



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 97 OF 2015

S N (Suing as the legal administrator of the Estate of the Late M N N)....**APPELLANT**

VERSUS

HUSSEIN J. OMAR.....1ST RESPONDENT

GODFREY MWANGI.....2ND RESPONDENT

STEPHEN KINYUA MWAURA.....3RD RESPONDENT

(Being an Appeal from the judgment and decree of the Hon. S.M. Mungai delivered on 15th May 2015 at Nakuru CMCC 962 of 2010 – Samuel K. Njenga(Suing as the legal administrator of the estate of the late Margaret Njeri Njenga versus Hussein Omar & Others)

JUDGMENT

1. On the 3rd January 2010, M N N, seven years old girl, was fatally knocked down by the Respondent's vehicle Registration Number KAL 030F along Mwariki road in Nakuru. The appellant being the father and administrator of the deceased estate sued for damages arising from the negligence of the driver of the vehicle, the 3rd Respondent. The claim was brought under the **Fatal Accidents Act Chapter 32** as well as the **Law Reform Act, Cap 26 Laws of Kenya**.

2. The Respondents denied liability by their driver, the 3rd Respondent and attributed contributory negligence to the deceased. Upon full hearing, the trial court made finding that the appellant failed to prove **any negligence** on the part of the driver and by extension no liability against all the respondents. This finding on liability is the subject of this appeal.

3. The grounds for the appeal can be summarised to one, **whether the 3rd Respondent was to blame for the accident or whether the deceased child contributed to its occurrence.**

4. My duty as the first appellate court is to re-consider and re-evaluate the evidence adduced before the trial court and come up with my own findings – **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others (1968) – EA 123**. I should however bear in mind that I ought not interfere with the trial court's findings on fact unless the same are based on no evidence or on a misapprehension of the evidence or that the trial court applied wrong principles in reaching its findings, - **Sumaria & Another -vs- Allied Industrial Ltd (2007) e KLR**, among other decisions.

5. I have considered evidence of the appellant (PW1) and the police officer – PW2 who investigated the accident, as well as evidence of DW1, the driver of the vehicle and another police officer DW2 and parties' written submissions before the trial court and in this court.

6. It is not in dispute that the accident vehicle belonged to the 1st Respondent and was being driven by the 3rd Respondent. In dispute is how the accident occurred, and in particular whether the deceased caused the accident wholly or contributed to its occurrence.

7. The appellant did not witness the accident. The investigating officers, PW2 and DW2 and the driver, DW1 are the only persons who hold the key to the above question.

PW2 PC Samson Okello was not the investigating officer but one PC Kiarie who had been transferred. He produced the police abstract, and testified that an inquest was opened but not finalised as at the time of his testimony. He had nothing useful to tell the court.

8. DW2 PC Samuel Muniri an officer from Nakuru Traffic base testified that the police file on the accident was produced in court but disappeared and that no body was charged as investigations were pending.

On cross examination, this officer stated what was in the occurrence book (O.B) that the child was crossing the road. He had nothing else to add.

9. On his part, the 3rd Respondent/driver of the accident vehicle testified that the accident occurred at a stage and that he had seen three children playing on the road pavement when he was about 100 meters away, that he hooted and they left the pavement but one girl ran across the road, that he applied emergency brakes but the vehicle did not stop on time – and the girl was removed under the vehicle. It was his evidence that the girl was not off the road but on the road. He blamed the girl's parents for allowing them to go to the main road at that age.

10. On cross examination, it was his evidence that he was driving at a speed of 40 KPH and that he tried to brake and that the skidded vehicle on the sand that was on the tarmac. He recommended payment of damages for the child's death, stating that he would not oppose payment of compensation for the child's death.

Upon the above evidence the trial Magistrate made findings that the appellant did not prove any negligence by the driver of the vehicle, and absorbed all the respondents from liability.

11. It is important to note that no report of the investigations was produced before the trial court, neither were any sketch plans, nor the police file which is said to have disappeared. The inquest that had been ordered under case **No.IAR(f)3/10** was also not undertaken and no reason was given. The trial court therefore relied on the evidence of the 3rd Respondent (driver) only, there having been no eye witness who testified.

12. In his own admission, the driver saw the deceased girl and other children playing from a 100 meter distance. He ought to have been aware that the children could dash onto the road without notice and therefore was under a duty to be more careful and to drive cautiously in the circumstances. In his own evidence, he stated that

“I applied emergency brakes but the vehicle did not stop.---though the vehicle stopped, it skidded first on the sand that was on the tarmac...”

13. The above can only be construed to imply that the vehicle was at a high speed in the circumstances, not the 40 KPH the driver wanted the court to believe. He had a very high responsibility of care and to take all evasive actions to avoid hitting the child with the front of his vehicle. This is buttressed by the drivers confirmation that the child was found under the bumper of the vehicle. - See **Maurice Milimo -vs- Kakamega Municipal Council, Civil Appeal No. 85 of 2005.**

14. The issue as whether a child of tender years can be held liable in a road traffic accident has been discussed in numerous decisions, **AM (minor suing through his next friend MAM) -vs- Mohamud Kahiye (2014) e KLR, Bashir Ahmed Butt -vs- Uwais Ahmed Khan (1982-88) I KAR (Court of Appeal), and Rahima Tayab & Others -vs- Anna Mary Kinaru (1983) KLR 114.**

15. The general thread running across all the decisions on subject is that in an area where there are no obstructions, and a driver has a clear view, in day time, a motorist is put on notice that he or she must exercise particular care for keeping an eye out for children and anticipating that they might cross without looking, and pass across from the front of the vehicle, and that failure to stop or swerve must construe negligence on the part of the motorist.

16. In particular in **Rahima Tayab** above, the Court of Appeal 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 in so far 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.”

17. Further, the court proceeded thus

“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.

A child has not sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy.”

18. In the present appeal, the driver of the vehicle cannot be said to have been careful enough having seen the children playing from a distance of 100 meters. He ought to have taken notice that the children or one of them could run across the road without any notice.

His failure to be more cautious in the circumstances, compounded by failure by his vehicle to stop when he applied brakes, if indeed he applied emergency brakes, can only be construed to mean that he was driving fast, was careless and must shoulder blame for the accident.

19. I agree with the appellant's submission that the trial magistrate failed to apply the legal principles in respect of young children. I find that the trial magistrate did not base his findings on the recorded evidence where the driver of the vehicle clearly admitted having committed acts of negligence by failing to exercise the duty of care expected of him in the face of young children playing within the vicinity.

It is more evident as the driver testified that he was not opposed to payment of compensation for the child's death, and recommended payment of damages.

20. It is trite that the burden of proof of negligence lies with the plaintiff, who must at all stages prove existence of the facts giving rise to the negligence – **Section 107, 108 and 109 of the Evidence Act.**

That is expected of a mature adult person who in instances of road traffic accidents is expected to take care of his own safety. It is however not the position of a seven year old child – See above decisions.

21. Even if the pedestrian was not of tender years, the evidence on record would not let the driver off the hook. He substantively contributed to the occurrence of the evidence.

As can be seen from the authoritative decisions I have cited above, a child of seven years cannot be held to have contributed to the accident. Nothing was provided to the court that she could appreciate the necessity of her own safety.

I further find that the trial magistrate's findings on liability were based on a misapprehension of the evidence and wrong application of the law.

22. Accordingly I proceed to set aside the trial magistrate's judgment on liability and substitute it with a finding that the Respondents jointly and severally are liable in negligence for the accident, and therefore in compensatory damages for the death of the deceased.

23. The appellant has no quarrel with the trial court's assessment of damages, nor do the respondents.

I uphold the awards of damages. The award under loss of dependency shall accrue interest at court rates from the date of the trial magistrate's judgment while special damages shall accrue interest at court rates from the date of filing of the primary suit.

24. Costs of the appeal and the court below are awarded to the appellant.

Dated, signed and delivered this 27th Day of September 2018.

J.N. MULWA

JUDGE