



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 105 of 1988

**JESSEE MURIITHI (Minor Suing through Next Friend REUBEN KIBURI).....
.....PLAINTIFF**

VERSUS

**JOHN GICHUNGE BAITURU.....1ST
DEFENDANT**

**ATTORNEY GENERAL.....2ND
DEFENDANT**

CORAM:

OGUK S. JUDGES.

Mr. Mwarania for Plaintiff

Mr. H. Oluoch (State Counsel) for Defendants.

JUDGEMENT

The Plaintiff, then a minor aged about 3 years at the time of the accident, brings this action through his father and next friend seeking special and general damages against the Defendants arising out of an accident that occurred on the evening of 11th July, 1987 involving .M/V, Reg. No. G.K. 6982, Land Rover belonging to the Ministry of Health which was then being driven by the 1st Defendant in the cause of his duties. The 2nd Defendant is merely brought into these proceedings as a representative of the Government of Kenya

vehicle and employee ("1st Defendant) was involved in the said accident.

At the material time, the Plaintiff was living with father, Reuben Kiburi M'Irangu (PW.3) at Kula Mawe Village, Isiolo, along Isiolo Waso road. He was the youngest child of his parents who have five children. Their house is about 30 yards off the Isiolo . Weso road which passes through a high density residential area with houses on either side. On this day at about 4.30 p.m, this child (the Plaintiff) in the company of his brother and sister, were on, their way home from an afternoon church service where they had accompanied their father. They had left their father (PW3) in church to go back to their house which was about 600 yards away but on the same side of Isiolo - Waso road.As they walked, off the said road in company of other children, there came a lorry carrying some Europeans behind them heading towards the same direction. Stephen Murungu M'Ikiara (PW.4), who was then seated at the verandah of his house close to the said road and saw- the said accident happen, explained that, as the said children

were approaching off the road on the same side where his house was located, he saw the lorry carrying the Europeans approaching "from Isiolo side along the said road. Behind the lorry, was a Land Rover, Reg. No. G.K 6982. The said Land Rover then started to overtake the said lorry by pulling off the murrum road on the sand side, that were the children were walking. He had first seen these vehicles approaching while they were some 50 meters away from where he was seated. As he saw Land Rover accelerated, to overtake the lorry it knocked down one of the said children (the Plaintiff) while the other children managed to run away. The child then fell down while the driver of the Land Rover (1st Defendant) went slightly ahead and stopped on the road about 10 paces from where the child had fallen. The accident happened so close to his house approximately 14 paces away and he rushed to where the child had fallen even before the 1st Defendant and the two occupants of his vehicle came to the scene. The child was crying and he noticed that he had some slight blood on his left leg and that the side of his head was dusty on one side where he had fallen. The 1st Defendant and the occupants of his vehicle went out to the scene, observed the child and the (1st Defendant) remarked that the child had not been seriously injured. They then took him back to their vehicle and rushed him to Isiolo District Hospital.

In the meantime, the Plaintiff's sister who was older than the rest of the children when the accident occurred, ran back to the church where they had left their father. (PW.3) and reported the accident. Upon receipt of the said report, the Plaintiff's father (PW.3) went to the District Hospital where he found the Plaintiff having been attended to. He was then being carried by a certain woman from their village and was crying. His left leg had been bandaged. He then took the child with him up to Isiolo Police Station where he found that the 1st Defendant had already reported the said accident to the Police and his vehicle Reg. No. G.K 6982 had been detained at the Police Station. He then went home with the child*

Continuing with his evidence, the Plaintiff's father (PW.3) testified that after two days, he noticed that the left leg of the child which had been bandaged was swollen, the child would not walk and was just crawling on his buttocks. He took him back to Isiolo Hospital for his leg to be X-rayed. There was no X-ray at the hospital and he was then referred to Meru District Hospital. He was again referred to Nkubu Mission Hospital where there was an X-ray. The left leg of the child was found upon being X-rayed to have sustained what Dr. Namasaka (PW.1) refers to as a green stick fracture. The child was taken back to Isiolo District Hospital when he was put on plaster of Paris up to the 4th of August, 1987. After the plaster was removed, he was again taken back to Nkubu Hospital for further X-ray which confirmed that the bones which had been fractured had re-united well although there was some infection which was controlled by medication.

The problem for the child did not end there, his father (PW.3) informed that although in the past, prior to the accident, he could call 'Mummy', 'Daddy' and his brothers, the child was increasingly becoming unable to talk. The father suspected that he had a major problem as he had noticed soon after the accident that the child had a small bruise at the back of his left side of the neck behind the back left ear. He then took the child to Nairobi Clinical Laboratories where he was examined by Prof. Kungu who gave him a report dated 4th July, 1988 (Ex.11) and then referred him to Kenyatta National Hospital. The child was thoroughly examined and found to be deaf and dumb. He then brought the child back to Meru where he was again seen by Dr. Randall (PW.2) who is the District Surgeon who prepared a report dated 25th of July, 1989 (Ex.4) in which he confirmed that the child was deaf and dumb. He attributed this to the accident which the child had suffered saying that the small external bruises on the back left ear was a sign that the child had suffered some internal injuries which impaired his power of hearing and speech. However, Dr. Namasaka in his earlier report dated 13th of August, 1988 (Ex.3) found that the Plaintiff had suffered some bruises on the left leg with some swelling a fracture on the left tibia at the distal 1/3 which he testified had healed without any complications.

Both Dr. Namasaka (PW.1) and Dr. Randall (PW.2) testified before the court and produced their respective medical reports (Ex. 3 & 4). The Plaintiff's father also produced a Police Abstract Report of the said accident and the receipts of payments for the said report together with X-Charges on two occasions all amounting to Sh.124/- Because of the present state of the Plaintiff he has now been admitted at Kaaga School for the deaf where his father has been paying Sh.2,700/~ a year as from

January, 1990. Beside this the child is in need of a hearing aid which is available at Kenyatta National Hospital at a cost of 15,000/-,

The Plaintiff through his father, shows the 1st Defendant from the injuries suffered by the Plaintiff in the said accident and holds both defendants liable to him in damages saying that the accident was solely caused by the negligence of the 1st Defendant who was then engaged in the course of his duties as such driver. He now asks for special damages in the sum of Sh.224/-, and general damages for pain, suffering and loss of amenities.

The Defendant's have denied the Plaintiff's claim saying that the 1st Defendant did not cause the alleged accident as alleged or at all and that if ever there was any such accident, he said was contributed for by the guardian of the minor Plaintiff who negligently left him to wander about along busy highway.

The Defendant's case is that on the material day at about 4.30.p.m., the 1st Defendant who is a driver of M/V. Reg. No, OK 6982, attached to Isiolo District Hospital, was driving the said vehicle along Isiolo - Waso road in the company of Simon Kimani (DW.1) and Kimani Njine (DW.4) who are both Clinical Officers at the said Hospital. They were then looking for the Hospital Secretary to authorise the fuelling of the said vehicle for a trip to Kabarak High School on the following morning. They had failed to get the said hospital secretary at his house and at other places and were now heading to check for him at another place beyond KulaMawe Village when the alleged accident occurred. According to these witnesses, after they had gone passed Soko Mjinga along the said road, there was a certain lorry ahead of them which the driver (1st Defendant) overtook. They then came across some road bumps across the road and the driver had to slow down to about 20 KPH.

He testified that after he had gone over the first two road bumps he saw a group of six (6) children some 35 to 40 ft away playing off the road* One of the said children then started to cross the road from the right side to the left side. He hooted to warn the said child but apparently he did not hear. He then swerved his vehicle towards the left to avoid hitting the child and never stopped. He then noticed from his window that the said child had fallen down in the middle of the road. By then the rear part of his vehicle was still on the road. He stated that his vehicle never came into any contact at all with the said child and that the child might simply have slipped and fallen on the road on seeing the vehicle KIMANI Njine (DW4) while supporting the 1st Defendant's story, stated that as the said child appeared from the right side of the road, their driver. (1st Defendant) "broke and then swerved to the left side to avoid the child." After they had noticed that the child had fallen down, they all came out of the vehicle and went to where the child was lying down. He was crying.

The 1st Defendant testified that the child (Plaintiff) had no visible injuries. He was trying to stand up and then falling down Simon Kimani (DW.1) noticed that the child had some small bruises but he could not recall on which part of his body they were. KIMANI Njine (DW.4) on the other hand was quite specific that the child had some injury on the leg above the ankle and they then decided to take him to the hospital as he was then bleeding. They took with them a woman neighbour of the child's parent who had come to the scene to help them carrying the said child who was then crying. They left the child being attended to at Isiolo Hospital and proceeded to the Police Station to report the accident. The 1st Defendant says that his report to the Police should not be construed to mean that he was involved in the said accident but he was simply acting as a good Samaritan*

The Defendant's father called two witnesses who were familiar with this child (Plaintiff) to show that he had hearing defect prior to this accident contrary to what his father is alleging.

Florence Makandi (DW.2) who lives some 400 meters away from the house of the Plaintiff's parents but works as a subordinate staff at Isiolo Hospital, testified that she has known this child since 1982 and that on many occasions prior to this accident she had tried to talk to this child but he could not hear. She believed that this child was not hearing properly. Maritha Murige (DW.3) who works with the Plaintiff's mother in the same market at neighbouring stalls says that she had been seeing this child prior to the said accident in company of his mother at the market and that she believes that the said child had a defect in hearing. She explained that on some occasions, this child could leave his mother and come to

play with her potatoes on display but even if she attempts to talk to him to stop playing with her tomatoes, their child could not hear until his mother told her that the boy had a hearing problem.

lengthy oral submissions were made before me by Counsel for the Plaintiff and Learned State Counsel for the Defendants both on liability and quantum. I am grateful for their depth submissions both on the evidence and on law.

Dealing first with the question of liability, it is not disputed that the 1st Defendant was the driver of M/V Reg. No. G.K. 6982, Land Rover, attached to the Ministry of Health, Isiolo. He was then on duty working for the hospital secretarial for the necessary authority to enable him to fuel the vehicle in readiness for a trip to Kabarak on the following morning. It was while he was driving along Isiolo Uwaso road looking for the said officer in company of two clerks from the same hospital that they came across the minor child and a group of other children within Kula-mawe village, Isiolo. This is a densely populated low income residential area with all sorts of houses on either side of the road. The 1st Defendant says that there are road bumps at the scene of the accident in this case and I believe him. Such road bumps must have been put there for the very obvious reason as it passes through a residential area with heavy human traffic. In his own testimony, the 1st Defendant admits that as he drove along the said road, he saw the Plaintiff in a group of 6 children playing off the road on the right side. He saw them in good time which he estimated as between 35 to 40 ft. Stephen Murungu M'Ikiara (PW,4) also saw the said children where he was seated outside the verandah of his house.

He even saw the 1st defendant's land-rover approaching together with a lorry carrying some Europeans.. The 1st Defendant and DW.4 admits that there was indeed such a lorry but they says that they had passed that lorry when the accident occurred. However (PW4) on the other hand, says that the said accident occurred while the 1st Defendant was trying to overtake the said lorry and was accelerating off the road on the side where the said children were walking. I have no doubts that M'ikiara (PW.4) had clearly seen what had happened. Whereas, I do not dispute the evidence of the 1st Defendant that these children might have been playing off the road as they were walking home from the church, the possibility that the sudden appearance of this land-rover behind them had caught them unaware cannot be ruled out. Whereas the 1st Defendant says that he had seen them in good time. I believe that these children had no notice of his approach. I say so because none of the two witnesses (DW.1 & DW.4) who were with him in the said vehicle testified that they heard him hooting to warn these Children. If ever he had hooted *and* this is quite important, I do not think that both DW.1 & DW.4., who elaborately testified as to how this accident occurred, could have failed to say so. I reject his evidence that he had hooted to warn these children as a lie but I accept his evidence that as the children got scattered on seeing his vehicle, he attempted to brake and swerve to his left to avoid hitting the minor Plaintiff who was then running to cross the road while others were going to the other direction. This was a dangerous situation caused out by the children as they were not playing on the road, but by the 1st Defendant himself. The 1st Defendant caused this dangerous situation first by trying to overtake a lorry in front of him which he admits was being driven quite slowly while it was not safe for him to do so given the fact that this was within a residential area where precaution had even been made for the safety of the residents of the area to put road bumps. He admits, that he had then crossed over two bumps and there was yet another bump to be crossed. Secondly, he had not hooted to warn the children who were off the road that he was approaching. Thirdly, as a driver of a lethal weapon, he had a greater duty of care than the pedestrians including the child Plaintiff. The duty upon him was even greater as he knew that he was passing through a built up area with heavy human traffic.

He told the court as follows: -

"I was familiar with the road and I used to see children around and there are houses nearby."

Perhaps, the position is well summed up by Sheridan, Ag. C.J. in the case of MONJU - V - JESSA (1963) E.A. 156 at page. 158 where he stated that:

"It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animal in the way at any moment, and he is bound to go not faster than will

permit him of his stopping; or deflecting his course, at any time to avoid anything he sees, after he has Seen it. If there is any difficulty in the way of his seeing, like for instance fog, he must go slower in consequence."

I may add, that it is the duty of every driver to guard against the possibility of danger which is reasonably apparent or foreable although this does not mean that he has to proceed in such away that he could avoid an accident no matter how reckless the other party may be.

In the instant case, the 1st Defendant was familiar with the area. He knew that there are always children criss-crossing this only road through their slum village He happened to have seen these children in good time some 35 to 40. ft a head of him. According to his own evidence and that of DW.4, he was going at no more than 20 KPH. Why could he not have hooted and then stopped to enable these children who were not actually on the road to move away. Even if his vehicle did not come into actual contact with this child, the fact that this child fell right near the rear right wheel of his land Rover, clearly shows that he is the one who had caused him to fall and to sustain the injuries he suffered I can see no way the 1st Defendant can escape liability in this case. Moreover, a child of 3 years cannot in law be guilty of contributory negligence. As I have responded out, even the child's elder sister who was no more than 10 years then would not be blamed because the 1st Defendant took all of them by surprise.

I am satisfied that the 1st Defendant is wholly to blame and that he together with the 2nd Defendant are vicariously liable to the Plaintiff in damages for his injuries.

The type of injuries which the minor Plaintiff suffered in this accident was a hotly contested issue. Soon after the accident, it was evidently clear that he had only suffered minor bruises on his left leg where he was bleeding from. It was only after 2 days that it was detected upon X-ray that he had in fact suffered a fracture of the distal one third on the left tibia. He had also bruises on the left toe as shown in his first out patient treatment card at Isiolo (Ex.8).. At that time, the controversial bruise behind the left ear which is alleged by his father and Dr. Randall (PW,2) who saw him more than 2 years later was not noted. These early clinical notes are very important in a case of this nature where the injury suffered is disputed. I have scrutinized the medical records which were made on this child on 12th July, 1987 (Ex, 7 & 8) and also on the 13th of July, 1987 (Ex,9 (a) in which there is no mention of any injury behind the left ear. Taking these clinical notes together with the evidence of the two women Florence Makandi (DW.2) and Maritha Murige (DW,3).who were familiar with the Plaintiff prior to this accident, I hold that the hearing and speech defects which the Plaintiff minor now suffers from, cannot be attributed to the accident that occurred on the 11th of July, 1987. I believe that it has not been proved on a balance of probabilities that the deaf and dumbness which the Plaintiff minor now suffers from was not due to his fall in the said accident.

The Plaintiffs injuries in the said accident which I accept and upon which I am giving to assess damages are those contained in the medical report of Dr. Wamasaka dated 13th of May, 1988 (Ex,3). Those are consistent with the three different clinical notes that were made on 12th and 13th day of July, 1987 (Ex.7, 8 & 9(a)). The Plaintiff had suffered:-

- (i) Bruises on the left leg
- (ii) Swelling on the left leg
- (iii) Fracture of the left tibia at the distal one third

He was put on plaster of pavis for 3 weeks. The fracture healed without any complications as the infant that developed was subsequently controlled. The awards in, comperable, cases for these type of injuries ranges from Sh50,000/= to Sh.80,000/-. In the particular circumstances of this case, doing these best I can, I am satisfied that a sum of Sh.70,000/- would be just and reasonable to award the Plaintiff as general damages for his pain and. suffering. To this I will add Sh.224/- for medical expenses incurred and in obtaining Police abstract. It is regretted that no evidence was adduced with regard to the charges paid to both Dr. -Namasaka and Dr. Randall for their professional examination and reports on this

child. Such charges should be strictly, proved but in the absence of any such receipts, I would award the Plaintiff Sh. 600/- (six hundred for each Doctor which i think a reasonable fee for such reports. They were not so detailed but thorough.

In the result, the Plaintiff will have judgement against the Defendants jointly and severally in the sum of Sh.1,424/- as special damages and Shs.70,000/- as general damages all amounting to Sh.71,424/- together with costs of the suit and ' interest therein at Court rates from the date of Judgement.

Delivered at Meru this 9th day of July, 1992.

OGUK .S.O.

JUDGE

291/92

CORAM - J. E. ASHIOYA - D/R.

Mr. Mwarania for Plaintiff

Mr. Oluoch for Defendant

ORDER: By consent Plaintiff's bill of costs taxed at Shs.32, 596/-.

J. B. ASHIOYA

DEPUTY REGISTRAR, MERU.

18/9/92