



Balaraj & another v EMM (Minor) Through Mother and Next Friend JNM (Civil Appeal 578 of 2019) [2024] KEHC 2655 (KLR) (Civ) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2655 (KLR)

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

CIVIL

CIVIL APPEAL 578 OF 2019

DAS MAJANJA, J

MARCH 15, 2024

BETWEEN

KAUR BALARAJ 1ST APPELLANT

FRANCIS KYENGO 2ND APPELLANT

AND

EMM (MINOR) THROUGH MOTHER AND NEXT FRIEND

JNM RESPONDENT

(Being an Appeal from the judgment and decree of Hon A.N. Makau (PM) dated 27.9.2019 in Nairobi CMC 8773 of 2018)

JUDGMENT

1. The appeal is from the judgment of the Subordinate Court's finding the Appellants fully liable and awarding the Respondent Kshs. 1,000,000.00 as general damages for injuries suffered in a road traffic accident that occurred on 06.09.2016. The events of accident were that the child was crossing the road to go back to school when she was hit by motor vehicle registration no. KBZ V belonging to the 1st Appellant. In the plaint dated 02.10.2018, it was alleged that the child sustained a comminuted fracture of the left tibia and fibula, 30% permanent disability and severe pain, mental anguish and discomfort.
2. In their memorandum of appeal dated 04.10.2019, the Appellants do not contest liability in this appeal but assail the trial court's findings on quantum of damages. They contend that the award was excessive in the circumstances and was not in line with authorities with similar degree of injuries. The appeal was canvassed by way of written submissions.



3. For an appellate court to interfere with the trial court's award on damages, it has to be shown that the court took into account an irrelevant factor, or left out of account a relevant one, or the amount is inordinately low or inordinately high that it was a wholly erroneous estimate of the damages (see *Kemfro Africa Ltd t/a Meru Express Services v Lubia & another* [1982-88] 1 KAR 777).
4. In arguing her case before the Subordinate Court, the Respondent proposed an award of Kshs. 1,500,000.00 by relying on *Kornelius Kweya Ebichet v C.P. Shoe Industries Ltd and another* [2008] eKLR where the plaintiff suffered fractures of the left tibia and fibula, was admitted into hospital for one week and was treated using metal implants. Further examination of the plaintiff revealed that he would require another operation for plate and bone grafting. Part of the plaintiff's bone tissue was lost resulting into abnormal leg movement. The court awarded Kshs. 1,000,000.00 as general damages.
5. The Respondent also relied on *Mt. Longonot Medical Services Limited & another v. Andason Kitonyo Kinyenze Pius* [2017] eKLR where the plaintiff suffered double fractures of the right tibia and fibula, and facial abrasions. He had to undergo surgery to fix the fractures with metal plates. Two years after the accident, the plaintiff still walked with crutches and had a deformity at the lower fracture site. The court awarded Kshs. 1,000,000.00 general damages.
6. On their part, the Appellants proposed an award of Kshs. 400,000.00 as sufficient compensation for pain and suffering. They quoted *Tirus Mburu Chege & another v JKN (Minor suing through the next friend and mother DWN & another)* [2018] eKLR. The plaintiff in the said case had suffered fractures of the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding, consistent loss of consciousness. The appellate reduced an award of Kshs. 800,000.00 to Kshs. 500,000.00 general damages. They also relied on the case of *Clement Gitau v GKK* [2016] eKLR where the court awarded Kshs. 600,000.00 where the child had sustained a fracture of the tibia/fibula and bruises on the neck.
7. At the hearing, Dr Cyprianus Okoth Okere (PW 1) recalled that he examined the child on 06.12.2016 and confirmed that he sustained a comminuted fracture of the left tibia and fibula. She was managed by plaster of paris and was not admitted to hospital. The doctor assessed permanent disability at 30%. PW 3, the child's mother, admitted in cross-examination that the child has healed and since 2016, she did not go to hospital again.
8. The authorities quoted by the Respondent involve injuries of adults who had to undergo different medical procedures, the injuries lasted longer and the victims were left with a permanent impairment even after healing. I find the authorities quoted by the Appellants to be more comparable to the present case where children suffered similar injuries and underwent same medical procedures. The trial magistrate focused on the 30% disability yet the evidence before the court was that the child had healed at the time of hearing. For assessment of permanent disability, the functionality of the leg ought to be negatively impacted even after the child had reached peak performance. That is not the situation in the present case where the minor had recovered fully and was going about her daily business as usual including taking herself to school.
9. Based on the nature of the injuries and the authorities cited, I find that the award of Kshs. 1,000,000.00 is thus on the higher side in the present circumstances. An award of Kshs. 700,000.00 would have sufficed as adequate compensation for the minor's pain and suffering.
10. I allow the appeal on the following terms:
 - a. The judgment of the Subordinate Court dated 29.07.2019 is set aside to the extent that the award of Kshs 1,000,000.00 general damages is set aside and substituted with an award of Kshs. 700,000.00.



b. The Respondent shall bear the costs of the appeal assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE

