



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 54 OF 2013

P W (A minor suing through her next friend and mother **P W**).....APPELLANT

VERSUS

PETER MURIITHI NGARI.....RESPONDENT

J U D G M E N T

1. The appellant (a minor suing through her next friend and mother P W) lodged an appeal against the judgment of Ag. Principal magistrate Embu in CMCC No. 77 of 2012. Judgment on liability was entered at the ratio of 50:50, general and special damages were awarded at Kshs.468,452/=.
2. The grounds of appeal are that the trial magistrate erred in apportioning liability at the ratio of 50:50 when the appellant had proved his case on full liability against the respondent. It was further contended that general damages of Kshs.600,000/= was too low since the magistrate did not take into account the level of comparable/current awards for the same for comparable injuries.
3. The medical condition of the appellant and her future expenses and needs considering her poor medical condition was not taken into account. The magistrate also failed to take into account factors which guide courts in determining reasonable awards of damages for personal injuries well settled in law over the years.
4. The other grounds include the contention that the magistrate erred in failing to award interest on special damages from the date of filing the suit and also in declining to award costs to the appellant and by failing to give any reasons for declining costs. It is further claimed that the magistrate failed to adhere to the legal principals applicable to the case and/or reached conclusions not supported by the evidence or applied the wrong principles.
5. The appellant seeks orders for setting aside of the judgment of the learned magistrate and substitution of a judgment on full liability against the respondent, an award of adequate general damages, interests on special damages from the date of filing the suit and award of costs.
6. The appeal was argued by way of written submissions. Mesrrs Nelson Kaburu & Co. represented the appellant while Amollo & Kibanya Advocates are on record for the respondent.
7. The appellant submitted that she gave evidence on how the accident occurred which was corroborated by two witnesses. She testified that the respondent's vehicle veered off the road and hit her. The defendant fabricated evidence as to how the accident occurred claiming that the plaintiff was crossing the road at the time of the accident. The damage on the vehicle was on the front part as opposed to the right side as claimed by the defendant which was not consistent with a pedestrian crossing road. The defendant also fabricated a story that the appellant emerged from behind a matatu after a motor cycle had just

passed. These particulars were not pleaded in the defence and it was a misdirection for the magistrate to rely on such evidence.

8. It is further argued that the magistrate failed to evaluate the evidence in order to determine which version of the evidence was true. The proceedings of the traffic case where the respondent was charged with careless driving do not support the evidence of the respondent in this case. The respondent admitted that he was speeding at the time the accident occurred and that he stopped about 50 metres from the scene.

9. On assessment of general damages it was argued that the magistrate overlooked certain factors which he ought to have taken into consideration. Firstly, he relied on only two cases both of which were cited by the respondent being that of ***John Kiriru Njoroge T/A Jengo Associates Advocates Vs David Njiru [2008] eKLR*** and ***David Thanju Karanja Vs Samuel Kimani Mombasa HCCC 60 of 1999***.

10. The appellant had cited several cases with comparable injuries and comparable awards which were ignored by the court in awarding damages. The appellant cited several cases in his submissions and pleaded for an award of Kshs.2 million arguing that the award of Kshs.600,000/= was inordinately low considering the serious nature of the injuries.

11. It was further contended that interests on special damages run from the date of filing the suit. The case of ***Prem Lala Musa Mbuyu [1965] EA 592*** was cited which sets out principles on awarding interests on special damages.

12. Section 27 of the Civil Procedure Act provides that costs follow the event in a case where the plaintiff has succeeded in a suit. The appellant citing the case of ***Nelson Kaburu Felix Vs Paul Murunga & 2 Others Nairobi Civil Appeal No. 143 of 2003*** argued that unless otherwise ordered by the court costs should be awarded to a successful party.

13. The appellant contend that she adduced sufficient evidence to prove full liability against the respondent and place that the court apportions liability at the ratio of 90:10 in favor of the appellant.

14. The appeal was opposed by the respondent who argued that the evidence demonstrated that the appellant was negligent in her actions resulting to the occurrence of the accident and that the learned magistrate was right in apportioning liability at the ratio of 50:50.

15. The respondent relied on the following cases on apportionment of liability:-

i. Bungoma High Court Civil appeal No. 123 of 2011.

ii. Eldoret HCCA No. 129 of 2010.

iii. Nairobi High Court Civil appeal No. 739 of 2003.

16. In the above cases the respondent argued that liability was apportioned at 50:50 for reasons that the court could not tell from the evidence adduced which party was responsible for the accident. Additionally in the said cases the witnesses were not able to tell the court how the accident occurred and the investigating officer in the traffic case did not testify.

17. The case of ***Homa Bay High Court Civil Appeal No. 24, 25 and 26 of 2013 Oyugi Judith & Another Vs Fredrick Odhiambo*** was cited where it was held that the general principle applicable in considering an appeal on quantum, is that it is within the discretion of the trial judge to assess damages and that an appeal court can only interfere where the judge took him to account an irrelevant factor or left out are levant factor or where the award was too low or too high. The respondent also cited ***Kisii High Court Civil Appeal No. 147 of 2012 Anthony Keriga Magesi Vs Florence Nyomenda Turbor [2015] EKLR*** in enumerating similar principles.

18. It is contended that the trial magistrate took into consideration all the relevant factors including the nature of injuries, the current and the future condition of the appellant in awarding damages and that the award of Ksh.600,000/= was adequate.

19. The respondent argued that there is no specific law requiring that interests on damages be awarded from the date of filing the suit. He relied on the **Mombasa Civil Appeal No. 15 of 1989 Sharrif Salim & Another Vs Malundu Kikava** where the court held that the power to award interests is given to the courts under Section 26 (1) of the Civil Procedure Act which does not require that interests on special damages be awarded from the date of filing the suit. Other cases dealing with Section 26(1) were also cited in this regard.

20. The respondent submitted that the award of costs in a suit is discretionary and that the learned magistrate exercised his discretion not to award the costs.

21. The duty of the 1st appellate court was explained in the case of **Jabane Vs Olenja [1986] KLR 661**

*“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular **Ephantus Mwangi - vs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278** and **Mwanasokoni vs. Kenya Bus Services [1982-88] 1 KAR 870.**”*

22. The issues arising from this appeal may be summarized as follows:-

(a) Whether the magistrate fully evaluated the evidence and whether he reached the correct finding on liability.

(b) Whether the magistrate misdirected himself in failing to award interests on special damages from the time of filing the suit.

(c) Whether the magistrate erred in failing to award the costs of the suit to the appellant.

23. In civil cases, the case of **D.T. Dobie (K) Ltd Vs Wanyonyi Wafula Chebukati [2014] eKLR** where Denning, J.'s dictum burden of proof of **Miller Vs Minister Of Pensions [1941]** was discussed thus

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

24. The evidence of the appellant was that on the 19th of March 2011 she was traveling in a matatu going to school. She was a student at Kangamu secondary school. On alighting from the matatu at around 8.00 a.m. she crossed the road. A Toyota Hilux pick up registration no. KAX 357T from Kagio direction heading to Sagana, veered off the road and hit her from the pedestrian walk. She suffered multiple injuries as a result of the accident and was taken to hospital unconscious.

25. She called PW3 who was a student at Gikindu Secondary School as a witness. He testified that on the material day he was near the school gate with his brother when he saw vehicle registration no. KAX 357T approaching the scene. PW1 had alighted from a matatu and crossed the road. The pick up veered off the road and hit PW1 off the tarmac. She fell on the same spot where she was hit but the vehicle stopped about 10 metres away. The respondent was the driver of the vehicle and there was no other person on

board.

26. PW4 a student at [Particulars withheld] Secondary School testified that on the 19th of March 2011 around 8.30 a.m. he was at the gate of the school when he saw a matatu stop and drop PW1. The student crossed the road to the side of the school but a pick up hit her after crossing. PW1 was hit while outside the tarmac. He rushed to the scene and together with the driver of the pick up assisted to take her to hospital. After the accident the pick-up stopped about 40 metres from the scene.

27. The respondent DW1 testified that on the material day around 9.00 a.m., he left Kagio heading to his farm which is next to [Particulars withheld] Secondary School. On the way he gave a lift to two people a man and a woman. Then he saw a Nissan matatu stop ahead of him and there was a motor cycle behind the matatu which overtook it.

28. The respondent further said that he suddenly saw a girl emerge into the road and hit the right side mirror of his vehicle and fell in the middle of the road. He was traveling at a speed of between 60 to 70 Kph. He was assisted by a school boy to put the girl in his car and took her to hospital where he was found by the police and the school principal. DW1 blamed the appellant for the accident and said that he would admit 10% liability while the appellant bears 90%.

29. He called one witness DW2 who testified that he had been given a lift by the respondent at the material time. He said he saw a matatu stop by the road and a motor cycle behind it. When the matatu passed a girl emerged from behind it crossing the road and she hit herself against the right side mirror of the vehicle falling on the tarmac. He further stated that the driver of the pick-up DW1, himself and two other people assisted to put the girl in the vehicle and she was taken to hospital.

30. The appellant's case was that she had already crossed the road by the time the accident occurred. She was hit off the tarmac on the side of the school. Her evidence was corroborated by that of two eye witnesses PW3 and PW4. The appellant and her witnesses told the court that the accident occurred off the tarmac on the pedestrian walk and near the gate of the school. The evidence of the appellant blames the respondent in that his vehicle veered off the road and hit her.

31. The respondents evidence was that the appellant was hit in the middle of the road while crossing and that she fell on the yellow line which was in the middle of the road. He said that he veered off the road to avoid hitting the appellant. He blames the appellant for the accident in that she did not ensure that it was safe to cross the road. It is noted that he admits liability at 10% arguing that the appellant should meet 90%. He denies that he was speeding at the time of the accident.

32. The evidence in chief of DW2 appeared to corroborate the respondent's evidence. However, during cross-examination the witness seriously contradicted the evidence of the respondent giving the impression that the evidence in chief was rehearsed and fabricated.

33. DW1 said that he was assisted by a boy at the scene to put the appellant in the car and take her to hospital. He did not mention that DW2 was at the scene at the material time. On the other hand DW2 in cross-examination said that he and two others a boy and a pedestrian assisted the respondent. He then proceeded to say that he did not see any school boys at the scene assisting the girl into the vehicle. The respondent said that he had known DW1 for about 6 months while DW2 said that he had known the respondent for about 25 years.

34. DW2 denied in cross examination that he had recorded a statement with the police and on being shown the statement denied that the signature was his. He later admitted that he recorded a statement and that he did not mention that there was a lady who had accompanied him in the respondent's vehicle.

35. The magistrate observed the demeanor of the respondent and on two instances during his evidence observed that he was not telling the truth. He said:-

I notice that the witness has become evasive to respond to the questions.

36. The court adjourned for further cross examination in the afternoon and the magistrate was to make further observation thus:-

I notice that the witness continues to be further evasive refusing to directly answer questions.

37. During cross examination the magistrate noted that DW2 was not telling the truth. He recorded:-

The witness too appears none truthful and evasive at answering questions. Before the accident, there was nobody around, not even school children. The defendant told me that he was going to his shamba which borders [Particulars withheld] Secondary only separated by a footpath. The defendant's shamba is about 50 metres from the gate to [Particulars withheld] Secondary.

38. The record bears witness that from the observation made by the court, the respondent and his witness were not truthful. The magistrate gave two versions of the evidence which he said he had gathered from the parties. Firstly, that the plaintiff's version was that the respondent lost control of his vehicle which veered off the road and knocked the appellant.

39. The respondent's version was that the appellant emerged into the road abruptly from behind a stationary matatu and was hit by the right side mirror and fell in the middle of the road. He went on to say "that there is no precise evidence by either the plaintiff or the defendant to show that their version are reliable as to the exact point of impact and the circumstances surrounding that accident."

40. This observation led the magistrate to apportion the liability equally between the parties. The magistrate did not fault the evidence of the appellant and her two eyewitnesses. This leads to a conclusion that he believed their evidence as opposed to that of the respondent and his witness. He observed that the two witnesses were not reliable and were not telling the truth. With this observation the magistrate had sufficient material before him to determine who was to blame for the accident. It was a misdirection for him to purport to be confused as to how the accident occurred.

41. Having evaluated the evidence, I find that the appellant and her two eye witness were credible witnesses. Their evidence on what happened at the scene was clear and well corroborated. I find that the appellant has proved her case on the balance of probabilities against the respondent on liability. However being a pedestrian who had just crossed the road when the accident occurred, it would be appropriate that minimal blame be apportioned to her as suggested in her submissions.

42. Consequently, I set aside the judgment of the trial magistrate and substitute it with judgment in favour of the respondent at the ratio of 75:25 on liability.

43. According to the medical reports of Dr. Wambugu and Dr. Wokabi which were not at variance the appellant sustained the following injuries:-

- A fracture left femur which was operated on and fixed with a metallic plate.
- Fractures of the left fibula and tibia malleoli which were operated on and fixed with K-wires and plates.
- Blunt injuries to the pelvis causing fractures of the pelvis.

44. The medical report explains that the respondent could not walk fast, or far or even squat and is unable to control urine and has to wear diapers. She suffered 20% permanent incapacity and also requires Kshs.90,000/= for removal of the metal implants in future.

45. The appellant prayed for general damages of Kshs.2 million for pain and suffering citing the following cases:

i. Pocyline W. Kinuva Alias Roselyne Muthui Katee Vs Ocharo Kibira & 3 Others Nakuru HCC No. 237 of 2002 where the plaintiff suffered a transverse fracture of the right tibia and fibula, compound segmental fractures of the left tibia and fibular bones and posterior dislocation of the left

hip with an acetabulum fracture and was awarded Kshs.1,500,000/= in 2009.

ii. James Thiongo Githiri Vs Nduati Njuguna Ngugi [2012] eKLR Nakuru HCC No. 344 of 2010 where the plaintiff suffered fracture of the right leg in three places and fracture on the left leg in one place. He was admitted in hospital for two months and the fractures fixed with metal rods and was awarded general damages of Kshs. 4,000,000/= million in 2012.

iii. Anthony Mwendu Maina Vs Samuel Gitau Njenga [2006] eKLR Nairobi HCC No. 1150 of 2001 the plaintiff suffered head injuries and concussion with loss of consciousness for one week, compound fracture of the radius and ulna of the left arm, fracture of the olecranon process of the left elbow, impacted fracture of the surgical neck humerus bone, fracture of the cromion process of the left clavicle on the blade of the scapular bone and was awarded Kshs.1.2 million in 2006.

46. The respondent proposed an award of Kshs. 500,000/- relying on the following cases:

i. John Kiriru Njoroge T/A Jengo Associates Vs. David Njiru [2008] eKLR where the plaintiff sustained fracture of the right leg, fracture of the right hip bone, multiple bruises on the knee, abdomen and lower limbs and was awarded Kshs.450,000/- in 2008.

ii. David Thanju Karanja Vs Samuel Kimani Mombasa HCCC No. 60 of 1999 the plaintiff suffered fracture of the right tibia, fracture of the right femur, fracture of the left femur, fracture of the mandible hand injury to the left foot fractures of metatarsals was awarded Kshs.1 million in 2002.

47. Looking at the injuries sustained in the respondent's cases, the injuries were of less serious nature than those suffered by the appellant in this case. The trial magistrate relied on only the respondent's cases and completely ignored the cases cited by the appellant which had comparable injuries and comparable awards.

48. The respondent's case of **David Thanju (Supra)** was an old case of 1999 and the award was made in 2002 which was about eleven years before the award herein was made. This was inappropriate because there were other more recent cases which the magistrate would have used even if he did not find those of the appellant relevant.

49. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini Vs A.M. Lubia & another (1982-88) I KAR 777:**

“ the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be wholly erroneous estimate of the damages.”

50. Considering the serious nature of the injuries where the plaintiff sustained multiple fractures, 20% permanent disability, urine incontinence and required future operations to remove metals, the award of Kshs.600,000/- was far below comparable awards for comparable injuries. The magistrate failed to consider the grave nature of injuries, the tender age of the plaintiff of 19 years and the school time lost after the accident. The judgment shows that the court totally ignored the authorities cited by the appellant. These were relevant factors that the magistrate failed to take into account and calls for interference by this appellate court. It is my considered opinion that the award was inordinately low and ought to be reviewed.

51. The court sets aside the award of general damages of Kshs.600,000/= and substitutes it with an award of Kshs.1.6 million.

52. The magistrate failed to award interests on special damages from the time of filing the suit without giving any reasons. Interests on special damages are awarded from the time of filing the suit for the reason that the expense has already been incurred at the time the case is filed. This principle has been upheld by courts in several cases.

53. It was held in the case of **Prem Lata Vs Peter Musa Mbiyu [1965] E.A. 592** that where the court departs from the laid down principle reasons must be given. In this case the magistrate gave no reason for his departure.

54. For the foregoing reasons, this court is empowered to correct the award of the learned magistrate. It is noted there was no dispute on the special damages awardable.

55. I hereby order that the interests on special damages of Kshs.186,904/= takes effect at court rates from the date of filing the suit until full payment.

56. The magistrate erred in omitting to award costs of the suit. It is not in dispute that the plaintiff was successful in his claim. Section 27 of the Civil Procedure Act provides that “costs of any action, calls on other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.” No reasons were given for the said omission by the learned magistrate.

57. It was held in the case of **Seif Mohamed Vs. Yunus Omar and another Civil Appeal Number 47 of 1993 [1993] LLR 5159 (CAK)** (Cockar, Omolo and Akiwumi JJA on 27 July 1994)

According to the proviso to section 27 of the Civil Procedure Act a successful defendant is entitled to costs unless there is a good reason to be stated.

Where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles for example where it gives no reasons or where the reasons given do not constitute a “good reason” within the meaning of the rule.”

58. Similarly in the case of **Universal Engineering Works Vs Mohamedali Suleiman Essaji [1951] 2 LRK 99** it was held:-

A successful party is entitled to costs unless there are good reasons for depriving him of the costs.

59. It was a misdirection by the learned magistrate to fail to give costs without any reasons.

60. The court hereby awards the appellant costs of the suit in the court below.

61. The total award in summary is as follows:-

(a)General damages -1,600,000/=

(b)Special damages- 186,904/=

Total1,786,904/=

The appellant is therefore entitled to an award of Kshs. 1,786,904/= less 25% amounts to Kshs.1,340,178/= plus costs of the suit.

62. The respondent will meet the costs of this appeal.

63. The appeal is hereby allowed.

64. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF APRIL, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Obongi for Kaburu for Appellant