



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 81 of 2002

G M T (A minor suing through the next friend)

JAMES THEURI WANGARI
PLAINTIFF

VERSUS

BOARD OF TRUSTEE ARCH – DIOCESE OF NYERI
..... 1ST DEFENDANT

NICHOLAS KARUMI
..... 2ND DEFENDANT

J U D G M E N T

G M T a minor has brought this suit through his father and next friend James Theuri Wangari seeking general and special damages from the Board of Trustees - Archdiocese of Nyeri and Nicholas Karuri (hereinafter referred to as 1st & 2nd Defendant respectively). It is the Plaintiff's case that he suffered personal injuries as a result of the negligence of the 2nd Defendant in the management and control of motor cycle registration No. KAM 670Z, and that the 2nd Defendant being an employee or servant or agent of the 1st Defendant who is the owner of motor cycle KAM 670Z, the 1st Defendant is vicariously liable to the Plaintiff for the negligence of 2nd Defendant.

Two witnesses testified in proof of the prosecution's case. These were the minor Plaintiff's father and next friend, James Theuri Wangare (P.W.1) and Catherine Muringi Mwai (P.W.2) an eye-witness who at the material time was selling fruits and vegetables at Chaka Market where the accident occurred.

Their evidence was briefly that on the material day, it was a market day at Chaka Market which is situated along Naru-Moru – Nyeri Road. At about 4.00 p.m. the minor Plaintiff who was in the company of a slightly older brother (then 6 years old) crossed the road from right to the left. The minor plaintiff had just finished crossing the road when motor cycle KAM 670Z which was being driven by the 2nd Defendant along Naru Moru Nyeri Road from Naru Moru direction swerved off the road to avoid a vehicle which was stationery and another one which was on the road. The motor cycle which was

travelling at a high speed knocked the minor plaintiff who was off the road. The minor plaintiff was taken to Nyeri Provincial General Hospital where he was admitted for 14 days. The hospital treatment card and hospital Summary Discharge were both produced in evidence. A police abstract report of the accident was also produced in evidence.

Subsequently the minor Plaintiff was examined by Dr. Wokabi. At the request of the defence he was examined by Dr. R. P. Shah for a second medical opinion. Both reports were produced in evidence by consent.

The Defendant denied liability to the Plaintiff and contended that the accident was solely caused or substantially contributed to by the plaintiff's negligence. The 2nd Defendant testified on behalf of the defence. He testified that on the material day it was a market day so there were many people around Chaka. He was therefore riding the motor cycle at a slow speed of about 30 to 40 K.P.H. when he saw two children chasing each other from the right side of the road. The first child crossed the road, but the second child collided with the motor bike and fell down. He testified that he was unable to avoid the child because the child came running. He denied having been negligent and maintained that he could not have been travelling fast as there were bumps at that section of the road.

Written submissions were exchanged and filed in court by the parties advocates, the Plaintiff's advocate urging the court to find in favour of his client and award him general damages of Ksh.900,000/ and Kshs.150,000/= for future operation while the defendant's advocate urged the court to find the Plaintiff to have been contributorily negligent to the extent of 10% and award Kshs.250,000/= as general damages and Kshs.70,000/= as cost for future medical expenses.

It is evident that the Plaintiff herein is a minor who was about 2½ to 3 years (going by the medical reports) at the time of the accident. This suit was therefore filed through his father and next friend who duly signed an authority for his name to be used as a next friend. It was submitted that the next friend adduced oral evidence that he was the father of the minor plaintiff and I do believe and accept his evidence.

It is evident that the minor plaintiff was knocked down when he was just about to finish crossing the road as he was running after his older brother who was just about 6 years old. The 2nd Defendant contradicted himself as to whether he saw the minor plaintiff before he was knocked down, first stating that he saw the two children chasing each other, but later changing that he only saw the minor plaintiff when he collided with his motor cycle. If the child came running from the right side of the road and knocked himself on the motor cycle on the left side of the road when he was about to finish crossing the road, then the 2nd Defendant ought to have seen the child and avoided him if he was exercising due care and attention. It is evident that the 2nd Defendant was negligent as he was riding his motor – cycle at a section of the road where he admits there were many people and therefore he ought to have been extra cautious. Moreover in **Butt v/s Khan [1981] KLR 349** (which was cited by both counsels) it was 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.*” (emphasis added)

This was followed in the case of **Tayab v/s Kinanu [1983] KLR 115** cited by the defence counsel wherein a 9 year old child was held contributorily negligent to the extent of 10% because “the evidence revealed that she had the requisite road sense and was capable of being contributorily negligent.

In this case the minor plaintiff was just about 3 years old. He had completely no “road sense” and appears to have been merely running after his brother. His immediate concern appears to have been to catch up with his brother and he did not appreciate that he was crossing the road and ought to be careful. This is not an appropriate case in which the minor plaintiff can be held contributorily negligent. I therefore find the 2nd plaintiff to be solely liable for the accident. It was conceded by the 2nd Defendant that the motor cycle belonged to the 1st Defendant and that he was at the material time employed by the 1st Defendant. I therefore find the 1st Defendant to be vicariously liable to the minor plaintiff.

The injuries suffered by the minor plaintiff were a deep cut on the head with a depressed fracture which has left the minor with an 7 cm long scar and an oral bone defect on the left frontal bone anteriorly. Dr. Wokabi who initially examined the minor plaintiff was of the opinion that the injuries predisposed him to a high chance of developing epilepsy. However 3 years down the road, the minor plaintiff has not exhibited any symptoms of epilepsy and I would therefore go by Dr. Shah's report that chances of developing epilepsy are now negligible. In my considered opinion a sum of Kshs.550,000/= would be adequate for pain and suffering. I would further award the minor plaintiff a sum of Kshs.150,000/= as cost of future surgery to correct the deformity in his skull bone and special damages of Kshs.2100/=.

The plaintiff shall also have costs of the suit and interest from the date of this judgment. Orders accordingly.

Dated signed and delivered this 26th day of April 2005

H. M. OKWENGU

JUDGE