



**BN (Minor Suing through the mother & next friend WK) v Jacinta (Civil Appeal 107 of 2019) [2024] KEHC 2052 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2052 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 107 OF 2019  
HM NYAGA, J  
FEBRUARY 28, 2024**

**BETWEEN**

**BN (MINOR SUING THROUGH THE MOTHER & NEXT FRIEND WK) ..... APPELLANT**

**AND**

**MIHIWA WANJIKU JACINTA ..... RESPONDENT**

*(Being an appeal arising from the Judgment and Decree of Hon. Soita – RM in Molo Chief Magistrate’s Court Civil Case No. 116 of 2018 delivered on 10th June, 2019)*

**JUDGMENT**

1. This appeal arises from the judgment and decree passed by the Resident Magistrate Hon. Soita on 10<sup>th</sup> June, 2019 in Molo Chief Magistrate’s Court Civil Suit No. 116 of 2018.
2. The Memorandum of Appeal filed on 25<sup>th</sup> June 2019 by E.M. Juma & Ombui Company Advocates on behalf of the appellant BA sets out six grounds of appeal namely that: -  
The Learned Trial Magistrate;
  - i. erred in law and in fact in failing to find that the Appellant proved his case on a balance of probability.
  - ii. erred in law and in fact in failing to consider the Appellant’s written submissions.
  - iii. erred in law and in fact in failing to consider the Appellant’s testimony.
  - iv. erred in law and in fact in failing to consider the evidence of the Appellant was not rebutted.
  - v. erred in law and in fact in applying principles not known in law and/or otherwise.



- vi. erred in law and in fact in failing to find that the Respondent was the sole author of the accident and hence 100% to blame.
3. It was the appellant's prayer that the said judgment of the subordinate Court be set aside and substituted with a Judgment of this Honourable Court, this Honourable Court do make such further orders as it may deem fit and appeal be allowed with costs to him.
4. The appellant's claim in the lower court was in the plaint dated 4<sup>th</sup> April, 2018. It arose from a road traffic accident which occurred on 1<sup>st</sup> March, 2018 along Industrial Area when the plaintiff herein was lawfully cycling. It was alleged that the Defendant/respondent so negligently and/or carelessly drove the Motor Vehicle registration number KCD 240 L as a result of which it knocked the plaintiff minor, thereby occasioning him severe injuries. He sought general damages, special damages and costs and interests of the suit.
5. The particulars of negligence pleaded were that the motor vehicle Registration Number KCD 240 L was driven without due care and attention, without proper look out before proceeding on, with an excessive speed in the circumstances, the driver failed to stop and wait for other road users to clear before joining the highway, failed to swerve, control and/or brake in any way to avoid the accident, failed to stop after the accident, failed to ascertain that the road ahead was clear before proceeding on, the driver overtook carelessly, drove under the influence of alcohol, failed to observe the highway provisions. The appellant had also pleaded Res Ipsa Loquitur.
6. It was the appellant's case that following the accident the minor sustained Fracture of the neck of the right femur (right hip) and tenderness of the right hip joint.
7. The defendant/respondent vide her defence dated 12<sup>th</sup> June, 2018 denied the claim, denied the applicability of the doctrine of Res ipsa loquitur and put plaintiff/appellant to strict proof. In the alternative the defendant/respondent averred that the accident was contributed wholly and substantially by the negligence of the Plaintiff and the rider/owner of the Motor cycle. She further pleaded that in due course she would commence third party proceedings to enjoin (sic) the owner/ rider of the motor cycle as a third party to this suit. The defendant/respondent set out the particulars of negligence on the part of the minor as being: failing to adhere to the Highway traffic code and road signs, riding his motorcycle in a zig zag manner on a public road; failing to notice the presence of the subject motor vehicle which was on the main road; jumping off the motorcycle without any reasonable regard to other road user's and particularly the subject motor vehicle; failing to heed the warning signs given by the driver of the subject motor vehicle; causing the accident; ramming into the subject motor vehicle; riding in to the middle of the road; not putting into consideration the safety of other road users and particularly himself; riding a motor cycle on a public road when he knew he had no riding skills at all; failing in any way to avoid the accident; riding motor cycle on a public road without a valid driving license; riding un-insured motor cycle on a public road; riding motor cycle in the path of motor cycle in the path of the subject motor vehicle; carelessly and recklessly managing the motor cycle on a public road; failing to stop, swerve, brake, slow down or in any manner control the motor cycle to avoid the accident; failing to keep any proper look out or exercise due care and attention or take any avoidance attention to prevent the accident; riding the motorcycle at an excessive speed in the circumstances, riding on a motorcycle without reflectors, a helmet and side mirrors; riding on a motorcycle while listening to music on head/ear phones; riding the motorcycle while taking on a mobile phone; hitting the subject motor vehicle and riding his motor cycle while intoxicated.
8. The defendant also enumerated the particulars of negligence against the owner of the motor cycle at paragraph 6 a- o of her defence but she did not file any third party proceedings against the said owner.



9. On 26<sup>th</sup> November, 2018, the matter was heard. Five witnesses testified in support of the Plaintiff's case while the Respondent closed her case without presenting any evidence.
10. The trial court after considering the evidence on record delivered its judgment on 10<sup>th</sup> June, 2019 dismissing the Appellant's suit for reasons that he had not proved negligence on the part of the defendant on a balance of probability.
11. The Appeal was canvassed through written submissions. Only the Appellant's submissions are on record. On 15<sup>th</sup> November 2023 when I issued a judgment date, I also granted the respondent 30 days to file his submissions and directed the Appellant to serve the judgment notice with those directions. However, there is no evidence of service on record.

### **Appellant's submissions**

12. The Appellant submitted that the Respondent closed his case without presenting any evidence and as such his case was uncontroverted. He posited that where the plaintiff has testified in support of his case but the defendants fails to call any witness to buttress his case then the plaintiff's evidence remains uncontroverted and the defendant's statement of defence mere allegations. In support of this proposition reliance was placed on the cases of Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 and Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR
13. The Appellant argued that the trial court in dismissing his case based his judgment entirely on the evidence of the police officer who neither witnessed the accident nor visited the scene of the accident, and as such the trial court failed to adhere to the provisions of Order 20 Rule 4 as he failed to summarize the case of both parties and analyze the evidence before making his determination and reasoning thereof.
14. The Appellant faulted the trial magistrate for failing to assess damages after dismissing his case. In this regard, he cited the case of Lei Masaku vs Kaplama Builders Ltd Civil Appeal No.40 of 2007 (2014) eKLR & Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] eKLR where courts held that trial magistrate must assess damages despite dismissing the suit.
15. The Appellant urged this court to award Kshs.3, 500,000/= as general damages for pain and suffering based on their submissions before the trial court.

### **Analysis & Determination**

16. From the pleadings, the evidence and submissions on record, these issues arise for determination:
  - i. Whether the appellant proved liability to the desired threshold.
  - ii. Whether the trial court ought to have quantified the damages.
17. This being a first appeal, this court has a duty to re-evaluate the case, and come up with its own conclusion as was held in Jabane vs Olenja, [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs Sunday Post [1958] E.A. 424.
18. In Henderson vs Henry E Jenkins & Sons [1970] AC 282 at 301 Lord Pearson at letter D stated:

“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is



satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.

But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

19. The standard of proof in civil cases is on a balance of probability. The balance of probability was defined in the case of *Kanyungu Njogu vs Daniel Kimani Maingi* [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
20. In *Miller vs Minister Of Pensions* 1947 ALL E.R 372, Lord Denning puts this standard in the following terms: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. 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.”
21. In *James Muniu Mucheru vs National Bank of Kenya LTD* C.A Civil Appeal No 365 of 2017 [2019] eKLR, the Court stated as follows: -

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable.”
22. In the instant case, two witnesses testified on liability, the Appellant and Police officer (PW5).
23. The Appellant adopted his statement filed in court on 5<sup>th</sup> April, 2018 as his evidence in chief. In that statement, he stated that on the material date at around 2 pm he was lawfully riding his bicycle off the road along Njoro-Elburgon Road towards Nakuru Direction. On reaching around Posta, he was suddenly knocked by motor vehicle Registration Number KCD 240 L from behind while he was off the road. He stated that the said motor vehicle was also heading towards Nakuru Direction and after the accident the driver of the suit motor vehicle took him to Njoro Sub-County Hospital where he received treatment.
24. In cross examination, he stated that he was cycling his bicycle on the left side of the road heading to Nakuru. He said that the subject motor vehicle was behind him while he was beside the road on the edge.
25. PW5 testified that the Appellant was cycling when he was hit by the said motor vehicle and sustained injuries. He stated the mother of the Appellant reported the accident but the owner of the motor vehicle did not and they would have charged her with failing to report the accident and careless driving.



26. In cross examination, he confirmed did not visit the scene of the accident and that the police abstract showed the matter was pending under investigation. He did not have the sketch plan or the police file. He could not tell how the accident occurred and could not blame the driver of the subject Motor Vehicle.
27. The respondent did not tender any evidence to buttress his case. The trial magistrate in dismissing the Appellant's case stated as follows: -
- “From the evidence adduced, PW1 stated that he was cycling on the road side when vehicle KCD 240L knocked him from behind in which he was injured and taken to the hospital. PW2 the medical practitioner, DR. Obed Omuyoma produced the medical report to confirm indeed accident occurred and the Plaintiff sustained injuries. PW5 the investigating officer had this to state,....i was part of the investigation, I did not visit the scene of the accident...I do not have point of impact or sketch marks, parties left the scene, there was no investigations...Police abstract does not indicate who is to blame....For now I cannot blame the Defendant...In essence, the plaintiff's witness, police officer, who produced the police abstract was not able to place blame on the Defendant. If the Plaintiff's own witness, who is a police officer; a rank of Corporal, cannot place blame on the Defendant on the accident, then how can the Defendant be negligent of the accident? The paramount duty of plaintiff in this case is to prove negligence on the part of the Defendant, which in the opinion of the court has not been discharged or given.”
28. In light of the above and as correctly pointed out by the Appellant, the trial court relied entirely on the evidence of PW5 without considering his evidence with regard to how the accident occurred.
29. The evidence of PW5 was of no probative value, as he confirmed he did not visit the scene of the accident and did not have any police documents to shed light on how the accident occurred. The trial court erred by solely relying on his evidence without even considering that the Appellant's evidence was uncontroverted. The appellant had blamed the respondent for the accident.
30. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:
- “Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
31. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff is uncontroverted and therefore unchallenged.



32. In the case of *Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988*, Makhandia, J (as he then was) held that:
- “The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”
33. In *Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya) (supra) Ali-Aroni, J.* citing the decision in *Edward Muriga Through Stanley Muriga vs Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:
- “In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.
34. Similarly, in the case of *Interchemie EA Limited vs Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000*, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.
35. In the case of *Drappery Empire vs The Attorney General Nairobi HCCC No. 2666 of 1996* Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.
36. In the instant case, the respondent blamed the Appellant for the accident and enumerated the aforementioned particulars of negligence against him but failed to present evidence to buttress his case. Accordingly, in the absence of any evidence to the contrary, I find that the Appellant proved his case against the Respondent on a balance of probability. I therefore set aside the dismissal of the suit by the trial court on the finding that the appellant did not prove his case I substitute it with a finding that on a balance of probability, the appellant had proved his case. Since there was no evidence adduced to prove any negligence on the part of the appellant, then the respondent is held wholly liable for the accident.
37. The trial court after dismissing the Appellant’s suit failed to quantify damages. It is now trite law that a trial court is under a duty to assess the general damages awardable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of *Mordekai Mwangi Nandwa vs Bhogals Garage Ltd CA No. 124 of 1993* reported in [1993] KLR 448 where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment.
38. Similarly, in the case of *Matiya Byabaloma & Others vs Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138* where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim.
39. In this case the Appellant pleaded that she sustained fracture of the neck of the right femur (right hip) and tenderness of the right hip. The doctor who testified in support of the Appellant’s case confirmed the Appellant sustained these injuries. He also stated that while in the ward at Provincial General Hospital he was taken to theatre and open reduction and internal fixation was done. He opined that the screws will be removed in the future at a costs of Kshs. 200,000/=. The discharge summary from



Provincial General Hospital that was produced in evidence also confirmed the said fracture and that post screw fixation was done. There was no evidence adduced to the contrary by the Respondent and it is my view that the appellant did establish he suffered the aforesaid injuries upon which the learned trial magistrate ought to have assessed the general damages.

40. The appellant before the trial court submitted that Kshs. 3,500,000/- would suffice as general damages and relied on the case of Nicodemus Osoro & another vs Jane Gatwiri [2019] eKLR. In this case the claimant sustained Bilateral fractures. On the right side she had segmental fracture involving right femur (distal and proximal). On the left side she had a fracture mid-shaft femur and fractured left lateral malleolus with multiple bruises on the anterior aspect of the leg. She was admitted at the hospital for a period of 65 days and she was surgically operated on both legs and fractures reduced by screws and the court awarded her Kshs. 2,000,000 /= as general damages.
41. It is trite law that comparable injuries ought to attract comparable damages (see the case of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd (2013) eKLR).
42. I find that in the authority referred to by the Appellant, the claimant therein sustained more severe injuries compared to those sustained by the minor herein.
43. I find the case of Pestony Limited & another vs Samuel Itonye Kagoko [2022] eKLR relevant. The Respondent herein suffered a fracture of the left femur (mid-shaft) and swollen left tender thigh and the high court on appeal substituted the lower court's award of Kshs. 1,400,000/= as general damages with Kshs. 800,000/= in 2022.
44. Taking into account the passage of time and inflationary trends, I opine that the sum of Kshs.800,000/= would suffice/= as general damages .
45. It was also the Appellant's case that he would need future medical expenses of Kshs. 200,000/= for the removal of screws. The medical report by Dr. Omuyoma corroborates this position. This evidence was uncontroverted.
46. It is trite law that special damages should be specifically pleaded and strictly proved. The Appellant pleaded special damages of Kshs. 41,130.00 and he produced receipts amounting to Kshs. 40,700/=
47. In the end the Appeal succeeds. The judgment and decree of the subordinate court is set aside and judgment entered against the respondent and in favour of the appellant as follows:
  1. Liability 100% against the Respondent
  2. General damages for pain and suffering of Kshs. 800,000/=
  3. Special damages Kshs. 40,700/=
  4. Future Medical Expenses Kshs. 200,000/=
  - Total Kshs. 1,040,700/=
  5. The appellant will have the costs of the appeal and costs in the lower court.
  6. Interest on the special damages to accrue from the date of filing suit in the lower court while interest on the general damages and cost of future medical expenses to accrue from the date of the judgment of the lower court.
  7. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU 28<sup>TH</sup> DAY OF FEBRUARY, 2024.**



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**H. M. NYAGA,**

**JUDGE.**

In the presence of;

C/A Oleperon

Mr. Wafula for Juma for Appellant

No appearance for Respondent

