REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 201 OF 2003

KISII BOTTLERS LIMITED ……...……...……..... APPELLANT

-VERSUS-

JOSEPHINE AKINYI MWIKWABE ……...……...…..RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate's Court at Migori Hon. Mr. Atonga in Kisii SRMCC No. 550 of 2002, delivered on 23rd October, 2003)

The respondent herein then as plaintiff filed a suit in the Principal Magistrate's court at Migori claiming general and special damages, interest and costs from the appellant then as the defendant contending that on 7th July, 1997 whilst lawfully walking along Mabera-Isebania road, the motor vehicle registration number KAG 655L Toyota Pickup was negligently and recklessly driven by the appellant and or its agent such that it lost control, hit her and caused her to sustain severe bodily injuries to wit; blunt head and abdomen injuries, cerebral concussion, bruises and lacerations to the lower abdomen, fracture of the right midshaft of the humerus and soft tissue injuries. According to the respondent, that accident was due to the negligence on the part of the appellant or its agent or servant.

The appellant entered an appearance and filed his written statement of defence on 12th February, 2003. In the defence the appellant denied culpability. It claimed that the suit was time barred. Alternatively it pleaded that if the accident occurred as alleged by the respondent, than it was substantially contributed to and or caused by the respondent's own negligence. The appellant proceeded to particularize the negligence it attributed to the respondent.

At the hearing the respondent summoned three witnesses; herself (PW1), **Dr. P. M Ajuoga** (PW2) and **P.C Fanwel Onjene** (PW3). On its part, the appellant called one witness, **Reuben Nyabutu**, a sales manager.

The respondent testified that on 7th July, 1997, she was from school walking along Isebania-Migori road on the left side and wanted to cross to the right. After she crossed the road she was knocked down by a motor vehicle, fell in the middle of the road and became unconscious. She only regained consciousness at Ombo Hospital. She had sustained a fracture on the right hand, injuries to the head and leg. She stayed in the said hospital as an in-patient for 2 weeks. At the time of the trial she had not fully recovered because she still felt pain on the back. She blamed the owner of the alleged motor vehicle for the accident.

Cross-examined by **Mr. Okongo**, learned counsel for the appellant, she stated that before she crossed the

road, she never saw any motor vehicle coming. There was a lorry though stationary at the side of the road but denied having disembarked from the same at the time of the accident. She was in standard 3 at the time and had gone to school. The motor vehicle knocked her outside the road while she was standing. She had wanted to cross infront of the stationary lorry. She was in the company of the owner of the stationary lorry and there were some students. She agreed that there was an iron bar to protect pedestrians on the side of the road.

Dr. P.M Ajuoga testified that on 16th April, 2003 he examined the respondent and observed the following injuries:-

a. Bunt head injuries

b. Cerebellum (sic) concussion

c. Blunt injuries on the abdomen

d. Bruises on the abdomen

e. Fracture on the right hand

The respondent complained of persistent pain on right arm, headache and dizziness. Other injuries were soft tissue and had healed well. He prepared a medical report to that effect which he tendered in evidence. He was paid Kshs. 2,000/= for the service.

P.C Fanuel Onjene then attached to Migori police station but in 1997 was at Isebania police station tendered in evidence police abstract with regard to the accident.

Cross-examined he stated that **P.C Kimaiga** investigated the case before his transfer. The file was then handed over to the O.C.S of Isebania Police Station, Chief Inspector **Mugo**. Nobody was charged with any traffic offence arising from the said accident. The police abstract was brought to him by a police officer from Isebania. With that the respondent closed her case.

Reuben Nyabutu testified on behalf of the appellant that he was the sales manager of the appellant. On 7th July, 1999 he was out on his normal duties as the sales representative of the region. At about 1.00p.m. he proceeded to Suba-Kuria market in motor vehicle registration KAG 655L branded CoCola. At Suba-Kuria he found a lorry with timber parked on the roadside. He checked and found the road clear and drove on. Suddenly, he saw a young girl hanging at the side of the driver of the lorry talking to a passenger. The young girl jumped into the road and attempted to cross. He knocked the girl as he moved to the left side of the road. He tried to brake and swerve but the young girl was hit. He stopped, took the young girl to hospital and went to Isebania police station to report the incident. The timber lorry had by then disappeared. He paid a hospital bill of Kshs. 6,000/= for the young girl. He blamed the accident on the young girl and the owner of the lorry.

Cross-examined by **Mr. Kerario**, learned counsel for the respondent he conceded that he was driving on the material day. He saw the lorry at a distance of 20metres. The accident took place at Suba-Kuria. There is sharp corner which prevented him from seeing the lorry. The respondent moved to right where his motor vehicle had swerved. When the police came, there was no lorry. Finally, he conceded that when overtaking, a driver takes care of the pedestrians and other motor vehicles on the road. That then marked the close of the appellant's case.

The learned magistrate having carefully evaluated the evidence on record found favour with the respondent's case. He found the appellant 100% liable for the accident. He thereafter proceeded to award the respondent Kshs. 220,000/= as general damages and Kshs. 3,700/= special damages plus costs and interests.

Aggrieved by the judgment and decree aforesaid, the appellant lodged the instant appeal. 5 grounds were

advanced in support thereof. These were:-

"1. The learned trial magistrate erred in law and infact in awarding to the respondent the sum of Kshs 220,000/= as general damages in this suit which was excessive in the circumstances.

2. The learned trial magistrate erred in both law and infact in deciding the case against the weight of the evidence.

3. The learned trial magistrate erred in both law and in fact in failing to make a finding on liability and or to apportion the same before proceeding to make an award on general damages.

4. The learned trial magistrate erred in both law and infact in failing to dismiss the respondent's suit in the subordinate court as having been filed out of time outside the period of limitation, based on leave sought for and obtained on insufficient grounds not provided for by law and following an incorrect procedure.

5. The learned trial magistrate erred in both law and infact ignoring in his judgment all the evidence led by the appellant and to the submission made on behalf of the appellant at the trial".

When the appeal came up for directions, **Mr. Odhiambo** for the appellant implored me to have the appeal canvassed by way of written submissions amongst other directions. I acceded to the request. The respondent subsequently went along with the decision. Those submissions were subsequently filed and exchanged which I have carefully read and considered alongside cited authorities.

This being a first appellate court, the court of appeal has held in **Selle –vs- Associated Motor Boat Co. Ltd (1968) E.A 123** that it has a duty to re-evaluate the evidence, assess it and make its own conclusions. The court must, however, bear in mind that it neither saw nor heard the witnesses hence make due allowance for that.

It is not denied that an accident involving the respondent and the motor vehicle being driven by the appellant occurred. It is also common ground that as a result of the accident, the respondent was injured. What is in contention is whether the accident was solely or substantially caused by the appellant's driver or was it solely or substantially caused by the respondent.

The respondent could or could not have been a minor though she was in class three then. However her age was not given. Ofcourse it has been held by the court of appeal that liability of minors in road traffic accidents is minimal unless it can be shown that such minor had the necessary road sense. For instance in the case of **Bashir Ahmed Butt –vs- Uwais Ahmed Khan (1987-88) 1 KAR**, the court of appeal observed ***"…The judge's finding that the plaintiff's action in crossing the road amounted at most to a slight error of judgment and, in a child of that age, did not constitute contributory negligence was correct …"***. In the absence of the age of the respondent, I am not prepared to hold that she was a minor.

It is also in evidence that the accident occurred as the appellant was overtaking a stationary lorry which was at a sharp corner. That being the case, it was the duty of the appellant's driver to be careful in the manner he drove his motor vehicle. He should have ascertained that the road was clear before he drove on. If he had kept proper look out and drove at a reasonable speed considering that he was emerging from a sharp corner he would have seen the respondent in ample time to avoid colliding with her. The appellant's driver did testify that he tried unsuccessfully to avoid hitting the respondent by swerving to the right. That is evidence of unreasonable speed. If he was doing a moderate speed considering the state of the road at the scene and swerved as claimed, he could not have collided with the respondent. The appellant also confirmed that he hit the respondent on the right side of the road from Isebania just like the respondent had testified. This confirms that she was actually just about to finish crossing the road.
I think considering all the circumstances obtaining at the scene, the evidence on record supports the finding of liability by the learned magistrate against the appellant. However, the finding should not have been on full liability considering that the age of the respondent had not been ascertained to determine whether she was a minor or not. She may as well have been a girl old enough to be possessed of good

road sense. Considering that she crossed the road at a such dangerous point, she also had some blame to bear for the accident and the learned magistrate should have held so.

Further, the appellant pleaded its defence that the respondent may have substantially contributed to and or caused the accident. The appellant gave particulars of negligence it attributed to the respondent. The respondent did not file a reply to the said defence and as such was deemed to have admitted the contents in the defence especially the particulars of negligence thereof. See Order VI rule 9 (1) of the Civil Procedure Rules and the court of appeal decisions in **Jivanji –vs- Sanyo Electrical Company Limited (2003) 1 E.A 9**8 and **Mount Elgon Hardware –vs- United Millers Limited C.A KSM 19 of 1996 (UR).** In those circumstances the best that the trial magistrate should have done was to apportion liability. Afterall the appellant had not specifically pleaded that the respondent wholly caused the accident. Weighing the evidence on record, I am satisfied that the respondent was to blame for the accident to the extent of 30%.

The appellant has questioned leave granted to the respondent to commence the suit out of time. Much as the appellant had raised the issue in its defence, it did not pursue it during trial. It did not invite the trial magistrate to make a ruling on it. The issue cannot therefore be revisted and canvassed in this appeal.

With regard to quantum, it cannot be gainsaid that the respondent sustained serious injuries going by **Dr. Ajuoga's** medical report. He suffered a fracture of the humerus bone of the right arm alongside other soft tissue injuries. For these injuries, the respondent was awarded Kshs. 220,000/=. The appellant takes the view that the award was manifestly excessive and calls for intervention by this court. On the other hand, the respondent is of the view that infact the award was low. However, the respondent is content with the same and therefore this court should not interfere with the award.

In the case of **Butt** (Supra) the court of appeal stated that ***"…An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and arrived at a figure which was inordinately high and low …".*** In the circumstances of this case I entertain no such fears. The award of general damages was within the acceptable range at the time for the kind of injuries sustained by the respondent. I do not see therefore any reason why I should intervene with the same.

In the upshot the appeal succeeds to a limited extent in so far as liability is concerned. Accordingly the award of general damages by the trial court shall be slashed by 30%. I make no order as to costs in this appeal.

Judgment dated, signed and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA
JUDGE