Police records in proof of the allegations of negligence.

[9] On quantum, Counsel for the Respondent conceded that this Court has the jurisdiction and obligation to re-evaluate the evidence and determine whether the lower court took into account the relevant principles in assessing the quantum of damages payable in the circumstances of this case, such as the question whether the minor had healed from the injuries sustained. In his submission, since the minor had healed at the time of examination, an award of **Kshs. 150,000/=** would have been adequate compensation had he proved his case. He otherwise prayed for the dismissal of the appeal.

[10] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** it was held thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[11] Accordingly, I have carefully perused and considered the record of the lower court. It shows that two witnesses were called in proof of the minor's case, namely: **RCK (PW1)** and **PC Cheserek Kiptoo (PW2). PW1** testified on **27 October 2015** and stated that the Plaintiff before the lower court was then a minor aged 15 years when the accident in question occurred on the **27 December 2014**; and that, at the material time, she was a guest at her cousin's home where there was some celebration, when she received information that the minor, who is her son, had been knocked by a motor vehicle near **Cheplaskei A.I.C Church**. She immediately proceeded to **Moi Teaching and Referral Hospital** where minor had been taken for treatment. She confirmed that the minor was treated and discharged; and added that, since the boy did not heal well, he had to be taken to **St Luke's Hospital** where he was given further treatment. Thereafter, the minor was examined by **Dr. Rono** and a Medical Report prepared dated **15 January 2015**. She blamed the Respondent for the accident and presented all the treatment documents before the lower court as exhibits to support the minor's prayer for compensation. It is noteworthy that all the documents that were identified by **PW1** and relied on by the Appellant before the lower court were produced by consent of the parties as exhibits on **9 February 2016**.

[12] PW2 on his part testified that he was attached to the Traffic Records Office at **Eldoret Police Station**. He therefore confirmed that an accident did happen on **27 December 2014** at around 2.30 p.m. at **Cheplaskei** area along the **Eldoret-Nakuru Road** involving **Motor Vehicle Registrtion No. KBU 258U** and a pedestrian; and that the motorist was overtaking a series of motor vehicles when the motor vehicle swerved off the road and thereby knocked the minor. **PW2** further told the lower court that the motorist, the Respondent herein, was charged with the offence of careless driving which he admitted in **Eldoret Traffic Case No. 214 of 2015.**

[13] The Respondent, in his evidence before the lower court as **DW1,** conceded that he was driving the **Motor Vehicle Registration No. KBU 258U** from **Nakuru to Eldoret** on the date in question. His contention, however, was that at about 2.00 p.m. he attempted to overtake a lorry at **Cheplaskei** area when, all of a sudden, a child of about 15 years jumped onto the road and was hit by his motor vehicle. He explained that he was unable to apply brakes in the circumstances. He thus took the boy to hospital and thereafter reported the accident to the Police. He blamed the minor for the accident and urged the lower court to dismiss the suit.

[14] From the foregoing summary, and having perused the entire record of the lower court, there is no dispute that the accident in question

happened; or that the minor was injured in the said accident. However, the Respondent pleaded negligence on the part of the minor in running across the road when it was not safe to do so. Accordingly, it was upon the Appellant to convince the lower court that the Respondent was to blame for the accident; and having considered the evidence presented before him, the Learned Trial Magistrate was of the finding that the Appellant had not proved negligence against the Respondent for the reason that neither the minor nor his cousin, **Moses Kiptanui** with whom he was at the material time were called to testify before the lower court to explain the circumstances in which the accident occurred. The lower court further noted that **PW2** was not the investigating officer and therefore did not visit the scene to shed more light on the manner in which the accident occurred.

[15] Upon re-evaluation of the evidence adduced before the lower court, the Learned Trial Magistrate's finding cannot be faulted. Serious allegations of negligence were made by the Appellant in the Amended Plaint against the Respondent and particulars supplied to that effect, namely:

> **[a]** Driving at an excessive speed in the circumstances;
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> **[b]** Failing to apply brakes, slow down, stop or in any other manner manage and/or control the said **Motor Vehicle Registration No. KBU 258U** so as to prevent it from being involved in an accident;
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> **[c]** Driving without adherence to the Traffic Rules;
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> **[d]** Exposing the Plaintiff to a probable risk he knew or ought to have known;
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> **[e]** Intentionally causing the accident by allowing himself to sleep while driving;
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> **[f]** Failing to exercise or maintain any proper or effective control of the said motor vehicle;
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> **[g]** Driving the said motor vehicle along the said road without paying any or any sufficient regard to the safety of his passengers;
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> **[h]** Driving and or allowing to be put on the road a defective mor vehicle;
>
> **[i]** Causing the accident.

[16] It was therefore the responsibility of the Appellant to prove those allegations to the satisfaction of the lower court, for **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** is explicit 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.***

[17] In the same vein, **Sections 109** and **112** of the **Evidence *Act*** provide that:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[18] PW1 was not at the scene when the accident occurred and she admitted in cross-examination that she never witnessed the accident and therefore could not explain what transpired at the scene. The minor did not testify as a witness before the lower court. Similarly, the only eye witness, **Moses Kiptanui**, who was with the minor at the material time, was also not called as a witness. The Police Officer who visited the scene for investigative purposes was not called either; and although it was the evidence of **PW2** that the Respondent was charged with the offence of careless driving; and that he admitted the charge, the Appellant did not deem it fit to obtain a certified copy of the proceedings or the court file exhibited before the lower court as proof of that assertion. The Police Abstract that was relied on by the Appellant seems to show that nobody had been charged; and that it was intended to have the Respondent charged with careless driving. Hence, neither the Court File Number nor the outcome of the proposed charges were stated in that document. There was therefore sound basis for the Learned Trial Magistrate to come to the conclusion that he came to, namely, that the Appellant's case had not been proved on a balance of probabilities.

[19] As to the whether the lower court erred on quantum, I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in the case of **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages."**

[20] Similarly, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[21] Accordingly, I find instructive the decision of **Wambilyanga, J** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, that:

> **"The Court will essentially take into account the nature of the injuries suffered the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."**

[22] Thus, I have given due consideration to the injuries sustained by the Appellant. According to **Dr. Rono's** Medical Report dated **15 January 2015**, the minor sustained the following injuries:

[a] Fracture of the left tibia

[b] Bruises on the face and upper limbs

[c] Temporary loss of consciousness with bleeding from the face.

[23] The Medical Report further shows that the minor was taken to **St. Luke Hospital** on **10 January 2015** for specialized treatment for the fracture and that he was taken to theatre and screws were used to align and stabilize the tibia fracture. Thus, in his prognosis, **Dr. Rono** was of the view that the patient would require follow-up treatment **at St. Luke Orthopaedic Clinic** for some time. He noted that the scars of the minor's fact had healed with keloid formation which has disfigured his face permanently.

[24] The Medical Report produced by the Defence before the lower court, was prepared by **Dr. V.V. Lodhia** on **4 June 2015**. It confirms that the minor sustained a fracture of the left tibia as well as soft tissue injuries on the left forehead; and that a pin had been inserted on the left tibia to secure the fracture. He however opined that the Appellant was left with no functional deficit in any of the affected parts. He was of the view that, since there was the possibility of the minor developing periarthritis at the fracture site, permanent disability was assessed at 2%.

[25] In the light of the foregoing, Counsel for the Appellant had urged the lower court to make an award of **Kshs. 1,000,000/=,** taking into account the rate of inflation**.** He relied on **Machakos HCCA No. 106 of 2003: Charles Mwania & Another vs. Batty Hassan suing through his grandmother and next friend Safina Aly Singila**, in which the Plaintiff suffered a fracture on the right tibia and fibula along with soft tissue injuries and was awarded **Kshs. 800,000/=;** which award was upheld on appeal. The Respondent had proposed an award of **Kshs. 150,000/=** on the basis of **Kiwanjani Hardware Ltd & Another vs. Nicholas Mule Mutinda [2008] eKLR** and **Simon Muchemi Atako & Another vs. Gordon Osore [2013] eKLR.** It is however manifest that in the authorities cited by the Respondent the injuries were basically soft tissue in nature, and therefore incomparable to the subject minor's injuries.

[26] Taking into account the following authorities, I would have found an amount of **Kshs. 500,000/=** as General Damages to be fair recompense for the minor's injuries; particularly paying due regard to the prognosis made by the two doctors:

[a] In **Voi High Court Civil Case No. 3 of 2016: Godfrey Wamalwa Wamba vs. Kyalo Wambua**, a sum of **Kshs. 700,000/=** was awarded in general damages for compound fracture of the right distal tibia/fibula together with minor soft tissue injuries;

[b] In **Mombasa High Court Civil Case No. 597 of 2001: Veronica Mwongeli Kilonzo vs. Robert Karume**, the Plaintiff was awarded **Kshs. 500,000/=** in general damages for compound fracture of right tibia and fibula;

[c] In **Nakuru High Court Civil Appeal No. 52 of 2008: Peter Ngigi Kamau vs. Philis Kamau Njuguna**, the Plaintiff was awarded **Kshs. 500,000/=** in general damages for comminuted fracture of the right tibia and fibula together with minor injuries.

The Special Damage award was ultimately conceded to by Counsel for the Appellant.

[27] In the result, I would agree that, since the Appellant failed to prove negligence on the part of the Respondent, the lower court cannot be faulted for dismissing his case. This appeal is therefore for dismissal and I would dismiss the same but with an order that each party shall bear own costs of the appeal and of the lower court matter, granted the peculiar circumstances of this case.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MARCH 2019

OLGA SEWE

JUDGE