REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 17 OF 2019

PATRICK MULI.....APPELLANT

-VERSUS-

EM *(Minor* suing through her Mother and

Next Friend **WG).....RESPONDENT**

(Being an appeal against the judgement delivered by Hon P.M. Chesang, SRM on 3rd February, 2017 in Kangundo PMCC 51 of 2014)

BETWEEN

E M *(Minor* suing through her Mother and Next Friend **WG)...PLAINTIFF**

-VERSUS-

PATRICK MULI (KASYOKA)

CAPTAIN MOTORCYCLE

MANUFACTURING COMPANY.....DEFENDANTS

JUDGEMENT

1. By a plaint dated 8th November, 2013, the Respondent herein sued the Appellant claiming special damages, general damages, costs and interests.

2. The cause of action arose on or about 13th January, 2012 when the Plaintiff, a minor, was lawfully walking off the road along Machakos-Kaviani Road. According to the Respondent, the 1st Defendant either by himself or both defendant's authorised driver/servant and/or agent so negligently, carelessly and at high speed drove, controlled and/or managed motor cycle reg. no. KMCN 259G that it hit the Plaintiff as a result of which the Plaintiff sustained severe injuries. Both the special damages and negligence were particularized in the plaint. The respondent also pleaded *res ipsa loquitor* and vicarious liability.

3. In their joint defence, the appellants denied ownership of the said motor cycle and the fact that it was being driven by them. They also denied that the accident occurred and in the manner pleaded by the Plaintiff. Accordingly, they denied liability. They pleaded in the alternative that the accident was caused by the negligence of the Plaintiff particulars whereof they itemised. The Defendant also challenged the particulars of injuries and special damages pleaded by the Plaintiff.

4. In response to the defence, the Plaintiff filed a response to the defence.

5. In support of the case, PW1 **–WG**, the Plaintiff's mother testified that on 18th January, 2012, she was at home when she was called by one

Roseline Miki who informed her that the plaintiff was involved in road traffic accident. She then rushed then to hospital where the plaintiff had been taken, she found that she had right upper teeth missing and cuts on the lower lip, left and right hand and legs. After that, the plaintiff lost consciousness. She produced treatment notes as exhibits.

6. It was her evidence that she reported the matter to the police at Machakos Police Station. It was her evidence that the Motor cycle that hit the plaintiff was KMCN 259G.

7. In support of her case, PW1 exhibited 6 receipts for Kshs. 1,500/. After being discharged the plaintiff continued with follow up treatment. She also exhibited a P3 and an abstract. She confirmed that the abstract bore the Plaintiff's name and disclosed the 1st defendant as owner of the motor cycle. It was her evidence that the motor cyclist was charged and fined Kshs. 5,000/- in default 3 months imprisonment and she exhibited the remand warrant. PW1 also exhibited a medical legal report. It was her evidence that they did a search to ascertain ownership and exhibited a certificate of search. According to her evidence, she knew both the motor cycle and the defendant. The plaintiff, she testified, was 7 years old and was yet to completely heal as she was still experiencing pain to her neck. In support of the plaintiff's age she exhibited her birth certificate.

8. In cross-examination, PW1 testified that she did not witness he accident. She however clarified that she was informed by **Rosaline Mutio** and fellow pupils who witnessed the accident that the plaintiff was walking beside the road on her way home from school.

9. PW2, PC Franscisa Ndinda Mutua, attached to Machakos Traffic Base also testified that on 18th January, 2012 an accident report was made to their station vide OB No. 14/18/1/2012 between motor cycle KMCN 259G and a pedestrian **EM**. She testified that investigations were done and **Patrick Muli David** was taken to court. From the record, the accident was along Machakos-Kanani road, and the cyclist hit a pot hole then lost control and hit the pedestrian. As a result, he was charged with riding an uninsured motor cycle. She testified that the pedestrian was injured and rushed to Machakos Level 5. A P3 form was issued from the station and later a police abstract was also issued. It was her testimony that the pedestrian was a child aged 8 years. In her opinion, had the motorcycle been moving at a slow speed, he could not have lost control.

10. In cross-examination, the witness testified that the investigation officer, **PC Mugo**, who visited the scene had been transferred to Kitengela and she was unable to trace the police file. She could not therefore tell whether the file had any sketch marks and whether the police officer gathered statements from witnesses. She stated that there was no one accompanying the child.

11. In her evidence, the rider was not charged with careless riding and the OB does not indicate that the pedestrian was walking along the foot path.

12. In re-examination, she explained that the child was hit while walking on a foot path for pedestrians.

13. PW3, **Dr. Emmanuel Loiposha**, attached to Makueni Referral Hospital, testified that while attached to Machakos level 5 hospital, he examined the plaintiff, aged 8 years, on 23rd March, 2012 and prepared the medical and P3 form for her. According to his evidence, the plaintiff sustained a cut scold on the right parietal region, cut lower lip, right leg soft tissue injuries and lost two upper teeth and one lower.

14. He testified that the plaintiff was treated at Machakos Level 5 hospital. At the time of examination, she complained of inability to masticate, pain on the absent root canals and phobia to motor cycles. In his conclusion, the plaintiff still required maxillofacial management in addition to counselling. He produced the report and the P3 form.

15. In cross-examination, he stated that he was not the one who observed the patient immediately after the accident, but did so two months later. He confirmed that the teeth were lost and explained that the fracture was attendant to lost teeth. Since union had already occurred, he did not indicate it in the P3 form and medical report. He confirmed that at 8 years of age, the teeth should grow back and he belied that the plaintiff must have fully healed and able to masticate.

16. At the close of the Plaintiff's evidence, **DW1 – Patrick Muli Kasyoka,** testifying as DW1 stated that on 18th January, 2012, an accident occurred, he was riding a bike from Machakos heading to Kathiani. In his evidence, he was on the left lane. On reaching Katunyu area, a child appeared in uniform running, so he knew she was from school. He stated that there were about five children, one of whom ran into the road from the left while the others did not cross. In his evidence, the child was about six years and was alone as there were no adults.

17. DW1 testified that he swerved from his lane to the right and engaged the breaks but the child and the bike collided. He stated that there were no bumps but it was a tarmac road. He disclosed that there was a school nearby. After the accident, a crowd began to gathered and wanted to beat him up, he boarded another bike and went to the nearest police station to report while he heard that the child was taken to hospital by a Good Samaritan.

18. He admitted that he was found guilty of the offence of riding without an insurance and not careless driving. He stated that the motorbike was not his but he was given a squad (chance to ride) though he could not remember the name of the person who gave him the bike.

19. The witness blamed the child for the accident because he did not wait for the road to clear. He averred that the accident occurred at about 1.00 pm and that the accident occurred in town.

20. In cross-examination, he stated that he did not know the child who got injured since he did not see the injuries. He admitted that he knew the road well and that there was a school nearby and it is a centre. He however insisted that he was moving at slow speed and that he saw the children about 5 metres ahead on a straight road. However, the children appeared suddenly. In his evidence, he could not remember the name of the owner of the bike since he last saw him in 2015 and did not know where the child lives as he did not visit her after the accident.

21. In re-examination, he insisted that he swerved to the right to avoid hitting the child but the child came to where the bike was.

22. DW2 – **Mutuku Matheka,** while adopting his witness statement, testified that on 18th January, 2012 he saw who were coming from school and saw them step beside the road to play. While playing the plaintiff hit one of the children and started running to cross the road and was in the process hit by a motorbike which was heading to Kathiani. She testified that the plaintiff was on the left side of the road while he was standing outside a kiosk which was about 20 metres from the road. He further stated that the child was hit on the right side of the road. According to him, the rider, whom he did not know before, tried very much not to hit the child, who was taken to the Hospital by a Good Samaritan. In his evidence, it was the child who caused the accident and there was no adult with the children.

23. In cross-examination, the witness stated that DW1 hit only one child on the left as one heads to Kathiani. She however did not move closer to see how the child was injured. She admitted that the road is straight and that there was a road at that place where the children were coming from. She stated that the bike was moving at slow speed. However, since there is a small hill, the rider could not have seen the children. In her evidence, DW1 did everything to avoid the accident.

24. In her judgement, the learned trial magistrate relied on the defendant's version as to how he accident occurred. According to her it was admitted that the accident occurred at a centre with a school and before the accident occurred the cyclist saw the children five metres away so that if he was moving at a slow speed he could have been able to stop. She also appreciated the fact that the plaintiff was 8 years old hence could not have been in a position to make good judgement and cannot be held liable. She proceeded to find the cyclist 100% liable.

25. As regards the injuries suffered, she found that the same were skeletal injuries and awarded Kshs 200,000.00 general damages with special damages of Kshs 500/- with costs and interests.

1. In this appeal it is submitted on behalf of the Appellant that the trial court disregarded the evidence adduced during trial, the Appellant's submissions before it and the several binding precedents as cited before her.

27. It was contended that despite the fact that the Plaintiff did not produce any evidence whatsoever during trial proving the Appellant's liability, the trial court still found the Appellant herein wholly liable, for the sole reason that the Respondent was a minor of eight (8) years as at the time of the accident and accordingly, such a minor cannot be held liable. According to the appellant, a perusal of the trial court judgments clearly shows that no other facts and/or evidence were considered by the trial Court in reaching its decision on liability despite the court's own admission that it is only the Appellant herein that explained how the accident occurred and that it relied on the Appellant's testimony.

28. In the appellant's view, there is no blanket rule that children cannot be held liable in contributory negligence in an accident and stress that each case must be determined on its own facts and merits. Based on the decisions in **Butt vs. Khan (1982-88) 1 KAR, Burke vs. Woolley and Maughan (1980) CA No. 744**, reported in ***2 Kemp & Kemp (4th ed) at pg 3311 and 3459,*** **Attorney General vs. Vinod (1971) EA 147,** and **Tayab vs. Kinanu (1983) eKLR,** it was submitted that the trial magistrate ought to have delved into the circumstances surrounding the occurrence of the accident to establish liability but she clearly failed to do so despite the Appellant herein adducing evidence that the accident occurred as a result of the child's negligence.

29. It was submitted that the Respondent completely failed to establish any liability whatsoever against the Appellant herein. Liability being a question of evidence it was submitted that the fact that an accident happened does not open facts or place liability at all and it would be a travesty if the only thing to be proved were to be the occurrence of the accident. In the instant case, pursuant to section 107 of the ***Evidence Act***, the burden of proof lied on the Respondent herein to prove her case on a balance of probabilities against the Appellant herein.

30. The appellant therefore urged the court to grant the prayers sought in this Appeal by setting aside the trial court's judgment and dismissing the suit against the Appellant with costs in favour of the Appellant, or at the very least apportion liability between the two parties with the Respondent shouldering the higher percentage.

31. As regards the quantum, it was submitted that should this honourable court in any way hold the Appellant herein partially liable, we seek that the award on quantum of damages be reduced to Kshs. 80,000.00 to be subjected to apportionment of liability considering that as at the time of re-examination of the Respondent by the doctor and also as per the doctor's evidence during trial, the Respondent's missing teeth had grown back with complete union and she was able to masticate thus had fully healed.

32. In opposing the appeal, it was submitted on behalf of the Respondent that the Respondent at the time of the accident was aged 8 years which was confirmed by the doctor who examined her and this was never disputed by the Appellant. As to whether a child of 8 years can be held to partial liability for a road traffic accident, the Respondent relied on **Bottorff v. South Construction Company,184 Ind. 221, 110 N.E. 977 (1915), Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982 – 88) IKAR 1 (1981) KLR 349**, and **Rahima Tayab & Others vs. Anna Mary Kinanu (1983) KLR 114 & I KAR 90** and submitted that in the present Appeal, the Respondent-minor was always in court but the Appellant chose not to call the minor to confirm her capability of understanding of endangering herself. Thus the Appellant did not prove any contributory negligence on the part of the Respondent- minor.

33. The Respondent also relied on **HKM vs. Francis Mwongela Ncebere (2017) eKLR and** averred that DW1 had a clear immediate vision of the children who were about 5 meters ahead of him. Though he was also aware of the road as he knew wit well and knew there was a school nearby, he did not explain as to why he did not immediately apply the brakes to the motor bike upon seeing the Respondent-minor but instead chose to swerve unto the lane where the minor was. If the Appellant was truly riding the said motor cycle at a slow speed as alleged in his testimony, then the Appellant should have been able to brake immediately instead of swerving since the Respondent-minor was 5 meters ahead of him. In fact, the Appellant swerved to the lane of the Respondent minor on seeing her and went ahead and hit her. Thus the Appellant not only did not apply the brakes immediately but swerved onto the lane on which the Respondent-minor was on and hit her. The Appellant could therefore not have been riding at a slow pace as he alleged. The trial court was correct in holding that the Appellant would not have been able to stop if he had been riding at a slow speed.

34. As regards the award, the Respondent relied on **Butt v. Khan** [1981] KLR 349, **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia** (1982 –88) 1 KAR 727, **Gicheru V Morton and Another (2005) 2 KLR 333, Tayab vs Kinanu (1982-88) 1KAR 90** and**Daniel Kosgei Ngelechi vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] Eklr**, **Kigaragari vs Aya (1982-88) 1 KAR 768 and** prayed for the award to be enhanced to Kshs 400,000/- having made note of the above injuries, the time the accident occurred and the years passed by.

Determination

35. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle –vs- Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

36. In **Coghlan vs. Cumberland (1898) 1 Ch. 704**, the Court of Appeal (of England) stated as follows -

> **"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."**

37. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

38. However, in **Peters –vs- Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given… Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question….it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

39. It was therefore held by the Court of Appeal in **Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

40. In this appeal, it is clear that the determination of the appeal revolves around the question whether the Respondent proved her case on the balance of probabilities and what ought to have been the quantum of damages. That the burden of proof was on the appellant to prove his case is in doubt. Section 107 (1) of the **Evidence Act**, Cap 80 Laws of Kenya provides that:

> **Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.**

41. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.***
>
> ***112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.***

42. The two provisions were dealt with in **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

> **"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."**

43. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, the appellant in this appeal depending on the circumstances of the case.

44. In **Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail fi no evidence at all were given as either side."**

45. I agree that the Court of Appeal's position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** espouses the correct legal position that:

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."**

46. However, just like any other general rule, there are exceptions to this rule. The plaintiff herein was a child aged 8 years. In **Bottorff v. South Construction Company,184 Ind. 221, 110 N.E. 977 (1915),** the Indiana Supreme Court stated:

> **"It has been laid down by law writers and the courts that the time of infancy is divided into three distinct periods, during each of which different presumptions prevail; the first period is that up to the age of seven years, during which the infant is conclusively presumed to be incapable of understanding the nature of crime and can in no way be held responsible therefor; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act. The third period is after the age of fourteen years when the infant is presumed to be capable of committing a crime and can be held the same as an adult. It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases."**

47. The law in cases involving children of tender years was however reiterated by the Court of Appeal in **Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90** where it was held that:

> **"The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission…The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. 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 and therefore cannot be found negligent unless he or she is blameworthy."

48. In arriving at that the decision the Court cited its decision in **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] 1 KAR 1; [1981] KLR 349** in which **Law, JA** expressed himself as hereunder:

> **"It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness. A young child cannot be guilty of contributory negligence although an older child might be depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child…Clearly each case must depend on its peculiar circumstances. In the instant case the learned Judge was right in finding that the defendant had been negligent, and that the plaintiff was struck when almost half-way across the road and that at the most the plaintiff had committed an error of judgement for which contributory negligence should not be attributed to him."**

49. It was on the same basis that it was held in **Nkudate vs. Touring & Sporting Cars Ltd and Another [1978] KLR 199; [1976-80] 1KLR 1333** that:

> **"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."**

50. In my judgement, it is clear that the learned trial magistrate properly took into account, the age of the plaintiff 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.

51. In this case the learned trial magistrate not only relied on that legal presumption but also relied on the defence evidence and found that based thereon, the defendant was 100% liable. The evidence of DW1 was that he was driving at a slow speed. He saw the children five metres away. In **Bashir Ahmed Butt vs. Uwais Ahmed Khan** (supra) the court expressed itself as hereunder:

> **"High speed can be *prima facie* evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 m.p.h may not be a safe speed in the early hours of the morning when children go to school along and cross a road which known to the driver as in the instant case, serves an area with several schools in it. In the manner of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence."**

52. In **HKM vs. Francis Mwongela Ncebere (2017) eKLR it** was held that:

> **"As a general rule, presence of a child or children along the road should awaken an intuitive signal of the high possibility that the child or children may enter or crossing the road without notice. That realization should make the driver to be extremely careful and to take such preemptive actions as slowing down considerably or moving away from their position at the time or making an abrupt stop if need be. From his statement, the driver had a clear immediate vision of the deceased child. At the time he saw the boy running, he ought to have been put on notice that he must exercise particular care and anticipate that the child would cross the road without looking. According to his statement, the driver saw the boy emerging from the vehicle he had passed, but it seems he did not give the presence of a child any or appropriate significance; had he acted properly he would have taken more decisive steps in dealing with the scenario that was unfolding fast. So his testimony that he tried ''to swerve and brake but was too close'' is not anywhere close to proper care and control of the vehicle in the circumstances of the case"**

53. In this case the area was well known to DW1 who ought to have taken extra care near a school. While the appeal is only based on the finding that the Plaintiff's age did not permit the court to find her negligence, the other ground which was that the evidence adduced even by the defence showed that DW1 was negligent was not addressed by the appellant in this appeal. Having considered the evidence afresh, I find no reason to interfere with the learned trial magistrate's finding on liability.

54. As regards quantum, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"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 different 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

55. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

56. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

57. In this case apart from urging the court to interfere with the quantum, no basis was laid for doing so. I have on my part considered the award and taking into account the injuries sustained, I find no compelling reason to interfere with the same.

58. In the premises I find no merit in this appeal which I hereby dismiss with costs.

59. Judgement accordingly.

Read, signed and delivered in open court at Machakos this 24th day of February, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Mburu for Mr A. K. Mutua for the Appellant

Mr Muthama for Mutua Makau for the Respondent

CA Geoffrey