



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 117 OF 2011

NAKURU MODERN FEEDS LTD.....1ST APPELLANT

KANYURA MWANGI.....2ND APPELLANT

-VERSUS-

JM (Minor suing through MN as NEXT FRIEND.....RESPONDENT

(Appeal from the judgment of the Hon. L. Komingoi Principal Magistrate, Nakuru dated and delivered at Nakuru on the 30th of June 2011 in Nakuru Civil Suit NO. 423 of 2009)

JUDGMENT

1. The Respondent's son, 11½ years old was knocked down by the appellants vehicle Registration No. KAQ 230P at Free Area Nakuru on the 7th December 2008 . He was injured.

The respondent sued the owner and driver of the vehicle for negligence alleging that the said vehicle was driven in excessive speed was driven without due care and attention, that the driver failed to slow down, swerve or in any other way control the vehicle so as to avoid the accident. He sought damages for pain and suffering as well as special damages.

2. The appellants denied the claim in its totality in their defence dated 26th June 2009 and in the alternative attributed negligence to the minor.

3. Upon full hearing the trial court found in favour of the respondent holding the appellants to blame at 90% and the minor 10%.

4. Evidence adduced by PW4 a sister to the minor who accompanied him was that while walking with other children, she saw the vehicle and held the minor but he insisted on crossing the road thereby he was knocked down sustaining serious injuries.

5. An officer PC Christopher did not investigate the accident but attended court to produce the OB extract, and the police abstract wherein the minor boy was blamed for the accident.

6. The Appellants driver (**DW1**) evidence was that he was driving at Free Area, Nakuru when a boy crossed the road from the right to the left side, that he had not seen the children who were walking together, that he tried to avoid the accident by breaking but unfortunately the vehicle hit the boy with the left side of the bumper. He was not charged with any traffic charge.

7. The trial court made findings that the minor did not contribute to the accident but however blamed him at 10%.

8. The appellants appeal is on liability apportioned appellant (90%) on the main ground that the trial magistrates findings were not supported by the evidence on record.

9. Being the first appellate court it is my duty to re-consider and re-evaluate the evidence tendered before the trial court and come up with my own findings – **Kiruga -vs- Kiruga & Another (1988) e KLR. And Peter -vs- Sunday Post (1985) EA 424** where the court rendered that:

“It is a strong thing for an appellate court to differ from the findings on a question of fact of the judge who tried the case who had the advantage of seeing and hearing the witnesses ---”

10. It is trite that where a court finds that the evidence adduced is not clear as to who caused the accident or contributed thereto, then the court will move to apportion liability at ratios it deems fit – **Civil Appeal No. 608 of 2007 Julius Omollo Chanda and Joyce Menga -vs-**

Samson Nyaga Kinyua.

11. I have considered parties written submissions and the trial courts judgment.

It is not in dispute that **PW4 sister** to the minor tried to restrain the minor from crossing the road. It is also evident that the driver did not see the children who were walking together with the minor off the road.

12. Both a minor or any pedestrian and a driver of a vehicle have a duty to take care of their own safety while on the road.

In **Tayab v. Kinanu C.A (Nbi) Civil Appeal No. 29 of 1982**, the court quoting from **Gough -vs- Thorne (1966) WLR 1387 (Lord Demming)** rendered that a young child cannot be guilty of contributory negligence but an older child may. It rendered further that

“--- But it depends on the circumstances. 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 the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.”

13. The minor boy in this appeal was **11 ½ years old**. The older sister tried to restrain him from crossing the road. It is my opinion that a minor of such age and especially where traffic rules are taught in primary schools he ought to have the basic sense of road safety.

14. In **Peris Onduso Omondi -vs- Tectura International Ltd & Another Nairobi Civil Case No. 715of 2002**, in very similar circumstances the court found a minor who ran away from other children and was hit by a vehicle as he crossed the road to blame to the tune of 20%.

The fact that the driver testified that he had not seen the minor and the other children before he crossed is evidence that he was not on the look out for other road users nor did he exercise due care and attention as he drove.

15. The practice of the courts as stated in the case **Rahima Tayab & Others (Supra)** is that a person under the age of ten years cannot be held to be guilty of contributory negligence unless there is clear proof that the minor had the capacity to know that he ought not do the act or make the omission complained of.

16. The evidence before the trial court points to a child (minor) who had a mind of his own, refusing to heed to a restraint by his elder sister. It is my opinion that the minor had the capacity know that crossing a road without due care and attention was not right.

The court would need great persuasion before imputing contributory negligence to such a minor - Court of Appeal in **Bashir Ahmet Butt - vs- Uwais Ahmed Khan (1982-88) IKAR 1 (1981) KLR 349**.

17. I am persuaded that the 10% contributory negligence apportioned to the minor was on the lower side.

The minor as I have stated above was 11½ years old hence outside the group of children where there is consensus by courts that “normally” they ought not be found guilty.

18. For those reasons I find that the minor 11 ½ year old boy contributed to the accident to the tune of 20%.

The appeal therefore succeeds to that extent. Due to the circumstances and guided by provisions of **Section 27 of the Civil Procedure Act** which gives power to a court to award costs upon its discretion and upon considering the peculiar circumstances of each case, I direct that each party to this appeal to bear their own costs.

Dated, signed, and delivered this 20th day of December 2018.

J.N. MULWA

JUDGE