REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 199 OF 2011

ALICE NYAWIRA MIANO……..……...APPELLANT

VERSUS

DR. MOSES MBURU MWAURA……RESPONDENT

(Being an appeal against judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 904 of 2003 (Hon. D. Ole Keiuwa, Senior Resident Magistrate) delivered on 3rd August, 2010)

MIANO NGARI (suing as next friend of

A N M, a minor)…….……...PLAINTIFF

VERSUS

DR. MOSES MBURU MWAURA……1ST DEFENDANT

S.M. RAVAL……..2ND DEFENDANT

JUDGMENT

In a suit filed in the magistrates' court appellant sought for judgment against the defendants, jointly and severally, for both general and special damages. She also sought for costs of the suit and interest on those costs and the decretal sum.

The suit against the defendants was instigated by a road traffic accident involving their vehicle registration number KVL 067 (Peugeot 504 Saloon) (the motor vehicle) and a minor, A N M (the minor). This accident occurred along Sagana-Karatina road near Kangocho trading centre on or about the 10th December, 1996 and at the material time the motor vehicle was being driven by the 1st defendant who is the respondent in this appeal

According to the averments in the plaint, the respondent so negligently drove, managed and or controlled the motor vehicle that he caused or permitted it to hit the minor. The plaintiff therefore attributed the accident solely to the respondent's negligence.

As a result of the accident, so it was averred, the minor is said to have sustained severe injuries and consequently she suffered loss and damage.

The respondent who was initially sued as the sole defendant before the appellant amended her plaint to include the 2nd defendant resisted the suit and more particularly denied that he was negligent as particularised in the plaintiff's plaint or at all.

The respondent admitted, however, that a road traffic accident involving the motor vehicle did occur but that the accident occurred ***"as a consequence of inevitable circumstances which cannot be attributed to the defendant."***

The respondent, in particular, laid the blame on the minor; he contended that the accident was caused solely or substantially contributed to by the minor who attempted to cross the road when it was not safe so to do, amongst other particulars of negligence attributed to the minor. He denied that the minor suffered any injuries loss or damage in any event.

At the conclusion of the trial the learned magistrate upheld the defendant's defence and dismissed the appellant's suit. In dismissing the suit the learned magistrate held that the evidence adduced by the plaintiff was inconsistent with her pleadings. According to the learned magistrate, while the plaintiff's evidence was that the vehicle veered off the road and hit her, the pleadings showed that she was lawfully walking on the road. The learned magistrate chose to believe the defence evidence that the minor was hit when she tried to cross the road. With that the appellant's suit was dismissed with costs but the court held that had the appellant's suit been successful the minor would have been awarded Kshs 300,000/= as general damages. No award would have been made under the head of special damages as they were not specifically pleaded, so held the learned magistrate.

The appellant was aggrieved by this decision and so she appealed to this Court; she has impugned the learned magistrate's decision on the following grounds of appeal:-

1) The learned magistrate erred in law and in fact "***in attributing total liability on negligence to the appellant herein, who was at the material time a child of six (6) years";***

2) The learned magistrate erred in law and in fact in attaching undue weight on the evidence of the defence and peremptorily rejecting the plaintiff's evidence;

3) The learned magistrate erred in law and in fact in rejecting the direct evidence of negligence against the respondent and proceeding to dismiss the plaintiff's claim;

4) The learned magistrate erred in law and in fact in failing to appreciate or apply the doctrine of res ipsa loquitor as pleaded by the plaintiff; and

5) The learned magistrate erred in law and in fact in delivering a judgment that was against the weight of evidence and the law.

As always, this court, being the first appellate court, has a legal obligation to reconsider the evidence and evaluate it afresh before coming to its own conclusions which may or may not be consistent with the trial court's findings of fact. Regardless of the conclusions this court comes to, I am mindful that the lower court had the advantage of seeing and hearing the witness and thus was able to assess with some degree of accuracy such elements of the evidence as their demeanour. I draw this legal position from **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court **(Sir Clement Lestang, V.P)** said:-

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has***

clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

The appellant **(PW1)** testified on 3rd May, 2010, fourteen years after the accident. By this time she had come of age if at all she was five or six years old when the accident occurred.

Her testimony was that she was on the left side of Karatina-Sagana road on the material date. She saw the motor vehicle, prior to the accident and according to her it was travelling at a high speed; it veered off the road and hit her. By then she was only 5 years old. It was her evidence that the respondent was to blame for the accident.

Because of the injury, she was admitted in hospital for five days; her broken leg was placed in plaster. A doctor examined her and made a report on the nature and extent of injuries she sustained.

The accident was also reported to the police who also issued her with the police abstract.

She testified that at the time of the accident she was with her aunt **Teresa Wanjira Kimondo (PW2).**

Teresa Wanjira Kimondo(PW2) herself testified that she saw the motor vehicle hit the appellant. The witness and the appellant were on the opposite side of the road when the accident happened. It would appear from her evidence that the two were also going opposite directions because according to her, she “***was climbing and she (the appellant) was coming down the road following other children.”*** She(the witness) was walking towards the shopping centre at the time. After the accident the respondent took the appellant to hospital at Karatina. The witness testified that the motor vehicle veered off the road and hit the appellant who was then on a foot path.

The doctor who examined the appellant was **Zachary Muriuki (PW3)**. He testified that he was an occupation therapist. He testified that the appellant had a history of an accident when he examined her. It was his evidence that the appellant had sustained compound fractures on the right leg. She was admitted for eight days but she was later attended to as an outpatient. The x-ray revealed compound fracture and that she had weakness of the right leg and she felt pain. There was slight muscle wastage and that the injuries were caused by a blunt object. The examination was done 12years after the accident but the doctor said that he relied on the discharge summary and the medical records from Karatina hospital where she had been treated; he also relied on the P3 form together with the police abstract to prepare his report.

Police Constable Abdi Mohamed Ali (DW1) produced the Occurrence Book and the Injury Register of 10th December, 1996. He testified that the accident was reported to the police on the material date and two officers, Corporal Mutisya and Sergeant Nicholas Muyuti visited the scene. According to him their findings were that the child, whom he said was aged 4 then, was to blame for the accident.

The respondent himself **(DW2)** confirmed that on the material date he was driving towards Nairobi; he was with his wife and their three children. He saw three children sitting on the left side of the road; they were about ten metres from the car when he first saw them. As he approached them one of children suddenly joined the road to cross it. He swerved to the opposite side to avoid hitting her. It was his evidence that the child hit the front passenger door of his car. The accident occurred after he had passed the shopping centre. He took the child to hospital.

His wife **Mercy Njeri Mburu (DW3)** testified that he was travelling with her husband at the materia time and that she was seated at the front. They were driving downhill. She said that “ a girl” crossed the road and her husband swerved to the other side . The child hit the left side of the vehicle . They took her to the hospital and reported the accident to the police at Karatina police station. She testified also that she did not see the child before the accident.

It is apparent from both the pleadings and the evidence on record that there are some issues that are not in

dispute and which in my view were crucial to the determination of the appellant's suit as much as they are crucial to determination of this appeal.

That the appellant was a minor, at the time of the accident, for instance, was not in dispute. From the available evidence, she was seven years old at the material time although **Police Constable Abdi Mohamed Ali (DW1)** who testified on behalf of the respondent said she was only four years old; the appellant herself testified that she was five years old then. The medical record from Karatina District Hospital where she was treated talks of seven years. What is clear, as far as the age of the appellant is concerned and in so far as her age is necessary for apportionment of liability is that she was a minor who was at most aged seven.

It was also not in dispute that an accident involving the respondent's motor vehicle and the appellant who was then a pedestrian occurred on 10th December, 1996 along Sagana-Karatina road.

It was not contested and indeed it was established, by medical evidence, that as a result of the accident, the appellant was injured. The respondent himself had to take the appellant to hospital and the available evidence shows that she was admitted in hospital for treatment of these injuries for several days.

The major question in dispute is how the accident happened and the person responsible for it. The analysis of the evidence of both the appellant and the respondent can give us a picture of the answer to this question.

The evidence of the appellant, her aunt **Teresa Wanjira Kimondo (PW2)** and that of **Dr Mburu (DW2),** the respondent, is consistent that the appellant was on the left side of the road. That is the same side of the road that the respondent must have been driving, if he was driving on his correct lane and there is no evidence that he was not.

Having so established, the other important question would naturally follow and whose answer can help the court understand how the accident occurred is whether the two were moving in the same direction or were headed in the opposite directions. To find the answer to this question one needs to look no further than the evidence of **Teresa Wanjira Kimondo (PW2), Dr Mburu (DW2)** and that of his wife **Mercy Njeri Mburu (DW3).**

Teresa Wanjira Kimondo (PW2) testified she was ***"walking towards the shopping centre"*** when the accident happened while **Dr Mburu (DW2),** on the other hand testified that he ***"had passed both the school and the shopping centre"*** when the accident happened. It is logical from this evidence that the motor vehicle and **Teresa Wanjira Kimondo (PW2)** were moving in the opposite direction**.**

The evidence of **Teresa Wanjira Kimondo (PW2)** and that of **Mercy Njeri Mburu (DW3)** gives a clue of which direction the appellant must have been moving. According to **Teresa Wanjira Kimondo (PW2),** she was ***"climbing"*** while the appellant was ***"coming down"*** the road. To my understanding this simply means that **Teresa Wanjira Kimondo (PW2)** and the appellant were also moving in the opposite direction.

It is evident from this analysis that both the vehicle and the appellant were moving in the same direction which was opposite to that in which **Teresa Wanjira Kimondo (PW2)** was moving. Again the evidence of **Mercy Njeri Mburu (DW3**) shows that this was the case; she testified that they were "***going downhill***" when the accident occurred. This is consistent with **Teresa Wanjira Kimondo's (PW2's)** evidence that "***the appellant was coming down the road as she herself climbed up the same road."***

So it is clear from the evidence that both the vehicle and the appellant were on the same side of the road and moving in the same direction. The next issue is whether the vehicle veered off the road and knocked the appellant down as suggested by the appellant or whether the appellant was injured when she crossed the road as contended by the respondent.

It was the respondent's evidence that he saw three children seated on the left side of the road. The

distance between him or his vehicle and the children, apparently when he saw them, was ten metres. Somehow, one of the children crossed the road and to avoid hitting her, the respondent swerved to the right. The child, according to the respondent ended up hitting the vehicle and not the other way round.

The evidence of the respondent, in my view appears doubtful; I say so because it is quite unlikely that there was sufficient time for a child seated on the left side of the road to rise and dash across it before the arrival of a vehicle that was barely 10 metres away from her, noting that the vehicle was moving downhill. If the respondent was to be believed, it means that the vehicle must have been relatively slow in which event it could easily have been controlled and the accident avoided altogether or the child simply sprung up from her seated position in time to collide with the respondent's vehicle; incidentally there was no evidence of the possibility of either of the two scenarios.

It is also curious that the respondent's wife who was incidentally seated at the front passenger seat of their car did not see the child who was hit prior to the accident. If the children, who included the appellant, were seated at the left side of the road and the respondent was able to see them, it is difficult to understand how a passenger at the front seat of the same car was not able to see the same children or any of them.

In my humble view, the point of impact would probably shed some light on how the accident occurred.

The respondent testified that the appellant hit the left side of his car; to be more precise, she hit the front passenger door. The implication here is that the appellant ran into the respondent's car rather than the car hitting her. This again does not appeal to me to be plausible because if the respondent swerved to the opposite side, as he testified, to avoid hitting the appellant, there is no way the appellant, a child of seven years at the time, would move after the car at a faster speed and hit its door. The car simply hit the appellant and the point of impact was the front passenger door.

While the point of impact on the vehicle was its left side, the medical evidence shows that the appellant was hit on the right side. According to the P3 form and the case summary from Karatina District Hospital where the appellant was treated, she sustained an open compound fracture on the right tibia/fibula.

If the appellant was moving in the same direction as the motor vehicle, as indeed it has been established to be the case, and both were on the left side of the road, it is possible the appellant to have been injured in the manner described by the medical evidence. It is quite possible from this evidence that she was hit while moving in the same direction of the road rather than when she had "crossed" the road as the respondent and his wife suggested. This is consistent with the appellant's pleadings that she was walking as a pedestrian along Sagana-Karatina road and her evidence that the motor vehicle veered off the road and hit her.

The Sagana-Karatina road would not be restricted, in my view, to the two lanes on which vehicular traffic travel but would also include the footpath along it.

In these circumstances, I would, contrary to the conclusion that the learned magistrate came to, hold the respondent liable for the accident.

I cannot find any evidential basis to hold the appellant partly to blame for the accident and even if there was such a basis the law on whether a minor of the appellant's age at the material time can be held to be negligent or contributorily negligent protects minors from such liability. The oft-quoted decision in this regard is **Butt versus Khan (1981) 1KAR 1982-1988** where Justice Madan said:-

> ***"I respectfully agree and I would also dismiss the appeal in so far as it relates to contributory negligence. Indeed, I am of the opinion the practice of the civil courts 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 the 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 the act or make the omission."(***See page 349).

The appellant was at most seven years and thus under the age of ten years meaning that she was in the category of persons who in law cannot be guilty of contributory negligence. It was not proved that she was in that group of young people who had the capacity to know the consequences of their acts or omissions.

This being the law, it may not have mattered that the appellant was attempting to cross the road or was "staggering" on it as the respondent suggested in his evidence. He owed the minor a duty of care irrespective of whether she was walking along the road or was crossing it.

In the same decision, Madan JA elaborated on what would amount to a safe speed in circumstances where children are likely to be in the vicinity; the learned judge said:-

> ***"Also in my opinion high speed can be prima facie evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for a traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 mph may not be a safe speed in the early hours of the morning when children go to school along and across the road which known to the driver as in the instant case, serves an area with several schools in it. In a matter of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers, if an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half the speed may not afford a defence in a case of negligence."(See page 252).***

The final question is that of quantum of damages. The learned magistrate was of the view that if the plaintiff's cause had succeeded, he would have awarded her **Kshs 300,000/=** in general damages; he did not, however, give the basis for what would have been his award.

For purposes of determination of this question one must consider the nature and the extent of the appellant's injuries and there is no better place to find this information than from the medical evidence available, and which, as far as I can see was not controverted.

According to the medical report submitted in court by **Dr Zachary Githui Muriuki (PW3)**, the appellant sustained a compound fracture of the tibia and the fibula of the right leg. She was admitted in hospital for eight days. She was put on antibiotics and injection of tetanus toxoid. The leg was placed in a plaster of Paris and the appellant was immobilised for six weeks. At the time the appellant was examined for purposes of preparing the medical report, the appellant complained of weakness of the right leg and pain at the fracture site. The same site has a permanent circular scar and that she is likely to suffer osteo-arthritis tibia/fibula in her right leg at a later age following sepsis at the site. In his estimation the appellant suffered grievous harm.

In his letter dated 11th July, 2001, and which was admitted in evidence in support of the appellant's case, the respondent offered to pay the appellant a total sum of Kshs. 70,000/= out of which the sum of Kshs 50,000/= was offered as general damages. The basis of this offer was that the respondent took it upon himself to take the appellant to hospital and also because it was the child who "jumped to the road" and hit his car. In any event, according to him, the appellant did not suffer any permanent disability.

The respondent's counsel, in his submissions, offered an amount of Kshs. 70,000/= in general damages for pain, suffering and loss of amenities. No decision was cited in support of this proposed award.

The appellant on the other hand asked for Kshs 600,000/= under the head of general damages; her counsel relied on the **Kisumu High Court Civil Appeal No. 196 of 2003, Peter Okello Omede versus Clement Ochieng** where a seven year old minor who sustained a fracture of the fibula in 2003 was awarded the sum of Kshs 300,000/= as general damages.

I have had the opportunity to consider this decision and have noted that the plaintiff did not just suffer a

fracture of the fibula but that he also dislocated a cervical joint. The doctor in that case observed the fracture and dislocation of the ankle joint is difficult to manage and would require a surgical follow up. The injuries were thus severer than what counsel submitted.

He also cited the decision **in Machakos High Court Civil Appeal No. 12 of 2005 Savco Stores Ltd versus David Mwangi Kimotho** in which the plaintiff sustained a fracture of the tibia and a fracture of the elbow and was awarded the sum of Kshs. 800,000/= in general damages .

Again in this particular case the injuries were severer; there was a fracture of the left tibia which went to a non-union; the claimant also suffered facial cut wounds and a fracture of the left ulna. The doctor established that the plaintiff would require future surgery to remove the metal implant. The plaintiff was also at the risk of suffering osteoarthritis of his knee and ankle joints. Permanent disability was assessed at 12%.

In my view this particular decision is far off the mark and is not a suitable guide in assessment of damages due to the appellant. Of the two decisions submitted by the appellant's counsel, the **Kisumu High Court Civil Appeal No. 196 of 2003, Peter Okello Omede versus Clement Ochieng (supra)** is closer to the point except that the apart from sustaining a fracture on the fibula, the plaintiff, as noted, also sustained a cervical dislocation which may not be comparable to fracture of a tibia. However, I have noted the award in that case was made more than 12 years ago. In these circumstances, trying as much as I can I consider the sum of **Kshs 350,000/=** to be a near adequate compensation in general damages for pain and suffering and loss of amenities. Accordingly, I award the appellant the sum of Kshs. 350,000/= in general damages together with the costs of the suit and the appeal. I also award the appellant interest at court rates on the decretal sum from the date of the judgment till payment in full. The appellant's appeal is allowed in those terms. It is so ordered.

Signed, dated and delivered in open court this 14th day of December, 2015

Ngaah Jairus

JUDGE