REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL 159 OF 2001

S. K……..……. PLAINTIFF

VERSUS

MOURIS MUIA MUASYA …….. DEFENDANT

J U D G E M E N T

S K, a minor suing through his uncle and next friend J K K hereinafter referred to as appellant, filed a suit in the Principal Magistrate's Court, Kitui against Maurice Muia Muasya, the Respondent herein, claiming damages for personal injuries which he sustained on 20/2/99 when the appellant was riding his bicycle on Kitui – Zombe Road and was hit by motor vehicle KRK 343 which was driven by the defendant.

Accordingl to the averments in the plaint, the accident was caused by the negligence of the defendant. The appellant's evidence is that he was going to a place called Miambani were his uncle had sent him and when he reached a place called Ngai Ndethya he met the defendant's vehicle which was driven in high speed, it swerved and hit him. He said he was on the left side whereas the defendant was on the right. He was injured. The appellant said he was born in 1984. At the time the accident occurred, he was about 15 years old.

The Respondent filed a defence in which he denied having been negligent or causing the accident and pleaded in the alternative that the accident was caused by the negligence of the appellant. He said that at the scene of the accident that was a corner, it was hilly, he was coming from the lower side. He saw the appellant come down hill. He stopped his vehicle on seeing the appellant who then jumped off the bicycle and the handle bars of the bicycle hit the windscreen of his vehicle. He denied having lost control and hitting the appellant. It was also pleaded in the alternative that the appellant contributed to the occurrence of the accident and further that the appellant admitted through his mother that he caused the accident and was fully liable for the injuries to both himself and the Respondent's motor vehicle.

The trial magistrate held that the plaintiff's evidence was not clear as to how the accident occurred nor did he prove negligence on the part of the defendant. He however accepted the evidence of the Respondent as being more credible and dismissed the appellant's suit.

In his appeal, the appellant challenges the court's finding on liability and cited six grounds which the court will consider in this judgement.

The only witnesses to the accident giving rise to his cause of action were the appellant and the Respondent. The evidence on record is that the police never even visited the scene to ascertain who may have given the right version of how the accident occurred. It was therefore the word of the appellant as against that of the Respondent. The trial magistrate believed the Respondent's evidence as the truth and dismissed the appellant's evidence as not having been clear as to how the accident occurred. In his

evidence, PW1 said that they were going the opposite directions with the Respondent and the Respondent driving downhill, in high speed at a corner and that the Respondent left the side on which he drove to come on the side on which the appellant was. This came out more clearly in the cross examination of the appellant. On the other hand, the Respondent testified that he was driving uphill when he saw the appellant cycling downhill. He stopped because he was in a slow speed and that appellant jumped from his bicycle and hit the Respondent's windscreen. That was the evidence of the appellant against the Respondent with each giving a different version of how the accident occurred. In my considered view, the magistrate reached an erroneous conclusion that the appellant's evidence was not clear as to the occurrence of the accident. The particulars of negligence as pleaded in the plaint had been proved by the appellant alleging in his evidence that the Respondent was in high speed and therefore failed to control his vehicle, and that he was negligent by driving an unlicensed motor vehicle. It was however inconvincible that the appellant would just reach the Respondent's stationary vehicle and jump onto it for no apparent reason as the Respondent alleged.

It was also contended by the appellant that the magistrate erred by holding a minor of tender years 100% liable and relied on the authority of EDWARD MURIGA versus NATHANIEL C.A. 23/1997. In that case, the High Court had found a minor of 8 years to have contributed to the occurrence of the accident but the Court of Appeal found that a child of tender age cannot be held guilty of contributory negligence and the Court of Appeal entered Judgement for the appellant on full liability.

In the present case, the appellant was 15 years at the time of accident. In my view, though he was not of majority age, yet he cannot be considered to have been a child of tender age. He was old enough for the uncle to set him a distance away on a bicycle and it was expected that he even knew the traffic rules governing riding of bicycles on the road. In my view, this court could have apportioned liability if the need arose, based on the evidence.

The other ground of appeal was that the trial magistrate distorted the facts which led the court to reach an erroneous decision. Counsel for appellant submitted that the court found the appellant to have been admitted for two days instead of two weeks and that appellant and Respondent testified that the vehicle stopped on the right side whereas the court found it to have been on the left side. I have read the judgement of the lower court.

Though the magistrate in making a summary of the plaintiff's case said that the plaintiff was admitted for two days, yet the court never made a finding on the issue of the number of days that the appellant was admitted. All that the court found was that the appellant had not explained what had occurred and had therefore not proved negligence against the defendant. The distortions if any did not affect outcome of the case. That distortion would have affected quantum had the court gone that far to assess damages. The court considered the Respondent's evidence that the appellant's mother had signed an agreement with the Respondent that the appellant was to blame for the accident yet there was no evidence of the said written agreement presented to court. The court should have made a finding that the Respondent had not proved the existence of any agreement between the appellant's mother on one hand and the Respondent. Though the Respondent claimed that the agreement was written, none was produced in court nor did he call the witnesses to the said agreement. It remained a mere allegation. The trial magistrate was in error in accepting the evidence on the alleged agreement.

I have found above that the appellant was not a child of tender years at the time of the accident. The appellant and Respondent were the only witnesses to the accident and they gave totally different versions as to the occurrence of the accident. An accident did occur and the appellant was injured. In this case the standard of proof is on balance of probability and the court is persuaded to apportion liability in terms of 50% against the appellant and 50% as against the Respondent as road users each owed the other a duty of care. The lower court's Judgement on liability is therefore set aside.

The appellant was said to have suffered injuries to the nose, blunt fracture to the eye and bruises of the face. A report was prepared by Dr. Salim indicated that the appellant complained of headaches, recurrent memories and seeing of floaters. Dr. Salim opined that the appellant suffered soft tissue injuries, he was hospitalized for 2 weeks and that there are long term effects of trauma to the head which he did not

indicate. The appellant submitted an award of Kshs.100,000/= to be awarded as general damages. They relied on the case of DANIEL NGUKU versus KARANJA KAMAU HCCC 4175/1985 where an award of Kshs.60,000/= was made in 1989.

The defendants did not submit on quantum. In my view, and considering above authority, an award of Kshs.70,000/= will suffice as General damages the injuries were fairly minor and had healed well. The court will allow proved special damages of Kshs.1,600/= for medical report and abstract.

In sum, the Judgement of the lower court dated 29/11/01 is hereby set aside. The appellant will have general damages of Kshs.70,000/= less 50% contribution which totals 35,000/=. He will also have Judgement for Kshs.1,600/= special damages. The appellant is entitled to half the costs of the appeal.

Dated at Machakos this 4th day of May 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE