REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 37 OF 2006

***VYATU* ….....APPELLANT**

VERSUS

CALEB ONYANGO UYOGO .....RESPONDENT

(Being an appeal against the decision and judgment of the Learned Principal Magistrate at Nyando (Mrs. Chepkwony) dated 8th February, 2012 in the original Kisumu SRMCC NO. 87 of 2010)

JUDGMENT

1. The Appellant herein was on 6th January, 2010 involved in an accident with a motor vehicle belonging to the Respondent. She was at the material time walking along the Sondu-Ahero Road together with her father and next friend when the Respondents motor vehicle veered off the road and hit first her father and then her. She sustained injuries and upon filing suit at the Principal Magistrate's court she was awarded general damages in the sum of Kshs. 300,000/= and special damages of Kshs. 6,300/=. The court however ordered her to shoulder 20% contributory negligence. She has filed this appeal against the order for contributory negligence.

2. It was directed that this appeal be canvassed by way of written submissions and the same have been duly filed.

3. Counsel for the appellant while conceding that the circumstances in which an appellate court can interfere with findings of fact by a trial court are limited, submitted that there was no basis for the finding of 20% contributory negligence. He submitted that the Respondent did not discharge its burden of proof as regards the pleaded contributory negligence as it did not adduce any evidence. That the finding of contributory negligence against the minor who was six years old was not borne out of the evidence and as such the finding appears whimsical and clearly erroneous. Counsel contended that nowhere did the evidence show that the plaintiff's father and next friend failed to exercise due care in ensuring the minors safety on the road. He urged this court to find that the trial Magistrate erred in principle and accordingly reverse the order for contributory negligence and hence find the Respondent 100% liable. He has cited several authorities in support of his arguments.

4. On his part counsel for the respondent urged the court to dismiss this appeal. He submitted that to begin with there was no evidence regarding the speed at which the Respondent's motor vehicle was driven and that although the Respondent did not tender any evidence at the trial it is apparent from the evidence on record that the appellant and her father were largely to blame for the accident; that there was no evidence that the Respondent's motor vehicle veered from the road and it is therefore logical to conclude that the appellant and her father were on the tarmac. He further submits that this is buttressed by the fact that the driver of the motor vehicle was not charged with a traffic offence. That in any event there is evidence

from the appellant's father that she was not hit by the vehicle but that she got injured when he pushed her so that she could not be hit by the vehicle. He cited several decisions where courts have found minors guilty of contributory negligence.

5. This Court appreciates that as an appellate court it can only interfere with the trial court's finding of facts and exercise of discretion if it was clearly wrong or where it was based on no evidence or where it was based on a misapprehension of the evidence or based on a wrong principle. I must also bear in mind that I did not have the benefit of seeing the witnesses testify – See **Selle vs. Associated Motor Boat Co. Ltd [1969] E. A. 123, Isabella Karanja vs. M. Malele [1982 – 88] 1 KAR 186.**

6. In this case it is not disputed that an accident involving the Respondent's motor vehicle and the appellant occurred on the material date and place. The award of damages is also not in contention. It is also noteworthy that the only evidence regarding the circumstances of that accident is that of the appellant's father and an eye witness. That evidence was to the effect that the appellant's father and next friend were walking off the road when the Respondent's motor vehicle veered off the road and knocked them. Indeed the trial Magistrate found this as a fact and the only reason she found the appellant guilty of contributory negligence was because the appellant's father did not exercise due care in ensuring her safety. She held as follows:-

> **"The defendant did not call any evidence or witness to rebut or challenge the allegations of blame and negligence laid against him. No evidence was laid on the alleged contributory negligence on the part of the plaintiff but because the plaintiff was accompanied by the father PW3 who is an adult he ought to have exercised due care in ensuring the plaintiff was safe on the said road. I therefore apportion liability at 80:20 in favour of the plaintiff."**

7. **In Civil Appeal No. 30 of 1997**

Between

Ossuman Dhahir v. Mohammed & Another And

Saluro Bundit Muhamed

Court of Appeal observed that in apportioning blameworthiness regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness. In the instant case the trial magistrate correctly made a finding that the Respondent was to blame for the accident. This finding was based on the evidence of not just the appellants' father but of an eye witness who stated that the pair were off the road when they were hit. The appellants' father did also give evidence that he tried to shield the appellant from being hit by the vehicle. The trial magistrate omitted to state what more he could have done. He too was caught by surprise as the vehicle came from the rear. Moreover the Respondent did not prove the particulars of contributory negligence it attributed to the Appellant and clearly the trial magistrate based her finding on an extraneous issue. Accordingly there are sufficient reasons for this court to interfere with her exercise of discretion.

8. The appeal is allowed. The order for contributory negligence on the part of the appellant is set aside and the Respondent is found wholly liable for the accident and in the end there shall be judgment for the Appellant against the Respondent as follows:-

(a) General Damages – Kshs. 300,000/=

(b) Special Damages – Kshs. 6,300/=

(c) Costs in the court below and in this court

(d) Interest at court rates.

Dated, signed and delivered at Kisumu this 23rd day of January, 2015.

E. N. MAINA
JUDGE

In the presence of:

No appearance Advocate for the Appellant

Mr. Nyamweya Advocate for the Respondent

Moses Okumu Court Interpreter

ENM/aao