REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 150 OF 2015

A M K (Minor suing through her mother and next friend

M N)..APPELLANT

VERSUS

CHAMBI FRANCISCA *ALIAS*

FRANCISCA SYOMBUA KYAMBI...........RESPONDENT

R U L I N G

1. **A M K (**Minor suing through her mother and next friend, **M N)** instituted a suit by way of Plaint dated the **15th** day of **November, 2011** against **Chambi Francisca *alias* Francisca Syombua Kyambi,** the Respondent, claiming General Damages and Special Damages in the sum of **Kshs. 43,500/=** plus costs and interest.

2. The claim arose out of a Road Traffic Accident that the Plaintiff was involved in on the **24th** day of **November, 2010** while riding a motorcycle Registration Number **KMCM 298P** which collided with motor-vehicle Registration No. **KBD 599W** that was owned by the Respondent. He blamed the Respondent or her authorized driver for negligence and averred that as a result of the accident he sustained serious injuries.

3. In her response the Respondent denied the occurrence of the accident/ownership of the accident motor-vehicle and attributed the occurrence of the accident, if it did happen to the Appellant or that he contributed to it by negligently riding his motorcycle directly onto the path of oncoming traffic.

4. At the hearing the Appellant testified that while riding at a sharp bend he noticed the Respondent's motor-vehicle that was parked in the middle part of the road. He attempted to avoid the motor-vehicle but the collision occurred. He called a witness **No. 56467 P C Prostus Ngano** who produced the police abstract on the accident in Court. He stated that the Appellant was charged following the accident but the charges were withdrawn after the Appellant who was a minor at the time of accident produced a provisional driving licence.

5. The Respondent's witness DW1, **Paul Kithendu** stated that the motor-vehicle was stationary when the Appellant who drove the motorcycle at a high speed hit it.

6. The Court considered evidence adduced and reached a finding that Respondent's motor-vehicle was stationary, when the Appellant failed to control the motor-vehicle and rammed into it. That had he been riding at **30 – 40 kph** as testified he would have easily braked, stopped or swerved to avoid the Respondent's motor-vehicle. The learned trial Magistrate dismissed the claim in totality following a finding that the Appellant failed to prove the case on a balance of probability.

7. Aggrieved by the Judgment, the Appellant appealed on grounds that:

- The Learned Ag. Senior Resident Magistrate erred in law and misdirected himself on the facts when he made a finding that the Appellant was wholly to blame for the accident contrary to the evidence tendered in Court by the Appellant and his witness.
- The Learned Ag. Senior Resident Magistrate erred in law and misdirected himself on the facts when he deliberately distorted the facts of the case and evidence by holding that the Respondent's motor vehicle Registration Number **KBD 559W** was stationary when the accident occurred contrary to Respondent's own pleadings and the Appellant's evidence.
- The Learned Ag. Senior Resident Magistrate erred in law and misdirected himself on the facts when he failed to follow judicial precedents that a minor could not be held 100% liable in contributory negligence, and he further erred when he

failed to at least apportion liability in view of the evidence before him.

- The Learned Ag. Senior Resident Magistrate erred in law and misdirected himself on the facts when he failed to assess the general damages payable to the Plaintiff should the claim have succeeded, leaving the inference that the learned Magistrate had a pre-determined mind to reject the Appellant's claim unfairly.
- The findings of the Learned Magistrate were against the weight of the evidence on record and the resultant Judgment amounted to a miscarriage of justice to the Appellant.

8. The Appeal was canvassed by way of written submissions that I have duly considered alongside authorities cited.

9. This being the first appeal, this court is duty bound to re-evaluate the evidence adduced at the trial, analyze it and come to its own conclusion bearing in mind that it neither saw nor heard witnesses who testified. **(See Selle vs. Associated Motor Boat Company LTD (1968) EA 123,126).**

10. At the outset the Respondent urged that the Appeal is incompetent because there was no decree on record. It was urged further that the importance of the decree or order appealed against in an Appeal to the High Court is mirrored in **Order 42 Rule 2** of the **Civil Procedure Rules** that provide thus:

> ***"Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."***

And **Order 42 Rule 13(4)** of the **Rules** that provide thus:

> ***"Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:***
>
> > ***(a) the memorandum of appeal;***
> >
> > ***(b) the pleadings;***
> >
> > ***(c) the notes of the trial magistrate made at the hearing;***
> >
> > ***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***
> >
> > ***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
> >
> > ***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***
>
> ***Provided that—***
>
> > ***(i) a translation into English shall be provided of any document not in that language;***
> >
> > ***(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."***

11. Further, it was submitted that under **Paragraph (f)(ii)** of the **Rule** the Court has the discretion to dispense with certain documents which may have been omitted from the record but it cannot overlook an order or decree appealed from.

12. The proviso to the definition of a decree by the **Civil Procedure Act** as provided by **Section 2** stipulate thus:

> ***""decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—***
>
> > ***(a) any adjudication from which an appeal lies as an appeal from an order; or***
> >
> > ***(b) any order of dismissal for default:***
>
> ***Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;***
>
> ***Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."***

I have perused the Memorandum of Appeal. The Appeal is against the Judgment and order of the learned Magistrate. The decree is omitted. I have perused the Lower Court record, it does not have a decree which means that at the point of appealing against the Judgment no decree had been drawn up and even thereafter none was drawn. This is acceptable therefore the Appeal is not incompetent.

On liability, the Appellant was a minor aged **16 years old** at the time of the occurrence of the accident. He got a provisional driving licence thereafter. The question is whether he was contributorily liable. In the case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982 – 88) I KAR I & (1981) KLR 349** the Court of Appeal held:

> ***"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……***
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> ***Clearly each 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 halfway across the road and that at the most the Plaintiff had committed an error of Judgment for which contributory negligence should not be attributed to him…… The practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence and thereafter, in so far 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 that act or make the omission….."***

13. In another case of **Rahima Tayab & Others vs. Auma Mary Kananu (1983) 1114 I KAR 90,** the Court of Appeal stated that:

> ***"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 or 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……***
>
> ***In the present case the trial Judge held in clear terms that the plaintiff had the requisite road sense and therefore her failure to see the approaching car was blameworthy. In the case of a grown up person the proportion of blame would have been substantial but having regarded to the plaintiff's tender years the degree of liability is assessed at 10%....."***

14. The Appellant herein was stated to have taken a driving course. He is a person who understood his duty to other road users. The accident occurred at a sharp bend, a place where the Appellant was expected to exercise a great duty of care. The Respondent stated that his motor-vehicle was stationary. It was also negligence on his part to park a motor-vehicle at such a bend. Therefore the learned Magistrate erred in reaching a finding that the Appellant was wholly to blame for the accident. In the circumstance the liability should have been apportioned at **50:50** for the Plaintiff as against the Respondent.

15. On quantum, the learned Magistrate failed to address himself on the question of quantum which was erroneous.

16. Medical reports were adduced in evidence by **Doctor P. Mutuku** for the Appellant and **Doctor Timothy Byakika** for the Respondent. The Appellant sustained a fracture of the right tibia and that was comminuted. Guided by the case of **Victor Musonga vs. Linus Waititu Kariuki HCC.C No. 2797 of 1997 (NBI)** the Appellant sought for a similar sum of **Kshs. 500,000/=** that was awarded in General Damages. Further he sought **Kshs. 100,000/=** for costs of future medical treatment and Special Damages in the sum of **Kshs. 43,500/=.**

17. The Respondent on the other hand proposed a sum of **Kshs. 150,000/=** for damages for pain, suffering and loss of amenities and Special Damages in the sum of **Kshs. 43,500/=.** She relied on the case of **Sudhjakaron K. Prabhakarau vs. Ashmat M. A. Guvurat** where **Kshs. 200,000/=** was awarded for a fracture to the left femur.

18. I have considered the authorities and the time that has elapsed from the time of the awards and the vicissitude of life. In the circumstance I find an award of **Kshs. 400,000/=** being reasonable in General Damages. The Appellant's fracture was fixed with a metal plate and screws and it was indicated by the Orthopedic Surgeon that there was need for readmission for purposes of a nailing procedure of the fracture, a sum of **Kshs. 100,000/=** proposed is reasonable. The sum proved in Special Damages was not in dispute.

19. Consequently, I find the Appellant's Appeal meritorious and I hereby enter Judgment for the Appellant thus:

General Damages	-	**Kshs. 400,000/=.**
Costs of future treatment	-	**Kshs. 100,000/=.**
Special Damages	–	**Kshs. 43,500/=.**
		Kshs. 543,500/=
Less 50% contribution	-	**Kshs. 271,750/=**

Kshs. 271,750/=

The Appellant will have costs of the suit at the Lower Court and of the Appeal. Plus interest on Special Damages from the date of filing of the suit until payment in full.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of August, 2018.

L. N. MUTENDE

JUDGE