AM (suing through next friend and father JA) v Kimilu (Civil Appeal 107 of 2018) [2023] KEHC 18299 (KLR) (2 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18299 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 107 OF 2018

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

AM (SUING THROUGH NEXT FRIEND AND FATHER JA) ..... APPELLANT

AND

MICHAEL MUEMA KIMILU ..... RESPONDENT

(Appeal from judgment and decree of Hon. TA Odera, Senior Principal Magistrate, SPM, in Mumias PMCCC No. 436 of 2013, of 13th July 2018)

JUDGMENT

1. The appellant had sued the respondent, at the primary court, for compensation for personal injury, following a road traffic accident, along Mumias-Busia road, on August 4, 2013. The appellant was a pedestrian, and was knocked down by motor vehicle registration mark and number KAS 168U, said to have belonged to the respondent, and liability was attributed to the respondent on account of negligence. The appellant filed a defence, denying the accident, and everything else pleaded in the plaint. He pleaded, in the alternative, that if such accident occurred, then it was authored by the appellant, or he substantially contributed to it.

2. A trial was conducted. 3 witnesses testified for the appellant, and 1 for the respondent. The suit was dismissed, as the trial court found that it was the mother of the appellant who was to blame, for neglecting the child, leaving him to wander in to the path of oncoming traffic. The court indicated that it would have awarded Kshs 400, 000.00 general damages, had it found the respondent liable.

3. The appellant was aggrieved, hence the instant appeal. The appeal has faulted the trial court on several grounds: for finding that a case had not been made out on balance of probability; dismissing the testimony of an eyewitness; holding that the case by the appellant was contradictory; failure to acknowledge that the appellant was just 6 years old; relying on the evidence by the respondent which did not displace the case for the appellant; failing to hold that the respondent had seen the appellant

in sufficient time to avoid the accident; considering extraneous matters; arriving at wrong conclusions; failure to consider the evidence by the appellant; and failure to consider submissions and authorities.

4. On May 18, 2022, directions were given, for canvassing of the appeal by way of written submissions. Both parties filed written submissions. The appellant submits that the accident was not denied, and that 2 versions of what transpired were given, and, as a consequence, the trial court should have apportioned liability equally between the parties. He cites *Menengai Oil Refineries v Peter Omboko Mirikwa (suing as the Administrator and Personal Representative of the Estate of Richard Mirikau Andanje– Now Deceased) & another* [2019] eKLR (Musyoka, J). On his part, the respondent submits that it all boils down to who had the burden of proving negligence, and it is asserted that the appellant had not discharged the burden that was on him. He cites *Charles Kavai (suing as the Administrator of the Estate of the Late Kevin Kioko Charles) v Bonface Mutunga & another* [2020] eKLR (Odunga, J).

5. The issues are who was to blame for the accident, and whether negligence can be attributed to a child of tender years.

6. The appellant called 2 witnesses on the aspect of liability. PW2 was a police officer. He produced a police abstract, and gave an account of what was in police records. He said that the accident happened at Koyonzo, as the respondent was overtaking another vehicle. He lost control of his car, veered off the road and knocked down the appellant. That testimony was on all fours with that by PW3, who testified that the car being driven by the respondent was overtaking a trailer, it veered off the road, and hit the appellant. On his part, the respondent testified that the road was clear, when suddenly the appellant jumped into the road, as he was too close, he could do little to avoid the collision. The trial court believed the respondent, and not the appellant.

7. Why did the trial court disbelieve the appellant? Firstly, because the mother of the appellant, who was with the child at the time of the accident, was not called as a witness. Secondly, the statement by PW3 in court contradicted what he had recorded in his written statement, filed with the plaint, where he was alleged to have said that the trailer and the respondent's vehicle were going in opposite directions. Was the dismissal of the appellant's evidence justified? I do not think so. With respect to the mother, the court itself noted that PW1 had stated that the mother did not attend court as she was tending to a sick child. The judgment is silent on why the trial court did not believe that testimony. In any case, the appellant was not bound to call any particular witness, so long as he had other witnesses to testify on what happened. The mere fact that the guardian, who had the child at the material time, and who would have been a crucial witness, did not testify, ought not to have been taken against the appellant, more so where the accident was admitted by the respondent. On the contradiction in the written statement of PW3, I am not persuaded that it was material. His testimony was that 2 vehicles were at the scene, whether one was overtaking the other or was merely by passing it, after the 2 met while going in opposite directions, may not be so material. What matters was that in the course of that overtaking or bypassing, the respondent lost control of his vehicle and knocked down the appellant. The trial court held that a party is bound by its pleadings, referring to the witness statement. With respect, the witness statement is not a pleading. It is not part of the evidence, unless and until it is formally adopted by the witness. PW3 did not adopt his written witness statement, therefore, the same did not become part of the evidence that the trial court could take into account. It was erroneous for the trial court to taken its contents into consideration in the judgment.

8. Of the 2 versions, that by the appellant and the other by the respondent, I find that by the respondent less believable. He talked of slowing down to go over 2 road bumps, then shortly after that pedestrians get into the road, and he is unable to control his car, and knocks one down. If he had slowed down at the bumps, as he alleged, how was he not able to apply instant brakes and prevent the collision, as slowing down suggested that he was on low gear, and slow speed. The narrative about slowing at road

bumps, and shortly thereafter not being able to brake suddenly to avoid knocking down a toddler, does not sound credible. He then said he had noticed those pedestrians, while he was going over the bumps, some 100 metres away. So, if he had seen them, did he keep a proper lookout, as any careful driver should, so as to deal with the possibility of them dashing into the road. Drivers are expected to keep a proper look out, for pedestrians who might suddenly get into the way. The pedestrians standing by the roadside could be persons of unsound mind, or who could be in distress, or could be children of tender years who have no sense of danger. Keeping proper look out would mean that the driver should maintain a speed which would enable him control the vehicle in the event of danger. After he saw them 100 metres away from him, he should have become conscious that they could get into the road, at any stage, and he needed to drive at a speed that would have allowed him to maintain control of the vehicle. That the respondent was unable to control his car, by way of braking, when the appellant allegedly ran into the road, as he alleged, was indicative of lack of care and attention on his part.

9. What I find even more incredible is the use of the term "ram," in the judgment, to describe how the collision happened, that it was the appellant who rammed into the respondent's car. I note that the respondent did not use the word in his testimony in court, but it is in his written statement, and the trial court must have picked it from there. Incredibly, the trial court did not give much consideration to what that suggested. How could that be? The car was doing a speed of 50-60 kilometres per hour, according to the respondent. It appears to have been a saloon car, which must have weighed well over 500 kilogrammes. The appellant was said to be a child of 4, in 2013, when the accident happened. At 4 years his weight would have been at most 10 kilogrammes, and he could not possibly run at the speed of a car. The very thought that he could ram into a speeding car is incredible. The converse should the correct position, that it was the respondent who rammed into the appellant. Ramming can only be done by the object that is heavy and which is travelling is at a speed. The use of it by the respondent suggested that the appellant was a heft individual, who was moving at high speed, while the respondent's car was either stationary or at crawling speed, for the appellant to ram into it, which is a most incredible and unbelievable thing. It must have been the respondent who was speeding, for he said that he was afraid of his car rolling, had be applied brakes. A car can only roll if it is being driven at a speed which is excessive. The accident happened in a built-up area, just 100 or 200 metres from a market, where the respondent should have expected pedestrians on the road. The speed, at which he was driving, must have not been conducive for such an environment, no wonder he knocked someone down. He must have been negligent.

10. So much for that. The accident should have been blamed on the respondent for the reasons that I have given above. The next consideration is as to whether negligence can be attributed to a minor of tender years, for the purpose of assessing contribution. The principle 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 v Touring & Sporting Cars Ltd & another* [1979] eKLR (Platt, J), *Butt v Khan* [1981] KLR 349 (Madan, Wambuzi & Law, JJA), *Tayab v Kinanu* [1983] KLR 114 (Law, Potter & Hancox, JJA), *EWO (suing as next friend of minor (OW)) v Chairman Board of Governors–Agoro Yombe Secondary School* [2018] eKLR (Aburili, J) and *Patrick Muli v EM (minor suing through her mother and next friend WG)* [2021] eKLR (Odunga, J). The appellant herein was just 4 years old when the accident happened. There is no way he could have contributed to it, in terms of being intelligent enough then to take precautions for his own safety. The suit was dismissed because negligence was attributed to his mother. The issue of vicarious liability does not arise, and the trial court fell into error in applying it to the facts of the instant case. The respondent should have been found to be 100% liable in negligence, for the accident.

11. On quantum, the appellant did not submit. The respondent too did not. The trial court mentioned Kshs 400, 000.00 in the judgment, but cited no authority. The injuries proved, by way of P3 Form and the medico-legal report by Dr. Charles M. Andai, are a fracture of the left clavicle distal end, and a blunt injury to left ankle and foot. In *Richard Maisiba Gichana v Kevin Ongaki Tengeya* [2019] eKLR (Maina, J), an award of Kshs 350, 000.00 was made for a left lateral 1/3 clavicle fracture and a deep cut on the wrist. In *Civil Holdings Co. Ltd v Hellen Anyango Okeyo & another* [2020] eKLR (Ougo, J), the court awarded Kshs 650, 000.00, for a 1/3 clavicle fracture, a cut wound on the right ear, and a blunt trauma to the chest. In *Ali Ramadhan v Isaac Bosire* [2020] eKLR (Njagi, J), an award of Kshs 400, 000.00 was made, for a fracture of the left clavicle and a blunt injury to the chest. The amount mentioned by the trial court would appear to be within the range. Taking into account passage of time and inflation, I will award Kshs 500, 000.00 for general damages. The proven special damages amount to Kshs 10, 850,00.

12. In the end, I find merit in the appeal, and I hereby allow it. The final orders made in the judgment of the trial court, on July 13, 2018, dismissing the suit in Mumias PMCCC No 436 of 2013, are hereby set aside, and substituted with orders that the respondent is liable at 100%, general damages are assessed, in favour of the appellant, at Kshs 500,000.00, with special damages of Kshs 10, 850.00. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances:

Mr. Mwebi, instructed by CM Mwebi & Company, Advocates for the appellant.

Ms. Odhiambo, instructed by Okong'o Wandago & Company, Advocates for the respondent.