REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 27 OF 2014

Appeal from the Judgment of the Principal

Magistrate Court Tigania (Hon Gichimu)

(CORAM: F. GIKONYO J)

H K M (suing on behalf of the estate of the deceased son K M....APPELLANT

Versus

FRANCIS MWONGELA NCEBERE.....RESPONDENT

JUDGMENT

[1] This Appeal emanates from the Judgment of the Principal Magistrate Court Tigania (Hon Gichimu) in which the Learned Trial Magistrate dismissed the Appellant's suit for both general and special damages for the death of K M as a result of a road traffic accident on 5th September 2010. The Appellant was aggrieved by the said judgment thus provoking the instant appeal in which he raised the following grounds of appeal:

1. **The Learned Senior Principal Magistrate erred in law and in fact in dismissing the appellate suit when it was proved on a balance of probability.**

2. **The Learned Ag Senior Principal Magistrate erred in law and in fact in dismissing the Appellants case when the defendant case did not even testify or call witnesses.**

3. **The Learned Ag Senior Principal Magistrate erred in law in dismissing the case on grounds that it was not proved that the defendant was the owner of the motor vehicle in question when the fact was not challenged by way of evidence.**

4. **The Learned Ag Senior Principal Magistrate erred in attributing negligence on a guardian who was not a witness in the case and also in attributing evidence negligence of a minor of 8 years.**

5. **The Learned Ag Senior Principal Magistrate erred in law on liability generally.**

6. **The Ag Senior Principal Magistrate relied on extraneous matters in arriving at the decision.**

Directions

[2] On 7th April, 2016, it was agreed that this appeal shall be canvassed by way of written submissions. Parties filed submissions which I shall analyze below.

Submissions by Appellant

[3] The Appellant submitted that although the plaintiff was not at the scene of the accident, he explained how the accident occurred and the motor vehicle involved. The Appellant urged that defendant filed a defence in this suit, but he neither appeared in court at any time nor testified in this matter. In the circumstances, the Appellant contended that the evidence in the lower court on ownership of the vehicle herein remained unchallenged. it was submitted for the Appellant that his case in the lower court was that the motor vehicle involved in the accident was motor vehicle Registration Number KBK 540F which belonged to the Respondent and in support of that assertion, the Appellant produced a Police Abstract. According to them, the fact of ownership of the said motor vehicle was not denied. The Appellant further urged the court to look at the statement by the defendants driver dated 12th September 2012, in which one Clipondo Kinoti Kimuru stated that he was driving the subject motor vehicle Registration Number KBK 540F belonging the Respondent, his employer. Consequently, the Appellant urged the court to find that the ownership was proved and was never rebutted either in evidence or through the written statement.

[4] It was further submitted the magistrate erred in attributing negligence to a minor of 8 years old and unnamed guardian. It was further contended that even though PW3 who was a police officer blamed an unnamed guardian, his evidence did not in any way water down the law of negligence of children or the evidence before the court. As such, the Appellant urged the court to allow this appeal, set aside the dismissal order with costs in this court and the court below. They also asked the court to review the award as per submissions in the lower court.

Submissions by the Respondent

[5] On the other hand it was submitted for the Respondent that there was no single attempt by the Appellant to prove ownership of motor vehicle Registration Number KBK 540F. To them, PW1 only mentioned a motor vehicle Registration Number KBK 450A as having been the offending vehicle and that he did not at any stage of his testimony state who the owner of the said motor vehicle was or link the Respondent to the said motor vehicle. He did not also make an attempt to procure and produce before court any documents on the ownership of the said vehicle.

[6] With regard to liability, it was submitted for the Respondent that the Appellant did not offer sufficient evidence to prove that the defendant or the driver of the offending motor vehicle was negligent as had been pleaded. In addition, they argued that it was evident from the testimonies of PW1 and PW2 that the deceased was old enough to cross the road on his own and was also at the time accompanied by an adult relative. It was further submitted that the police investigations established that the driver of the alleged offending motor vehicle was blameless and that there was no evidence gathered by the police to suggest that the driver had been negligent. The Respondent concluded that based on the evidence of the three witnesses, the trial court made a factual finding that the plaintiff had failed to prove a case of negligence against the driver of the alleged offending motor vehicle and urged the court to uphold the decision of the court below.

DETERMINATION

[7] This is a first appeal; I should, therefore, discharge this court's responsibility of the court; analyze, re-assess the evidence on record and reach own conclusions but bearing in mind that this court neither saw nor heard the witnesses testify. See ***SELLE V ASSOCIATED MOTOR BOAT CO.*** **[1968] EA 123 and** ***KIRUGA V KIRUGA & ANOTHER*** **[1988] KLR 348**).

[8] The trial court dismissed the Appellant's suit on the grounds inter alia it was not proved that the subject motor vehicle was owned by the Respondents and that the particulars of negligence were not proved against the Respondents. Therefore, after careful consideration of the record of appeal and the rival submission of the parties, the points in controversy in this appeal seems to be two, namely; (1) ownership of the subject motor vehicle; and (2) liability. What does the evidence and pleadings say on the two issues?

Ownership of the vehicle

[9] The Appellant in paragraph 3 of the plaint stated as follows:

> **"that on 5th September 2010, the plaintiffs deceased son K M was lawfully walking as pedestrian along Meru Maua road near kwa Amos when the defendant his agent or driver drove motor vehicle registration number KBK 540F Mitsubishi Canter carelessly and negligently and violently hit and fatally injured the deceased….."**

The plaint in paragraph 3 expressly stated that motor vehicle registration number KBK 540F Mitsubishi Canter is the one which was involved in this accident. The plaint did not, however, expressly state that the motor vehicle herein belonged to the Respondent. Similarly, the Respondent did not expressly deny that the said vehicle was being driven by the Respondent or his agent. The evidence called to support the above impleading was as follows. PW1 in his evidence in chief testified inter alia that the motor vehicle Registration Number KBK 540A is the one that was involved in the accident herein. PW2 described the vehicle which caused the accident to be a Canter and was coming from Ngundune to Maua. PW3 a police officer then attached to Tigania Traffic Patrol stated that he had a file involving motor vehicle registration number KBK 540F Isuzu Canter. The file was AR/F/38/2010. According to the records from the police, the owner of the said motor vehicle was the Respondent herein and its driver at the material time of the accident was Elipondo Kinoti. He also produced a Police abstract which showed that the owner of the subject motor vehicle was the Respondent herein. Although PW1 stated that the motor vehicle which caused the accident was KBK 540A, when I consider the evidence adduced as a whole, the vehicle which caused the accident was a Canter registration number KBK 540F. In accordance with the Respondents witness statement which was filed in court on 14th September 2012, and adopted in court as the Respondents evidence, the maker one Cliphondo Kinoti stated that that he was driving his employer's motor vehicle KBK 540F Mitsubishi Canter along Meru-Maua road when nearing Kwa Amos area a young boy immediately emerged from behind the vehicle he had passed. He stated that the boy was running while crossing the road. And that he tried to swerve and brake but he was too close and thus hit the boy while he was on his lawful lane. The testimony of PW3 and that of the driver of KBK540F leaves no doubt that; (1) motor vehicle registration number KBK 540F is the one that was involved in this accident; and (2) the said vehicle was owned by the Respondent. I should say something about the police abstract. The Police Abstract on record shows that the subject motor vehicle registration number KBK 540F belonged to the Respondent. It even gave details of the insurance cover on the vehicle at the time. The Respondents did not call any evidence to rebut the contents of the police abstract. Except, they made two submissions; (1) that a Police Abstract could not be relied upon to prove ownership of a motor vehicle; and (2) that the only way of proving ownership of a motor vehicle is by production of a search certificate issued by the Registrar of Motor vehicles. Here I am content to cite what the Court of Appeal in **JOEL MUGA OPIJA Vs EAST AFRICAN SEA FOOD LIMITED [2013] eKLR** stated that:

> ***"In any case in our view, an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."(Underlining for Emphasis mine)***

See also what was stated in **NANCY AYEMBA NGAIRA vs. ABDI ALI Civil Appeal 107 of 2008[2010] eKLR, Ojwang**, **J (**as he then was) that:

> ***"There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question."***

[10] Applying the law on the facts of the case, I am satisfied on a balance of probability that the Appellant has on a balance of probability proved that the subject motor vehicle at the time of the accident was motor vehicle registration number KBK 540F Mitsubishi Canter and was owned by the Respondent. Consequently, I the Learned Magistrate erred on this point.

Liability

[11] As far as liability is concerned, I should decide whether the child herein was guilty of contributory negligence. This subject has been a subject for legal discourse over the years. The *Court of Appeal in* **BASHIR AHMED BUTT vs. UWAIS AHMED KHAN [1982-88] 1 KAR 1 & [1981] KLR 349** held as follows -

> **"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....**
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> **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....**
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> **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....**
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> **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.

Later the *Court of Appeal* considered the above case in **RAHIMA TAYAB & OTHERS –VS- ANNA MARY KINANU [1983] KLR 114 & 1 KAR 90** and stated -

"Since the learned judge found that the plaintiff paused on the side of the road before beginning to cross, the defendant should have seen the plaintiff before the moment of impact and had she seen the plaintiff at the roadside, she might have been able to avoid hitting her by slowing down or taking avoiding action. Therefore the finding that the defendant was negligent is correct....

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....

In the present case, the trial judge held in clear terms that the plaintiff had the requisite road sense and therefore her failure to see the approaching car was blameworthy. In the case of a grown-up person the proportion of blame would have been substantial, but having regard to the plaintiff's tender years the degree of liability is assessed at 10%....

In determining what is a reasonable standard of care, the four factors, *inter alia,* **that have to be considered are:**

(1) the likelihood of a pedestrian crossing the road into the motorist's path

(2) the nature of the pedestrian, whether a child or adult

(3) the degree of injury to be expected if the pedestrian was struck

(4) the adverse consequences to the public and to the defendant in taking whatever precautions were under consideration...

In the instant case, there were no obstructions like parked cars and the defendant had a clear immediate field of vision. At the time of the day and with known schools in the vicinity the motorist is put on notice that he or she must exercise particular care for keeping an eye out for children and anticipating that they might cross without looking, and who passed across the front of her car, and her failure to stop or swerve, must construe negligence on the part of the defendant".

[12] In this case, the Trial Magistrate observed that it was very clear how the accident occurred. Although the officer who investigated the case was not called, however, the evidence on record is sufficient to determine liability in the case. First of all the deceased child was said to be aged 7 years although the Certificate of death indicates he was 4 years. There was no conclusive evidence that the

deceased child had sufficient road sense. This is despite the general statement by PW2 that the boy appeared to have road senses and could cross the road by himself. This statement should be seen within the entire evidence by PW2 which was that the boy was not crossing the road. PW2 stated that the deceased child was walking along the road and was not trying to cross the road. He stated that at the scene there was a bridge and an oncoming vehicle. He stated that the driver of motor vehicle KBK 540F did not stop to allow the other vehicle to pass. Instead, he drove the vehicle at high speed and without hooting or applying emergency brakes hit the child killing him instantly. In assessing reasonable care the **degree of injury to be expected if the pedestrian was struck is relevant. The boy died instantly and this is an indication of high velocity of the vehicle.**

[13] In accordance with the Respondents witness statement which was filed in court on 14th September 2012, and adopted in court as the Respondents evidence, the maker one Cliphondo Kinoti stated that that he was driving his employer's motor vehicle KBK 540F Mitsubishi Canter along Meru-Maua road when nearing Kwa Amos area a young boy immediately emerged from behind the vehicle he had passed. He stated that the boy was running while crossing the road. And that he tried to swerve and brake but he was too close and thus hit the boy while he was on his lawful lane. **As a general rule, presence of a child or children along the road should awaken an intuitive signal of the high possibility that the child or children may enter or crossing the road without notice. That realization should make the driver to be extremely careful and to take such preemptive actions as slowing down considerably or moving away from their position at the time or making an abrupt stop if need be. From his statement, the driver had a clear immediate vision of the deceased child. At the time he saw the boy running, he ought to have been put on notice that he must exercise particular care and anticipate that the child would cross the road without looking. According to his statement, the driver saw the boy emerging from the vehicle he had passed, but it seems he did not give the presence of a child any or appropriate significance; had he acted properly he would have taken more decisive steps in dealing with the scenario that was unfolding fast. So his testimony that he tried ''to swerve and brake but was too close'' is not anywhere close to proper care and control of the vehicle in the circumstances of the case. That portends negligence on the part of the Appellant's driver. As the boy was 7 years at the time, what the Court of appeal said in the case of RAHIMA TAYAB is relevant, to wit that:**

> **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....**

The attempt to blame the grandmother for the accident does not remove the duty of proper care by the driver of the subject motor vehicle herein. Blame on the grandmother does not also make the child herein blameworthy. The driver herein simply did not exercise **reasonable standard of care in the circumstances of the case, for he did not take into account: (1) the likelihood of the child crossing the road into the motorist's path; (2) the fact that the pedestrian herein was a child; and (3) the degree of injury to be expected if the pedestrian was struck. Even looking at the evidence by PW2 which was not controverted, there was a bridge at the point where the accident took place and these are ordinarily signs for the driver to drive carefully. This coupled with the fact that he saw the child on the side of the road; he ought to have been extremely carefully. The driver herein was substantially to blame for the accident. I, therefore, hold the driver of motor vehicle to have been 90% liable for the accident herein. Accordingly, being the employee of the Respondent, the Respondent is vicariously liable for the accident herein to the extent of 90%. I will apportion contributory negligence of 10% only to the deceased minor whose personal representative is** the Appellant respectively. The trial magistrate was therefore wholly wrong in dismissing the primary suit herein when it had been proved on balance of probabilities that the driver of motor vehicle KBK 540F was negligent. It was also shown on the required scale that the said vehicle belonged to the Respondent. I set aside the trial court's judgment.

QUANTUM OF DAMAGES

Pain and suffering

[14] Now that liability has been settled, I will assess the quantum of damages payable. I have considered the submission on quantum of damages. As the deceased minor died instantly, I award a sum of Kshs 10,000 pain and suffering.

Loss of expectation of life

[15] Counsel for the Appellant suggested a sum of Kshs 150,000 whereas counsel for the Respondent suggested a sum of Kshs 100,000 of loss of expectation of life. From the circumstance of this case I find a sum of Kshs 100,000 to adequate compensation under this head of damages.

Loss of dependency

[16] For loss of dependency the Appellant proposed a sum of Kshs 250,000 whereas counsel for the Respondent suggested a sum of Kshs 150,000. In law, loss of dependency will be awarded in respect of untimely death of a child of 7 years. See the case of **KENYA BREWERIES LIMITED vs. SARO [1991] MOMBASA CIVIL APPEAL NO. 441 OF 1990 (eKLR)** where the Court of Appeal rendered itself thus:

> **"We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have "homes" for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a "home" while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare". If any legal authority is required in support of our views we would quote this court's decision in *Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others* [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-**
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> **"In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets**

of the great religious of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is "outrageous and pernicious" is not well-founded and must be rejected. ..."

[17] The deceased child was aged 7 years and was already in school. This is an important factor in the assessment of damages. In my considered estimation, and applying the above principles, a sum of Kshs 200, 000 is fair compensation. Accordingly, I award loss of dependency in the sum of Kshs. 200,000.

Special damages

[18] The Appellant specifically pleaded and proved special damages in the sum of Kshs 20,000 which was for obtaining Limited Grant for purposes of filling suit. I accordingly award him Kshs 20,000 under this head of damages.

[19] In the final analysis I enter judgment for the Appellant as follow:

1. **Pain and suffering……..…….Kshs 10,000**

2. Special damages……...…..…Kshs 20,000

3. Loss of expectation of life…….....Kshs 150,000

4. **Loss of dependency…….....…..Kshs 200,000**

TOTAL Kshs 380,000

Less 10% contribution Kshs 38,000

TOTAL Ksh 342,000

The Appellant will also have costs of this Appeal.

Dated, signed and delivered in open court at Meru this 8th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kariuki advocate for the respondent

Mr. Anampiu advocate for the appellant – absent

F. GIKONYO

JUDGE