REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 51 OF 2017

MWM alias MWM Suing as the administratrix of the

Estate of the Late HGW.....APPELLANT

-VERSUS-

DAVID IRUNGU GICHANGA.....RESPONDENT

(Being an appeal from the judgment in Mukurweini Principal Magistrate's Court

Civil Case No. 1(B) of 2017 (Hon. B.M. Ochoi, Principal Magistrate)

delivered on 5 December 2017)

JUDGMENT

On or about the 23rd day of November, 2015, HGW, who was then aged 10 was knocked down by a motor-cycle registered as No. KMDQ 226L. The accident occurred along Karundu-Kangurweini road. Waweru was fatally wounded for he succumbed to his injuries the following day.

On 17 January 2017 the deceased's mother who is the appellant in this appeal initiated a suit against the respondent and a company called Captain Motorcycle Manufacturing Limited for her benefit and that of the deceased's estate under the Fatal Accidents Act, cap. 32 and the Law Reform Act, cap. 26 respectively. In that suit the respondent was described as the owner or the insurer of the motor-cycle while the company was described as its registered owner; the claim against it was, however, later withdrawn.

The appellant attributed the accident to the negligence of the respondent, his servant or agent. She sought for both general and special damages.

In his statement of defence the respondent denied all the allegations against him but in the alternative contended that the accident was wholly or largely contributed to by the negligence of the deceased.

At the conclusion of the trial the appellant's suit was dismissed. According to the learned magistrate negligence on the part of the respondent was not proved and, in any event, the appellant's witness was found not to be credible. The present appeal is against this decision; in his memorandum of appeal, the appeal has given the following as his grounds of appeal:

1. The learned magistrate erred in both law and fact in failing to consider the evidence tendered by the eyewitness on the occurrence of the accident; he erred in finding it inconsistent and unreliable and thus arrived at an erroneous decision.

2. The learned magistrate misdirected himself by requiring the attendance of a police officer yet a police abstract was produced and admitted in evidence by consent of the parties.

3. The learned trial magistrate erred in both law and fact for considering irrelevant matters and going against the weight of the evidence on record in dismissing the suit.

4. The learned trial magistrate erred in both law and fact in failing to consider or adequately adopt and appreciate the written submissions of the appellant on record and the authorities cited in support of these submissions.

5. The learned trial magistrate misdirected himself in failing to make a finding that the deceased was a child of tender years and therefore no liability attached when the defendant witness admitted causing the accident.

6. The learned magistrate erred in fact and in law by failing to follow precedents in award of general damages.

7. The learned magistrate erred in law in making a global award of Kshs. 600,000/= that was inordinately low in the circumstances.

8. The learned trial magistrate misdirected himself in law and in fact for ignoring a decision of a higher court contrary to the doctrine of stare decisis.

This Honourable Court is enjoined to consider the evidence on record afresh and reach its own conclusions in exercise of its appellate jurisdiction but always bearing in mind that the subordinate court had the advantage of seeing and hearing the witnesses first hand. **(See Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126).**

The appellant testified that the deceased was her son and was born on 18 July 2004; he was admitted at Nyeri provincial general hospital after the accident but he later succumbed to the injuries on 24 November 2015. She blamed the motorcyclist for the accident.

An eyewitness. Kingo Kariuki (PW2) testified in support of the appellant's case and stated that on 23 November 2015 he was at Karundu picking coffee when he saw the deceased emerge from Horaini towards Karundu. A speeding motorcycle knocked him down; The rider of the motorcycle also fell together with his motor-cycle. It was his evidence that the collision occurred on the right side of the road.

The rider, Gilbert Irungu Maina testified that on 23 November 2015 he was riding the accident motorcycle along Ikiraniro/Karundu/Kangurwe Gwomba road; he was travelling from Karundu coffee factory towards his home. When he reached Karundu market, the deceased emerged from what he described as 'nowhere' either pushing or running after a tyre ring or rim onto the road. He was later to testify and say that, in fact, the deceased emerged from one of the market stalls alongside the road and only noticed him when he was a meter away. He could not avoid hitting him because, in his own words, there was an oncoming vehicle from the opposite direction. The motorcycle landed on the deceased after the collision. He immediately went to report the accident to the police who later came to gather the details of the scene.

It was his evidence that the accident was caused by the child who rushed to the road without taking any necessary precautions. He testified further that the motorcycle belonged to his cousin, David Irungu Gichanga.

This is all there was to evidence.

From this evidence, it is apparent that on 23 November 2015 a road traffic accident involving the deceased and a motorcycle registered as KMDQ 226L occurred at Karundu market; it is also not in dispute that the rider of the accident vehicle was Gilbert Irungu Maina. There is no doubt that the deceased died as a result of the injuries he sustained in the accident.

The major point of contention both in the magistrates' court and which this court has to interrogate in the present appeal is to whom, between the deceased and Maina, liability is to attach or, in the alternative, whether each of them was responsible for the accident either in equal measure or in varied degrees. According to Maina, the deceased was solely responsible for the accident. The learned magistrate, on the other hand, was of the view that negligence was not proved and the only eyewitness available was not credible. The end result of the positions taken by the respondent and the magistrate was, as noted, the dismissal of the appellant's suit.

Unlike the trial court, the appellate court does not have the advantage of seeing and hearing the witness and therefore, more often than not, the former court has the upper hand in determination of such aspects of the evidence as the demeanour and the credibility of witnesses. It follows that when the trial magistrate makes a determination on the credibility of a witness, the appellate court must be cautious in disturbing such a determination. I must hasten to add, however, that if the determination is clearly based on either erroneous interpretation or a misapprehension of facts leading to a wrong conclusion, the appellate court, with all its inadequacies, will not fold its hands, stand by and close its eyes to the injustice that is bound to follow if those factual conclusions are not tampered with.

Going back to the appellant's case, the eye witness' credibility was questioned for the simple reason that while he stated in his statement that the motor-cycle veered off the road, he never said so in his oral evidence in court. Again, so held the learned trial magistrate, while the witness stated in his statement that the rear tyre and its rim were extensively damaged, he only spoke of the motor-cycle's chain having entangled the deceased when he testified. According to the learned magistrate's, these were contradictions from which one could not tell not only how the accident happened but also went a long way in besmirching the witness' credibility.

The witness' testimony was relatively brief and it shouldn't be difficult to reproduce it here, if not for anything else, to appreciate why the learned magistrate may have got it all wrong. The record reads as follows:

PW2 MALE ADULT CHRISTIAN SWORN STATES:

My names are KINGO KARIUKI, a resident of Karundu. I am a farmer. On 23/11/15 I remember I was in Karundu 3 PM. I was plucking coffee. A child came emerging from Horani heading towards Karundu. A motorbike came down the incline. It was speeding. It knocked him down. The child and the driver fell down. The motorcycle wheel chain was wrapped around his neck. I rushed to the scene. I realised it was the deceased. We called the child's mother. The child was transferred to Nyeri. The road was murram. The child was knocked on the right side of the road.

CROSS-EXAMINATION:

I want my statement considered by the court. The accident happened near a shopping centre.

Mwaura: close of the plaintiff's case.

A quick glance at this part of the proceedings reveals that the witness was not cross-examined on the contents of his statement and, in particular, the alleged inconsistencies between his statement and his testimony. As a matter of fact, his evidence was neither shaken nor controverted by way of cross-examination. Even if one was to assume that the witness adopted his statement as his evidence, it was not open to the learned trial magistrate to take it upon himself the task of determining the credibility of the witness on issues he had not been tested upon. By so doing the learned magistrate fell into error for the simple reason that there was no factual basis of questioning the credibility of the witness and thereby disregarding his evidence.

One other crucial issue which the trial court ought to have considered but which it failed to take into account was the age of the deceased. At the time of the accident, the deceased was about 10 or 11 years and so, in legal parlance, he was a child of tender years. Once it was established that a child of such an age was involved in the accident, it was incumbent upon the court to determine whether he had the necessary road sense as to be cautious on the proper use of any road that is prone to vehicular traffic and the appurtenant lurking dangers if one was negligent or careless in any way while on or near such a road.

The oft-cited case on this point is **Bashir Ahmed Butt versus Uwais Ahmed Khan (1982-88) 1KLR 1**; in that case, the plaintiff then aged 7 ½ was struck by a car while crossing the road. It was held by the trial court that the defendant who was then driving the car drove it at a speed which was excessive in the circumstances and that he was not keeping a proper look-out. It was argued on behalf of the defendant, inter alia, that the plaintiff was clearly guilty of contributory negligence. His argument was dismissed by the learned trial judge and in doing so he cited the decision in **Andrews versus Freeborough (1966) 2 ALL ER 721** which was a case concerning a girl aged 8 and who stepped on the kerb into the path of an oncoming car. Wilmer, LJ stated:

I should have a good deal of persuasion before imputing contributory negligence to the child having regard to her tender age.

Davies LJ said in the same case:

Even if she did step off into the car it would not be right to count as negligence on her part such a momentary…act of inattention or carelessness.

The Court of Appeal upheld the trial judge's decision on this point and went further to discuss and follow the decision in **Gough versus Thorne (1966) 1 WLR 1387** where the Court of Appeal in England refused to attribute any contributory negligence to a girl of 13 ½ years old who was knocked down while crossing the road. Lord Denning said:

A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. He or she is not to be found guilty unless he or she is blameworthy.

The test, according to Lord Denning is whether the child is of such an 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.

But in **AG versus Vinood (1971) EA 147** a boy of 8 ½ years was found to have contributed, albeit to a minimal degree, to a road traffic accident in which he was severely injured. The boy gave unsworn evidence to the effect that he was on his way to his father's shop and had to cross River Road to reach there. There were cars parked on both sides of the road and he came between two of them to cross the road. Before he began to cross the road, he looked both ways and saw a car approaching from one direction. The car was about 15 feet away to his right. He thought it was far enough for him to cross the road safely but while he was half way across the road he said the car struck him; he was positive that he did not run into the car.

The driver of the car testified that he was driving at an average speed of 15 m.p.h; there were cars parked on his left side of the road while others were ahead of him. while he was passing the cars parked by the road, he heard somebody hit his car on the front passenger door. He immediately stopped and then saw a boy lying on the left side of the road. He admitted that River Road was heavy with traffic and full of pedestrians and that he had to take precautions because he knew that children used the road. He said that he was looking in front of him and he did not see this boy at all. He only heard a bang and he immediately stopped. He said he did not see anything coming from his side.

A passenger in the vehicle corroborated the driver's testimony that the car was travelling at about 15 m.p.h but added that she saw the boy suddenly emerge from two parked cars on the left side of the road and rushed out and hit the vehicle somewhere near the front door. She heard a bang and when the car stopped, she saw the boy lying on the ground. Against this background of facts, the learned trial judge held as follows:

In the circumstances it may or may not have been inherently dangerous to drive such a vehicle through that street at that time at a speed of 15 miles an hour, looking only at the cars in front and not looking also from side to side, but, however, that may be, I am driven to the conclusion, and so find, having given the matter careful consideration, that, on the balance of probabilities, the accident was the result primarily of the negligence of the second defendant in the control and management of the vehicle which she was driving, and that it was contributed to some small extent by the first plaintiff himself. Bearing in mind his age and the degree of intelligence which he may be assumed to have possessed at the time, I determine the element of contributory negligence to be ten per cent.

The Court of Appeal of East Africa agreed with the learned judge and dismissed the senior state attorney's argument that on the evidence

adduced before the trial court there was nothing to show that the driver was negligent or was in any way to blame for the accident. Based on these facts the Court of Appeal agreed with the learned judge that the driver was not keeping a proper lookout when he did not see the boy coming from the side. He was also driving at an excessive speed in view of the fact that River Road at the material time was heavy with traffic and full of pedestrians, with cars parked on both sides of the road. He was aware that children would be using that road. The driver should have driven at a speed which could have allowed him to pull up at a distance much less than 50 feet.

On the question of contributory negligence, the state attorney had submitted that the trial judge was wrong in apportioning 90% of the blame to the driver and 10% to the young boy. The court relied on **Gough versus Thorne** (supra) and noted that in dealing with contributory negligence on the part of a young boy the age of the victim, his ability to understand and appreciate the dangers involved have to be taken into account.

In the ultimate, the Court of Appeal agreed with the trial judge in apportionment of liability; it held that in apportioning the blame the trial judge considered the age and degree of intelligence of the schoolboy at the material time, and he assessed his degree of liability at 10%. The boy was found to have clearly misjudged and miscalculated when he thought he could safely cross the road at the material time he did; to this extent the trial judge could not be said to have misdirected himself in apportionment of liability.

To sum it up, each case must depend on its peculiar circumstances.

Turning back to the present appeal, the accident happened within a market area and on a road which, going by the available evidence, is lined up with market stalls, at least on that market section. In such an environment, a motor vehicle driver or a rider, for that matter, would be expected to be conscious of human traffic being as much close to the road as the stalls beside it; moreover, in the absence of any sort of barrier separating one side of the road from the other, pedestrians are bound to crisscross the road moving from one stall to the other in the normal course of their business. It would not be unusual in such circumstances if a pedestrian, and in this particular instance, a boy of the deceased's age suddenly popped up, so to speak, on the road. Whether the sudden appearance is attributable to the negligence of the pedestrian in issue is certainly a question worth of consideration but a motorist who finds himself in such an environment bears the responsibility of driving, managing or controlling his vehicle in such manner as to avoid any sort of collision with any member of public and in particular, a child of tender years; he must not only drive or ride at a manageable speed but, as it were, he must also keep a proper lookout for any eventuality.

In his judgment in **Butt versus Khan** (supra), Justice Madan was of the view that the practice of the civil courts ought to be that ordinarily, a person under the age of 10 years cannot be guilty of contributory negligence, and thereafter, in so far as a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. The learned judge went further to state:

> ***Also in my opinion high speed can be prima facie evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for a traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 mph may not be a safe speed in the early hours of the morning when children go to school along and across the road which known to the driver as in the instant case, serves as an area with several schools in it. In a manner of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the traffic act is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence.***

Going by the circumstances in which the accident happened in the present case, the rider of the motor-cycle cannot be said to have been riding at a speed at which he could stop his motorcycle at short notice; neither can he be said to have been keeping a proper lookout. The end result was that he could not control his motorcycle so as to avoid the accident and neither could he see the deceased early enough to avoid hitting him.

Based on the facts of the case and the applicable law, I would find that the motor-cycle rider bore a greater degree of responsibility for the accident; I dare say I would have been prepared to find him solely responsible for it were it not for the fact that no evidence was led by the plaintiff to demonstrate that even at his age, the deceased was not cautious of the dangers that lurked on or around the road. I would therefore apportion liability at 90: 10 percent with the motorcycle rider bearing the larger share of the blame.

The next question of concern to the appellant was the award made if her suit had succeeded. The learned magistrate did well as he ought to and assessed the award payable to the deceased's estate had the plaintiff's suit succeeded. Under the head of pain and suffering he made an award of Kshs. 100,000/= having found as a fact that the deceased died a day after the accident. He relied on the decision in **Nyeri High Court Civil Case No. 43 of 2013, David Kahuruka Gitau & Another versus Nancy Ann Wathitu & Another reported as (2016) eKLR.** On the lost years he made a global award of Kshs. 600,000/= on the basis that there was no evidence that the deceased was attending school and therefore the suggestion that he would have been a lawyer in future was not supported by any evidence. Under the head of loss of expectation of life, the learned magistrate made an award of Kshs. 100,000/= and finally awarded the estate Kshs. 80,980/= as special damages.

The appellant thought these awards were far below what she and the deceased's estate were entitled to; her learned counsel proposed Kshs. 150,000/= for pain and suffering but still cited the decision in **Nyeri High Court Civil Appeal No. 43 of 2013 David Kahuruka Gitau & Another versus Nancy Ann Wathitu Gitau & Another** reported as 2016 eKLR where an award of Kshs 100,000/= was made under that head.

Despite the deceased's age, the appellant opined that he was entitled to the sum of Kshs. 1,680,000/= as an award under lost years; in coming to this figure counsel for the appellant applied what he regarded as the minimum wage at the deceased death, a multiplicand of 35 years and loss of dependency at one third of the deceased's presumed income. Counsel cited the decisions in **Meru High Court Civil Appeal No. 18 of 2014** in which the Court is said to have awarded a global sum of Kshs. 1,000,000/= for loss of dependency where the deceased was aged 9

and **Meru High Court Civil Appeal No. 21 of 2014 DMM versus Stephen Johana Njue & Another (2016 eKLR)** in which the deceased was aged 16 and a global sum of Kshs. 1,200,000/= was made under the head of loss of dependency.

Counsel also proposed the sum of Kshs. 150,000/= under the head of loss of expectation of life and relied on the decisions in **Nairobi High Court Civil Case No. 34 of 2013 Silas Mugendi Nguru versus Nairobi Women's Hospital** where an award of Kshs 150,000/= was made for loss of expectation of life.

As far as I can see, the learned magistrate considered heads under which the various awards could possibly be made; in particular, pain and suffering, loss of expectation of life, lost years and special damages. He further made the awards upon consideration of the decisions submitted to him; as a matter of fact, the awards made were either comparable or similar to those awards in some of the cases cited by the appellant's learned counsel. I would be hesitant to fault the learned magistrate for a global award for lost years for, in my humble view, he correctly found as fact that there was no basis upon which an award under this could be mathematically computed. The minor was not working and could not have been expected to be working at his age. Further, there was no evidence that he was even going to school. The best the learned magistrate could do in these circumstances, which he dutifully did, was to make a global award for loss of dependency.

If it will help, I need to remind counsel for the appellant that an appellate court will not necessarily disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. For the appellate court to interfere, it must be shown that the trial court proceeded on wrong principles or that it misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low. (See Butt versus Khan (supra) at page 4, per Law JA).

I am not convinced that the learned magistrate misdirected himself on any of these pertinent aspects in assessment of damages. In the final analysis I will and hereby do allow the appeal only to the extent of overturning the learned magistrate's decision dismissing the appellant's claim. I will substitute the order of the trial court with the order that the appellant's suit succeeds save that liability is apportioned at 90:10% in favour of the appellant and against the respondent. The appeal on assessment of damages is dismissed. The appellant shall have damages as assessed by the lower court subject to apportionment. The Parties will bear their respective costs of appeal. The appellant shall have costs in the lower court. It is so ordered.

Dated, signed and delivered in open court this 5th day of July, 2019

Ngaah Jairus

JUDGE