REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 209 OF 2010

A M

(MINOR SUING THROUGH HIS NEXT FRIEND

M A M).....PLAINTIFF

V E R S U S

MOHAMUD KAHIYE.....DEFENDANT

J U D G M E N T

1. The Plaintiff has filed this suit through his next friend, his paternal aunt. The suit is a claim for general and special damages for personal injuries suffered in a road accident which occurred on 20th May, 2009 along a street in Garissa town. The Plaintiff's case as pleaded is that he was a pedestrian along that road when motor vehicle registration number **KAM 835 D,** owned by the Defendant and driven by his servant or agent veered off the road due to the negligence of the driver and hit him, causing him serious bodily injuries. Particulars of negligence and injuries were pleaded.

2. The Defendant filed a **statement of defence dated 4th October 2010**. He denied that his driver/agent negligently or carelessly managed the vehicle, or that it was negligently driven, or that the Plaintiff suffered injuries, loss and damage as pleaded. The Defendant averred at paragraph 7 of his defence, without prejudice and in the alternative, that if an accident did occur, it was caused by the Plaintiff, or that he substantially contributed to it. Particulars of the Plaintiff's negligence were set out. The Defendant finally prayed for dismissal of the Plaintiff's suit with costs.

3. At the hearing, the Plaintiff testified and called five witnesses. The Defendant also testified and called one witness. The following documents were admitted in evidence by consent –

Exhibit P1: Plaintiff's bundle of documents dated 8th February 2011

Exhibit D1: Defendant's bundle of documents dated 20th June 2011

Exhibit D2: Defendant's supplementary bundle of documents dated 20th September 2011

4. The Plaintiff's next-friend, M A M (PW1) testified that though she was the Plaintiff's paternal aunt, she had brought him up as his mother takes care of a special-needs child and his father works far from home. She therefore adopted the Plaintiff under the Somali custom. She adopted her **witness statement**

dated 15th August 2011 as her testimony-in-chief. She recounted the events of 20th May 2009 at around 4.30 pm when she received information that the Plaintiff had been hit by a vehicle. She and others took him to ***Garissa Provincial Hospital*** and later to ***Aga-Khan University Hospital, Nairobi*** where he was admitted until 3rd July 2009.

5. In cross-examination she stated that she had noticed that her name had been misspelt in the pleadings and requested the advocate to adjust it; that she had been married once but had divorced in 1993; and that she did not know anyone by the name **Said Ali Said**.

6. The second witness, **Saharare Ismail Noor** (**PW2**), adopted his **witness statement filed on 12th September 2011** as his testimony-in-chief. In it he stated that he heard a loud bang as he was buying sugar in a shop near the scene of the accident. He then heard someone shouting and crying. He rushed to the scene and found the Plaintiff on the side of the road injured. He assisted to take him to hospital.

7. The Plaintiff (**PW3**) gave unsworn testimony as he did not understand the nature of the oath. Though he stated that he was ten years old, he also said he was born in the year 2001. That would make him about 12 years old when he testified. His mother (PW4) corroborated this. He was thus about 8 years old at the time of the accident. He testified through an interpreter. He adopted his witness statement filed in court on 10th July 2012.

8. The Plaintiff recalled the events of 20th May 2009. He was walking home from school on the right side of the road. A vehicle drove towards him from the front and hit him. He was with his older siblings. He was later told that he was pulled from underneath the motor-vehicle and taken to ***Garissa Provincial Hospital*** and later to ***Aga-Khan University Hospital, Nairobi*** where he underwent surgery on his lower abdomen. He underwent a lot of pain during his two months hospitalization and even after getting discharged.

9. In cross-examination the Plaintiff asserted that when the accident occurred he was coming home from school at about 4.30 pm accompanied by his siblings and two other children who were in the same school; that these children were 3 or 4 metres behind him and nobody was walking next to him; that he had used that road many times when going and coming back from school; that he was facing a junction which was about 4 to 5 metres from where he was; that though the motor-vehicle came from the front he did not quite see it; and that he had never seen school children hanging from moving vehicles taking rides and had never done so himself.

10. The fourth witness for the Plaintiff, **K A M (PW4), was** his mother. She adopted her **witness statement filed in court on 16th August 2011**. She explained that the reason why she gave authority to PW1 to file suit on her son's behalf was because she has had a very sick child who required her undivided attention. She recalled that at the time of the accident she was at home when her daughter informed her what had transpired and led her to the scene of the accident. She and others took the Plaintiff to the hospital. Thereafter the Defendant told her that he owned the motor-vehicle.

11. In cross-examination PW4 stated that part of the Plaintiff's medical bill was paid by her husband's employer while the rest is yet to be paid, but is secured by her father-in-law's title deed.

12. The fifth witness, **N M A (PW5)** was 16 years old and an older sister of the Plaintiff. She adopted her **witness statement filed on 16th August 2011** as her testimony-in-chief. She stated that she witnessed the accident and described how it occurred. She was about 11 or 12 years old at the time of the accident. Her testimony was that the Plaintiff was ahead of her when he was hit. They were all walking on the side of the road which was tarmacked; that she could see him ahead of them as they walked towards another road that joined the main road they were walking along; and that the junction was next to a big acacia tree on the edge of the road. She was very shocked after the Plaintiff was hit by the motor vehicle. PW6 removed the Plaintiff from underneath the vehicle. PW5 then rushed home and reported the incident to PW1 and PW4 and they all ran back to the scene of the accident.

13. In cross-examination PW5 stated that she was in class 4 while the Plaintiff was in class 1when the accident occurred. She further stated that the Plaintiff was ahead of her when he was hit by the motor-vehicle but was not far from her; that they were on their way home from school; that she had not been coached on what to say in court; that the vehicle came from the right hand side and approached them from the opposite side at the junction, veered off the road and hit the Plaintiff; that she was about 20 metres from the junction; and that she did not see any other vehicle at the scene of the accident. She said that she had occasion to see children hanging from the back of slow-moving vehicles in Garissa town but not those in her school.

14. On re-examination, she confirmed that the Plaintiff was hit while on the right hand side of the road in the direction they were walking.

15. The sixth witness, **A M A** (PW6) was 14 years old and the Plaintiff's older brother. He was about 10 years old at the time of the accident. He gave sworn testimony. He adopted his **witness statement filed on 16th August 2011**. He explained that they were walking home from school on the right hand side of the road. He saw the accident vehicle veer off the road and approach them where it knocked down the Plaintiff. He pulled the Plaintiff from beneath the vehicle. He did not see any other vehicle on the road.

16. In cross-examination he asserted that there was no corner at the road. There was an acacia tree near the junction. He could not remember the colour of the accident vehicle.

17. That was the totality of the Plaintiff's evidence.

18. The Defendant testified and called one witness, **Mohamed Hussein Hilowle (DW1)**. DW1 adopted his **witness statement filed on 9th July 2012** as his testimony-in-chief. In it he explained that he was a conductor in the accident vehicle. Unknown to him and the driver of the vehicle, there were three children hanging on to a canter with a box body that was approaching them. The Plaintiff then suddenly ran onto the road without confirming that the road was clear. The driver tried to avoid hitting the Plaintiff, but he was not able to because he was too near already. According to him it was the negligence of the Plaintiff that led to the accident.

19. In cross-examination DW1 stated that he could not recall the full names of the driver of the motor-vehicle as he had only known him for two months prior to the accident; that he was sitting in the front cabin of the accident vehicle with two children; and that the accident happened at a corner. The driver applied brakes and swerved in an effort to avoid the Plaintiff.

20. In re-examination he maintained that he had never seen the investigation report in Exhibit D1.

21. The Defendant testified as **DW2.** He adopted his **witness statement filed on 9th July 2012** as his testimony-in-chief. He had known the Plaintiff and his parents before the accident. He learnt about the accident from his driver whom he instructed to take the Plaintiff to hospital. He visited him in hospital at Garissa before he was transferred to Nairobi for further treatment.

22. In cross-examination he agreed that his vehicle hit the Plaintiff as it was being driven by one ***Daud Adan***. The conductor was DW1. He had not known the driver very well, and because of that fact he was charged in Court for failing to keep records of the driver. He further stated that after taking the boy to hospital, the driver disappeared. He attributed the disappearance to the fact that the driver was on the wrong and caused the accident. He confirmed that the accident vehicle was insured against third party risks. He reported the accident and the insurance company conducted their investigations. By that time the driver had already disappeared.

23. Parties filed written submissions through their learned advocates and cited cases. I have considered those submissions, including the cases cited. The following issues stand out for determination –

> (i) Was the accident caused by the negligence of driver of the vehicle or by the Plaintiff's negligence?

(ii) Was the Plaintiff injured as a result of the accident, and if so, what were those injuries?

(iii) What damages (if any) is the Plaintiff entitled to?

Issue No. 1: <u>Was the accident caused by the negligence of driver of the vehicle or by the Plaintiff's negligence?</u>

24. Apart from denying that the accident vehicle was negligently driven, the Defendant has pleaded that the Plaintiff contributed to occurrence of the accident. According to DW1 the Plaintiff ran across the road from behind a van he had apparently been hanging on to. There was not enough time for the driver to avoid hitting him. However, an investigation report conducted by ***Shieldwise Loss Assessors*** contracted by the insurance company (part of Exhibit D1) notes that the conductor was one **Mursal Idle Ahmed**, not DW1 who was called **Mohamed Hussein Hilowle**.

25. This is the Defendant's own document. It means therefore that DW1 was not a truthful witness. He cannot have been the conductor of the accident motor vehicle. His testimony is entirely false and will be disregarded.

26. There was laid before the court direct eye-witness evidence of the accident in the testimonies of the Plaintiff and his older siblings, PW5 and PW6, and to some extent the testimony of PW2 as well. Save for some minor discrepancies and some lack of clarity on the part of the Plaintiff, PW5 and PW6 attributable to their young ages, their testimonies agreed that the Plaintiff was knocked down and nearly ran over while he was off the road. The motor vehicle for some reason left the road and found him where he was walking beside the road. The Defendant offered no credible explanation why the vehicle left the road. The driver disappeared after taking the Plaintiff to hospital. There is no evidence at all that the accident was inevitable as pleaded by the Defendant. The Defendant in cross-examination appeared to be of the view that the driver caused the accident, hence his disappearance.

27. Part of the Defendant's defence is that the accident was caused by the negligence of the Plaintiff who was then aged about eight (8) years. Whether a child can be guilty of contributory negligence has been a subject for legal discourse over the years. The ***Court of Appeal*** in **Bashir Ahmed Butt –vs- Uwais Ahmed Khan [1982-88] 1 KAR 1 & [1981] KLR 349** held as follows -

> **"It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness…A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child....**
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> **Clearly each case must depend on its peculiar circumstances. In the instant case the learned judge was right in finding that the defendant had been negligent, and that the plaintiff was struck when almost half-way across the road, and that at the most the plaintiff had committed an error of judgment for which contributory negligence should not be attributed to him....**
>
> **The practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence, and thereafter, insofar as a 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 that act or make the omission....**
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> **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 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 a road which known to the driver as in the instant case, serves an area with several schools in it. In a manner 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 that speed may not afford a defence in a case of negligence.

28. Later the ***Court of Appeal*** considered the above case in **Rahima Tayab & Others –vs- Anna Mary Kinanu [1983] KLR 114 & 1 KAR 90** and stated -

"Since the learned judge found that the plaintiff paused on the side of the road before beginning to cross, the defendant should have seen the plaintiff before the moment of impact and had she seen the plaintiff at the roadside, she might have been able to avoid hitting her by slowing down or taking avoiding action. Therefore the finding that the defendant was negligent is correct....

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, insofar 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....

The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. 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, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy....

In the present case, the trial judge held in clear terms that the plaintiff had the requisite road sense and therefore her failure to see the approaching car was blameworthy. In the case of a grown-up person the proportion of blame would have been substantial, but having regard to the plaintiff's tender years the degree of liability is assessed at 10%....

In determining what is a reasonable standard of care, the four factors, *inter alia,* **that have to be considered are:**

(1) the likelihood of a pedestrian crossing the road into the motorist's path

(2) the nature of the pedestrian, whether a child or adult

(3) the degree of injury to be expected if the pedestrian was struck

(4) the adverse consequences to the public and to the defendant in taking whatever precautions were under consideration...

In the instant case, there were no obstructions like parked cars and the defendant had a clear immediate field of vision. At the time of the day and with known schools

in the vicinity the 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 who passed across the front of her car, and her failure to stop or swerve, must construe negligence on the part of the defendant".

29. In this case it has not been shown that the Plaintiff, were he older, was in any way negligent. The evidence on record is that he was walking on the side of the road. The accident vehicle left the road and knocked him down while he was on the side of the road. There is no evidence from the Defendant why the vehicle left the road to find the Plaintiff off the road. Its driver was clearly negligent. The Defendant as the owner of the vehicle is vicariously liable. **On liability therefore I find for the Plaintiff at 100%.**

Issue No. 2: <u>Was the Plaintiff injured as a result of the accident, and if so, what were those injuries?</u>

30. Following the accident the Plaintiff was admitted at ***Garissa Provincial Hospital***. After 2 days he was transferred to ***Aga Khan University Hospital, Nairobi*** where he remained for about 2 months. While there he underwent surgery in the abdomen.

32. He was examined by one **Dr Kambuni** on **8th March 2010** nearly 10 months after the accident. He confirmed that the Plaintiff sustained the following injuries –

(i) Left rib fractures.

(ii) Left haemothorax.

(iii) Hemoperitoneum resulting from blunt abdominal injury.

In his opinion, the Plaintiff would require follow-up as the liver injury could progress to liver cirrhosis and portal hypertension. Due to this, he required annual follow-up to detect and treat this condition if it occurs. The doctor also opined that there would be need for surgery to correct the surgical scars on the abdomen and to cure any intestinal obstruction that might occur.

33. Approximately one year later, the Plaintiff was examined by **Dr Wokabi** on **25th February 2011**. The doctor prepared a medical report (**Exhibit D2**). He found that the Plaintiff had suffered the following injuries:-

i. **Multiple fractured ribs on the left side.**
ii. **Extensive friction burns on the chest, abdomen and both legs.**
iii. **Intra-abdominal injuries with laceration of the liver.**

At the medical examination the Plaintiff's mother complained that he was not able to play vigorously with others.

34. Dr. Wokabi's opinion was that the Plaintiff suffered multiple life-threatening injuries especially the intra-abdominal ones.

The doctor further opined as follows -

i. The Plaintiff made very remarkable recovery and has no major complaints.

ii. The scars he has on various parts though multiple and prominent are not the kind of scars that will require any plastic excision at any given time in his life. The opinion expressed by Dr. Kambuni concerning correction of these scars is no longer true.

iii. Broken ribs are always known to unite well and are never known to cause any long term

complications.

iv. The abdominal injury and subsequent surgery will always predispose him to developing possible complications of intestinal obstruction, the possibility of which is quite high.

v. Lacerations of the liver always heal and are never known to leave any scars or develop into cirrhosis as opined by Dr. Kambuni, or require any surgery.

vi. The Plaintiff should be considered to have fully recovered from the major injuries.

Issue No. 3 - <u>What damages is the Plaintiff entitled to?</u>

35. The Plaintiff suffered very serious injuries that required hospitalization for a long time. Treatment was painful and uncomfortable. There is a bright side, though: probably because of his young age at the time of the accident the his injuries healed very well; so well, in fact, that some of the fractures that he had suffered could no longer be detected when he was examined by the second doctor in February, 2011. No permanent incapacity was noted by that doctor. But the ugly scars are still there.

36. Taking into account all matters placed before the court, including the comparable cases cited and the diminished purchasing power of the shilling, and balancing this against that and doing the best that I can, I will award the Plaintiff **KShs. 800,000/00** for pain, suffering and loss of amenities. Out of this sum KShs 400,000/00 will be invested for the Plaintiff in an interest-earning account in the joint names of the Deputy Registrar of the court and the Plaintiff's next friend. The account shall be opened with a reputable bank or financial institution. The entire proceeds of the account shall be released to the Plaintiff upon attaining the age eighteen (18) years.

37. As for special damages, **KShs 90,600/00** has been proved by way of receipts in **Exhibit P1**. I will award this sum.

38. In the result, judgment is entered for the Plaintiff as above. The general damages will attract interest at court rates from the date of judgment till payment in full. Special damages will attract interest from date of filing suit. The Plaintiff will also have costs of the suit plus interest thereon at court rates from the date of suit.

39. Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF OCTOBER 2014

H. P. G. WAWERU

<u>J U D G E</u>