



Faida v VW alias LW (Minor suing through her next friend BWI) (Civil Appeal E012 of 2022) [2024] KEHC 2815 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E012 OF 2022
WM MUSYOKA, J
MARCH 15, 2024**

BETWEEN

GODFREY OUMA FAIDA APPELLANT

AND

**VW ALIAS LW (MINOR SUING THROUGH HER NEXT FRIEND
BWI) RESPONDENT**

*(Appeal from judgment and decree of Hon. EC Serem, Resident
Magistrate, RM, in Busia CMCCC No. 338 of 2019, of 4th April 2022)*

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for compensation for personal injury, following a road traffic accident, along Mumias-Busia road, on 14th August 2019. The respondent was allegedly a pedestrian walking on the left side of the road in question, when she was allegedly knocked down by motor vehicle registration mark and number KCA 347L, said to have belonged to the appellant, the respondent allegedly sustained injury, and liability was attributed to the appellant on account of negligence. The respondent filed a defence, denying the accident, and everything else pleaded in the plaint. He pleaded, in the alternative, that if such accident occurred, then it was authored by the respondent, or she substantially contributed to it.
2. A trial was conducted. 7 witnesses testified for the respondent, and 2 testified for the appellant. Liability was resolved at 50% against the appellant and 50% against the respondent. Kshs. 1,200,000.00 for general damages, Kshs. 21,960.00 for special damages and costs were awarded to the respondent.
3. The appellant was aggrieved, hence the instant appeal. The appeal has faulted the trial court on several grounds: for failing to consider his submissions; failing to take into account the evidence on record; adopting the wrong principles in the assessment of damages; awarding an excessive amount of general



- damages; and failing to consider comparable awards in assessing damages. The appellant asks that the award on general damages be set aside, and that the court re-assesses the general damages.
4. On 20th November 2023, directions were given, for canvassing of the appeal by way of written submissions. Both sides filed their respective written submissions.
 5. The appellant submits that the trial court should have been guided by Kenya Power Limited & Another vs. Zakayo Saitoti Naingola & another [2008] eKLR and Jennifer Mathenge vs. Patrick Muriuki Maina [2020] eKLR, on the principles that apply to assessment of damages. He cites Jane Muthoni Nyaga vs. Nicholas Wanjohi Thuo & another [2010] eKLR (W Karanja, J) where Kshs. 300,000.00 was awarded for allegedly similar injuries; Muthamia Isaac vs. Leah Wangui Kanyigi [2016] eKLR (Aburili, J), where Kshs. 400,000.00 was awarded, George Osewe Osawa vs. Sukari Industries Limited [2015] eKLR, where an award of Kshs. 500,000.00 was given; Civicon Limited vs. Richard Njomo Omwancha & 2 others [2019] eKLR (Majanja, J), where Kshs. 450,000.00 was awarded; and Peter Gakere Ndiangui vs. Sarah Wangari Maina [2021] eKLR (Sergon, J), where an award of Kshs. 500,000.00 was made. It is also submitted that the costs should have been subjected to apportionment on the basis of 50:50.
 6. On her part, the respondent submitted on grounds of appeal, which she collapsed into 3. On whether the submissions of the appellant were considered, she points at the judgement of the trial court, to submit that the trial court did state that it had considered submissions from both sides. On whether the trial court considered all the evidence on record, the respondent, again, goes to the judgement of the trial court, and points out, from the paragraphs of the said judgement, to the fact that the evidence tendered by both sides was considered. On assessment of general damages, it is submitted that the trial court did not err, and applied the correct principles, and the decisions relied on by the trial court are cited, being Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs. Naomi Galma Galgalo, where an award was made of Kshs. 1,400,000.00; Joseph Njeru Luke & 3 others vs. Stellan Muki Kioko [2020] eKLR, where an award of Kshs. 750,000.00 was made and Macharia Miriam & another vs. Muema Ndila [2017] eKLR where an award of Kshs. 1,400,000.00 was made. She cites Harun Muyoma Boge vs. Daniel Otieno Agulo [2015] eKLR (Majanja, J), to argue that assessment of damages is not an exact science. She relies on United Millers Limited vs. Tom Maina Surara (Ougo, J), where an award of Kshs. 900,000.00 was made.
 7. The appellant appears to have reduced his grounds to just 1, assessment of general damages. I note though that his submissions argue another issue that he has not appealed against, costs. The respondent has distilled the 5 grounds into 3: whether the submissions placed by the appellant before the trial court were considered; whether the trial court considered the whole of the evidence tendered; and whether the assessment of general damages was in line with the known principles.
 8. For the purpose of determining this appeal I have very closely and carefully gone through the record of appeal, and the original trial court records, and I am fully acquainted with the material that was placed before the trial court by the parties, and I have also considered how the same was handled by the court, to enable me come to my own conclusions. Ultimately, the final determination will abide the pleadings placed before me by the parties, for parties are bound by their own pleadings. I will consider the matter along the lines proposed by the respondent, by considering all the 5 grounds of appeal, collapsed into 3.
 9. On whether the written submissions by the appellant were not considered, the best place to go should be to the judgement of the trial court. I have noted from page 2 of the said judgement, the trial court recited the submissions that were made by both sides, in terms of the points made, and the authorities relied on. It cannot be true then that the written submissions were not considered. The trial court acknowledged them, which is testimony to the fact that the court saw them. The court also recited them, meaning that it read through them, and distilled the issues raised in them. It is not lost on me



that the trial court proceeded to frame the issues for determination after it had recited the submissions from both sides. At page 2 of the judgement, the trial court stated that in its considered view, the award proposed by the appellant was on the lower side. No doubt, the trial court could not have come to that considered view without having seen what the appellant was proposing in his written submissions. The trial court assessed liability at 50:50, in line with what had been proposed by the appellant in his written submissions, as captured in the judgement. There can be no merit, in the circumstances, that the submissions made by the appellant were not considered by the trial court.

10. To clear any doubts, this is how the trial court recited the submissions made by the appellant, as captured in pages 2 and 3 of the judgement:

“The defendant submits that the Plaintiff did not prove that the subject accident occurred and if it occurred, negligence on his part was not prove. On liability, he suggested 50:50. On quantum, he suggested an award of Kshs. 300,000/= as damages.

He places reliance on the flowing authorities:-

- i. Jeremiah Maina Kagama v Kenya Power and Lighting Co. Ltd (1991) eKLR
- ii. ...”

11. On the second ground, the evidence on record not being taken to account, hence arriving at a wrong decision, again I have gone back to the judgement of the trial court. I have noted that the trial court addressed the issue of liability in pages 3, 4, 5 and 6. The testimonies of the critical witnesses, the eyewitnesses, PW7 and DW1, on liability were recited and analysed, before the trial court came to the conclusion that it came to, that liability was 50:50, in line with the case that the appellant was putting up at the trial court. So, I see no basis for his complaint, in that regard.

12. However, whereas the trial court did well to narrate and analyse all that evidence, it came to the wrong assessment of liability. The respondent pedestrian was a child of tender years. PW7 put her age at 7 or 8 years; while DW2 said she was 8 years old. No liability, whether criminal or civil, attaches on a child of tender years. In criminal law, criminal responsibility is not to be attributed to a child of 12 and below. It cannot then be the converse in civil law, that such a child is to be found tortuously liable for a civil wrong. The general principle is that a child can only be found guilty of negligence if he is old enough to be expected to take precautions. When confronted with a minor of tender years, as a party to alleged negligence, the trial court has to consider whether that particular child was old enough to be expected to take precautions for his own safety. Even where it is established that an 8 year-old was old enough to be expected to take precautions for his own safety, the degree of negligence apportioned to him would be a token compared with that attributable to the driver of the accident vehicle, in cases of motor traffic accidents.

13. In Attorney-General and another vs. Vinod and another [1971] EA (Duffus P, Law and Mustafa, JJA) it was said that “In dealing with contributory negligence on the part of a young boy the age of this boy and his ability to understand and appreciate the dangers involved have to be taken into consideration.” Citing Gough vs. Thorne [1966] WLR 1387 (Lord Denning), it was said “A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.” In the end a child of 8½ years was said to have had contributed to the accident by his negligence, to the extent of 10%. Attorney-General and another vs. Vinod and another [1971] EA (Duffus P, Law and Mustafa, JJA) was followed in Tayab vs. Kinanu



- [1983] eKLR (Law, Potter & Hancox JJA), where it was said “In the instant case, the trial judge held in clear terms that the plaintiff had the requisite road sense. Her failure to see the approaching car was in my view blameworthy. In the case of a grown-up person, the proportion of blame would have been substantial, but having regard to the plaintiff’s tender years I would follow the precedent of Vinod’s case, and assess her degree of liability at 10%.”
14. No negligence was attributed to a child of 6, in *Esther Nkudate vs. Touring & Sporting Cars Ltd & another* [1979]eKLR (Platt, J), where it was observed “The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these.” In *NM & another (Suing as Representative of the Estate of LN (deceased) vs. Ndungu Isaac* [2020] eKLR (Odunga, J), it was observed that a child of 5 could not contribute, by way of negligence to a road traffic accident. It was observed “In my judgement, it is clear that the learned trial magistrate did not take into account, the age of the deceased and whether in those circumstances she could be deemed to have negligently contributed to the accident or negligently caused the accident. The law when it comes to accidents involving children of tender years seem to place strict liability of the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety”, and “In my view the failure to take into account the age of the deceased in arriving at his decision amounted to a failure on his part to take account of particular circumstances or probabilities material to an estimate of the evidence. That entitles the court to interfere with his findings.”
 15. How did the trial court handle this? I have very carefully gone through the judgement, and at the section where liability or negligence is apportioned, there was no discussion nor consideration of the age of the respondent, and not citation of the principles set out in the decisions that I have discussed above. The trial court was, no doubt, wrong in its application of the law, with respect to contribution of negligence where a child of tender years is involved.
 16. So, what do I do in the circumstances? The respondent has not raised the issue. It is not raised in her written submissions. She did not file a cross-appeal on it. Parties are bound by their pleadings, but it would be wrong to allow that decision to stand, as it is wrong in principle. The contribution attributable to a minor of 8 years cannot be anything above 10%, going by the authorities that I have cited above. The assessment of contributory negligence on the part of the respondent, at 50%, was wholly erroneous, and the wrong principle was applied. I shall set aside that assessment, and substitute it with an assessment of contributory negligence at 10% on the part of the respondent.
 17. The more substantial issue is on assessment of general damages, which is spread over 3 grounds. I shall consider that next. The injuries that were proved at trial were bruises to the forehead, blunt injury to the chest, bruises on the left hip, bruises on the back, fracture of the pelvis, bruises on the left elbow, bruises on the right knee and the lower part of the right thigh, and bruises on the abdomen. The main injury appears to have been the fracture to the pelvis, accompanied by multiple soft tissue injuries. The respondent was admitted in hospital for 18 days. The court awarded Kshs. 1,200,000.00 general damages, which the appellant argues was excessive.
 18. Assessment of general damages for personal injury is done on the basis of looking at awards for comparable injuries by the courts. In *Joseph Njeru Luke & 3 others vs. Stellah Muki Kioko* [2020] eKLR (Majanja, J), the injuries sustained were fractures of the pelvis, with soft tissue injuries to scalp, chest, back, left buttock and left knee, and the victim was awarded Kshs. 750,000.00. In *Peter Gakere Ndiangui vs. Sarah Wangari Maina* [2021] eKLR (Sergon, J), the injuries were pelvic fractures, with blunt injuries to the chest, buttocks, the right thigh and bruises on the leg. There was also head concussion. An award of Kshs. 500,000.00 was made. In *Gitonga vs. Kalunge* [2022] KEHC 3070



(KLR)(Cherere, J), there was a left acetabulum fracture with hip dislocation, and multiple soft tissue injuries to the head, chest and left shoulder. The victim was in hospital for 6 days. An award of Kshs. 1,700,000.00 was made.

19. I consider the injuries in Joseph Njeru Luke & 3 others vs. Stellah Muki Kioko [2020] eKLR (Majanja, J) and Gitonga vs. Kalunge [2022] KEHC 3070 (KLR)(Cherere, J) as closer to those sustained by the respondent herein. The injuries, in Peter Gakere Ndiangui vs. Sarah Wangari Maina [2021] eKLR (Sergon, J), were a lot more severe, but the appellate court awarded a much lower quantum, compared with the other 2 cases. I note that in the instant appeal, the respondent was in hospital for 18 days, compared with the 6 days in Gitonga vs. Kalunge [2022] KEHC 3070 (KLR)(Cherere, J). Gitonga vs. Kalunge [2022] KEHC 3070 (KLR)(Cherere, J) is the more recent decision. I am also alive to the vagaries of inflation on the Kenya shilling. In view of the above, I am persuaded that the award made by the trial court was within the range, and should not be disturbed.
20. In the end, I find no merit in the appeal herein. I find that the trial court erred in assessing contributory negligence against the respondent at 50% and I hereby reduce it to 10%. The award on general damages shall remain undisturbed. The respondent shall have the costs of the appeal. Orders accordingly.

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

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Nanjira, instructed by Kimondo Gachoka & Company, Advocates for the appellant.

Mr. Kiprop, instructed by Kiprop Luseria & Company, Advocates for the respondent.

