



ISAAC RIGONDI

KEMA INVESTMENTS LIMITED APPELLANT

-VERSUS-

T.M.Minor suing through his father and next friend

P.M.O.....RESPONDENT

(Being an appeal from the decision, judgment and or decree of the Hon. Mr. G O Oduor, Resident Magistrate given on 9th February 2010 at Kisii in the Original Kisii CMCC 792 of 2006)

JUDGMENT

This appeal emanates from the judgment and the decree of the Senior Resident Magistrate, Kisii **Hon. S. Wewa** dated and delivered on 7th May 2005 by which she entered judgment for the respondent in the sum of Ksh.780,000/= as general damages and Kshs.3,000/= as special damages. The minor respondent had sued through his father for injuries he suffered as a result of an accident which occurred on 12th March 2005 along Kisii-Migori Road near Itieria whilst he was walking along the verge of the said road.

The appeal attacks the judgment appealed from basically on the ownership of the vehicle which caused the accident, i.e. motor vehicle registration No KAH 612C; findings on negligence and assessment of damages.

The evidence on record establishes that the minor, **T.M.**, then 13 years of age, was walking off the road, towards Suneka to a nearby kiosk when he was hit by a motor vehicle registration No. KAH 612C driven by the appellant. Consequently, the minor suffered grave injuries and lost consciousness for 7 days. He sustained fracture base of the skull, left femur and bruises all over the body.

Dr. Ogando Zoga who examined him about two months afterwards concluded that the injuries sustained will definitely have impact on his education as he already has memory loss, post traumatic epilepsy and permanent scars. It is significant that **Dr. Odondi** for the insurer of the appellant detected on 25th February 2006 that the minor walked with a limping gait as a result of the shortening of the left lower limb due to poor reduction of the fracture fragments.

In his evidence before the trial court, the 1st appellant, Isaac Ringondi, testified inter alia:

“12.3.2005, I was driving from Nairobi to Migori. I was driving KAH 612C Toyota Corolla. Near Itierio Mixed School there was a trailer ... I had to move off the road. I did hit the child with the back door left side. He was off the road ...”

The 1st appellant, also candidly admitted that:

“I am a driver of a company motor vehicle, Kewa Investment.”

In her well considered judgment the learned trial magistrate held;

“I do find that it is the driver who was to blame. He avoided colliding with an unknown matatu and hit the child. He was not prudent. I hold him liable. The driver was in the course of his employment, he was agent of the owner of the motor vehicle he was driving. The owner is to be held 100% vicariously liable for the negligent action of his driver.”

The learned trial magistrate then proceeded to quantify damages as stated herein above.

When the appeal came up for directions on 3rd June 2011 it was agreed that it be disposed of by way of written submissions which were accordingly filed. I have carefully read and considered them alongside the authorities cited.

On assessment of the evidence on record, I find that the entire grounds of appeal have no merit whatsoever. Firstly, the 1st appellant was the driver and employee of the 2nd appellant. The 2nd appellant did not in fact file any defence to deny the averment that the 1st appellant was acting in the course of his employment and that the 2nd appellant was vicariously liable. In this respect, I wholly agree with the holding of the learned trial magistrate stated hereinabove.

Secondly, the 1st appellant was charged with and convicted of dangerous driving in ***Kisii Traffic Case No. 618 of 2005***, which fact is prima facie evidence of negligence.

Thirdly, the 1st appellant admitted in court that he hit the minor and caused him injuries.

Fourthly and finally, it has not been shown to me that the award of damages was erroneous in any way.

In my view, the minor suffered serious injuries which are indeed permanent. The award of Kshs.780,000/= is not excessive in the circumstances. I have no reason to disturb it since I am not satisfied that either the trial court while awarding damages took into account an irrelevant factor, or that the award is so inordinately low or high as to be a wholly erroneous estimate of damages. See ***Kisii HCCA 125 of 2008 Josephine Angwenyi v S. Ochillo***.

This appeal fails and is accordingly dismissed with costs.

Judgment dated, signed and delivered at Kisii this 23rd day of August, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of :

Edwin Mongare Court clerk

.....Counsel for the plaintiffs/Applicants

.....Counsel for the defendants/respondents

R. LAGAT-KORIR

JUDGE