



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 13 OF 2012

BETWEEN

AUGUSTINE MOGIRE MOREKA APPELLANT

AND

W K N a minor suing through

her mother and next friend J M O RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.C. Owiye, RM dated 15th December 2011 at the Senior Resident Magistrates Court at Nyando in Civil Case No. 54 of 2009)

JUDGMENT

1. The respondent was a passenger in motor vehicle registration number KBA 414P on 30th June 2008 when it lost control and overturned along the Sondu-Ahero Road. She filed suit against the appellant claiming general and special damages for the injuries sustained. According to the plaint filed on her behalf, the respondent sustained bruises on the right cheek, left ear, cerebral concussion and fracture of the left humerus bone.
2. From the record, the issue of liability was resolved in a related suit namely; **Nyando RMCC No. 47 of 2009** where the appellant was held 100% liable. The respondent was awarded Kshs. 350,000.00 and Kshs. 5,000.00 as general and special damages respectively. The appellant now appeals against the judgment on the grounds set out in the memorandum of appeal dated 18th June 2012 principally on the ground that the respondent did not prove her case on the balance of probabilities. The main contention was that she was not a passenger in the vehicle and that she did not prove that the appellant owned the vehicle. The appellant also submitted that the award of damages was far excessive in light of the injuries sustained by the respondent and the authorities cited.
3. The respondent supported the judgment of the subordinate court and urged the court to uphold it. Counsel submitted that the evidence and submissions were consistent with and supported the finding of the trial court.
4. As this is a first appeal from the magistrate's court, I am guided by principle that the duty of the first appellate court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that it neither heard or saw the witnesses (see ***Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123***).
5. The respondent, J M O testified that she was the mother on the child, W K N. She told the court that on

the material day her daughter and other children had gone to Kisumu when the vehicle they were travelling in overturned. She was informed that the child had been injured and was taken to Nyabondo Hospital and later referred to Kisii District Hospital. She was later issued with a P3 form. She produced treatment notes and a report prepared by Dr Ajuoga who examined her on 18th July 2008.

6. In finding the appellant liable for the accident, the learned magistrate held that the issue of liability had been determined by a test case. In the circumstances, it was not open for the appellant to contest the issue of liability in this case unless the finding on liability in the test case was set aside or reversed on appeal. Since the issue of liability involves the ownership of the vehicle, it was also not open for the appellant to agitate the fact that the vehicle was not owned by the appellant.

7. Mr Ombui, learned counsel for the appellant, also submitted that the respondent did not produce the certificate of ownership of the vehicle issued by the Registrar of Motor vehicles to prove ownership. The question of ownership is one of fact and the respondent produced a police abstract which showed that the respondent was the owner of the vehicle. As the appellant did not rebut this evidence, the respondent proved this issue on a balance of probabilities. However, in light of the determination of the test case, this issue is settled and the finding on liability is affirmed.

8. As to whether the respondent was a passenger, the child's mother testified to the fact. Her testimony was supported by the police abstract that was produced in evidence and corroborated by the fact that the child was sustained injuries consistent with a road traffic accident thus establishing her case on the balance of probabilities. The appellant did not rebut this evidence by calling contrary evidence. I therefore find and hold that that respondent proved that she was a passenger.

9. As this an appeal on the issue of quantum the general principle is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727***).

10. I would further add that in determining whether or not to interfere with the assessment of damages, the court has to bear in mind that damages should not be inordinately high or too low. Damages are meant to compensate a party for the loss suffered but not to enrich a party, and as such, they should be commensurate to the injuries suffered. Past decisions, when taken into consideration, should be taken as mere guides as each case depends on its own facts.

11. The nature and extent of the respondent's injuries was described by Dr Ajuoga as follows, "*[The respondent] suffered soft tissue injuries which are healing well, the fractured humerus bone is also healing well and no permanent disability is anticipated.*"

12. The respondent proposed an award of Kshs. 600,000/- based on the case of ***Philip Korir Cheruiyot v Nebco (K) Ltd & Another KERICHO HCCC No. 70 of 2000 (UR)*** where the plaintiff was awarded Kshs. 600,000/- in 2006 for a fracture of the right humerus, head injury and an injury to the radial nerve which affected the right arm leading to 30% disability. The appellant suggested a sum of Kshs. 100,000/- based on the case of ***Isaac Mwenda Micheno v Mutegi Murango NRB HCCC No. 335 of 2004 (UR)*** where the plaintiff was awarded Kshs. 100,000/- for a fracture of the left tibia and fibula and soft tissue injuries in 2004.

13. As Dr Ajuoga noted that the child sustained a fracture which healing well with no disability anticipated. The decision cited by the respondent was on the higher side as it was based on the fact that there was some level of disability while that cited by the appellant did not take into account the level of inflation. In light of the cases cited, the award of Kshs. 350,000.00 was, in my view, inordinately high and I shall reduce the same and award **Kshs. 150,000.00**.

14. The appeal is allowed to the extent that I set aside the award of general damages and substitute with

an award of **Kshs. 150,000.00**. The said sum shall accrue interest at court rates from the date of judgment in the subordinate court.

15. The appellant shall have half the costs of the appeal.

DATED and DELIVERED at KISUMU this 6th day of September 2016.

D.S. MAJANJA

JUDGE

Mr Ombui instructed by E. M. Juma and Company Advocates for the appellant.

Mr Taremwa instructed by Ochillo and Company Advocates for the respondent.