



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 132 OF 2011

S K N (A minor suing thro' his next friend and next of kin

JOEL NJUGUNAKARURI).....APPELLANT

VERSUS

ERIC NDUNGU WARUI.....1ST RESPONDENT

MOLO MOUNT MINERAL WATER LTD.....2ND RESPONDENT

JUDGMENT

The plaintiff/appellant SKN, a minor, filed a suit through his next friend Joel Njuguna Karuri against Eric Ndungu Warui and Molo Mount Mineral Water Ltd, the defendants/respondent. The plaintiff was seeking compensation for injuries that the minor sustained following a traffic road accident which involved the minor and the 2nd defendant's vehicle KAR 233E Toyota Hiace, which was driven by the 1st defendant. In the plaint filed in court on 7/3/08, the plaintiff pleaded that the 1st defendant managed the said vehicle negligently as a result of which it knocked down the plaintiff who sustained serious injuries. The particulars of negligence are listed at paragraph 4 of the plaint which are inter alia that the 1st defendant drove the vehicle at an excessive speed without considering the nature of the road, that he did not have sufficient regard for other road users; that he did not maintain a steady control of the vehicle, failing to warn of an approaching vehicle to pedestrians and failing to slow down or swerve to avoid the accident.

In their defence, the defendants denied the particulars of negligence attributed to them and stated that if an accident occurred, it was solely caused or largely contributed to by the negligence of the plaintiff. The particulars of negligence attributed to the plaintiff are inter alia that he failed to have regard to other road users, ignored warning by the defendant's hooting, failed to have due regard for his own safety, engaged on his own frolics on the road, and ran across the road without looking out for oncoming vehicles.

After hearing the testimonies of the plaintiff, 1st defendant and submissions of counsel, the trial magistrate dismissed the plaintiff's suit. Being aggrieved by the said decision the plaintiff filed this appeal on two grounds:-

- 1. That the trial court erred in finding that the plaintiff had not proved his case to the required standard;**

2. That the learned trial magistrate erred in law and fact in implying that a minor of 7 years would not be a competent witness;

Mr. Ngure, counsel for the plaintiff filed submissions. On whether the plaintiff proved his case to the required standard, Mr. Ngure urged that the plaintiff testified to having been hit after the vehicle having left the left side of the road to avoid hitting a cow on the road, swerved and hit him while he was off the road. According to counsel the 1st defendant did admit that fact in cross and re-examination.

It was also submitted that if the 1st defendant was driving at 30k.p.h. as alleged in evidence, a competent driver would have been able to apply emergency brakes to avoid the collision with the child and that having failed to stop or apply brakes, it means the 1st defendant was driving at a high speed.

It is also the plaintiff's submission that the court misdirected itself in stating that the police officer who visited the scene should have been called because the police abstract was produced by consent and that was proof of admission of liability by the defendants. Further, it was submitted that the 1st defendant in his evidence admitted that the child was not negligent and also denied that the child was playing or engaged in gymnastics and walking on the road as pleaded in the defence. Mr. Ngure urged that parties are bound by their pleadings and the 1st defendant could not purport to deny his defence. Counsel relied on the decision in **Associated Electrical Industry Ltd v William Otieno (2004)KLR Pg2** where the court restated the law, fact that each party is bound by its pleadings. In addition to the above, counsel urged that the presence of the police officer who visited the scene was not necessary because the 1st defendant said that on trying to pick up the child, an angry mob crowded and he was rescued by the police. Counsel said that if the 1st defendant had done no wrong, why would the crowd want to attack him.

On the issue of whether the plaintiff was a competent witness, Mr. Ngure urged that the plaintiff was not alleging negligence of the 1st defendant because he was a minor but had proved that the accident occurred and he was injured and the court erred in implying that the minor was not a competent witness. Counsel further urged that in any event a minor cannot be liable in negligence unless the court ascertains that he was old enough to be expected to take precautions and on that point he relied on the case of **Butt v Khan (1981)1 KAR 1982-1988** and **Attorney General & Another v Vinod & Another EALR(1971)pg50**. That based on the above authorities the defendants should be found wholly to blame for the injuries sustained by the minor following the collision.

The defendants also filed submissions and Mr. Kisilah, counsel for the defendants argued that the onus was on the plaintiff to prove that the 1st defendant was negligent (See **Section 109 of Evidence Act** and the case of **David Nandwa v Kenya Kazi Ltd (1982-88)1 KAR 1178**). Counsel urged that the trial magistrate complied with **Order 21 Rule 4 & 5** of the **Civil Procedure Rules** in that she fully analysed the evidence of both parties, extracted the issues and arrived at the conclusion that the plaintiff did not prove his case to the required standard. It was counsel's submissions that the plaintiff failed to prove that the defendant drove at a high speed or that there were cows on the road and that the plaintiff's statement was full of discrepancies.

As regards the second ground, counsel submitted that the record does not indicate that the magistrate implied that the minor was not a competent witness. He agreed with the court's observation that the fact that the plaintiff was a minor did not mean that the defendant owed a higher duty of care and relied on the decision in **Livingstone Otundo v Naima Mohamoud (Minor) HCC NO. 1367 of 1981**, where a minor was a victim of an accident and the court observed that the degree of the driver's obligation to the minor was that of a reasonable man and that the trial court applied the proper principles as regards the evidence of the minor; that though admissible, it did not raise the standard of duty of care owed to the minor and neither was the court under an obligation to lower the bar on the standard of proof for the appellant.

This is the first appellate court and its mandate is to re-evaluate the evidence adduced by all the witnesses in the trial court and arrive at its own independent determination and conclusions. However, in so doing, the court bears in mind that it did not have the advantage of seeing the witnesses. It is trite law that the

appellate court will not interfere with the finding of the trial court unless it establishes that the trial court's finding was based on no evidence or was based on misapprehension of the evidence or acted on wrong principles. See **Wanjohi v Resma Commercial Agencies & Another CA 91/2002** and **Mwanasokoni v K.B. Services Ltd (1985)KLR 931**.

Before analyzing the evidence adduced in the trial court, the evidence adduced by the parties is as follows:-

PW1, SK, who was aged 10 years at the time of testifying was subjected to a voir dire examination after which he was found to understand the meaning of the oath and was intelligent enough and gave evidence on oath. He recalled that on 8/2/2006, when he was about 7 years, he was going home from school about 5.00 p.m., walking towards Molo on the right side; that he was walking off the road when a Nissan matatu KAR 233E came from Molo direction, there was a cow on the left side of the road and that the vehicle swerved to avoid hitting the cow and hit him and he sustained injuries. PW1 was the sole witness to that accident.

DW1, Erick Ndungu Waruhiu, the driver of the subject vehicle, recalled that on the said date, while on the way from Molo to Elburgon, at Salama, he found a vehicle parked on the right side of the road and a matatu on the right side and that suddenly a child came from behind the Nissan and crossed from the right to the left side; that the child was crossing facing where he was heading; that he hooted and swerved to the far left side but that the boy got shocked when he hooted. He said that he tried to pick up the child to take him to hospital but a crowd gathered and started to harass him but the police arrived and rescued him.

From the pleadings and evidence of the witnesses, the occurrence of the accident is not denied or that the 1st defendant was the driver of the vehicle that caused the accident. The point of departure is the manner in which the accident occurred. Both PW1 and DW1 gave totally different versions of what occurred before the collision occurred. Since there was no other eye witness called, the trial court could only determine the issue of liability by closely examining the evidence adduced by both PW1 and DW1.

DW1 admitted that the place where the accident occurred is a very busy place with a church and shops and that he was only driving at 30k.p.h. DW1 also admitted that ***“the boy was not walking on the road, he was not playing.”*** From the 1st defendant's testimony some of the particulars of negligence attributed to the plaintiff were denied. In my understanding, when DW1 said that the plaintiff was not walking on the road, then contradicts himself and says that the plaintiff started to cross from behind a stationary vehicle, either DW1 was able to see the plaintiff while he was still off the road or in the alternative, he was telling court untruths. If the 1st defendant saw the plaintiff while still off the road, then DW1 should have been able to avoid the accident by braking or stopping. DW1 also said that he hooted to alert the plaintiff. He said:- ***“I saw him about 5 metres from the matatu. Any other person would have ran back but because he was a child, he got confused and ran to the left side.”*** This was a child of tender age – 7 years. DW1, as a prudent driver, should have tried to avoid the accident in every way possible. By the above statement, it is clear that DW1 knew that a child of such tender age did not have the capacity to judge as an adult would and should have exercised greater care to ensure the child was not hit. He should not even have hooted to confuse the child because he knew hooting would confuse a child. The action he took was not that of a prudent driver. There is no evidence that DW1 applied emergency brakes to avoid hitting the child. In my view, either DW1 was over speeding and was not driving at 30k.p.h. as alleged or he did not just take care for the safety of other road users as required of him. In my view, the trial court misdirected itself when it found that only the evidence of the police officer who visited the scene could shed light on the point of impact. She should have carefully considered the evidence before the court.

Can the plaintiff be held to have been negligent?

In the case of **Butt v Khan (1981)1 KAR 1982-1988 349**, the Court of Appeal held that a child of tender years cannot be found to have been contributorily negligent unless it was proved that the child knew or ought to have known that he should not do the act or make the omission.

The court relied on the case of **Gough v Thorne (1966)1 WLR 1387**, where the court refused to attribute contributory negligence on a girl aged 13½ years who was knocked down while crossing a road. In that case, the court held that the test was 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. In **Butt's** case J Madan then said at page 361:-

“I respectfully agree and I would also dismiss the appeal in so far as it relates to contributory negligence. Indeed, I am of the opinion the practice of the civil courts ought to be that normally, a person under the age of ten 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 plaintiff was 7 years old at the time of the accident and so far, there is no evidence that he had the capacity to know or judge whether a vehicle was at a safe distance for him to cross the road that is if one were to go by the 1st defendant's explanation on how the accident occurred.

The police abstract was admitted in evidence by consent of the parties. In the abstract, police did not attribute blame on any of the parties involved but the matter was referred to insurance, meaning that the defence was admitting liability and that the insurance was to compensate the plaintiff. If the defence was denying liability they would have insisted on calling the maker of the abstract to explain how the accident occurred and who was to blame.

Having analysed the pleadings and evidence adduced before the trial court and the authorities cited on the issue of liability, I am satisfied that the trial court by failing to carefully analyze the evidence before it, arrived at the wrong determination by dismissing the plaintiff's case. I am satisfied that there was sufficient evidence to attach liability against the defendants at 100%.

In the plaint, it was pleaded that the plaintiff sustained the following injuries:-

1. **Loss of one upper canine tooth;**
2. **Bruises to the left knee;**
3. **Bruises to the upper right face and right ear;**
4. **Bruises to the right part of the legs and toes.**

The P3 Form, out patient record (PEx.2 and PEx.3 confirmed the said injuries. The plaintiff was also examined by Dr. Omuyoma who prepared a report (PEx.5) in which assessed the degree of injury as harm. The plaintiff's counsel suggested an award of Kshs.200,000/- and relied on the following decisions:-

1. **Esikar Ole Morimpo v Ray Inder Singh HCC 1772/85.** In that case an award of Kshs.250,000/- was made in 1989, where the plaintiff sustained a fracture of the right ankle, fracture of the mandible and loss of consciousness for three days;
2. **Mrs Wairimu Njui v Kaberi & Anor HCC 2116/80**, where an award of Kshs.250,000/- where the plaintiff sustained soft tissue injuries to the face, trunk and right foot.

The defendants did not submit on quantum. However, in the lower court the defence submitted an award of Kshs.50,000/-. They relied on the decision of **George Mgambi Githinji v F.K. Getheka HCCA 4038**, where the plaintiff sustained loss of pre molar tooth, laceration of the right side of the bruises over the right shoulder, chest and both knees. The decision was made in 1993 where an award of Kshs.60,000/- was made.

I have considered the above submissions and decisions and I find the injuries in the authority cited by the defence to be more comparable to this case. It was made in 1993, 21 years ago. Due to increase of inflation and depreciation of the shilling, I think an award of Kshs.120,000/- in general damages will be fair. Proved special damages are Kshs.2,500/-. The plaintiff will have judgment for the total sum of

Kshs.122,500/- in both general and special damages. Costs of the lower court and appeal to the plaintiff.

DATED and DELIVERED this 3rd day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ngure for the appellant

Mr. Mwangi holding brief for Mr. Kisilah for the defendants

Kennedy – Court Assistant