REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 271 OF 1983

CONSTANTINE PETER ABOLA OCHIENG ....PLAINTIFF

VERSUS

ALFRED OBUDHO AYIEKO...DEFENDANT

JUDGMENT

July 10, 1985, **O'Kubasu J** delivered the following Judgment.

The plaintiff, Constantine Peter Abola Ochieng, is a male child suing through his father, John Harry Ochieng Ongolo. This suit arises out of a traffic road accident which occurred on the May 18, 1981, along Outer Ring road in the City of Nairobi. According to medical reports produced in evidence, the plaintiff was a young boy aged about 10 years. Since the boy sustained very serious injuries as a result of this accident he did not recover sufficiently as to be in a position to give evidence when the hearing of this suit commenced on May 27, 1984.

Like many accident cases we have two versions on how this tragic accident occurred. We have the evidence of Jacqueline Atieno (PW 1) who was walking with the plaintiff along Outer Ring road. Then we have the evidence of Mwangi Karanja (PW 2) who was also walking along that same Outer Ring road. And lastly we had the evidence of Julius Mungai (PW 3) who was in a *kiosk* near Outer Ring road. These three witnesses gave evidence which was almost similar and briefly put, they are all saying that the defendant was to blame for this accident. On the other hand, we have the evidence of Alfred Obudho Ayieko (DW 1) the defendant and his passenger Philip Muchunga (DW 2). According to DW 1 and D W 2 this accident occurred due to the negligence of the plaintiff.

I now wish to examine the evidence of each of these witnesses more closely.

Jacqueline Atieno (PW 1) testified that on May 18, 1981 at about 11.00 a.m., she was walking with the plaintiff and that they crossed the road and then started walking by the roadside. Then PW 1 suddenly realized that the plaintiff had been knocked down by a vehicle. This vehicle then ran over the plaintiff and proceeded on. There were people waiting for a bus and they stopped the driver and instructed him to take the plaintiff to the hospital. PW 1 recognized the driver of the vehicle that had knocked down the plaintiff as the defendant in this case. PW 1 accompanied the plaintiff and the defendant to the hospital. In cross-examination, PW 1 said that the plaintiff was carrying a home-made toy prior to the accident and that they were walking on the verge of the tarmac. PW 1 also said that there was no bus near the scene.

Mwangi Karanja (PW 2) testified that on May 18, 1981 at about 11.30 a.m. he was walking from Embakasi towards Donholm Estate when he saw two children walking from Donholm Estate. The two children then crossed Outer Ring road after checking both sides. The two children then continued walking towards the City Centre. Then a vehicle from Embakasi direction appeared at a high speed and making a

lot of noise. This vehicle passed PW 2, left the road and hit the boy throwing him in front and then ran over him. The driver of the vehicle failed to stop and PW 2 ran after the vehicle so that he could take its registration number. The driver was however forced to stop by those at the bus stage and PW 2 was able to take the vehicle's registration number as KMN 950. The driver was then forced to take the child to the hospital.

Julius Mungai (PW 3) in his testimony stated that on May 18, 1981 he was at a *kiosk* when he saw a girl and a boy crossing Outer Ring Road. The two started walking on the roadside. Then PW 3 heard a vehicle coming at a very high speed and making a lot of noise. This vehicle hit the child, threw him in front and ran over him and then continued. People shouted at the driver of that vehicle to stop. People then forced the driver to take the child to the hospital.

Put briefly, what these witnesses (PW 1, PW 2 and PW 3) were saying is that the defendant was driving at a very high speed his vehicle left the road and hit the child who was on the verge, threw him in front and then ran over him. That is the version being put forward by the plaintiff's camp. Let us then move over to the defendant's camp and consider their version.

The defendant, Alfred Obudho Ayieko (DW 1), testified that on May 18, 1981 at about 11.00 am he asked for permission to go to the bank to collect some money. He drove form Embakasi along Outer Ring road. He gave a lift to Philip Muchunga (DW 2) and Maina. The defendant was driving his car registration numbers KMN 950, a Peugeot 404. He was driving at a speed of 40 to 50 KPH. He came along a section where there were two bus stages on both sides of the road.

He gave an indication to show that he was turning left into Jogoo Road. Then as the appellant was overtaking a bus, there came a child from behind that bus. The child was pushing a toy trolley. According to the defendant, the child did not stop to look whether it was safe to cross. The defendant applied brakes and tried to swerve but unfortunately the vehicle hit the child. The defendant stopped and got out of his car. The child who is the plaintiff was lying on the road. The defendant and his two passengers put the child in the car and asked the lady who had been with the child to accompany him to the hospital. The defendant drove to Kenyatta National Hospital Casualty Section. He got a card for the child and he was admitted for observation. The defendant turned to the lady and asked for the contact of the child's father. Then the defendant went to report the accident at Nairobi Area Police Headquarters. The defendant recorded a statement and his car was detained for inspection .

According to the defendant, the accident occurred in the middle of the road and it was not true that his car left the road and went to the pavement of the road.

Philip Muchunga (DW 2) was a passenger in the defendant's car and his evidence on how the accident occurred was similar to that of the defendant (DW 1). After the accident Muchunga (DW 2) went to Industrial Area Police Station and recorded a statement on how the accident had occurred. He (DW 2) was a witness for the defendant in a traffic case arising out of this same accident in which case the defendant had been charged with dangerous driving. The defendant was however acquitted in that traffic case.

The court proceedings in respect of the traffic case were produced vide court File No 9314/81 as Exhibit 1.

Looking at the evidence before me on how the accident occurred, I am entitled to make my own independent evaluation and come to my own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the resident magistrate's court at Makadara then he is not liable. We have to look at the evidence as a whole and reach our own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored.

The version given by the three witnesses (PW 1, PW 2 and PW 3) for the plaintiff has to be compared to the version given by the defendant and his witness. PW 1, PW 2, PW 3 testified to effect that the defendant was driving very fast, left the road, hit the child and then ran over him. This version is, in my

view, exaggeration of what took place. It cannot be true. There was no independent evidence to show that the defendant's vehicle left the road. We now know that the defendant was driving a Peugeot 404 car. If this car had run over this child surely he would not have survived. Hence, I would accept the defendant's version which is to the effect that the plaintiff emerged from behind a bus and hence the defendant was not able to brake in time to avoid hitting the child. Having accepted the defendant's version we must now consider whether the plaintiff who was a child then aged 10 years could be guilty of contributory negligence. In *Butt v Khan* (Civil Appeal No 40 of 1977 – unreported)— Madan JA said:

> "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 the capacity to know that he ought not to do the act or make omission."

Then in *Rahima Tayab and Another v Anna Mary Kinanu* –(Civil Appeal No 29 of 1982- unreported) Law J quoted the above and went on to say:

> "This dictum is entitled to the greatest respect. It will be noted that Madan JA did 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."

I must apply the above to the facts of this case. We have evidence from PW 1, PW 2 and PW 3 that the two children (plaintiff and PW 1) had crossed Outer Ring Road after checking both sides – an indication that they had the requisite road sense. But Jacqueline Atieno (PW 1) was a much older child than the plaintiff who was only 10 years old. Having regard to the plaintiff's age, can contributory negligence be imputed to him in this case? In my view this would appear to be a borderline case. In *A-G v Vinod* [1971] E A 147, the Court Appeal for East Africa upheld a finding that a boy aged 8 ½ years, who ran out from a line of parked cars into the path of an oncoming car, was contributorily negligent to the extent of 10%. In his judgement, Mustafa JA said:

> "In dealing with contributory negligence on the part of a young boy, the age of this boy and his ability to understand and appreciate the dangers involved have to be taken into consideration."

and he (Mustafa JA) cited the following passage from judgement of Lord Denning in *Gough v Thorne* [1966] WLR 1387

> "A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. 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. He or she is not to be found guilty unless he or she is blameworthy."

In *Tayab's* case (*supra*), Law JA cited the above authorities and went on to state:

> "In the instant case, the trial judge held in clear terms that the plaintiff had the requisite road sense. His failure to see the approaching car was in my view 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 I would follow the precedent of *Vinod's* case and assess her degree of liability at 10%."

In the case before me, I find that the plaintiff was blameworthy since he emerged from behind a bus and dashed across the road without ascertaining that it was safe for him to do so. But in view of his tender age I would assess his degree of liability at 10%.

There now remains the question of damages. From the medical reports and from oral evidence of Dr Sande (PW 5) the plaintiff sustained very serious injuries as a result of this accident. He had severe brain damage and a compound left thigh injury. In his oral evidence Dr Sande (PW 5) stated *inter alia:*

"This boy will never walk on his feet. There is no intellect left. He cannot go to any school. The boy is one which we describe as a vegetative state. It means that he cannot do anything for himself. Although he has a chance of normal life, that life requires constant nursing and medical care. If the brain is not working properly one is unable to breath and one is likely to develop chest diseases like pneumonia. Since they cannot look after their toilet they are prone to develop urinary infection."

The above is a fair assessment of the plaintiff's condition after he had been examined by specialists like Professor Jeshrani and Professor Ruberti. I do not need to reproduce what has been stated in various medical reports produced in this case since even Mr. Kamau for the defendant does not deny the degree of injuries as assessed by Dr Sande (PW 5). Our task is to assess what would be reasonable and fair quantum of damages in this case. As we do so we must bear in mind any recent cases of similar nature not in overseas and developed countries, but, in Kenya. Foreign awards can be used as a guide only. We Kenyans are mature enough and must set our own standards. We must not be slaves to foreign decisions. We know the state of economy and we know the standard of living in this country.

As we assess damages in personal injuries cases, it should always be remembered that money cannot adequately compensate life or a lost limb. As we assess damages we must always strive to secure some uniformity in the general method of approach. What I mean here is that comparable injuries should as far as possible be compensated by comparable awards. Hence we must always keep in mind the current level of awards being ordered in similar cases. And when I say I am not stating anything new as can be seen from the following passage from the speech of Lord Morris of Borth–y-Gest in the case of *H West and Son Ltd v Shephard* [1964] AC 326 at 345:

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

Mr. Wamalwa, who appeared for the plaintiff, submitted that a proper award in this case would be a figure somewhere in the region of 3 to 5 million shillings. Mr. Wamalwa was however unable to refer me to any recent cases in which injuries similar to those of the plaintiff were considered and award in the region of 3 to 5 million shillings ordered. It should be pointed out that since human life is full of uncertainties we cannot say that we must always look for past cases of similar injuries. Perhaps we might be dealing with a case of the worst injuries. Perhaps a worse case is yet to come before us. But on my own part I would say that I have come across and read of worse cases than what I am dealing with here. We are dealing with a case of severe brain injury which rendered the plaintiff to be described as a 'vegetable.' It is indeed a serious matter.

I wish now to consider a few cases in our own courts in which brain injuries were considered.

In *Joyce Wanjiku Mogothe v EA Post Telecommunication and Another* Nairobi High Court Civil Case No 2536 of 1977 (unreported), a girl aged 9 at the time of accident, sustained fracture of the skull and brain injury. She was unconscious for 10 days. Mental capacity was affected, school work deteriorated and there was reduction of memory. In that case the court assessed general damages at Shs 300,000. Our present case reveals more serious injuries than what was awarded in Mogothe's case.

In *Bashir Ahmed Butt v Uwais Ahmed Khan* Civil Appeal No 40 of 1977 (unreported), the Court of Appeal reduced an award of £20,000 to £15,000 as damages awarded to a bright 7 1/2 years old school boy who sustained a fractured skull and brain damage, on the ground that the trial judge had over-estimated the chances of epilepsy supervening . I have also considered the awards in various cases for example–*Uganda Cement Industry Limited v Imelda Kawa* Civil Appeal No 51 of 1975 (unreported), *Mwanahamisi v Nairobi Deluxe Services and Others* Civil Appeal No 25 of 1976, *Mohamed Juma v*

Kenya Glass Works Limited Civil Appeal No 1 of 1980, *Oratah v George Ayuka Otieno and Another* High Court Civil Case No 109 of 1983 and *Musila v Zablon W Marigo* Nakuru High Court Civil Case No 376 of 1979. I have also considered the other cases referred to by both advocates but in my view the most relevant of these is *Tayab's* case. Before I come down to the figures let me say that it would appear that in *Tayab's* case the Kenya Court of Appeal indicated that it is important to keep awards for personal injuries under control lest a danger arises of injuring the body politic by making large awards. And this is why I said earlier that we should look at the situation from our own country's point of view. Let the Courts in Britain award large sums. Let the Courts in USA award even larger sums. But our standards are different. It would be unreasonable to copy blindly from awards made in those countries. In *Tayab's* case Potter JA cited the following passage from *Lim Poh Choo v and Islington Area Health Authority* [1979] 1 All ER 332 at page 341 by Lord Denning MR.:

> "I may add, too, that if these sums get too large we are in danger of injuring the body politic, just as medical malpractice cases have done in United States of America. As large sums are awarded premiums for insurance rise higher and higher and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the tax payers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

It is interesting to note here that even in the United Kingdom, strong and developed as it is, we still hear of concern expressed in respect of large awards. After all is said and done what the court must try to do is to achieve a fair and reasonable compensation for injuries sustained.

I have now considered the degree of injury in the present case and other cases of similar nature and bearing in mind all that I have said, I would assess general damages for pain, suffering and loss of amenities at Shs 700,000. But since I have found that the plaintiff was guilty of contributory negligence to the extent of 10% I now award him 90% of this amount of Shs 700,000 which comes to Shs 630,000.

I now move on to special damages. Mr. Wamalwa handed in a list showing what he considered to be past and future expenses. I have considered this list together with the evidence of John Harry Ochieng Ongolo (PW 6), the plaintiff's father and Ernest John Barlow (PW 7), the proprietor of Invalid Equipment. Mr. Kamau, who appeared for the defendant, was of the view that past and future expenses should not be itemised. There are however quite a number of items that Mr. Kamau conceded were correct. Items 1,2,3,5,6, and 7 cannot be contested and Mr. Kamau very correctly conceded that these have been proved.

The total comes to Shs 53,173. Item 4 was not proved but since there was indeed transport expenses incurred I award a figure of Shs 20,000 to cover this item. Item 8(c) is allowed at Shs 18,000 per annum with multiplicand of 10 and hence total comes to Shs 180,000. There was no evidence to support item 8(b). I allow 8(c) at Shs 1,260 per annum with multiplicand of 10 and hence the total comes to Shs 12,600. I also allow 8 d (i), 8 d(ii) and 8(iii). I use the multiplicand of 10. Hence d(i) comes to Shs 36,000, d(ii) Shs 90,000 and d(iii) Shs 79,200. I shall also allow item 10 and from the evidence of Barlow (PW 7) life of electrical bed would be about 8 years and hence this would have changed. Hence item 10(ii) would be multiplied by 6 assuming that the plaintiff would reach the age of 60. According to evidence of PW 7 life of wheelchair could be for life.

Hence under item 10 I award Shs (25,00 x 6) + 9,000 +500, which comes to Shs 159,500. Having done all the calculations by adding up all the above underlined figures the total comes to Shs 630,473, representing past and future expenses.

In the end the damages will be as follows:

General damages for pain suffering and loss of amenities - Shs 630,000

Special damages - Shs 630,473

Total **- Shs 1,260,473**

As we look at these figures it should be remembered that the plaintiff is to receive this money in a lump sum and hence if properly invested it could be of great assistance to him and his father in future. So the final position is that this poor boy who has been rendered a cabbage since he will never walk, never go to school and be subject to all sorts of chest diseases is now awarded the sum of Shs 1,260,473, as general and special damages; plus interest at court rates and the costs of this suit.

Order accordingly.

Dated and delivered at Nairobi this 10th day of July , 1985.

E.O O'KUBASU

JUDGE