REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, OMOLO & PALL, JJ.A.)

CIVIL APPEAL NO. 23 OF 1997

BETWEEN

EDWARD MARIGA through

STANLEY MOBISA MARIGA.......................................APPELLANT

AND

NATHANIEL DAVID SCHULTER........................1ST RESPONDENT

ESCO (K) LIMITED...2ND RESPONDENT

(Being an Appeal from the Judgment of the High Court of

Kenya at Nairobi (Mr. Justice Mwera) dated 28th October, 1992

in

H.C.C.C. NO. 2339 OF 1991)

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JUDGMENT OF THE COURT

Edward Mariga, a minor suing through his father, Stanley Mariga, as next friend, (hereinafter called "the appellant"), filed a suit in the superior court against Nathaniel Schulter (the first respondent) and Esco (K) Ltd (the second respondent) claiming damages for personal injuries he sustained on 23rd March, 1990 when he was hit by a motor vehicle registration number KVZ 871 owned by the second respondent, but being driven by the first respondent, along Lenana Road in Nairobi. The appellant and his brother, Michael Mariga, were on their way home from school.

According to the averments in the plaint, the accident was caused by negligence on the part of the first respondent. The appellant's evidence and that of his brother was that the appellant was hit as they walked on the pavement. He suffered a fracture of the left femur and bruises on both hands. He was taken to hospital by the first respondent who also met the full cost of his treatment.

The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother. Mwera J. heard the case and held that the accident was substantially contributed to by the appellant's own negligence and held him 90% to blame. He awarded the appellant Shs.80,000/- general damages for pain and suffering which he then reduced by 90% and entered judgment in his favour for Shs.8,000/- together with interest and costs.

In this appeal, the appellant is challenging the apportionment of liability and the quantum of damages. Looking at the evidence as a whole, we get the clear impression that the appellant's father was determined to reap the maximum financial benefit from his son's accident by deliberately exaggerating the injuries sustained by him and their long term effect. But that apart, the evidence before the learned Judge established, on a balance of probabilities, that the appellant was on the pavement when the vehicle hit him and there can be no clearer evidence of negligence than this, especially in the absence of an explanation from the first respondent, as to how the accident happened. The allegation in the defence that the appellant had dashed across the road is not evidence and remains forever an allegation. The learned Judge had reasoned that children being what they are, the appellant could have crossed the road in the course of play, but there was no evidence to support this view of the Judge.

At the date of the accident the appellant was 8 years old and therefore a child of tender age. As a matter of law, a child of tender age cannot be held guilty of contributory negligence - see Bashir Butt v Uwais Ahmed Khan (1988) 1 KAR 1. So both on the evidence and as a matter of law, the Judge's finding as regards contributory negligence is unsustainable. We allow this ground of appeal.

The other ground of appeal is against the award of Shs.80,000/- general damages which Mr. Weda, for the appellant, submitted is so inordinately low that it must be a wholly erroneous estimate of the damages. He referred to a number of cases in which larger amounts had been awarded. But taking into account the actual injuries suffered by the appellant, the level of recovery achieved, and his age, we cannot detect anything erroneous about the estimate made by the learned Judge. We reject this ground of appeal.

In the result we allow this appeal, set aside the judgment and decree of Mwera, J and enter judgment for the appellant against the respondents jointly and severally for Shs.80,000/- together with costs and interest at court rates from 28th October, 1992. The decretal sum will be deposited in an interest bearing account in a reputable bank in the joint names of the Registrar of the High Court and the appellant's father and the interest will be applied for the education of the appellant. The capital, if any, will be paid over to the appellant upon reaching the age of majority. The appellant will also have the costs of this appeal.

Dated and delivered at Nairobi this 26th day of September, 1997.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR