Dennis v SOO (Civil Appeal 160 of 2018) [2023] KECA 881 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 881 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 160 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JULY 7, 2023

BETWEEN

ODHIAMBO DENNIS ..... APPELLANT

AND

SOO ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kisumu (Cherere J) dated 26th July 2018 in Kisumu High Court Civil Appeal No. 49 of 2017)

JUDGMENT

Judgment of Mumbi Ngugi JA

1. This second appeal arises from a decision of the High Court (T. W Cherere, J) in which the court upheld the decision of the Magistrate's Court in respect of personal injuries suffered by a minor, EO, following a road traffic accident.

2. The respondent, SOO, the minor's father, had sued the appellant, Odhiambo Dennis, seeking damages in respect of the injuries sustained by the minor in the accident which occurred on March 16, 2015 near [Prticulars Withheld] School, Kisumu. The accident involved the appellant's motor vehicle registration number KBU 064F which, according to the respondent, was so recklessly driven that it violently collided with the minor, occasioning him bodily injuries. The minor sustained a fracture of the tibia and fibula, bruises on the knee, soft tissue injuries on the lower back, soft tissue injuries with lacerations on the shoulder joint, lacerations on the left and right elbow and lacerations on the right knee.

3. According to the respondent, while he and the minor were crossing the road from [Prticulars Withheld] School to where the respondent had parked his motor tricycle, the appellant's motor vehicle tried to overtake a Nissan van that had given the respondent way and knocked the minor down. The minor fell on the road and sustained injuries. The respondent blamed the appellant for overtaking without due care.

4. On his part, the appellant contended that when he approached [Prticulars Withheld] School, he slowed down as there was a bump just near the gate. There were motor vehicles parked along the road and the place was crowded as the vehicles were picking students. As he was about to pass a Nissan van that was partly parked on the road, 'something hit the bumper' of his vehicle, prompting him to stop. On checking what had happened, he found a boy lying on the ground. Shortly thereafter, the respondent emerged from the school and took the minor to hospital. The appellant denied that the respondent was holding the minor's hand when the accident occurred.

5. In its decision, the trial court apportioned liability at 70:30% in favour of the minor. It awarded damages of Kshs 500,000 for the injuries sustained.

6. The appellant was aggrieved by the decision on both liability and quantum and filed an appeal before the High Court. He contended that he was driving slowly while overtaking a Nissan van that had been parked partly on the road when the minor bumped into the left side of his vehicle. He therefore urged the first appellate court to find the respondent 100% liable or in the alternative, to apportion liability at 50:50.

7. With respect to the quantum of damages, it was his contention that the damages awarded were not in consonance with decisions in cases with similar injuries. He proposed an award of Kshs 250,000.

8. The respondent's position on appeal was that the appellant did not exercise due care while driving near a primary school; that he was driving at a high speed and was therefore not able to avoid the accident; that the minor was only 7 years old and could not be held liable in negligence since such a child had no road sense of his own.

9. The first appellate court found no reason to interfere with the trial court's decision on liability or quantum. It took the view, with regard to quantum, that the appellant had not placed anything before it that showed that in assessing damages, the trial court took into account an irrelevant factor or left out a relevant one, or that the amount awarded is so inordinately high as to be considered an erroneous estimate of the damage.

10. Still dissatisfied, the appellant has lodged the present appeal raising five grounds of appeal in his memorandum of appeal dated December 13, 2018. He impugns the decision of the High Court on the grounds that it failed: to re-evaluate the evidence and the applicable law carefully and make independent findings and conclusions; to hold that the appellant did not breach his duty to exercise reasonable care in the circumstances; and in upholding the apportionment of liability against the appellant without analysing the evidence relevant thereto. Further, that the court erred in failing to hold that the assessment of damages was made without taking into account a relevant factor, namely that like injuries attract similar awards; in misapprehending the age of the authorities on injuries that he had cited and in failing to take them into account.

11. The appellant, represented by learned counsel, Ms Barasa, filed submissions dated February 21, 2023. He reiterates his grounds of appeal, asserting that the first appellate court failed to re-evaluate the evidence before her as a result of which she failed to hold that the appellant did not breach his duty to take reasonable care; had erred in upholding the apportionment of liability between the appellant and the respondent; and had erred in upholding the award of damages and failing to analyse the authorities he had cited.

12. He argues, further, that both the trial court and the first appellate court had failed to give a basis for the apportionment of liability yet, in determining liability, the court must consider the facts of the case and come to a conclusion with regard to who most contributed to the accident. The appellant asserts that there were bumps at the scene of the accident and that he had slowed down but did not see the

minor. He notes that the respondent had testified that he was holding two minors, one on the right and the other one on the left, and that before crossing the road, he looked both sides of the road, but it is the child on the left that was hit.

13. The appellant further submits that had the courts properly analysed the evidence, they would have found that both parties were equally to blame for the accident. The appellant relies on the case of *W.K (minor suing through next friend and mother J.K v Ghalib Khan & another* (2011) eKLR in which the Court of Appeal apportioned liability equally between the appellant and the respondent.

14. With regard to the quantum of damages, the appellant submits that it was pleaded and proved that the minor sustained a fracture of the right tibia and fibula bones and soft tissue injuries which healed without any resultant complications. It is his submission therefore that there was no basis for the award of Kshs 500,000, an award that was not supported by any similar award. In his view, the award was made without taking into account a relevant factor.

15. The respondent opposes the appeal and has filed submissions dated February 22, 2023. His counsel, Ms Mukhongo, submitted that the first appellate court considered the relevant evidence in upholding the finding on liability by the trial court, and this court should therefore not interfere with the decision. The damages awarded were commensurate with the nature of the injuries sustained by the minor. The court's finding in favour of the respondent on both liability and quantum was supported by the weight of evidence presented during trial, and the respondent had discharged his burden of proof and proved negligence on the part of the appellant.

16. Regarding liability, the respondent submits that the appellant's testimony before the trial court was that the minor had been left in a motor tricycle on the right side across the school gate and that he was purportedly following his father by crossing to the school which is on the left. He notes that this evidence was contradicted when the appellant stated that the minor bumped onto the left front side of his motor vehicle. The appellant had also admitted that he was unable to see the minor coming as there were school vans parked on the left side of the road blocking his view, and that it was as he was passing the last van that he knocked down the minor. The respondent submits that the appellant should have exercised maximum caution while driving as he was around a primary school at a time when the children were going home. He relies in support on *Rahima Tayab & others v Anna Mary Kinanu* 1983 KLR 114 &1 KAR and *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] 1 KAR 1 to submit that the minor in this matter, aged 7 years, could not be blamed for the accident.

17. The respondent further submits that in assessing damages, comparable injuries should, as far as possible, be compensated with comparable awards made in previous decisions. It is his submission that there is no evidence that in assessing the damages, the trial court took into account an irrelevant factor, or left out of account a relevant one, or that the amount awarded is so inordinately high as to be considered an erroneous estimate of the damages.

18. This being a second appeal, we are confined to a consideration of matters of law. The appellant contends that the first appellate court failed to re-evaluate the evidence presented before the trial court, which it has a duty to do. By not re-evaluating the evidence, it failed to find that the trial court erred in the apportionment of liability for the accident. Secondly, that it erred in failing to find that the trial court took into account irrelevant factors or failed to take into account relevant factors in assessing the damages.

19. The appellant submits, correctly, that the first appellate court has a duty to re-evaluate the evidence before the trial court and reach its own decision on the facts. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR it was held that:

> " First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words a first appeal is by way of a retrial and facts must be revisited and analysed afresh, - see *Selle and another v Associated Motor Boat Company Ltd and others* (1968) EA 123."

20. I note that the first appellate court properly summarised its duty on an appeal, and went on to summarise the evidence that was tendered before the trial court. In impugning the decision of the first appellate court, the appellant argues that while the court properly set out the applicable principles on a first appeal, it misapprehended its duty by stating that:

> " It then behoves this court to summarise the evidence that was tendered before the trial court. This appeal revolves around both liability and quantum."

21. I agree with the appellant that this summation of the duty of the first appellate court is not the most elegant. However, in upholding the decision of the trial court in apportionment of liability, the first appellate court observed as follows with respect to the evidence:

> " 13. It is not disputed that the minor was crossing the road in front of a Nissan that was parked partly on the road when the accident occurred. It is also not disputed that the accident occurred near a primary school where children normally cross the road to and from the school. What is in dispute is whether the minor was crossing the road in company of respondent as stated by the respondent or alone as stated by the appellant.
>
> 14. In whatever circumstance, appellant had a duty to exercise reasonable standard of care in all the circumstances of the case considering the likelihood of children crossing the road into the path. The minor was 7 years and negligence cannot be attributed to him in view of the holding in E*liud Mwale Lewa & another v Paka Tours Limited & Anor* and *A M (minor suing through his next friend M A M) v Mohamud Kahiye* (supra). That does not however exonerate the next friend from blame considering that he also had a duty to ensure that the minor crossed the road only when it was safe to do so and this he failed to do. Consequently, I find that the trial court's decision apportioning liability at 70:30% against the appellant was well considered and find no reason to interfere with it."

22. While a more comprehensive evaluation of the evidence before the trial court was desirable, I am not satisfied that the brief analysis by the first appellate court led to an error of law that is fatal to its decision. The appellant's ground of appeal with respect to the re-evaluation of the evidence must therefore fail.

23. The appellant's second main contention is that the first appellate court erred in upholding the apportionment of liability by the trial court. He submits that the respondent did not discharge the burden of proof to the required standard. It is his contention that the respondent should have been held liable for the accident, and if not, liability should have been apportioned at 50:50.

24. Section 107 and 108 of the *Evidence Act* cap 80 stipulates who bears the burden of proof with respect to a matter in issue. The burden of proof in civil cases is on a balance of probabilities. In this case, there is no dispute with respect to the occurrence of the accident. The trial court found, a finding that the first appellate court agreed with, that the respondent was 70% to blame, apportioning 30% of the liability to the respondent. In his evidence before the trial court, the appellant testified that when he approached Xaverian School, he slowed down as there was a bump just near the gate. There were also motor vehicles parked along the road, and the place was crowded as the vehicles were picking up students. He further stated that as he was about to pass a Nissan that was partly parked on the road, something hit the bumper of his vehicle, prompting him to stop. When he went to check, he found a boy lying on the ground. Shortly thereafter, the father of the boy emerged from the school and took him to hospital.

25. While the appellant contended that the respondent had left the minor in a tuk tuk and the minor was following him when the accident occurred, the appellant's own evidence does not bear this out: he heard 'something' hit the bumper of his vehicle and when he got out of the vehicle, found the boy lying on the road. This evidence echoes his statement to his insurer, which formed part of the evidence before the trial court, in which he stated:

> ''I was driving straight ahead towards Xaverian Primary School where Nissans, tuk tuks, motor bikes and bicycles had parked outside the school waiting to pick up school children. They parked in such a way that the school gate was not visible from the main road. One of the Nissans had also parked partly on the road. I then cleared a road bump just before I got to the area around the school gate...as I was about to pass the Nissan which was partly parked on the road I heard a sound like something had hit itself onto my vehicle...''.

26. The respondent's evidence was that on the material day, he and the minor, together with another minor whom he had picked from Xaverian School, were crossing the road from Xaverian School to where he had parked his motor tricycle. The appellant tried to overtake a Nissan van that had given them way and was partly parked on the road, and the appellant hit the minor who was slightly ahead of the respondent and the other minor.

27. From the evidence of both the appellant and the respondent, it emerges that the accident occurred outside Xaverian Primary School at about 3.00p.m. There were bumps on the road near the school gate. Vehicles had slowed down, and one of them, a Nissan van, had given the respondent and the minors way to cross. The appellant was trying to overtake this Nissan van when he hit the minor, whom he testified that he had not seen. The trial court apportioned liability at 70:30, an apportionment that was upheld by the first appellate court.

28. Given the evidence before the court and the age of the minor, I take the view that the appellant carried a larger share of liability for the accident. A prudent driver, passing a primary school gate where children were crossing the road, where vehicles had stopped and where he could not see the school gate, should have exercised greater caution before attempting to overtake the stationary Nissan van. However, as there is no cross-appeal on liability before us, and not being satisfied with the appellant's appeal on liability, I find no basis to interfere with the decision of the first appellate court on liability.

29. Before closing on the issue of liability, let me address myself briefly to the appellant's complaint that neither the trial court nor the first appellate court considered the decision in *Livingstone Otundo v Naima Mohamou (A Minor Who Had Sued Through Her Next Friend Mohamoud Ali)* [1990] eKLR. In this case, this court allowed an appeal in which the appellant challenged the finding of the trial court on liability and quantum with respect to an accident that occurred in Eastleigh involving a five-year-

old child. The Court of Appeal accepted the evidence of the appellant that the five-year-old had dashed into the road from amongst the people walking on the road and knocked herself against the mudguard of the appellant's vehicle. The court held that:

> " This evidence was not controverted nor was there any indication whatsoever that he did not measure up to his required obligation. In holding the appellant liable in negligence, the learned judge did not, in the circumstances of this accident, even consider what course of action he (appellant) would have taken to ascertain that it did not occur. The occurrence of this accident without more was no ground for holding the appellant liable in negligence."

30. I take the view that even had the two courts below considered the above decision, the outcome on liability would not have been different. In the present case, the evidence from the appellant and the respondent is that the minor was hit by the appellant's vehicle when the appellant was trying to overtake a stationary vehicle that had stopped outside a school gate to allow the minor and his father to cross the road. Its facts and circumstances are vastly different from the facts in the *Livingstone Otundo case* and would not have assisted the appellant.

31. The appellant also impugns the award of damages by the trial court that was upheld by the first appellate court. He submits that it was too high relative to the nature of injuries sustained by the minor. The respondent defends the award, maintaining that it accords with the injuries sustained and awards in similar cases.

32. The circumstances under which an appellate court will interfere with an award of damages were set out by the court in *Butt v Khan* [1978] eKLR in which the court stated:

> " An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..."

33. This principle was also applied in *Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd* [2013] eKLR in which this court stated:

> ''In *Arrow Car Limited v Bimomo & 2 others* (2004) 2 KLR 101 this court cited and applied the *KEMFRO Africa Ltd case* (supra) with regard to the principles to be considered before interfering with an award of damages by a trial judge when it held:
>
> > " in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must a wholly erroneous estimate of the damage."

34. In this case, the evidence before the trial court indicates that the minor sustained a fracture of the tibia and fibula, bruises on the knee, soft tissue injuries on the lower back, soft tissue injuries with lacerations on the shoulder joint, lacerations on the left and right elbow and lacerations on the right knee. The trial court considered these injuries and the damages awarded in comparable cases and made an award of Kshs 500,000.

35. In upholding the award of damages by the trial court, the first appellate court noted the injuries and the amount of damages that the parties had proposed in the trial court, and the authorities relied on.

It noted that the authorities cited by the respondent were too high and the injuries in respect of which the awards were made were more serious than those sustained by the minor in this case. The court noted that the precedents relied on by the appellant before the trial court, while they related to injuries similar to those sustained by the minor in this case, were between 7- 19 years old. The damages awarded in those precedents ranged between Kshs 200,000 and Kshs 350,000. The court observed the principle enunciated in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* [1985] eKLR and concluded that there was no evidence before it to show that:

> " ...in assessing the damages, the trial court took into account an irrelevant factor, or left out of account a relevant one, or that the amount awarded is so inordinately high to be considered an erroneous estimate of the damage."

36. I agree with the conclusion of the High Court in this regard. While the award of damages of Kshs 500,000 to the minor in this case is higher than what was awarded in similar injuries in the judicial precedents cited by the appellant- which were from about 7 years prior to the decision of the High Court- it has not been demonstrated to be so inordinately high as to warrant interference by this court.

37. I would accordingly dismiss the appeal on both liability and quantum with costs to the respondent.

Judgment of Kiage, JA

38. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA with which I agree, and have nothing useful to add.

39. As Tuiyott, JA also agrees, the appeal shall be disposed of as proposed by Mumbi Ngugi, JA.

Judgment of Tuiyott, JA

40. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2023

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR