



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 121 OF 2012**

**D O (a minor suing thro'**

**P O O as next of friend) ..... APPELLANT**

**V E R S U S**

**AKAMBA PUBLIC ROAD SERVICES LTD. .... RESPONDENT**

The Appellant, being dissatisfied with part only of the judgment of the Honourable Mr. S. Atonga (PM) in KISUMU CMCC NO. 326 OF 2011 – D O (a minor suing through P O O as Next of Friend) - VERSUS- AKAMBA PUBLIC ROAD SERVICES LTD., delivered on 14.09.2012.

**J U D G M E N T**

On 9th December 2010, the appellant, a minor then aged 5 years, was travelling in a motor vehicle Registration No. KAM 564J belonging to the defendant when an accident occurred and she sustained injuries which she was subsequently awarded a sum of Kshs.100,000/= as general damages for pain and suffering and 2,000/= as special damages. The trial Magistrate however ordered that the appellant was to bear 40% contributory negligence. It is this order that forms the gist of this appeal. It is her contention, as can be discerned from the Memorandum of Appeal dated 15th March 2014 as well as in the submissions of his learned counsel, that this finding is not supported by the evidence at all and that no reason was given for it. His Advocate has cited several authorities in support of this submission.

The appeal was opposed. Learned counsel for the Respondent submitted that the Plaintiff was accompanied by his parents who owed him a duty of care and who deemed it fit for him to travel in the condition he did, and did not see the dangerous condition they were exposing him to. He contended that moreover he was an unlawful passenger in the bus as he neither had a ticket nor a seat. He wondered how the defendant could be held wholly liable for the occurrence of the accident when the appellant's own witnesses pointed to their being negligent. He urged the Court not to interfere with the Judgment of the trial Magistrate and drew the Court's attention to the fact that it did not have the benefit of seeing the witnesses give evidence.

Being the first appellate Court, I am required to reconsider and evaluate the evidence afresh so as to arrive at my own conclusion of course bearing in mind that I did not have the advantage of seeing the witnesses testify – **Selle V. Associated Motor Boat Co. Ltd. [1969] E.A. 123 at 126**. It is also trite that apportionment of liability being an exercise of judicial discretion an appellate Court would only rarely interfere and could only do so if it is demonstrated that the trial Magistrate in exercising this discretion was:-

a) clearly wrong or

- b) based on no evidence
- c) misapprehension of the evidence
- d) based on an application of the wrong principle

**(See Isabella Wanjiru Karanja V. Washington Malele (1982 – 88) KAR 186.**

The Defendant now Respondent did not adduce evidence at the hearing and the evidence of the witnesses for the appellant was therefore not rebutted. That evidence clearly points to negligence on the part of the driver of the bus. He was driving at a high speed and therefore lost control of the motor vehicle at a bump uprooting the seat on which the appellant's mother sat with her as a result of which the appellant sustained injuries. There was evidence which was also not rebutted that the appellant's mother was wearing a safety belt. This authority cited by the Respondent's Advocate – **W.K V. Ghalib Khan Neer Construction – C/Appeal No. 328 of 2005** would clearly not apply to this case as here there is no doubt as to who was to blame for the accident. I agree with counsel for the appellant that the trial Magistrate's finding of contributory negligence is not based on the evidence. How, pray may I ask would the appellant's mother have saved her from the injuries when their seat was ripped off or uprooted. Even the seat belt she had did not prevent her seat from being uprooted. It has been alleged now – not pleaded in the defence – that the appellant's parents allowed her to be exposed to this danger. The Respondent being the owner of the bus owed this child a duty of care and so was responsible for providing her with a seat belt which given the circumstances his mother found herself in might not even have helped. The owner of the bus was also responsible for charging the fare and cannot now be heard to say that since the appellant did not pay them she was an unlawful passenger.

Accordingly I allow this appeal and set aside the order for the apportionment of liability at 40% :60% so that the Respondent is now held wholly liable for the accident. The appellant shall also get the costs of this appeal. It is so ordered.

**Signed, dated and delivered at Kisumu this ....30th..... day of .....July..... 2015**

**E. N. MAINA**

**JUDGE**

**In the presence of:**

N/A for the appellant

N/A for the respondent

Moses Okumu - CC