REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 17 OF 2015

M M (Suing thro' the next of kin **C M N).....APPELLANT**

VERSUS

BONIFACE NGARUYA KAGIRI.....1ST RESPONDENT

BUILD MORE CONTRUCTION CO. LTD.....2ND RESPONDENT

J U D G M E N T

1. The Appellant, a minor, who was the Plaintiff in the Lower Court instituted a suit through his father and next kin where he averred that the 1st Respondent was the driver of motor-vehicle Registration No. **KAK 828Y Isuzu Trooper** while the 2nd Respondent was its registered and/or beneficial owner. That on the **10th** day of **February, 2006** while he was lawfully cycling along **Kitui-Kavisuni** road at **Kiumoni** when he was knocked down by the 1st Defendant who was in control of motor-vehicle Registration Number **KAK 828Y.** He blamed the 1st Respondent for negligence. He held the 2nd Respondent vicariously liable for negligence of the 1st Respondent therefore claimed from them jointly and severally general damages for pain, loss and suffering; special damages in the sum of **Kshs. 2,700/=,** costs and interest.

2. In a joint defence the Respondents denied liability and in the alternative argued that the accident was solely caused and/or contributed to by the Appellant's negligence.

3. The trial Court reached a finding that the Appellant was substantially to blame for the accident; a fact that could not be ignored though the child's liability for the accident was lower than that of an adult. Liability was apportioned at **35:65** in favour of the Plaintiff as against the Defendant. An award of **Kshs. 80,000/=** was made in general damages, **Kshs. 2,700/=** in special damages less contribution making a total of **Kshs. 53,755/=.**

4. Aggrieved by the Judgment, the Appellant appealed on grounds that:

- The learned Magistrate erred in law and fact in apportioning liability to a minor aged **6 years** without any factual findings.
- The learned Magistrate erred in law and fact on apportioning against the minor contributory negligence of **35%** without any factual basis.

Therefore he prayed for substitution of orders that the Respondents were **100%** liable and the Respondents to pay the sum of **Kshs. 28,945/=** that was deducted from the overall Judgment awarded of **Kshs. 82,700/=** on account of contributory negligence.

5. The Appeal was canvassed by way of written submissions. The Appellant stated that as a general rule a child cannot be held liable of contributory negligence unless he/she is of such an age as to be expected to take precautions for his or her safety and that he is not to be found guilty unless blameworthy. He cited the case of **A. G. & Another vs. Vinod & Another (1971) EA 147** where a boy of **8½ years** was held not old enough to be guilty of contributory negligence. That the learned Magistrate failed to evaluate the evidence of the child to enable him reach a finding if the child understood the need to take precaution for his own safety. That facts presented should have established the age of the child, intelligence, understanding and the level of appreciating of oncoming danger and actions taken by the child on seeing danger. That having seen children while some **60 metres** away the 1st Respondent should have avoided knocking the Appellant.

6. The Respondent relied on the **A.G. Case (Supra)** and argued that the Appellant had the capacity to know that he ought not to have done the act of crossing the road. That in the case a child of **8½ years** who ran across the road from a gap between parked vehicles was contributorily negligent to the extent of **10%.** Citing the case of **Tayab vs. Kinamu (1983) Vol. 1 LKR, 114,** he argued that having been cycling he knew dangers that could accompany cycling. Finally he relied on the case of **Gough vs. Thorne (1966) WLR 1387** and submitted that **Lord Denning** stated that:

"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. A child has not the road sense of his or her elder. He or she is not to be found guilty unless he or she is blameworthy."

7. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial **(See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123).**

8. At the time of testifying in Court, the Appellant whose age was estimated at **7 years** was taken through *voire dire* examination. He was found to understand the nature of oath hence gave sworn evidence and was subjected to cross examination. He stated that he ran across the road following other children who had already crossed. That he saw the motor vehicle that was approximately **80 metres** away as illustrated. On cross examination he stated that he did not stop because he did not know the motor vehicle would hit a person.

9. The 1st Respondent on the other hand stated that he saw children who were on both sides of the road. While **10 metres** away a child suddenly crossed the road. He engaged brakes but the motor vehicle skidded and hit him. The surface of the road had loose chips of sand and there was also a corner at the place. What was not established was the speed at which he was moving.

10. The learned trial Magistrate appreciated that a child could not be contributorily negligent unless he/she was of such an age as to be expected to take precautions for his/her own safety and that he/she could not be found guilty unless he/she was blameworthy. With that in mind he went on to find that the Appellant was substantially to blame for the accident hence apportioning the liability at **35:65** in favour of the Plaintiff.

11. At the time of the accident the child was stated to have been about **6 years old** and in Standard 1.

12. In the case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982 – 88) IKAR 1 (1981) KLR 349** the Court of Appeal held that:

"It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. 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…A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such 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....

Clearly each case must depend on its peculiar circumstances. In the instant case the learned judge was right in finding that the defendant had been negligent, and that the plaintiff was struck when almost half-way across the road, and that at the most the plaintiff had committed an error of judgment for which contributory negligence should not be attributed to him....

The practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence, and thereafter, insofar 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 that act or make the omission....

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 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 a road which known to the driver as in the instant case, serves 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."

13. In the case of **Rahima Tayab & Others vs. Anna Mary Kinanu (1983) KLR 114 & I KAR 90:**

"The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission....

The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. 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. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

14. The 1st Respondent did see the children on both sides of the road prior to the accident. As a prudent driver he should have reasoned consciously and appreciated the possibility of any of the children crossing the road suddenly. He had an extra duty of care to exercise. The driver acted by braking suddenly but because of the sand the vehicle skidded and hit the child. From the evidence, on being cross examined the Plaintiff had no sense of the consequences of crossing the road when there was an oncoming vehicle but was solely blamed for the

accident. It was erroneous for the trial Magistrate to set the percentage of liability on the part of the Plaintiff as high as he did since the driver was substantially to blame for the accident. I therefore find that the 1st Respondent was **90%** liable for the accident while the 2nd Respondent was vicariously liable. In the result I apportion contributory negligence of **10%** to the Plaintiff. Therefore I set aside the trial Court's Judgment on liability and substitute it with the following orders:

Judgment is entered for the Appellant as follows:

General Damages	-	80,000/=
Special Damages	-	2,700/=
		82,700/=
Less **10%** Contribution	-	8,270/=
Total	-	**74,430/=**

The Appellant shall have costs in the Lower Court and of this Appeal.

15. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **12th** day of **June, 2018.**

L. N. MUTENDE

JUDGE