S.M *(minor suing through his next friend (M.A)* …..…… PLAINTIFF

VERSUS

MAHESH KERAI & MANOJ A. PATEL ……..…..……DEFENDANTS

R U L I N G

S.M (a minor suing through his next friend M.A) has filed this suit against Mahesh Kerai (1st defendant) and Manoj A. Patel (2nd defendant).

The claim arises out of a road traffic accident involving motor vehicle registration No. KAP 668V (which was owned by the 2nd defendant and driven by the 1st defendant). On 11th December 2005, along Vasco Da Gama Road in Malindi, the minor plaintiff was walking along the said road when he was hit by the said motor vehicle thereby sustaining injuries for which he seeks special Kshs. 139,280/- and general damages. The cause of the accident is attributed solely to the negligence of the defendants in:-

- Driving at an excessive speed in the circumstances.

- Failing to stop, slow down, swerve, or in any other way manage and/or control the said motor vehicle to prevent it from hitting the plaintiff

- Failing to maintain the said motor vehicle in a roadworthy condition.

- Failing to drive with due care and attention

In their statement of defence, the defendants admit occurrence of the said accident on the said date and place but deny that it was due to any negligence or breach of statutory duty on their part or that the doctrine of res ipsa loquitar or vicarious liability applies in the circumstances of this case.

Further and/or in the alternative and on a without prejudice basis, it is the defendant's contention that the accident was substantially contributed to by the negligence of the plaintiff in that:-

a) The plaintiff failed to take regard of other road users particularly the 1st defendant

b) Failed to maintain proper look out.

c) Abruptly crossed the road without observing or keeping the left – right watch as required before crossing.

d) Carelessly exposing himself on the road, to the risk of injury

e) Failing to keep and maintain traffic rules, particularly the rules observed by pedestrians when cross

f) Failing to stop and wait before crossing the road, despite the fact that 1st defendant hooted.

The defendants rely on the doctrine of volenti non fit injuria.

At the hearing, Hussein Juma Nalwa (PW1) a tuk-tuk driver testified that on 11-12-05, he was watching football being played on a field near the beach. He was facing the field which was not too far from the road, when he turned back and noticed that a child had been hit. He rushed to see what had happened and found that a child had been hit by a vehicle along the road – he found the driver whom he identified in court as the 1st defendant. On cross examination PW1 confirmed that he did not witness the child actually being hit because his back faced the road but it appeared to him that the child was crossing the road when he got hit.

Hosni Mubarak Abdallah (PW4) was riding his bicycle along the Sea Front road on the material date. He had just got near the Hindu Temple where there are bumps, and he noticed a pickup single cabin, ahead of him. There were children crossing the road about twelve (12) metres ahead of the bumps. There were three persons of Asian origin inside the pick up. Just after the bump, as the children crossed the road from the football field, one child got hit and he fell in the middle of the road – he lay unconscious. The motor vehicle stopped, and PW4 recognized the boy as someone whom he knew – so he carried the child and told the motor vehicle driver

"***lets take the child to hospital…"***

so the child was taken to Galana Hospital. The child's father, M. A.A (PW2) told the court that the minor was born on 7th July 2000, and so on the date of accident he was five years old. He got information about the incident and rushed to Galana Hospital where he found the child being attended to by Dr. Rakesh – the child was in a coma. The doctor suggested that the child be rushed to ICU Mombasa due to his condition, and a CT scan be done. So he paid the Galana Hospital bill of Ksh. 2,400/-, then got an ambulance at a fee of Kshs. 20,000/- to take the injured child to Mombasa.

The receipt for the ambulance is produced as ex.3. On the way to Mombasa hospital, PW2 received a call from someone who wanted to know the condition for the child and who advised him to take the child to Coast General Hospital, as the caller had contacted Coast General Hospital and made all the necessary arrangements. PW2 obliged, and the child was admitted there as per ex4, but there was no doctor available.

PW2 called 1st defendant (Manesh) to tell him about the prevailing situation, and that he was now taking the child to Pandya Hospital. The child was thus attended to at Pandya Hospital as per the discharge summary, Ex5 having been admitted there for 12 days – three of which were spent in ICU. A CT scan was done at Mombasa Hospital as Pandya did not have the facilities and PW2 paid Kshs. 1,500/- as per the receipt produced as Ex6. The CT scan showed a linear oblique fracture extending down the left parietal vault to the supero – medial margins of the right orbit. Another fracture was noted in the right fronto- parietal bone involving the superior margin of the right orbit.

The child also underwent x-rays of the head and the radiologist's report showed a linear fracture left parietal bone extending to the roof of the left orbit.

The child was discharged and attended out patient clinic which necessitated hiring of a transport at Kshs. 3,500/- per trip, as the child's condition could not allow for use of public transport. PW2 paid the Pandya Hospital bill of Kshs. 152,260/- but was given a 10% discount of tax being Kshs. 3,710 – the receipt is produced as ex.12. Photos of the child while in hospital were produced as Ex.13.

Dr. Palki who treated the child compiled a medical report at a fee of Kshs. 1500/- as per the receipt Ex9. It is PW2's evidence that the child changed after the RTA, and at times he would appear to be in a daze, other times he would cry, and at other times he appeared normal. The child was referred for further examination by a neurologist at the Aga Khan Hospital and an assessment report compiled at a fee of Kshs. 2,500/- as per the receipt produced as Ex.14.

It is worth noting that 1st defendant contributed towards the hospital expenses, he paid a total of Kshs, 100,000/- towards the medical expenses. 1st defendant made negotiations with PW2 and gave him a document entitled "Memorandum of Understanding", in which (1st defendant) Mahesh was to pay the total hospital bill at Pandya Hospital of Kshs. 150,000/- while PW2 would clear the bills at Galana Hospital and Tawfiq Hospital and the matter would rest there. This document was made on a without prejudice basis, and is not signed by either party. Apart from behavioural change, PW2 lamented that the child had to repeat class because he had been away from school for six months and that his performance has become poor. The neurologist had recommended that the child be taken for further treatment in Nairobi at a cost of Kshs. 140,000/- but this has not been realized due to financial constraints.

The road traffic accident was reported to police and according to Pc Joseph Wambua of Malindi Police Station, it was not established who was to blame for the accident as the police abstract stated the matter was pending under investigations.

In his defence, the first defendant informed this court that on 11-12-05 he was driving motor vehicle KAP 668V, (which belongs to Manoj Patel). He was coming from Silversands direction towards Malindi Town. There were bumps near the Khoja mosque, so he slowed down and he saw a child run from the beach direction to the road – he was running very fast – the child was six (6) feet away. The child hit the side of the motor vehicle, so DW1 stopped his motor vehicle, picked up the child and rushed him to hospital. He confirmed that the child was eventually admitted to Pandya Hospital and that he paid Ksh. 100,000/- towards his medical expenses. DW1 insists that he was on his proper lane and blames the child for the accident, saying, the child just dashed into the road and even though DW1 tried to avoid him, it was too late saying the child was running very fast.

From the evidence, there is no dispute that the minor was involved in a collision with motor vehicle registration KAP 968V which belonged to Manoj Patel (2nd defendant) and was being driven by Mahesh Kerai (1st defendant) on 11-12-05, along Vasco Da Gama Raod. It is clear that PW1 did not witness the actual collision, as he had his back to the road.

It is also not disputed that there are speed bumps on the said road and that there were going children crossing the road at the time. PW4 who was riding a bicycle along the said road, just behind the motor vehicle in question stated on cross-examination that the motor vehicle had cleared the two speed bumps and that from the bumps to where the accident occurred, measured about 12-13 metres. He could no state the exact point of impact between the child and the motor vehicle because he was behind the motor vehicle but he was categorical that the child was hit.

He explained thus:-

"***I was riding on the side walk i.e along the sea wall. I was heading in the same direction as the motor vehicle. It was a group of children crossing, ten of them had already crossed and there were some more crossing, but when they saw the accident, they stopped crossing"***

The 1st defendant disputes this, saying he on cross-examination that he only saw the child crossing the road – other children had formed part of the crowd which was watching football. PW4 on further cross-examination stated that he could not tell the speed of the motor vehicle but that after hitting the child, it stopped about 5 metres away. DW1 says he was driving at about 10-15kph and that it is the child who hit the motor vehicle on the driver's side – he explained that he had just gone over a speed bump, so his motor vehicle could not be moving fast.

The issues for determination are;-

(a) whether the defendants are liable directly or vicariously for the accident

(b) did the plaintiff minor contribute to the accident

In his written submissions, Mr. A. A. Mazrui for the plaintiff pointed out that the 1st defendant confirmed being the driver of the aforesaid motor vehicle which collided with the plaintiff, thus confirming that he is directly liable for the accident and that DW1 also testified that indeed the motor vehicle belonged to the 2nd defendant which therefore makes the 2nd defendant vicariously liable. It was Mr. Mazrui's further submission that the law with respect to contributory negligence visa vis minors is that a child can only be found guilty of contributory negligence if he is old enough to be expected to take precautions – he referred to the Court of Appeal decision in **Attorney General and Anor V Vinod and Another (1971) EA pg 147** where Mustafa J.A. in his judgment which was unanimously supported by both Duffris P and Law J. A. Stated:-

"***in this respect, I would refer to the observations of Lord Denning in the Court of Appeal in England it the case of Gough V Thorne (1966)1 WLR 1387 at pg 1390, where he said: A very young child cannot be guilty for 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 should be attached to him or her. A child has not the road sense or experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy"***

Mr. Mazrui submits that in the present situation the defence has failed to prove that the child could be expected at his age to take precautions or have rod sense and experience and so the child could not have negligently contributed to the accident. Mr. Mazrui urges the court to hold that finding a five year old minor victim liable for contributory negligence is not tenable with the relevant legal and judicial principles. He argues that keeping in mind the circumstances prevailing at the time, the fact that 1st defendant was driving along a public road next to a playing field where a football match was just finishing, and that children had been watching the said match, the it was incumbent on the 1st defendant tot take special care to ensure that he did not collide with any child.

He also asks this court to consider the injuries sustained, which he submits suggest more than a mere striking of the car's tyre by the child, and that it in fact suggests that the motor vehicle was being driven fast.

Mr. Ole Kina for the defendants agrees with these arguments and I may only add that indeed the question of a minor contributing to an accident has well been addressed by our courts – having been confirmed by the Court of Appeal in **Tayab v Kinam (1982- 88)1 KAR** 90 in upholding the finding by Mustafa J in **Vinod's case** and also re-stated by Madan J. A. in his judgment in **Butt v Khan (1982-88)1 KAR** where he stated:

"***Indeed, I am of the opinion that practice of civil courts 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 opinion."***

The evidence adduced, supported by the birth certificate clearly confirm that the plaintiff minor was aged 5½ years at the time of the accident certainly too young to know how to act or what precautions to take while crossing a road. I cannot therefore fault the reasoning presented by Mr Mazrui on that part. The child was hit, and the circumstances prevailing that is the nature of the road (the presence of speed bumps – which were in themselves a warning to any driver along that road to be continuous with regard to speed), the presence of a crowd nearby, which included children, the movement along the road –all these factors should have raised a red flag to the 1st defendant to be extremely cautious. He has not even suggested that the presence of the child may have been hampered by any other object and so yes, he is to blame for the collision and I hold him liable at 100%. The 2nd defendant becomes vicariously liable by virtue of being the driver of the motor vehicle which 1st defendant was driving and he has not denied that the same was being driven with his permission and/or authority. What appears to be contested is

a) The injuries and the quantum proposed Mr Mazrui seeks to rely on the hospital records, P3 form,

Doctor's reports all which detail the injuries suffered by the child as

1) Linear fracture left parental bone extending to the roof left arbit

2) Fracture right front paretal bone

3) Thin fracture of antenor wall of right maxilliary sinus

4) Head concussion injury leading to a coma

5) Multiple facial bruises

6) Multiple forearm bruises both forearms

Both Pw 2 and Pw 4 and even the 1st defendant confirmed to this court that after collision, the child was in a coma,and his condition was critical. Mr Ole Kina point out that the medical reports by Doctor Palkin Yusuf A.M. and Doctor Juzan Hooter, although marked for identification, were never produced as exhibit and to that then the nature and extent of the injuries suffered were not framed – he has sought to rely on the decision of Angawa J. in HCCC 1187 of 1999 Richard Ochola Wangulu V Securicor Kenya Limited where she stated;-

"**I find that Plaintiff has failed to establish that he did sustain injuries and to what extent. The medical report was crucial to this case. The Plaintiff chose not to produce them"**

He also refers to the Court of Appeal decision C.A No.192 of 1996 Thuranira Karauri V Agnes Ndeche which held that a medical report is only admissible in evidence on its production by the author unless it is produced by consent of the other party to the suit. On these basis then, Mr Ole Kina prays that the suit be dismissed with costs.

It is true that the medical reports by the Doctor have not been produced – they were only marked for identification. Yet should the court completely shut its eyes to the evidence availed from both sides that indeed the child suffered some injuries to the head and was in a coma?

In Ochola`s case, the court did not even have the benefit of seeing the medical report as the Doctor who had prepared declined to release it to the plaintiff due to non payment of fees, and the plaintiff had not even served the defendant with his list of documents in that case. In the present case the reports were presented to court and marked, only that they were not produced – I think the situation prevailing here can be distinguished from the Ochola case.

In Thuranira`s case , the medical report was produced by the Plaintiff who was not the maker of it. What is more the Doctor purported to express an opinion in injuries that were sustained six years earlier – the plaintiff had never been his patient from the examination, and the plaintiff had been involved in another accident 5 years earlier, which he concealed and the court found that it was impossible to determine which injuries were caused by the accident in question.

In the present case the child's injuries were described clearly by the Plaintiff's witnesses and even the Defendant. Doctor Palkhi who compiled one of the medical reports treated the child at Pandya Hospital, and infact there is a discharge summary produced as Exhibit 5 which listed his injury as;-

RTA – Head Injury – severe H(meaning fracture) frontal bone – Contusim injury. That discharge summary was written by Doctor Palker and defence did not object to its production. I think it would be myopic of me to ignore that evidence – it at least discloses the nature of injury suffered and I decline to dismiss the claim as suggested. However the none production of the reports mean that the extent of the injuries and their residual effects remain in limbo as contents of documents only marked, but not produced but the NATURE of injury is known and cannot be downplayed and Exhibit 5 offers some guidance on injuries and what then to consider in awarding quantation. Mr Mazrui has cited very useful

just decisions which I am inhibited from applying to the fullest, for lack of EXTENT of injury and the residual effects – but they are useful grounds.

Mr Mazrui suggests general damages of Kshs.2.2million shillings whereas Mr Ole Kina offers Kshs.300,000/- based on the Tayib V Kinanu Case. I take note that these are decisions awarding damages more than twenty years ago, and take into consideration the note of inflation and the dwindling nature of the Kenyan shilling …..the cost of living and in my view the sum of Kshs.1,000,000/-(one million) is a fair figure and I so award.

For specials pleaded and proved by receipts – these are pleaded as;-

Galana Hospital Kshs.12,920/-

Ambulance 20,000/-

Pandya Hospital 152,260/-

CT Scan 11,500/-

Neurolgist Opening fees 40,000/-

Doctor`s consultation 2,500/-

Taxi 10,500/-

Police Abstract 100/-

Less Defendant's contribution 100,000/-

Total 139,780/-

There are receipts produced supporting these special damages, save to point out that the receipts for taxi (a) do not bear stamp duty and 9b) were not produced as exhibit, only document for identification, so that remains an item not produced and is taken out of the special damages claimed which then reduces it by a further 10,500/-. The total special damages awarded is Kshs.129, 280/-(one hundred and twenty nine thousands, two hundred and eighty shillings only.

Delivered and dated this 28th day of October 2009 at Malindi

H A OMONDI

JUDGE