



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Kwach, JJ.A.)
CIVIL APPEAL NO. 110 OF 1986

BETWEEN

LIVINGSTONE

OTUNDO.....APPELLANT

AND

**NAIMA MOHAMOUD (A minor who had sued through
her next friend Mohamoud Ali).....RESPONDENT**

(An appeal from a judgment and decree of the High Court

of Kenya at Nairobi (Abdullah, J.) dated the 4th day of

November, 1985

in

H.C.C.C. NO. 1367 OF 1981)

JUDGMENT OF THE COURT:

On 23rd September, 1980 at 6.30 p.m. the appellant was driving his peugeot 304 motor vehicle registration NO. KJL 103 along Major Kinyanjui road in the Eastleigh area of the City of Nairobi. This is a thickly populated residential area with residential buildings on both sides of the road. Families with children live in some of these buildings. At the time the appellant was driving along this road, human traffic on both sides of the road was heavy. People were walking along the pavement on both side of the road. The weather was clear and there was sufficient light. According to the appellant, he was familiar with this area and was driving his motor vehicle at a speed of 25 kilometres per hour. As he so drove, the respondent, a five year old female child, dashed from the midst of the people walking a long the pavement on his near side of the road and knocked herself against the left mudguard of this vehicle. She fell down on the pavement. The appellant braked his vehicle immediately. It stopped about 25 feet away from the point of impact. The latter was about two to three feet from the pavement on his near side of the road. Before the respondent came out from the midst of people, the appellant had not seen her. This

happened suddenly.

Before the accident, the respondent had been given a shilling and was just about to cross the road to go to a Kiosk on the opposite side to buy something. The accident occurred immediately after she entered the road. Consequent to this accident, she became unconscious for a few hours. She had cerebral concussion, fracture of the lateral 1/3 of the right clavicle and abrasion of both knees. She was hospitalised for four days. She blamed the appellant for these injuries and claimed damages in respect thereof from the appellant. At the time of hearing the suit against the appellant in the court below, it would appear that she had fully recovered.

In his judgment, Abdullah, J. said:

"In the absence of independent eye witnesses, photographs, measurements and sketch plan of the scene of the accident at or immediately after the accident, it is difficult to come to any positive conclusion with regard to causation of the accident. Having regard to the nature of the injuries sustained by the plaintiff, it cannot be said that the impact of the plaintiff with the motor vehicle was of such a force to conclude that the defendant was 'travelling at a high speed'. The defendant's version that his car stopped 25' after the point of impact has not been seriously challenged by the plaintiff. Moreover, P.W.3 also supports this assertion that the car stopped 25' after it hit the child. There was nothing in the demeanour of the defendant to suggest that he was an unreliable witness or his testimony was unworthy of credit. The defendant claimed that immediately before the impact, he was travelling at 25 kilometres per hour. There is no other evidence to dispute the rate of speed put forward by the defendant, except the assertion of the mother of the plaintiff. In view of all the evidence before the court, it cannot be accepted that the car was travelling at a high speed. However, such finding does not absolve the defendant from liability.

Besides the speed, the court must consider whether he kept any proper look out or sufficient regard for the pedestrians crossing the road. In doing so, regard must be had that the accident occurred in a residential area where according to the defendant there was heavy human traffic at that time of the day, namely, 6.30 p.m. when people were returning from industrial area to Mathare Valley. The defendant was familiar with that area as he used to travel frequently on that road. In these circumstances, it is not unreasonable to expect the defendant to be aware that in that residential area with heavy traffic, there may be children using the road. The defendant maintains that the child jumped all of a sudden on the left side of his car. I find this difficult to accept. It must be borne in mind that Naima was about 5 years old at the time of the accident. There is evidence that she had been given a shilling to buy something from the Kiosk across the road. It is possible that this child who had been given a shilling was happily trotting off to cross the road towards the Kiosk on the other side of the road in expectation of buying something palatable to her tongue. That does not suggest that she would jump on an oncoming vehicle. It may seem that she may have dashed out of the crowd of persons to cross the road. If so, should not the defendant have kept a proper look out for such eventuality, namely, that children in the residential area could dash out towards the road. I think such eventuality was a reasonable probability at that time of the day and a motorist who frequently travelled on that road and who was aware of heavy human traffic at that time of the day, should have expected such reasonable probability."

He then went on to say:

"To ask Naima, a child of 5 years, who ran away from the bosom of her mother, to buy sweets or something across the road from her house, to prove fault on the part of the defendant who was driving a lethal machine in a residential area where there was heavy human traffic in order to succeed in her claim for injuries received for being knocked down by that machine is to add insult to injury. In any event, this would be so, wherewithal to prove such fault is not forthcoming through no fault of Naima. In my opinion, the defendant who was using this lethal machine in the residential area where children may reasonably be expected to dash out

from the pavement teeming with heavy human traffic was under an obligation to keep greater look out for other road users, especially pedestrians like Naima, than Naima."

The learned judge then concluded:

"Having considered all the circumstances, including the highly likely possibility that Naima dashed across the road without keeping a proper look out, I come to the conclusion that the defendant also failed to keep a proper look out for such pedestrian of tender age as Naima and that he is liable.

He then proceeded to award the respondent general damages of Shs. 35,000/- for pain and suffering.

Dissatisfied with this decision, the appellant appeals to this court and puts forward seven grounds of appeal. These grounds are mainly on liability and quantum of damages. At the hearing of this appeal, counsel for the appellant submitted that although the trial judge found that the appellant was not driving at a high speed immediately before the accident, he, however, went on to hold that the appellant had a duty to be on the look out for an eventuality such as the one that occurred in relation to the respondent. To counsel, the judgment of the learned judge was one of sympathy than of law. He then adverted to the authorities cited in his list of authorities which he relied on in support of the appellant's appeal.

Responding to the appellant's appeal, counsel for the respondent contended that the matter before the trial court was determined on its own peculiar circumstances. According to him, the appellant was driving through a very thickly populated area of Nairobi when the accident occurred. He was familiar with this area. The onus on him was very heavy indeed. To counsel therefore, the appellant could not escape liability. In regard to general damages, counsel was of the view that the award by the lower court was modest and that this court should not interfere with it.

Having exonerated the appellant from the allegation of driving his motor vehicle at a high speed immediately before the accident, the learned judge nevertheless held that in the circumstances of the case before him, the appellant was under an obligation to keep a greater look out for other road users vis-a-vis the latter especially pedestrians like the respondent considering that there was a reasonable probability that at the time of the day he drove through the heavily populated area in Nairobi children in such an area could dash out towards the road. According to the learned judge, the appellant did not live up to this obligation. On account of this, he held him liable in negligence.

Clearly, at the time the appellant drove his motor vehicle along Major Kinyanjui Road in the Eastleigh area of the City to Nairobi in the circumstances set out above, he had an obligation to keep a proper look out for children who could dash out into the road from the adjacent residential buildings. But how great was this obligation for such an eventuality? In the circumstances of the case before the learned judge, the appellant's duty of care should have been judged by what he ought reasonably to have anticipated in this regard and then consider what course of action he would have taken to ensure that no accident occurred. In other words, the degree of his obligation in connection therewith was that of a reasonable man. That was the standard by which his negligence ought to have been adjudged. An obligation greater than this would mean imposing an impossible burden on him - see the case of *Moore (An Infant) v. P ayner*, (1975) RTR 127.

With the knowledge of the neighbourhood through which he drove his motor vehicle registration NO KJL 103 at a speed of 25 kilometres per hour, the appellant's evidence was that suddenly and before seeing her, the five years old respondent dashed out into the road from the midst of people walking along the pavement of his near side and about two to three feet from this pavement she knocked herself against the front left mudguard of his vehicle. This evidence was not controverted nor was there any indiction whatsoever that he did not measure up to his required obligation. In holding the appellant liable in negligence, the learned judge did not, in the circumstances of this accident, even consider what course of action he (appellant) would have taken to ascertain that it did not occur. The occurrence of this accident without more was no ground for holding the appellant liable in negligence.

The holding of the learned judge imposed an impossible burden on the appellant. This was not right in law. In the circumstances of the case before the learned judge, we are unable to agree with him that the appellant was negligent. In view of this, we do not have to deal with the appellant's appeal on quantum of damages. Accordingly, we allow his appeal, set aside the judgment of the superior court and dismiss the respondent's suit in that court with costs to the appellant herein. Costs of this appeal are awarded to the appellant. Those then are the orders of the Court.

Dated and delivered at Nairobi this 13th day of March, 1990.

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR