



**Sese v TN (Minor suing thro' her next friend WMO) (Civil Appeal
25 of 2022) [2023] KEHC 24692 (KLR) (6 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 24692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 25 OF 2022
PN GICHOHI, J
NOVEMBER 6, 2023**

BETWEEN

IRENE NYANSUGUTA SESE APPELLANT

AND

TN RESPONDENT

MINOR SUING THRO' HER NEXT FRIEND WMO

*(Being an Appeal from the judgment and decree of Hon. W. Kugwa (Resident Magistrate)
in Kisii Chief Magistrate's Court Civil Case No. 461 of 2021 delivered on 13/04/2022)*

JUDGMENT

1. The background of this Appeal is that in a Plaintiff dated 8th April, 2021, the Respondent (TN (Minor suing thro' her next friend WMO) was the Plaintiff in Kisii Chief Magistrate's Court Civil Case No. 461 of 2021. The Appellant (Irene Nyansuguta Sese) was sued as the registered, insured and/or beneficial owner of motor vehicle registration number KCW 218R Toyota Vitz (the suit vehicle).
2. The Respondent pleaded that on 12/02/2021, she was a lawful pillion passenger aboard motorcycle registration number KMFM 342Y along the Kisii – Nyamatara road in Nyambara area when the Appellant lost control of the suit vehicle and collided with the motorcycle.
3. As a result, an accident occurred where the Respondent suffered pain, loss, injury and damage. She blamed the Appellant for causing the accident as particularized in paragraph four (4) of the Plaintiff. The Respondent therefore prayed for general damages, special damages, costs and interests.
4. In her Statement of Defence dated 2nd June 2021, the Appellant generally denied the occurrence claim and further pleaded that if any accident occurred as alleged, and which she denied, then the same was wholly caused and/or substantially contributed to by the negligence on the part of the Respondent and the owner and/or servant or agent of the motorcycle registration number KMFM 342Y.



5. In its judgment dated 04/02/2022, the trial court held the Appellant 100% liable for the accident and awarded the Respondent general damages of Kshs. 800,000.00 and special damages of Kshs. 7,800.00. The Respondent was also awarded costs of the suit together with interest on general and special damages.
6. Aggrieved by this decision the Appellant filed this appeal vide a Memorandum of Appeal dated 19/04/2022 on five (5) grounds can be condensed into three (3) that:-
 1. The learned trial Magistrate erred in law and in fact in holding the Appellant 100% liable without taking into consideration the evidence on record.
 2. The learned trial Magistrate erred in law and in fact in adopting the wrong principles thus awarding the Respondent Kshs. 800,000/- general damages which was excessive and inordinately high in view of the injuries sustained.
 3. The learned trial Magistrate erred in law and in fact by failing to consider submissions by the Appellant thus arriving at an erroneous decision.
7. The Appellant therefore prayed that the Appeal be allowed by setting aside the decision of the trial court with a substituted order that the suit be dismissed with costs. In the alternative, the Appellant prayed that the award for general damages be re-assessed downwards. She further prayed for costs of the Appeal.
8. Pursuant to the directions issued by this Court on 29/09/2022, the Appeal was canvassed by way of written Submissions.

Appellant's Submissions

9. In submissions dated 01/11/2022 and filed on 09/11/2022, the Appellant argued that the absence of an eye witness, a sketch map and an investigation diary could not render the Appellant 100% liable for the accident. She submitted that the police abstract was merely an indication that an accident occurred but not conclusive proof as to liability. In addition, she submitted that her failure to call any witnesses did not buttress a finding on liability against the Appellant.
10. On general damages, the Appellant referred to Dr. Gaya's medico-legal report indicating that the "fractures have healed very well" with no deformities and "no permanent disability according to the Accident Compensation scales" and submitted that the trial court failed to exposit her basis for awarding the sum of Kshs. 800,000.00 as general damages. For those reasons and while relying on the case of *George Raini Atungu vs Moffat Osnave Aunga* [2021] eKLR, the Appellant urged this Court to award general damages in the range of Kshs. 400,000.00 and Kshs. 650,000.00.

Respondent's Submissions

11. Her submissions are dated 12/01/2023 and filed on 16/01/2023. On liability, the Respondent submitted she was a pillion passenger and that the Appellant was over speeding while overtaking another motor vehicle thus causing the accident.
12. She submitted that preliminary findings by the Investigation Officer found the Appellant liable for the accident. While citing the High Court decision in *Barongo Serveillus Yopnen vs Geoffrey Nyakundi* [2020] eKLR, the Respondent submitted that as a pillion passenger, she was not in any way in control of the motor cycle and in the absence of any evidence by the Appellant to rebut her evidence, the trial court's finding that the Appellant was 100% liable was proper. She therefore prayed that the appeal against liability be dismissed with costs.



13. On quantum, the Respondent submitted that the awards by the trial court were neither inordinately high nor excessive as to warrant the interference by this court irrespective of the fact that the trial court failed to advance reasons in support of her award.
14. She submitted that the trial court took into account the injuries that she had sustained, the P3 form, Dr. Gaya's medical report and Dr. Nyameino's medical report where permanent disability was assessed at 5%. Relying on the case of *Dennis Matagaro vs NKO (Minor suing through next friend and father WOO)* [2021] eKLR, the Respondent urged this court to dismiss the appeal on quantum with costs.

Analysis and Determination

15. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified- (*Selle vs. Associated Motor Boat Company Ltd* [1968] EA 123).
16. From the Memorandum of Appeal and the submissions by parties, the issues that arise for determination are both on liability and quantum.
17. On liability, Wilfred Makana Orutwa (PW3) who was the minor's grandfather and next friend adopted his Witness Statement dated 8th April 2021. He reported the accident and obtained the police abstract. He blamed the driver of the suit motor vehicle for the accident though he did not witness the accident.
18. PC Kenneth Walumbe (PW1) attached to Kisii Police Station. He did not visit the scene. He gave brief facts of the accident as captured by the Investigating Officer one PC Gichuki in police abstract (P Exh.1.) that the accident occurred on 12th February 2021 at about 9.30 hrs along the road from Kisii to Nyamato and involved motor vehicle registration number KCW 218 R registered in the name of the Appellant and a motor cycle registration number motorcycle registration number KMFM 324Y Honda on which the minor TN (Respondent) was a pillion passenger.
19. While overtaking, the said motor vehicle collided with the motor cycle and both rider and pillion passenger sustained injuries. They were rushed to Ram Hospital while both the motor vehicle and the motor cycle were taken to Kisii Police Station. The Investigating Officer blamed the driver motor vehicle registration number KCW 218 R though she was not charged with any traffic offence.
20. On this issue , the trial court held:

“The question is , is there a dispute that the accident did not occur? It is not disputed only that the defence denies liability. All in all, the defence did not call a witness neither to rebut the evidence and did not demonstrate or disapprove that the driver of the said motor vehicle can be absolved from the blame. On this note the standard of proof is on the balance of probability and in my considered opinion, I hold the Defendant 100% liable.”
21. The Appellant is listed in the Police Abstract as the owner of the suit motor vehicle. She did not call any witness and the occurrence of the accident is not rebutted. The Police Abstract shows that the matter was pending under investigations. It is not material that the driver was not charged with any traffic offence.
22. Though it is also apparent that the rider was not a witness and it is not shown what became of him after being rushed to hospital, that is not an issue here in the circumstances of this case. Any issue of liability would be as against the rider and the Appellant and not the Respondent.



23. In this case, it is not disputed that the Respondent was a pillion passenger. Superior Courts have severally held, including in the case of *Janet Kathambi (supra)*, that there is nothing a pillion passenger can do prevent an accident of this nature occurring as the passenger had no control over the motor cycle. The Appellant does not show who would have shared the liability with her so that she is not held 100% liable. This Court finds no error in the trial court's finding on liability.
24. On quantum, Daniel Nyamwino (PW2) examined the minor on 24/02/2021 at Kisii Teaching and Referral Hospital. He noted that she had a painful swelling on the right side of her head and neck and bruises on the left shoulder region; her chest and lower back were painful; the right forearm below the elbow joint and right leg below the knee were under plaster cast; her injuries were 10 – 12 days old. He using treatment notes and Hospital attendant card filled the P3 Form (P Exh. 2) and classified degree of injury as grievous harm.
25. Using the P3 form, treatment notes and clinic appointment card from Kisii Teaching and Referral Hospital, PW2 prepared the medical report (P Exh. 3 (a) showing that the minor sustained :-Scalp contusionWhiplash injuries to the neckChest contusionBack contusionFracture of the right radius boneBruising of the left shoulder regionRight tibia and fibula fractures.
26. He opined that that the injuries were likely to heal well and assessed the degree of permanent disability at 5 %.
27. The medical report by Dr. Z. Gaya dated 26/11/2021 (DExh.1) was produced by consent in support of the Appellant's case. It shows that the Respondent sustained :-Soft tissue injury of the head, neck, back and right forearm.Fracture of the right forearm.Fracture if the right leg.
28. The doctor opined that the fracture of the distal third right radius had healed well without any deformity and that the fractured right tibia and fibula had also healed well and there was no leg deformity or shortness. His prognosis and opinion were being a young girl who was still growing , the fractures have healed very well and with continued growth, she should not have any deformities. In that regard, he opined that there was no permanent disability according to the Accident Compensation Scales.
29. The parameters within which the Appellate Court may interfere with award of general damages by the trial court are now settled ,bearing in mind that the trial court exercises its discretionary power to arrive at a particular figure as damages again guided by comparable awards for such injuries.
30. From the trial court record, the Respondent had proposed a sum of Kshs. 1,500,000/= as general damages citing the case of *Clement Gitau v GKK* [2016] eKLR. On the other hand, the Appellant proposed an award of between Kshs. 200,000/= and Kshs. 250,000/= citing the case of *Daniel Otieno Owino & another vs Elizabeth Atieno Owuor* [2020] eKLR.
31. In *Clement Gitau (supra)*, the Respondent sustained fracture of the left tibia-midshaft and bruises on the neck according to medical report by Dr. Maina Ruga. On the other hand, Dr. Theophilous Wangata showed that the Respondent sustained comminuted fracture of the left distal tibia and fibula and bruises on the neck. The degree of permanent incapacity was assessed at 20%.On appeal, High Court did not disturb the award of Kshs. 600,000/= “taking into consideration of the changing trends of inflation.”
32. In *Daniel Otieno Owino (supra)* , the Respondent had sustained compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose, blunt chest injury and soft tissue injury on the left lower limb involving the thigh and



ankle region. High Court substituted the award of Kshs. 600,000/= by the lower court with an award of Kshs. 400,000/=.

33. In *George Raini Atungu (supra)*, relied on by the Appellant herein, the Respondent adult suffered a chest contusion, a fracture of the left radius and ulna, pelvic contusion, a contusion to the right leg and a fracture of the right tibia/fibula bones. The High court sustained lower court's award of Kshs. 650,000.00 in general damages.
34. In *Dennis Matagaro (supra)* cited by the Respondent, the minor sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the left tibia and fibula. The High Court upheld an award of Kshs. 700,000.00.
35. The parameters within which the Appellate Court may interfere with award of general damages by the trial court are now settled, bearing in mind that the trial court exercises its discretionary power to arrive at a particular figure as damages again guided by comparable awards for such injuries.
36. This Court is guided by the case of *Catholic Diocese of Kisumu v Tete* [2004] eKLR, the Court of Appeal had this to say:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”[emphasis added]

37. In this case, this Court is satisfied that authorities cited by the Respondent herein are more comparable with the injuries sustained by the Respondent in this case. Even a look at the trial court's judgment does not show which authority it relied on and reasons for arriving at an award of Kshs. 800,000/=, this Court is satisfied that the award herein was fair, reasonable and justifiable. There is no reason to interfere with it.
38. In the upshot, this appeal is devoid of merit. It is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 6TH DAY NOVEMBER, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

N/A for Respondent

Aphline, Court Assistant

