



REPUBLIC OF KENYA



KENYA LAW
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AO (Minor suing through next friend of father JOO) v Khainga & another (Civil Appeal E038 of 2022) [2025] KEHC 1860 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E038 OF 2022
WM MUSYOKA, J
FEBRUARY 21, 2025**

BETWEEN

AO (MINOR SUING THROUGH NEXT FRIEND OF FATHER JOO) APPELLANT

AND

PARANAPASH KHAINGA 1ST RESPONDENT

DANIEL ODHIAMBO 2ND RESPONDENT

(Appeal from judgment and decree of Hon. EC Serem, Resident Magistrate, RM, in Busia CMCCC No. 106 of 2020, of 3rd October 2022)

JUDGMENT

1. The appellant had sued the respondents, at the primary court, for compensation for loss and damage allegedly arising out of a road traffic accident on 12th February 2020, along the road from Busia to Kisumu. The appellant was a pedestrian on the said road, and was knocked down by motor vehicle registration mark and number KCE xxxT, said to have belonged to the respondents, and liability was attributed to them on account of negligence. The respondents filed a defence, denying everything pleaded in the plaint, but, in the alternative, pleading contribution on the part of the appellant.
2. A trial was conducted. 5 witnesses testified for the appellant, while 1 testified for the respondents. Judgment was delivered on 3rd October 2022. On liability, the court held the appellant 50% liable and the respondents also liable at 50%. On quantum, the court awarded Kshs. 450,000.00, for pain and suffering, and Kshs. 9,000.00 for special damages; all totalling Kshs. 459,000.00. Upon subjecting the total judgment award to contribution, the amount came down to Kshs. 234,000.00.
3. The appellant was aggrieved, hence the instant appeal. The appeal raises several grounds revolving around liability. It is averred that the trial court erred in finding a minor liable for contributory



- negligence, the decision was against the weight of the evidence, the judgment was based on theories and suppositions, and issues were not properly framed.
4. On 29th April 2024, directions were given, for canvassing of the appeal by way of written submissions. Both parties filed written submissions.
 5. The appellant has reduced his grounds of appeal to just 1, whether apportionment of liability equally was well founded in law. He argues that he was a minor of tender years, and that, with respect to liability by such minors, the courts have placed strict liability on drivers, and have shifted the burden onto the drivers to show that the child was of such age as to be expected to take precautions. He cites Patrick Muli vs. EM (minor suing through her mother and next friend WG) [2021] eKLR (Odunga, J) and Lillian Achieng (a minor suing thro 'Rusalia Atieno Amaya as her next friend vs. Nation Media Group Kisumu HCCA No. 18 of 2005 (Warsame, J) (unreported). He urges that the trial court should have found the respondents wholly liable for what befell him, and liability should have been assessed at 100% against them. He has also attached the decision in Bash Hauliers Limited vs. Anastacia Ndinda Kimonye [2020] eKLR (Odunga, J).
 6. On their part, the respondents have not submitted on the principle relating to apportionment of liability where minors of tender years are involved, but dwells on burden of proof, and the principle that where the evidence by both sides is conflicting on what exactly transpired, and the court cannot find one way or the other, the best way out should be to hold both sides equally liable. They rely on Hussein Omar Farah vs. Lento Agencies [2016] eKLR (Omolo, Tono & Githinji, J), Matunda Fruits Bus Services Limited vs. Moses Wangila & another [2018] eKLR (J. Ngugi, J) and Philip Papoi Papa vs. Jiginashkumar Rameshbai & another [2017] eKLR (Meoli, J). They urge that the decision of the trial court be upheld.
 7. The appellant did not take to the witness stand. His story was told by PW2, who claimed to have had witnessed the accident. In his witness statement, dated 11th June 2020, he avers that he was at a stage near Nyamwanga Primary School, when he saw the vehicle, driven by the 1st respondent, DW1, knock the appellant down, as the latter was walking to school. PW2 was among those who boarded that vehicle to rush the appellant to hospital. He says that the vehicle was driven carelessly and at speed. When he took to the witness stand, on 26th July 2021, he stated that the appellant was on the left side of the road, and was not crossing the road, when the vehicle, which was moving fast, hit him. He stated that children were going to school at that hour, and the driver should have been careful.
 8. The accident was conceded by the 1st respondent, the driver of the accident vehicle who testified as DW1. In his witness statement, he avers that the appellant dashed across the road, and he, DW1, swerved the vehicle, trying to avoid hitting the appellant, to no avail. The appellant hit the rear part of the vehicle, and they rushed him to hospital. He testified on 30th May 2022. He blamed the child, for coming so near that he could not apply brakes, and had to swerve. He said that he had used the road for about 2 years, and he knew it well. He was approaching Nyamwanga Primary School, and it was the usual time when children go to school, and children were crossing the road. He saw the child at close range, some 3 metres away, crossing the road, and he, the appellant, knocked the rear right side of the bumper. He said that the child was running.
 9. Faced with that, the trial court took the view that the narratives from both sides were not clear on what exactly transpired, and concluded, based on Haji vs. Marair Freight Agencies Limited [1984] KLR 139, that where it is proved that both sides were to blame, and no reasonable means of determining a reasonable distribution of liability is positive, both should take the blame equally.



10. The appellant argues that he was a minor of tender years, and that that fact ought to have been considered in apportioning liability. In the written submissions, placed on record before the trial court, both sides did not raise the issue of the appellant being a child of tender years, and it was not submitted that that was a factor to be considered. The parties dwelt more on burden of proof, and on which of the 2 versions of what transpired was more believable. In the judgment, the trial court did not advert to the issue of the appellant being a minor of tender years, and how that could affect liability.
11. The principle, with respect to this, appears to be that a child of tender years, that is below 10 years, cannot be guilty of contributory negligence. The burden would be on the defendant to establish that the child was knowledgeable or intelligent enough to take precautions. There is a long line of cases on this. See *Esther Nkudate vs. Touring & Sporting Cars Ltd & another* [1979] eKLR (Platt, J), *Butt vs. Khan* [1981] KLR 349 (Madan, Wambuzi & Law, JJA), *Tayab vs. Kinanu* [1983] KLR 114 (Law, Potter & Hancox, JJA), *EWO (suing as next friend of minor (OW)) vs. Chairman Board of Governors–Agoro Yombe Secondary School* [2018] eKLR (Aburili, J) and *Patrick Muli vs. EM (minor suing through her mother and next friend WG)* [2021] eKLR (Odunga, J).
12. In assessing liability, the trial court did not advert at all to the fact that the appellant was a minor, given that the suit being tried had been brought by him as a minor, through his next friend and father. The fact that a party, to a suit for damages arising out of a collision in a motor traffic accident, is a minor, ought to make the age of the minor a matter of consideration, in assessing liability. The court should have been interested in establishing his age, to determine whether he was a minor of tender years, to which the principle stated above could apply. The trial court did not consider that at all in the analysis of the evidence on liability.
13. The pleadings are clear that the suit was by a minor. His age though is not pleaded in the body of the plaint. His father, PW1, did not mention the age of the minor in his witness statement, dated 11th June 2020. But PW2, the eyewitness, did mention it in his, also dated 11th June 2020. He described him as a boy of about 10 years. Some of the medical records filed together with the plaint indicate the apparent age of the appellant. The Kenya Police Medical Examination Report, P3, dated 13th February 2020, puts his age at 10; and so, does the medical report, by Dr. Joseph C. Sokobe, dated 26th February 2020.
14. When the father, PW1, took to the witness stand, he said that the appellant was 10 years old, at the time PW1 was testifying, and 9 years old at the time of the accident. He did not, however, disclose his year of birth, nor produce documentary evidence. PW2, the eyewitness, in his oral testimony in court, did not advert to the age of the minor, but he adopted his statement, where he had described him as about 10 years old. The police witness, PW3, mentioned 10 years as the age of the minor. PW4 and PW5 were medical personnel, who produced the medical records. They did not mention the age of the minor, but the medical records they produced did.
15. In their pleadings, the respondents did not refer to the age of the appellant minor. Neither does the witness statement filed by the 1st respondent. However, when the 1st respondent, DW1, took to the stand, he assessed the age of the appellant as between 11 and 12 years.
16. There was ample material upon which the trial court could determine that it was dealing with a fairly young child, and, in assessing liability, take that into account. The heading or intitulum of the pleadings starkly stood there, shouting that the suit was about a minor. The fact of his age could not be ignored, in the ascertainment of liability, and the trial court was in error in failing to take it into account.
17. According to the judicial authorities, some of which I have cited above, liability does not attach to a child at a very young age, tender years, unless it is established that he is intelligent enough to take precautions for his own safety. The question should be whether the appellant herein was a child of



tender years. The witnesses put his age between 9 and 12. 10 years was the figure cited by most of them. However, I would go by what PW1, the father of the appellant, informed the court, that the child was 9 years old at the time of the accident. He was the parent of the child, and he would have known better than all the other witnesses, who largely estimated the age of the appellant based on their visual assessment of him. There can be no better evidence on the age of a child than that coming from his parents.

18. Age 9 would place the appellant minor within the bracket of a child of tender years, although very close to the margin. PW1 was careful not to offer him as a witness, and, therefore, the trial court did not get a chance to see and hear him, to enable it to assess whether he possessed adequate intelligence, to have been expected to take precautions for his own safety. Nevertheless, there was still material that could guide the court in ascertaining whether he had such intelligence. PW1, his father, testified that the minor used to go to school alone, unescorted. That could be a pointer that he trusted him to be sufficiently intelligent to be in a position where he could be precautious for his own safety, and where liability could be attributed against him, for contributing to the cause of an accident, through his negligence.
19. The burden is, however, on the defendant to establish that the minor was sufficiently intelligent to take precautions for his own safety. The respondents herein were the defendants. They did not lead any evidence to establish that.
20. The trial court decided the matter on the basis that the testimonies from both sides were conflicting, and, based on that, held that it could not assess who was to blame, and, as an accident had in fact happened, involving both, applied the principle that both road users were to blame, and assessed their contribution to be equal.
21. Was there justification for that? I do not think so. The trial court was dealing with a minor of tender years. Never mind that that minor was trusted by PW1 to take himself to school unaccompanied by an adult or other older child. The burden was on drivers of vehicles near or around a school environment to take extra precautions, particularly at the hour or times when children would be on the road going to school. The accident happened at precisely that hour, when the road was busy with school-going children. PW2 and DW1 both testified that the accident happened near Nyamwanga Primary School. DW1 testified to have been familiar with that road, for he had used it for 2 years or so. So, he knew the road well, and should have been alert that the road would be teeming with school children at that hour, and that he needed to drive cautiously, as anything untoward could happen.
22. Was DW1 cautious, in the way he handled his vehicle at the material time? To assess that I would have to recite from a portion of his testimony where he described what happened. He said:

“I blame the child ... because she came from so near hence I could not apply brakes hence I swerved to the side of the road and he hit at the right side of my bumper ... I was approaching Nyamwanga Primary School. Around 6:30 AM. It is the usual time for children to go to school, with children crossing to go to school. I saw the child at close range, around 3 metres, he was crossing from right to left, and I was at the left. He knocked the rear right side of the bumper. I was driving at around 50 - 60 km/hr. I saw him in front ... The child hit the rear right bumper because I couldn't apply brakes, so I swerved away from the road but before the motor vehicle could get out of the road, the child knocked the motor vehicle. There is nothing else I could do. The child crossed at a close range running.”

23. From the excerpt of the trial record, it would be clear that DW1 knew that he was approaching a primary school, and there would be, at that hour, many school children on the road, on their way to



the school, and that he needed to drive cautiously, to avoid a mishap. He conceded that there were children crossing the road at that point. He conceded that he did in fact see the appellant on the road, but he was unable to avoid hitting him.

24. Was the driver, the 1st respondent herein, negligent? To the extent that the vehicle that he was driving hit a school child near a school, at a time when children going to that school were busy crossing the road, should be a pointer that he did not drive his vehicle, in those circumstances, with due care. He was not mindful to the fact of the presence of many school children on the road at that hour. To have been unable to control his vehicle, either by braking or swerving, to avoid the collision with the appellant, suggested that he was driving a little bit too fast in the circumstances.
25. The other thing. The 1st respondent claimed that the child appeared suddenly and entered the road abruptly, giving him no chance to avoid hitting him. The accident happened along the main road from Busia to Kisumu. Judicial notice should have been taken that the said road is a highway, a major road connecting Kenya and Uganda. It is not a narrow road through a bush, from which children could spring a surprise on motorists, by suddenly jumping into the road out of nowhere. I take judicial notice of the fact that the highway from Uganda towards Kisumu would be wide and clear enough for motorists to be able to see clearly, both the tarmacked roadway ahead of them and the spaces from the edges of the tarmac to the bushes or the built-up areas, and the notion that the appellant appeared suddenly, seemingly out of the blue, to stun the 1st respondent, cannot possibly be factual.
26. The trial court should have had it prime in mind that the accident happened at the proximity of a school, and it involved a child of tender years. Whether the child was crossing the road, or was walking besides it, would be beside the point. The 1st respondent owed the minor pedestrians, in the neighbourhood of that school, a higher duty of care, which behoved him to drive, manage and control his vehicle in such a manner as to be able to bring it to an instant or abrupt stop to prevent or avoid a collision with any of them. The fact that he was unable to manage or to control his vehicle, by either swerving or braking, to avoid the collision with the appellant, was a clear case of negligence on his part. It was erroneous to attribute contributory negligence on the minor appellant, in the circumstances. Liability should have been attributed wholly on the respondents.
27. In the end, I find merit in the appeal, and I hereby allow it, in the terms proposed in the memorandum of appeal, dated 27th October 2022. The appellant shall have the costs of the appeal. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 21ST DAY OF FEBRUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. F. Omondi, instructed by Omondi & Company, Advocates for the appellant.

Ms. Wesonga, instructed by Kimondo Gachoka & Company, Advocates for the respondents.

