



**First Assurance Company Limited v BNM (Minor suing through next friend MM) & another  
(Civil Appeal E055 of 2023) [2024] KEHC 1857 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1857 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E055 OF 2023**

**DAS MAJANJA, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**FIRST ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**BNM (MINOR SUING THROUGH NEXT FRIEND MM) ..... 1<sup>ST</sup> RESPONDENT**

**TOM MASUD ..... 2<sup>ND</sup> RESPONDENT**

*(Being appeals from the Judgment and Decree of Hon. S. A. Opande, PM dated 6th  
January 2023 at the Nairobi Magistrates Court, Milimani in Civil Case No. 2659 of 2016)*

**JUDGMENT**

1. The Appellant appeals against the judgment of the Subordinate Court allowing the 1<sup>st</sup> Respondent's claim against the Appellant. The court found the Appellant fully liable and awarded the 1<sup>st</sup> Respondent Kshs. 6,500,000.00 as general damages, Kshs. 1,000,000.00 for future medical expenses, Kshs. 455,387.00 as special damages together with costs and interest.
2. The Appellant appeals against the judgment on the basis of its Memorandum of Appeal dated 30.01.2023. It assails that judgment on the ground that the trial magistrate ignored the evidence showing that it was neither the registered or beneficial of motor vehicle registration number KAK 967U which is alleged to have caused the accident. It also complains that the general damages and damages for future medical expenses awarded by the court were inordinately high.
3. Before I deal with the issues in this appeal a background of the case is necessary. In the Amended Plaint dated 09.03.2020, the Respondents claimed that the Appellant was the registered owner of motor vehicle registration number KAK 967U driven by the 2<sup>nd</sup> Respondent. That on 02.05.2013, the 1<sup>st</sup>



- Respondent was walking along Kayole Spine Road when the 2<sup>nd</sup> Respondent drove the motor vehicle negligently and as a result hit him causing him grievous harm.
4. The Appellant filed a Statement of Defence dated 20.06.2016. It denied that it was the registered owner of the motor vehicle and as such was a stranger to all the allegations of negligence made against it. The 2<sup>nd</sup> Respondent did not enter appearance or file his defence.
  5. At the hearing of the suit, the Plaintiff (PW 1) testified as well as his father and next friend (PW 2), two other witnesses, PW 3 and PW 4 testified that they were present when the accident took place. The Appellant called David Kioko Kimuli (DW 1). The thrust of his evidence was that he bought the motor vehicle when he retired as the Appellant's Executive Director. He later sold it to one Joseph Maina on 08.11.2012 hence was not liable for the accident.
  6. As to whether the Appellant was liable, the trial magistrate found that the 1<sup>st</sup> Respondent had proved his case and that the driver of the motor vehicle was solely liable for the accident. The court held that the evidence showed that the Appellant was the owner of the motor vehicle, that there was no evidence that the title to the motor vehicle passed from the Appellant to DW 1 and that the Appellant ought to have joined DW 1 as the third party. That the transfer document between DW 1 and Mr Maina did not have any weight as there was no evidence that the motor vehicle was ever sold. It is this finding that has precipitated this appeal.
  7. In resolving this issue, the court is guided by the principle that the first appellate court must reconsider the evidence, evaluate it and draw its own findings keeping in mind that the trial court interacted first hand with the parties thus had the advantage of observing their demeanor and general conduct during the trial (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
  8. The 1<sup>st</sup> Respondent's case that the accident took place is not controverted. What is in dispute is whether the Appellant is to blame as the registered owner of the motor vehicle as the Copy of Records shows that as at 02.05.2013, the Appellant was the registered owner. Under section 8 of the [Traffic Act](#) (Chapter 403 of the Laws of Kenya), "The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle." This statutory presumption may be rebutted by contrary evidence. In [Robert Njoka & Alice Wambura Njagi & 3 Others](#) [2013] eKLR amongst other cases, the Court of Appeal held that registration of a person as the owner of the motor vehicle is only *prima facie* evidence of title to the motor vehicle and the person named therein is presumed to be the owner unless proved otherwise.
  9. Did the Appellant discharge the burden of showing that it was not the owner? DW 1 recalled that he purchased the motor vehicle in 2006 from the Appellant which gave him the original logbook, an undated transfer, KRA PIN Certificate and Certificate of incorporation. He paid the purchase price and took possession of the motor vehicle but did not register the motor vehicle immediately. That he later sold the motor vehicle to one Joseph Maina as evidenced by the sale agreement dated 08.11.2012. He stated that at the time of the accident neither he nor the Appellant were in control of the motor vehicle.
  10. I have considered the totality of the evidence and I find that the Appellant proved on the balance of probability that it was not the owner of the motor vehicle at the time of the accident. I say so because, there was no reason for the trial magistrate to disbelieve the testimony of DW 1. In any case, that evidence was not controverted in any material respect. Further, his testimony that he was not the owner of the motor vehicle was corroborated by the police abstract produced by the 1<sup>st</sup> Respondent which showed that the 2<sup>nd</sup> Respondent was the owner of the motor vehicle at the time of the accident and that it was insured under that name. The police abstract cannot be ignored. In [Ibrahim Wandera v P](#)



*N Masbru Limited* [2007] eKLR, the Court of Appeal held that ownership of a motor vehicle could be proved by the police abstract (see also *Wellington Nganga Mathiora v Akamba Public Road Services Ltd & Anor* [2010] eKLR). This goes to show that the Appellant discharged the burden placed on it to disprove that it was the registered owner. In addition, the 1<sup>st</sup> Respondent did not show that the 2<sup>nd</sup> Respondent was the Appellant's driver in order to impute vicarious liability or that the DW 1 or the Appellant's driver was driving or in possession of the motor vehicle at the time of the accident. On the contrary, the evidence shows that 2<sup>nd</sup> Respondent was the owner and driver of the motor vehicle. The Appellant's appeal on this issue therefore succeeds.

11. Despite the finding on liability, I now turn to consider the issue of quantum of damages. The trial court has discretion in awarding damages and the court will only interfere with an award if it is shown that the award is inordinately high or low as to represent an entirely erroneous estimate or that the trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low (see *Bashir Ahmed Butt v. Uwais Ahmed Khan*. [1982-88] KAR 5).
12. The Appellant complained that the trial magistrate misapprehended the evidence in material respects and thus arrived at a wrong assessment of general damages. That the award of general damages and future medical expenses was inordinately high considering the injuries sustained by the 1<sup>st</sup> Respondent. It complained that the trial magistrate failed to take into account the evidence and submissions thereby making an inordinately high award.
13. According to the Plaintiff, the 1<sup>st</sup> Respondent sustained head injuries and was admitted to the Intensive Care Unit (ICU) at Kenyatta Hospital for 14 days where he underwent various procedures. He sustained depressed fractures of the skull, brain swelling, paralysis of the upper right and lower limbs, loss of consciousness and speech and language difficulties. The injuries pleaded by the Appellant were confirmed when he was examined by Mr. W M Wokabi who prepared a report dated 08.04.2019. He concluded that the 1<sup>st</sup> Respondent had sustained a very major brain injury and opined that he would never regain his speech and language fully and would thus have difficulties which would affect his school and career. That the moderate paralysis on the right side would persist permanently. He assessed permanent disability at 45% and would likely suffer epilepsy in future.
14. Before the Subordinate Court, the 1<sup>st</sup> Respondent submitted that a sum of Kshs. 7,000,000.00 as general damages would be sufficient recompense. He relied on *Bernard Mutisya Wambua v Swaleh Hasbil* [2017] eKLR where the plaintiff was awarded Kshs. 6,500,000.00 for severe skeletal and soft tissue injuries for which he was hospitalised for several months, he lost use of his right hand due to paralysis and his lower limb bones infected. He also cited *Kangaroo Shuttle v Joshua Maian Nganga* [2020] eKLR where the claimant suffered a head injury with loss of consciousness for 2 months, skull fracture with a large epidural haematoma, loss of six teeth and paralysis of the right limbs and was awarded Kshs. 5,000,000.00 and *Martin Kidake v Wilson Simiyu Siambi* [2014] eKLR, the court awarded Kshs. 3,500,000.00 where plaintiff suffered a severe head injury, fracture of the right collarbone, fracture of the right humerus, loss of ability to speak, walk and hold heavy objects with his right upper limb and severe lack of coordination with the upper and lower limbs. The 1<sup>st</sup> Respondent also relied on *Alex Wachira Njagua v Gathuthi Tea Factory and Another* [2010] eKLR in which the plaintiff, a child, sustained a blunt injury of the head with a contusion, fracture of the left tibia and right fibula, cut wound on the forehead, bruised elbow and knee and was awarded Kshs. 3,000,000.00.
15. The Appellant did not dispute the nature of the injuries suffered by the 1<sup>st</sup> Respondent. It contended that the decisions cited by his advocates did not offer a reasonable guide on the award the court ought to have made. In urging the court to disregard the authorities cited, the Appellant submitted that an



award of Kshs. 500,000.00 would be sufficient and it cited *Moiz Motors Limited and Another v Harun Ngethe Wanjiru* [2021] eKLR where the plaintiff sustained a depressed front bone fracture of the skull, severe soft tissue injuries on the face, soft tissue injuries on the chest, both knees, hip joints and a severe soft tissue injuries of the toes of the right leg. The court reduced the award from Kshs. 700,000.00 to Kshs. 500,000.00.

16. Since the nature and extent of injuries was not dispute, the issue then is whether given comparable cases, the award was reasonable. Since general damages are damages at large, in making an award, the court considers the nature and extent of injuries suffered and is guided by comparable cases where the courts have awarded damages while at the same time ensuring a claimant is fairly compensated (see *Maore v Geoffrey Mwenda* [2004] eKLR). The cases cited by the 1<sup>st</sup> Respondent are self-evident as the claimants in those case suffered severe injuries similar to those sustained by the 1<sup>st</sup> Respondent. The injuries sustained in the case cited by the Appellant bore little relationship to those suffered by the 1<sup>st</sup> Respondent. The trial magistrate considered all the cases and a came to a conclusion that I hold was within the limits set out by the applicable decisions.
17. The trial magistrate awarded Kshs. 1,000,000.00 as future medical expenses as proposed by the 1<sup>st</sup> Respondent on the ground that he was still undergoing rehabilitative therapy. On future medical expenses, the Court of Appeal in *Tracom Limited and another v Hassan Mohamed Adan* [2009] eKLR observed as follows:

We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91, this court, stated:-

“ And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person’s legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

18. In view of the injuries sustained by the 1<sup>st</sup> Respondent and the fact that this aspect of his case was not disputed, I hold that the trial magistrate reached a fair conclusion on the amount constituting future medical expenses.
19. In the final analysis, I allow the appeal on the following terms:
  - a. The Judgment of the Subordinate Court dated 06.01.2023 is set aside as against the Appellant and the suit against him dismissed with costs.
  - b. The 1<sup>st</sup> Respondent’s shall bear the cost of the appeal assessed at Kshs. 30,000.00.



**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Maina instructed by Eboso and Company Advocates for the Appellant.

Mr Njeru instructed by Njeru Githonga and Company Advocates for the 1<sup>st</sup> Respondent.

