REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 91 of 2009

REAGAN KIBIA (*Suing through next of kin Rosemary Mwaromo*)……. APPELLANT

VERSUS

IGOJI
TEACHERS COLLEGE ..... 1ST RESPONDENT
SARAFIN MIRITI …… 2ND RESPONDENT

(An appeal from the judgment of principal magistrate Nkubu in P.M.C.C. No. 33 of 2007 delivered in open court on 29/7/2009)

JUDGMENT

The plaintiff (appellant) sued in Nkubu PMCC No. 33 of 2007 through his mother Rosemary Mwaromo for compensation for personal injuries. The evidence before the lower court was quite straight forward. The plaintiff at the date of the accident was 3 years old. He was in the company of his mother Mwaromo. The mother gave evidence in the lower court. She stated that on the material date she was tending to her farm which is beside Nkubu to Igoji road. It was 5pm. Whilst on her land, adjacent to that road, the appellant, her son Reagan Kibia, attempted to cross the road. There were other children grazing goats on the other side of the road. The appellant attempted to go where they were. The appellant was hit whilst in the middle of that road by the 2nd respondent who was driving vehicle registration number KXL 568 lorry. The vehicle stopped and the driver rushed the appellant to hospital. Mwaromo noted that the appellant was injured on the head, back, left leg and hip joint. As a result of the accident, he suffered a fracture to the head. Mwaromo produced in evidence a report made by doctor Macharia. On being cross examined, she accepted that there is a corner and an inclination where the accident occurred. She further stated that from the noise which came from that lorry she was able to know that it was traveling at high speed. In support of the defendant's defence, the 2nd respondent stated that he was on 29th January 2006 driving the subject motor vehicle at 30kph. There was a lorry ahead of him which was traveling very slowly because it was heavily loaded. When it passed he saw 4 children crossing from the left to the right side of the road. He braked and one child retreated. The one who went back was hit by the vehicle. He said he saw that child turn retreat and run. He was not charged with a criminal offence over that accident. When he was

cross examined, he confirmed that he had seen the children before the accident. He saw them when they were 10 feet from the vehicle and he begun to apply breaks from that distance. The lower court dismissed the appellant's claim. The learned magistrate had this to say in his judgment:-

"The sole evidence by the mother does not disclose how the vehicle was being driven prior to the accident. Her evidence does not disclose what the driver could have done, given the circumstances, to avoid the accident. She only know (sic) of the accident after it had taken place. The police also found rightly that the 2nd defendant (2nd respondent) could not be blamed for the cause of the accident. Rosemary Mwaromo is therefore 100% liable for the cause of the accident and damages which her child subsequently suffered out of it. Vehicles running along a road have a right of way to pedestrians, save for areas with zebra crossing. Where there is a sign post of children or pedestrian crossing the driver is alerted to be more careful and drive at a speed which would enable him not inconvenience (sic) or cause an accident to such person. The accident in this case did not occur at such an area which call for driver higher (sic) duty of care than the ordinary one. As such, I find no evidence on which the driver can be held liable for the accident and damages, whether special or general as of against (sic) the plaintiff. The plaintiff's (appellant's) case must therefore fail and costs to the defendant."

I respectfully do not support that finding on two fronts. Firstly, the learned magistrate ought not to have found the mother of the appellant guilty of negligence because she was not a party in the cause. The appellant sued the respondent through his mother. If the respondent wished to lay blame of the accident on the mother of the appellant they ought to have counterclaimed which they did not. Black's Law Dictionary defines next friend as:-

"A person who appears in a law suit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the law suit……"

It is clear from that definition that Mwaromo was not a party to this suit. I disagree with the finding of the learned magistrate because a child of tender age should not readily be found to have contributed or to be guilty of negligence. It was so stated by Madan J.A. in the case of **Bashir Ahmed Butt Vs. Uwals Ahmed Cahan** (unreported). The learned judge stated in that case that no child below the age of 10 years can be guilty of contributory negligence. Platt J. in a case where a child of 6 years was killed in a motor accident whilst he was a pedestrian stated:-

"In my view, the position is that each case must be decided on its own merit. The determining factor being whether the child is mature enough to be able to take precautions for his or her own safety, having in mind that young children do not usually have sufficient experience in these matters." See the case of Nkudate Vs. Touring & Sporting Cars Ltd & Ano. [1976- 80] 1 KLR 1333."

Platt J. in that case proceeded to find the driver to 100% to blame for the accident. In my view, the evidence before the lower court showed that the 2nd respondent failed to keep a proper look out and failed to control his vehicle. If he is to be believed, he stated that he saw 4 children when he was 4 ft away traveling at 30kph. At that speed, on seeing 4 children crossing the road, he ought to have stopped. He did not. He did not even hoot. I find having re-evaluated the

lower court evidence that the 2nd respondent was responsible for the accident 100%. He ignored the presence of children and failed to stop. The doctor's report which was submitted in evidence showed that the appellant suffered the following injuries:-

- *Head injury – fractures of the right temporal and parietal bones. There was intracranial hemorrhage and ontusion of the frontal lobe.*
- *Multiple scalp cuts*
- *Soft tissue injuries – bruises on the back and both hips*

In his opinion, the doctor stated that although the injuries had healed, the appellant had developed hyperactive disorder as a result of the head injury and he had attention deficiency which makes learning for him difficult. He was doing poorly in school and may require to be taken to a special institution. The respondent in the submissions discounted this evidence because it was not supported by records from the school to prove that the appellant was doing poorly. It however should be noted that the doctor's report was produced with no objection from the respondent. That being so, it becomes part of the record and the court accepts its contents to be the correct position. I have considered the case of **Wilfrend Ndumba Kirima Vs. James Kiogora Mbogori & Ano.** Civil Case No. 147 of 1993. The plaintiff in this case was awarded general damages of Kshs. 450,000/=. The injuries suffered by the plaintiff in that case were depressed fracture of the scar, fracture of the left femur and bruises to the face. The plaintiff suffered the disability of permanent depressed scar blurred vision, headaches and shortening of the left leg. That case was decided in 1995. I believe it is a good indicator of the amount the appellant should be granted in this case. The judgment of this court is as follows:-

1. ***The judgment of PMCC Nkubu No. 33 of 2007 delivered on 29th July 2009 is hereby set aside. It is substituted with judgment for the appellant against the respondents jointly and severally for general damages of Kshs. 500,000/=.***

2. ***The appellant is awarded the costs of PMCC Nkubu No. 33 of 2007 and costs of this appeal.***

Dated and delivered at Meru this 21st day of May 2010.

MARY KASANGO
JUDGE