REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 85 OF 2005

CHRISTABEL NDUTA MALENYA (minor, suing thro' next friend)

MAURICE MILIMO ……..……. APPELLANT

V E R S U S

KAKAMEGA MUNICIPAL COUNCIL .....…… RESPONDENT

J U D G M E N T

The appeal herein is against the decision of the Principal Magistrate, S. Kibunja Esq., made in Kakamega CMC Suit No.102 of 2004 in which the said magistrate dismissed the suit with costs. That suit had been instituted by the appellant against the respondent herein and the appellant's claim in it was for general damages by the minor, MAURICE MILIMU LUTSA, (on whose behalf the appellant sued and has now appealed) plus special damages. The injuries were sustained in an accident on 22-9-2003 near Museno area on Kakamega/Kisumu Road when motor vehicle registration No. KAN 027 P, a Peugeot 504 saloon hit the minor. There was no dispute that the said motor vehicle was owned by the Respondent and was being driven by its servant and/or agent. The appellant attributed negligence in the accident to the Respondent and alleged Res ipsa loquitor , but the Respondent denied the allegations of negligence.

In his Memorandum of Appeal dated 24-11-2005 the appellant set out the following grounds of appeal:-

1. That the trial magistrate erred in law and fact in failing to hold that a minor of 3 years could not be guilty of contributory negligence.

2. That the trial magistrate erred in law and fact in failing to hold that the appellant had proved negligence against the respondent.

3. That the learned trial magistrate erred in law in dismissing the appellant claim its entirety in face of the nature of the evidence which was before the him and the judgment was wrong, unfair and has occasioned a serious miscarriage of justice.

4. That the learned magistrate erred in law in failing to properly evaluate and distinguish the authorities placed before him and thereby reaching a wrong decision based on the following principles of the law.

5. That the trial magistrate erred in law in failing to assess General damages that would have been compensation to the appellant.

In the trial court, the father of the minor, Maurice Milimu Lisutsa, testified as PW1 and one Prodas Yadisima, a farmer from Sigalagala, testified as PW2 on behalf of the plaintiff. The respondent had three witnesses, David Ochieng (DW1) who was the driver of KAN 027 P and Silvanus Baiyo Otiende (DW2) a councillor cum Mayor of Kakamega who was seated at the back seat of KAN 027 P with Morris Otinga (DW3), another councilor. The facts that were not in controversy were that –

(i) The accident occurred along Kisumu/Kakamega Road near Museno on 22-9-2003 in which the child was hit and injured by motor vehicle KAN 027 P.

(ii) Motor vehicle KAN 027 P was moving from Kisumu towards the direction of Kakamega on Kisumu/Kakamega Road.

(iii) The time of the accident was around 5.30 p.m.

(iv) It was wet as it had rained or drizzled.

(v) There were no pot-holes on the section of the road where the accident occurred.

(vi) After the accident the vehicle No. KAN 027 P stopped a distance away from the point of impact.

(vii) There were children playing near the road at the scene where the accident occurred and DW1 said he saw them from a distance as he approached the scene.

(viii) There was no evidence that DW1 hooted before the accident to warn the children who were playing near the road as he approached.

The plaintiff's eye witness, Prodas Yadisima (PW2), testified that the vehicle was at a high speed and that it moved to the right lane thereby hitting the minor. Prodas Yadisima testified that he was heading to Kakamega from Sigalagala and was walking on the left side of the road. The vehicle passed him. He said in cross-examination that the vehicle passed him and moved from its left lane to the right lane where it hit the minor about 50 meters from where he, PW2, was. He told the trial court that the vehicle stopped after hitting the minor some distance from the point of impact.

In defence, the driver of the vehicle, David Ochieng (DW1) testified that he was doing about 80 Kmp due to the drizzle. This is the same speed estimated by Silvanus Baiyo (DW2) who sat at the back seat of KAN 027 P. Although DW1 testified that he saw the child about 10 meters away, DW2 who was at the back seat put the distance at 20 meters. But these were approximations. DW1 testified that he saw from a distance children playing on the right side of the road at the scene as well as other people as he approached the scene. Their presence should have raised a red flag and warned the DW1 to slow down and to drive carefully. DW3, told the court that at Sigalagala their vehicle had slowed down a little but DW1 accelerated after that. This was also the evidence given by DW2 who said that the vehicle had slowed down at the market before the scene of the accident but ostensibly picked up speed which he put at 80 kmp. DW1, the driver of KAN 027 P, told the court in evidence that he applied brakes when he saw the child about 10 meters away and swerved to the right but still hit the child and the vehicle landed in a ditch. He is the only one who alluded to the vehicle landing in a ditch. DW2 said the vehicle swerved to the right in an attempt to avoid hitting the child.

From this evidence, can it be said that the plaintiff established on the balance of probabilities negligence on the part of the respondent? The trial magistrate analyzed the evidence and stated that PW2 had not recorded a statement with the police after the accident and for that reason, he said, PW2's evidence had to be "*taken with caution.*" But the statements of the defendant's witnesses were not produced and the fact that PW2 had not recorded a statement with the police (for reasons which did not come out in evidence) did not mean that he was incapable of telling the truth. Nor did the fact that the

evidence of the witnesses for the Respondent who had given statements to the police was gospel truth. This was a case where no traffic offence was mounted and none of the statements made to the police were produced during the trial. Evidence needed to be tested in the trial and no where else. The caution applied by the trial court was , in the circumstances of this case, a misdirection. The trial court observed that in their testimony DW1, DW2 and DW3 were in agreement that DW1, the driver, did not lose control of the vehicle and that the child emerged from the side suddenly and came onto the road where he was hit. The fact that the driver and other defence witnesses were in unison or in a chorus in their assertion that the driver did not lose control did not necessarily mean that their evidence should not be examined with circumspection against the evidence of PW2 who too was an eye witness. Dw1, DW2 and DW3 were officials of the Respondent and it would not be reasonable to expect that they would give evidence adverse to the defendant or in a discordant manner. But this is not to say that they could not tell the truth for this reason.

The evidence shows that DW1 had accelerated and the vehicle had picked up speed before the accident. DW1 put it at 80 kmph. But the fact that when DW1 applied brakes the vehicle veered off into a ditch (according to DW1) must mean that it was at a high speed. DW1 stated in cross-examination that he did not see the child until the child came onto the road. This must obviously mean he was not keeping a sharp look out. Although he put the distance at 10 meters, it seems, in the circumstances of this case, that he did not keep a good look out for it was DW3 who said in examination in chief that he shouted to the driver, DW1, not to hit the child. The fact that it was wet as a result of a drizzle, and the fact that there was, according to DW1, a slight curve, and the fact also that DW1 had from a distance seen children by the side of the road playing should have warned him to slow down and to be careful so as to avoid an accident such as the one that took place.

The analysis by the trial magistrate that "*if the child was off the tarmac road and was hit by the left bumper, then there is no way she (the child) would have fallen on the tarmac as she was on the right side. She fell on the tarmac as she was on the tarmac when DW1 hit"* her. This appears to be consistent with the evidence of the respondent in the trial court. But it was not the issue. The issue was whether the child could be held contributorily negligent.

PW2 testified that he saw the vehicle move from the left lane to the right lane and the child was hit on the right lane. The child was picked after the accident by PW1 from the right side. This does not appear to show that the child was beside the road. It seems the child was crossing the road as stated by the Respondent's witnesses. But if DW1 had seen children from a distance and had driven at a slower speed and was more cautious, the accident might have been averted. As I have said, there is an issue of contributory negligence in this case but the question to be determined is whether in the circumstances of this case contributory negligence could be imputed on the child who was aged three years at the time of the accident and who was among the children DW1 saw before the accident.

Mr. Wainaina, learned counsel for the appellant, urged the court to find the respondent 100% liable for the accident and to allow the appeal. To buttress his submission, he relied on the case of **BUTT v. KHAN [1981] KLR 349. In that case, the Court of Appeal in 1981** held that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. In the said case, the court referred to the English authority, **Gough v. Thorne [1966] 1 WLR 1387** in which the English Court of Appeal refused to attribute any contributory negligence to a girl aged 13 1/3 years who was knocked down while crossing a road. The learned judge in the case held that "***a very young child could not be guilty of contributory negligence, although an older child might be depending on the circumstances. The test was whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child. On the other hand in Attorney General v. Vinod [1971] EA 147 the former Court of Appeal upheld a finding that a boy of 8 years of age, who ran across a road from a gap between parked vehicles was contributorily negligent to the extent of 10%. Clearly each case must depend on its peculiar circumstances……..***"

Mr. Mwinamu, learned counsel for the respondent who opposed the appeal, contended that whether a child was liable for contributory negligence depends on the circumstances of each case. He referred to

the Court of Appeal decision in **Civil Appeal No. 110 of 1986** in which he said a minor was held 100% liable where, the said , a minor had dashed onto the road from the rear of a stationary vehicle. He contended that in the instant appeal, the fact that the driver of the vehicle that hit the child was not charged was proof that the respondent was not negligent. He also relied on **NRI H.C.C.C. NO.851 of 1971.** He urged me to find that the child was to blame for the accident in which she was hit and injured by motor vehicle KAN 027 P. It was Mr. Mwinamu's submission that negligence was not proved on the part of the respondent. He urged the court to dismiss the appeal.

I have carefully considered the evidence adduced in the trial court. The child was a little girl aged 3 years. The accident was at 5.30 p.m. It was wet due to a drizzle or rain. The driver of the motor vehicle KAN 027 P had slowed down at a market place at Sigalagala but had accelerated and picked up speed before the place where the accident occurred. From a distance, DW1, the driver of motor vehicle registration No. KAN 027 P testified that he observed children playing beside the road from a distance. He should have slowed down seeing there were children ahead who could dart across the road. The evidence before the trial court does not show that he slowed down. The child crossed the road and was hit. DW1 had to swerve and he told the trial court that the vehicle landed in a ditch. This is symptomatic of high speed. It is not lost on me that DW3 had to shout to DW1 to try an avoid the child. If DW1 had slowed down to a speed of 60 kmph, he would have probably been able to avert the accident. Considering that it was daytime and DW1 had a good view of the road including the children playing ahead of him, he had a responsibility to take care to avoid hitting the child. Every motorist has a duty to take care to avoid hitting young children especially where one sees a child ahead of him. A child of 3 years as in this case cannot be expected to take care of herself.

Guided by the **principle in Butt v. Khan** (supra) it is my finding in this case that the plaintiff being a very young child and as the circumstances were such that the Respondent's driver (DW1) could have averted the accident if he had been more circumspect, the child of such tender age could not be contributorily negligent in view of the fact that there was no proof that the child knew or ought to have known that she ought not to have crossed the road as she did. In my view no contributory negligence can be imputed on a child of 3 years as a child of such tender age cannot be expected to take care of herself or himself as he/she is not likely to know how to do so. It is my finding that the trial court went into error in imputing negligence on the child. There was sufficient evidence before the trial court that the plaintiff had proved on the balance of probabilities that DW1 was negligent in the circumstances and the child could not be held guilty of contributory negligence.

In the result, I allow the appeal and set aside the judgment of the trial court. In its place, I enter judgment for the appellant on 100% liability.

The trial court should have but did not assess damages. The trial court shall proceed to assess damages on this basis. It is so ordered.

Delivered, dated and signed at Kakamega this 8th day of November, 2007

G. B. M. KARIUKI

J U D G E