REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 50 OF 2019

ALA (Suing as the Next Friend and Father to **ZM*)*.....APPELLANT**

VERSUS

PHILIP OBONYO OLUOCH.....RESPONDENT

[Appeal from the Judgment and Decree of Honourable M. Agutu (SRM)

dated and delivered on the 7th March 2019 in the original

Kisumu CMCCC No. 324 of 2017]

JUDGMENT

The appeal before me was brought by the party who was the Plaintiff in the original suit.

1. The Plaintiff had sued the Defendant seeking compensation for injuries which his daughter, Z, had sustained in an accident.

2. The learned trial magistrate had held that each of the persons involved in the accident were equally to blame. She apportioned liability on the ratio of 50:50.

3. Being dissatisfied with the said apportionment of liability, the Appellant urged this Court to find that the trial court erred in law and in fact, by arriving at that conclusion.

4. The Appellant was of the view that the judgment was against the weight of evidence.

5. Essentially, therefore, there is only one issue for determination in this appeal; the question as to whether or not the trial court erred in apportioning liability at 50:50.

6. Being the first appellate Court, I have the obligation of re-evaluating all the evidence on record, and to draw my own conclusions therefrom. However, I am also alive to the fact that unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were giving evidence.

7. Accordingly, if the trial court made an assessment of evidence based on the demeanour of a witness, this court would have to accept such an assessment unless it can be clearly demonstrated from the totality of the evidence on record, that the trial court's conclusion was improbable.

8. PW1, AA, is the father of the girl, Z.

9. He gave evidence on 15th December 2017. On that date he testified that the daughter was 12 years old.

10. During his testimony, **PW1** adopted his Witness Statement, which had been filed on 5th October 2017, as his evidence-in-chief. In the said Witness Statement, **PW1** stated that Z *"is 11 years now."*

11. PW1 told the Court that he learnt about the accident when he was aboard a matatu, enroute to Bondo. It is his neighbor Patrick (**PW2**) who phoned **PW1**, to give him the news, that Z had been hit by a car.

12. Immediately upon receiving the news, **PW1** terminated the journey to Bondo, and rushed to the hospital where Z had been taken for treatment.

13. During cross-examination **PW1** said that Z was knocked down by the Defendant's vehicle.

14. He also said that ordinarily, there was a person who helped children to cross the road. However, on the material day, the person was not present, to help the children in crossing the road.

15. PW2, PATRICK ANGALUKI VOLEMI, testified that he was an eye-witness to the accident. He was at the scene, delivering water to Samos Hotel. He said;

> **"A motor vehicle came from Mamboleo on the left hand side, as you face Kisumu town. It hit a child who was crossing the road from the left to the right. The child was almost at the middle of the road when she was hit."**

16. During cross-examination **PW2** reiterated that the vehicle involved, did come into contact with Zipporah.

17. PW3, PC GEOFFREY NDIAMA, was a police officer who was attached to the Kondele Police Station, at the material time.

18. He testified that the minor was knocked down by the vehicle.

19. PW3 produced the Police Abstract, and explained that

> **"the parties involved are reflected in the Police Abstract."**

20. PW4, GEORGE MWITA, was a Clinical Officer at Nyando.

21. On 13th September 2016, he examined Z, who had been involved in a road accident on 7th September 2016.

22. She sustained the following injuries;

> **"tender right side of the head; bruises on the lower back; swollen right hand with bruises; bruises on the left arm; and bruises on the knee joint."**

23. PW4 produced the **P3** Form as an exhibit.

24. During cross-examination **PW4** said that it was possible for a person to get such injuries from a fall. However, he also said that the person could suffer such injuries when hit.

25. After **PW4** testified, the Plaintiff closed his case.

26. The Defendant then called one witness, **GEORGE CHIANDO NDINYA (DW1)**. In his Witness Statement he said that on the material day, he was in the Defendant's vehicle, a Toyota Dyna.

27. The said vehicle was being driven by Charles Ouko.

28. According to **DW1**, the vehicle left the Defendant's premises at about 1200 hours.

29. When they reached the Salima Area, a minor who had been standing on the left side of the road, suddenly ran onto the road.

30. DW1 testified that the driver applied brakes and swerved to the right, to try and avoid hitting the minor.

31. It was the evidence of **DW1** that the minor did not make any contact with the vehicle.

32. However, **DW1** later accompanied the driver when he was taking the minor to hospital. **DW1** also testified that the driver of the vehicle reported the accident, to the Kondele Police Station.

33. During cross-examination, **DW1** said that he first saw the minor when the vehicle was about 50 metres away.

34. DW1 testified that the driver swerved to the right.

35. At the material time, there were other children on the road.

36. DW1 said that the vehicle braked a metre away from the child.

37. On the one hand, the Plaintiff's witnesses testified that the minor was hit by the vehicle, whilst, on the other hand, the Defendant insisted that there was no contact between the vehicle and the minor.

38. But the first thing to take note of is that the trial court held the Defendant liable.

39. They cannot have been held liable unless the trial court was convinced that the Defendant's vehicle was involved in the accident with the minor.

40. The significance of the finding on liability is that whilst the Plaintiff appealed against the apportionment of liability, the Defendant did not lodge any cross-appeal to challenge the determination on liability. In the said circumstances, I hold the considered view that it is not open to the Respondent to contend that there was no contact between the vehicle and the minor.

41. From the uncontested evidence of **PW1** and **PW2**, there were road signs along the road where the accident occurred. The said road signs were for;

> **"Slow Down"**, and
>
> **"Children Crossing"**.

42. Accordingly, any person driving within that area had already been cautioned to slow down; and the main reason for that was that children would ordinarily be expected to be crossing the road within that area.

43. As **DW1** confirmed, even at the material time, there were some children on the road. In the event, it was incumbent upon the Defendant's driver to demonstrate that he paid heed to both the road signs and also to the actual presence of children along the road.

44. In the case of **BUTT Vs KHAN, CIVIL APPEAL NO. 40 OF 1977** Madan J.A (as he then was) said;

> **"Also in my opinion 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 a traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 mph may not be a safe speed in the early hours of the morning when children go to school along and across a road which, known to the driver, as in the instant case, serves as an area with several schools in it. In a manner of speaking, there would be children here, children there and children everywhere. The safe speed on an occassion like this is that which will bring the driver out of the area unscathed and free from accident."**

45. In the instant case, the driver did not get out of the area unscathed. He was involved in an accident with the minor.

46. As I have already indicated above, the Respondent did not challenge the trial court's finding, that his driver was 50% liable for the accident.

47. The only question now before me is whether or not the Respondent was liable 100%, as has been asserted by the Appellant.

48. In the considered opinion of the Respondent, the minor was guilty of contributory negligence. That opinion is based upon the understanding of the Respondent, that the minor was eleven years old at the time of the accident.

49. Both parties before me cited the decision in the case of **BASHIR AHMED BUTT Vs UWAIS AHMED KHAN, CIVIL APPEAL NO. 40 OF 1977**, to support their respective positions. In that case Madan J.A. said;

> **"Indeed, I am of the opinion that the practice of civil courts 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 doing the act or making the omission, he had capacity to know that he ought not to do to the act or make the omission."**

50. Before delving into the issue of contributory negligence, we have got to verify the age of the minor.

51. In her judgment, the learned trial magistrate held that the minor was eleven years old, as at the time of the accident.

52. PW1, who is the father of the minor, indicated that the said minor was 12 years old; but he also mentioned the age of 11.

53. Meanwhile, in the **P3** Form, the age of the minor was indicated as 9 years.

54. The Appellant has submitted that a minor of 9 years cannot be held to a higher standard and duty of care than a prudent mature adult, trained and licensed as a driver.

55. In my understanding, the trial court did not purport to hold the minor liable to a higher standard and duty of care, compared to the Defendant's driver. By holding the minor contributorily negligent, the trial court was saying that in the circumstances of the case, the minor had the capacity to know what she ought to have done, but she failed to act accordingly.

56. Similarly, when the driver was held 50% liable, the trial court was saying that the driver had the capacity and duty to know what he ought to have done in the circumstances, but he failed to act accordingly.

57. On the issue of the minor's age, the best evidence could have been a birth certificate, or a baptismal card or medical records showing when the minor was vaccinated etc. Any official document which was prepared in the ordinary course; and which was not prepared with reference to the facts giving rise to the case, might be useful in determining the correct age.

58. However, when there is a professional medical assessment of the age of the minor, that too, would form a good piece of evidence in the ascertainment of the age of the minor.

59. In this case the **P3** Form came close to an official document, but the information therein was not verified by a medical professional.

60. Whereas the age cited on the **P3** Form could be a guide to the age of the minor, the court cannot overlook the oral testimony by the father of the minor.

61. In the circumstances, I find that the learned trial magistrate cannot be faulted by holding that the minor was 11 years old, on the basis of the evidence adduced by her father.

62. I also find that because the minor did not testify at the trial, the court was deprived of the opportunity to ascertain whether or not she had the capacity to know what she ought to have either done or refrained from doing at the material time.

63. The Respondent has urged this Court to find that the failure by the Appellant, to have the minor testify in court, should not work in their favour. I was invited to draw an adverse inference, that the evidence she would have given would not have been favourable to the Appellant's case.

64. The Appellant cited the following words, from the case of **RAHIMA TAYAB Vs ANNA KINANU [1983] KLR 114**;

> **"A judge should only find a child guilty of contributory negligence if he or she is of such 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."**

65. Whilst I appreciate that in the absence of the minor from court, the Respondent did not have the opportunity to establish the capacity of the said minor, I find that there was no legal basis upon which I could make the presumption that the minor would have given unfavourable evidence if she had testified.

66. The Court can only find a minor guilty of contributory negligence if some blame is demonstrated to attach to him or her. In the absence of evidence from which the minor could be held guilty of contributory negligence, the Court ought not to hold him or her liable.

67. In this case the minor was hit by the Defendant's vehicle when she had already reached half-way across the road.

68. As the Defendant's witness said that he had seen the minor when the vehicle was about 50 metres away from her, I hold the considered view that the minor had acted in such a manner as would have kept her safe, if only the Defendant's driver had controlled the vehicle better. For a minor aged 11 years, I find that she acted in such a manner as would be required of a person of her age.

69. The degree of care shown by the minor was in consonance with that which would have been expected of a person of the same age.

70. Therefore, I find that the learned trial magistrate erred by apportioning liability 50:50.

71. Accordingly, the appeal is allowed, and the judgment on the issue of apportionment of liability is set aside.

72. I substitute the said aspect of the judgment with a holding that the Respondent was 100% liable.

73. Costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE