REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 89 of 2008

1. ELIUD MWALE LEWA

2. AGNES IDZA MWALE (Legal representative

of late LORNA UCHI MWALE LEWA) ……..…… APPELLANT

VERSUS

1. PAKA TOURS LIMITED……..…….. RESPONDENT

2. AHMED MOHAMED OMAR ……..…… RESPONDENT

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JUDGEMENT

The Appellants having filed this appeal against the judgement of Hon. Mr. Kiama the Resident Magistrate at Kilifi in Kilifi SRMCC 175/2006 which judgement was delivered on 18th April 2008.

In the plaint filed before the lower court on 21st March 2006 the Plaintiffs Eliud Mwale Lewa and Agnes Idza Mwale sued as the legal representative of their deceased child Lorna Uchi Mwale Lewa. The Defendants in that suit were named as Paka Tours Company Limited (first Defendant). Ahmed Mohamed Omar (second defendant) and Hakika Transport Services Limited (the third Defendants).

The brief facts of the case were that on 14th August 2005 the 2nd Defendant whilst driving a motor vehicle registration No. KAP 003V as the authorized driver of the first and third Defendants negligently drove the said vehicle and ran over the child Lorna Uche. As a result of the injuries which she sustained the child died. The Plaintiffs sought both general and special damages. The learned trial magistrate delivered his judgement on 8th April 2008 wherein he found in favour of the Plaintiffs and awarded total damages in the sum of Kshs.140,000/-. Being dissatisfied with that judgement the Plaintiffs filed this present appeal. The Memorandum of Appeal dated 12th May 2008 listed four Grounds of Appeal. The Appellant seek that the judgement of the learned trial magistrate be set aside and that the suit be heard afresh before a different court of competent jurisdiction. In the alternative they seek that the High Court do re-assess the evidence adduced in the lower court and issue a ruling thereon.

Despite having been duly served with the hearing notice for this appeal the Respondents failed to

appear and/or file their submissions. This court therefore only has the benefit of the Appellant's submissions.

The Appellants in their Memorandum of Appeal stated their first and second Grounds of Appeal to be as follows:-

"***1. THAT the learned magistrate erred in law and in fact in holding that the Deceased a minor of five years was contributory negligent***

2. THAT the learned magistrate erred in law and in fact in holding that the Deceased was to blame at all"

I will proceed to consider these two grounds together. In his judgement at page 47 line 15 the learned trial magistrate in finding the deceased was to bear 20% liability for the accident states that:-

"***Since no one gave evidence on the exact position of the deceased when she was knocked, it would be unfair to the 2nd defendant to bear 100% liability. The deceased shall bear 20% liability while the 1st and 2nd defendant 80%".***

With respect I find this reasoning on the part of the trial magistrate to be deeply flawed. Contributory negligence should only be assessed and found where the evidence supports such a finding. It is not logical to impose contributory negligence on one party just to even out the scales. If the evidence supported a finding of 100% liability on the Defendant then that is the finding the trial magistrate ought to have made. He cannot decide to impose liability on the Plaintiff where it was neither warranted nor supported by the evidence.

The evidence is clear that the victim who met her death as a result of this accident was a minor aged 5 years old. The learned trial magistrate found this child to be 20% liable for the accident. In the case of **Gough –vs- Thorne (1966) WLR 1387** it was held:-

"***A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. 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 real sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy".***

In the case nearer home **Butt –vs- Khan Civil Appeal No. 40 of 1977** (unreported) Hon. Madan Judge of Appeal as he then was whilst ruling on a similar issue where the child was 10 years of age held that:-

"***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 a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission".***

A child of 5 years cannot be held to have reached the age of reason. A child of 5 years would not be expected to take precautions for her own safety and cannot be blameworthy in such a case. In my view the victim in this case being a 5 year old child did not have the capacity to exercise good judgement for herself. I therefore find that the learned trial magistrate did err both in fact and in law in apportioning contributory negligence to such a child.

In the 3rd and 4th grounds of this appeal the Appellant argue -

"***3. THAT the learned magistrate erred in law and in fact in making a finding on loss of dependency for a minor;***

4. THAT the learned magistrate erred in law and in fact

In failing to make an award for lost years".

At page 47 line 25 the learned trial magistrate states whilst considering whether to award damages under the Fatal Accidents Act thus:-

"***Under Fatal Accident Act, I will not award any amount as the deceased was only a child aged 5 years. She was not working and had no dependants. No case law was cited to me to show that a child of 5 years is entitled to any damages".***

Here again I find the reasoning of the learned trial magistrate to be flawed in reaching this decision. When a child dies the parents do suffer a quantifiable loss. It is established custom in both African and Asian communities that children are educated and raised in the expectation that they will in turn provide for their parents in their old age. There are several instances where courts have indeed proceeded to make awards for lost years under the Fatal Accidents Act Cap 32 Laws of Kenya. In his judgement at page 47 line 27 the trial magistrate states that:-

"***No case law was cited to me to show that a child of 5 years is entitled to any damages under this hand".***

This I find is not entirely true. In the Plaintiff's submissions filed in the subordinate court on 27th November 2007 counsel did at page 4 thereof argue for an award for lost years and did infact cite a case in support thereof. The trial magistrate either did not read or failed to give consideration to these submissions. His contention that no prayer was made for damages under the Fatal Accidents Act is therefore incorrect. Once again I find that the learned trial magistrate erred both in law and in fact by failing to make any award for lost years.

Based therefore on the foregoing I am satisfied that this appeal must succeed. I further find that the omissions and errors of the learned trial magistrate went to the very root of the Plaintiff's case. In my considered opinion this is a case mete for re-evaluation before a different court of competent jurisdiction. I hereby allow this appeal and set aside in its entirety the judgement and award of the learned trial magistrate. Secondly I hereby order that the case be heard afresh before a different magistrate. No order on costs.

Dated and delivered at Mombasa this 18th day of September 2009.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Iyoodi holding brief for Applicants

No appearance by Respondent

M. ODERO

JUDGE

18/9/2009