IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Madan, Wambuzi & Law JJA)

CIVIL APPEAL NO. 40 OF 1977

BETWEEN

BUTT.....APPELLANT

AND

KHAN.....RESPONDENT

JUDGMENT

This is an appeal by the defendant in a High Court suit in which the plaintiff, an infant suing through his father as next friend, was awarded general damages of Kshs 400,000 and special damages of Kshs 3,276, in respect of injuries suffered by him through the defendant's negligent driving of a motor car. The grounds of appeal do not challenge the finding that the defendant was negligent, but they contend that the plaintiff should have been held to have been guilty of contributory negligence, and that the general damages awarded were manifestly excessive.

The accident giving rise to this appeal occurred shortly before 8 am on September 15, 1972, at Karakoram Road in Nairobi. There are several schools in this part of Nairobi, and at the relevant time Karakoram Road was thronged with children on their way to school. The plaintiff, then aged 71/2 years, and his sister Raheela, then aged about 9 years, were two of these children. They were on their way to Juja Road Primary School, and for this purpose had to cross Karakoram Road. Raheela, who was walking ahead of her brother, crossed safely, but the plaintiff had only partly crossed when he was struck by a car driven by the defendant, which left brake or skid marks 36 feet 9 inches long visible on the road-way. The learned trial judge (Sachdeva J) held that the defendant drove his car at a speed which was excessive in the circumstances, and that he was not keeping a proper lookout. These findings have not been challenged on this appeal. It was, however, submitted by Mr Sharma that the plaintiff was clearly guilty of contributory negligence, in attempting to cross the road when it was unsafe to do so. The learned judge directed himself most carefully on this point. He referred to a number of relevant authorities. For instance, in *Andrews v Freeborough* [1966] 2 All ER 721, a case concerning a girl aged eight years who stepped off the kerb into the path of an oncoming motor car, Wilmer LJ said:

"I should have needed a good deal of persuasion before imputing contributory negligence to the child having regard to her tender age."

Davies LJ said:

"Even if she did step off into the car it would not be right to count as negligence on her part such a momentary... act of inattention or carelessness."

In *Gough v Thorne* [1966] 1 WLR 1387 the Court of Appeal refused to attribute any contributory negligence to a girl aged 131/3 years who was knocked down while crossing a road. The learned judge held that a very young child could not be guilty of contributory negligence, although an older child might be, depending on the circumstances. The test was whether the child was of such an 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. On the other hand in *Attorney General v Vinod* [1971] EA 147, the former Court of Appeal upheld a finding that a boy of 8 years of age, who ran across a road from a gap between parked vehicles, was contributorily negligent to the extent of 10%. Clearly each case must depend on its peculiar circumstances. In the instant case, the learned trial judge, having, found that the defendant had been negligent, and the plaintiff was struck when almost half-way across the road, held that at the most the plaintiff had committed an error of judgment for which contributory negligence should not be attributed to him. I respectfully agree, and I would dismiss the appeal in so far as it relates to contributory negligence.

As regards the appeal against the quantum of damages, the plaintiff suffered a fractured skull, the fracture line extending from the frontal bone to the base of the skull; he lost two permanent teeth, and bled from the nose. He was unconscious for some ten hours, spent four days in hospital and a further month in bed at home. These were serious injuries, but could not by themselves justify an award of Kshs 400,000 by way of general damages. The fracture had healed, and there is no clinical evidence of any physical damage to the brain although Dr Ruberti, who was called as a witness for the plaintiff, was of the opinion, on the basis of an electroencephalograph, that some of the brain cells were dead and would not regenerate. He did not particularise the extent or location of this damage, to which he had made reference in his report. The medical experts agree however, that the plaintiff has suffered a degree of permanent disability as a result of his injuries. Dr Ruberti described this disability as follows:

“In my opinion, this patient had had a severe mental involvement following the accident, and I would assess his permanent disability as at least 50%.”

Mr Nevill, the expert witness called on behalf of the defendant, certified as follows:

“He is suffering from a moderate degree of postconcussion syndrome. The history and school records suggest a diminished cerebral ability which could amount to a disability of perhaps 25%.”

The learned judge assessed the degree of permanent disability at 50%, in accordance with Dr Ruberti’s opinion. In coming to this finding, the learned judge had the advantage of seeing and hearing the plaintiff when he gave evidence, and of hearing other witnesses, such as the plaintiff’s headmaster and father. The effect of this evidence was to satisfy the learned judge that, whereas before the accident the plaintiff had been a normally bright and intelligent child, he now lacks concentration, suffers from headaches and failure of memory, and his performance at school has deteriorated to a considerable extent. This is a grave state of affairs, and one which will adversely affect his earning power and enjoyment of life in the future. I cannot see any misdirection or error on the part of the learned judge in his approach to the question of permanent disability, and I see no reason to differ from his assessment of 50% in this respect. I would dismiss the grounds of appeal that the learned judge erred in rejecting Mr Nevill’s assessment of 25%, and that he erred in finding that the plaintiff was now an abnormal child. There was ample evidence to support these findings.

There is however, one further matter which requires consideration in this case, and that is the probability or otherwise of the onset of post-traumatic epilepsy Dr Rubert estimated that there was a 50% chance of epilepsy developing; in Mr Nevill’s view the chance was no more than 5%. For the purpose of his assessment of damages, the learned judge fixed upon the figure of 25%. In this connection it must be remembered that the head injury suffered by the plaintiff was what is known as a ‘dosed head’ injury. There was no intercranial haematoma, and no evidence of actual damage to the brain tissue by reason of pressure from a depressed fracture or penetration of bone splinters. According to Brains, *Diseases of the Nervous System* the incidence of epilepsy where there has been no penetration of the dura (as in this case) is only 2%. According to Dix and Todd, *Medical Evidence in Personal Injuries Cases*, the incidence in closed-head injury cases (as this was) is not more than 5%. These authorities support Mr Nevill’s

evidence that in the case of 'closed-head' injuries, 5% would represent the average incidence for the subsequent occurrence of epilepsy. He also said that if there is no manifestation of epilepsy within a year or two the risk is even smaller. This statement also finds support in the text books In the case now under consideration, more than five years have passed since the accident, and fortunately no signs of epilepsy have been detected in the plaintiff. It would seem that the chances of epilepsy supervening in his case are remote in the extreme. The learned judge has written a most careful and thorough judgment and it is with considerable diffidence that I feel constrained to differ from his finding as to the probable incidence of epilepsy in this case. The learned judge, rightly in my own opinion, rejected Dr Ruberti's assessment of 50%, which according to the text books would be a high figure even when dealing with 'open-head' or 'missile' brain damage. I agree with Mr Sharma's submission that Mr Nevill's assessment of 5% is probably the correct figure and should have accepted. The learned judge in my respectful view, erred in holding that the probable chance of epilepsy supervening in this case was as high as 25%. This must have had some effect on his mind in fixing the general damages at Kshs 400,000, a high figure by any standards. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This, with respect, is what I think happened in this case. The learned judge attached undue importance to the likelihood of epilepsy developing in the future. To what extent this view influenced him in awarding the amount he in fact awarded is a difficult question to answer. I can only say that in my view he probably awarded considerably higher damages than he would have done had he appreciated that the likelihood of epilepsy supervening in this case was minimal. In *Oluoch v Robinson* [1973] EA 108 the plaintiff suffered actual and severe brain damage and epilepsy in fact supervened. The then Court of Appeal reduced the general damages awarded from Kshs 280,000 to Kshs 220,000. The plaintiff in that case was aged 62, and although the physical injuries suffered by the plaintiff in this case were much less severe, his whole life lies before him, and he will be gravely handicapped throughout by reason of the degree of mental impairment. On the other hand he has fully recovered his physical injuries. Again, it may be (I put it no higher) that the learned judge was unduly influenced by recent awards in English courts. For one thing, it must be remembered that an English pound is only worth Kshs 15 of Kenya money, so that an award of £20,000 in England represents an award of £15,000 in Kenya. Doing the best I can in all the circumstances, and having regard to the constant erosion in the value of money, I would reduce the general damages to that limited extent, and order that the decree appealed from be amended accordingly. Notwithstanding this partial success, I would make no order as to the costs of this appeal and would leave the parties to bear their own costs.

Wambuzi JA. I have had the advantage of reading in draft the judgment prepared by Law JA. I agree that the learned judge directed himself properly on the question of contributory negligence and I do not think it has been shown that this court is justified in interfering with his finding that the plaintiff aged 71/2 at the time of the accident, was not guilty of contributory negligence.

However, as regards the quantum of damages I also feel constrained to differ in some measures from the very careful judgment of the learned judge on the issue. In my considered view the damages awarded in this case are so inordinately high that I think this court should interfere with the award for two reasons

First in the case of *Attorney General v Vinod* [1971] EA 147 a child who was only one year older than the plaintiff in this case was awarded Kshs 70,000 for what I consider to have been more serious injuries. He had a fractured skull and lost a certain amount of actual brain matter. In addition he had compound fracture of the right leg and shortening of that leg. He was in hospital for about four weeks and thereafter he had to attend as an out-patient fortreatment. There was a likelihood that he would suffer from epileptic fits in the future and also from some measure of permanent deterioration in his general mental condition. In the present case there was no loss There was no loss of actual brain matter and no evidence of physical injury to the brain. Apart from the fracture to the skull and loss of two permanent teeth, there was no other fracture as in the *Vinod* case. The plaintiff was in the hospital for only four days. Admittedly no percentage of permanent disability appear to have been given in *Vinod's* case but I note in the instant case, a conflict of the medical evidence on this issue which is given as 50% on one hand and 25% on the other. There is a further clash of medical opinion as to the usefulness of what has been referred to as EEC (electro-encephalogram) used by Dr Ruberti in determining severity of head injuries. Be that as it may,

the learned judge gave his reasons for rejecting the lower percentage but I should not think that those mathematical expressions must be approached in relation to the actual damage suffered as proved on the evidence. I think it is accepted that these percentages are no more than estimations by the medical men. In *Gomes v Attorney General*, Uganda [1969] EA 259 a student sustained severe brain damage leading to a change in personality and impairment of academic ability. The possibility of the occurrence of epilepsy was 3% three years after the accident. He was awarded £2,250 general damages.

In *Oluoch v Robinson* [1973] EA 108 the respondent suffered arthritis in the knee and brain injury resulting in epilepsy, black outs, lack of memory and concentration. The damages of £14,000 award to him were reduced to £11,000 by the Court of Appeal for East Africa. Admittedly at the time of the trial the respondent was aged sixty two and had a much shorter time to live than the plaintiff in the instant case. On the other hand his earning capacity was known and loss to him in that aspect could be more accurately estimated than in this case. In *Bhogal v Burbridge* [1975] EA 285 it was stated that some uniformity must be sought in the award of damages and recent awards in comparable cases in local courts may be looked at. I note that the learned trial judge did also consider a number of awards in foreign courts and these authorities have been relied on by Mr Vohra for the respondent, but as my learned brother Law JA would put it, these foreign awards should act only as a guide bearing in mind differing conditions of Kenya, see *Kimothia v Bhamra Tyre Retreaders* [1971] EA 81. Even taking into account inflation on which no evidence was adduced, perhaps leaving the matter to judicial notice of what it was, I am unable to say, for example, that the money value has fallen over six times in the last seven years since the decision in the Vinod case. I think there should have been some evidence to guide the court on the question of inflation.

Secondly, I respectfully agree with my learned brother Law JA that the learned judge's estimate of 25% as the chance of epilepsy developing in this case is against the weight of evidence. I appreciate that there was the evidence of Dr Ruberti who fixed the chance at 50%. As I said in this judgment these are mathematical expressions and must be weighed with the other evidence. In the plaintiff's condition Dr Nevill's estimation of no higher than 5% is supported by other medical works based on the type of injury suffered by the plaintiff. With respect Dr Ruberti's figure of 50% stands by itself. The evidence shows that the learned judge clearly overestimated the chance of epilepsy developing in this case and this must have influenced the quantum of damages he awarded.

I am alive to the difficulties attendant upon determining compensation in money terms, a question very carefully considered by the learned trial judge. But I would think that in the circumstances of this case and for the foregoing reasons an award of Kshs 300,000 proposed by Law JA is on the high side but I would concur in the proposal and also in the other orders as he proposes.

Madan JA. I have had the advantage of reading in draft the judgments of both Wambuzi and Law JJA. The facts of the case are, with respect, lucidly set out in judgment of Law JA, and I will not repeat them. While not challenging the finding of negligence on his own part, the defendant's first contention before us is that the plaintiff a boy 71/2 years of age should have been held to have been guilty of contributory negligence. After a very careful analysis of the evidence before him the learned trial judge held:

"In the instant case it is admitted by the defendant that the boy had traveled a distance of about nine feet almost half the width of Karakoram Road before he was hit, and even if he dashed into the road as claimed by the defendant he must have expected to get to the half of the road before the defendant's car passed. This was at most a slight error of judgment for which, to my mind, contributory negligence cannot be attributed to the boy."

I respectfully agree, and I would also dismiss the appeal insofar 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, insofar 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.

Also in my opinion high speed can be prima facie evidence of negligence in some cases. A person

travelling within or at the permitted speed limit may be immune from prosecution for a traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 mph may not be a safe speed in the early hours of the morning when children go to school along and across a road which known to the driver as in the instant case, serves an area with several schools in it. In a manner of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence.

The defendant's second contention before us is that the quantum of general damages ought to be reduced.

It is not without some reluctance as well as with some trepidation that I beg to differ from my two learned brethren who are, with respect, well experienced in a matter of this kind, for I am of the opinion that the appeal against the quantum of damages should be dismissed.

Speaking generally, it is necessary to find the present correct bearings for the assessment of damages in injury cases as a result of the changed conditions of life which have toppled over many of the older concepts. Some awards of damages made not so many years back which were considered reasonable and proper then would I think be considered inadequate now. I think gone are the days when an award of £1,000 for quite a serious injury was considered munificent; also gone are the days when a reasonably tidy sum of money lasted a fairly long time, and it could buy the comforts of life. The pattern of living has changed, the outlook of the society has also changed. Some luxuries have become common necessities, and some necessities are more expensive to buy than some of the luxuries in the past. We live in a consumer society.

For example, I think also gone are the days when an award of Kshs 12,000 for a fracture of the leg leaving it three-quarters of an inch shorter together with some limitation of the flexion of the knee was allowed to stand upon appeal though with some hesitation (see *Femandes v People Newspapers Ltd* [1972] EACA 63). Also gone are the days when Kshs 20,000 was awarded as general damages for the loss of three fingers or the right hand even though it was recognised that the injury involved an undoubted substantial loss of earning power (*Gomes v Attorney General, Uganda* [1969] EACA 259). As proof of recognition of the changing conditions, we may compare *Gomes* with *Mworia v Corrugated Iron Sheets Ltd* [1975] EA 240, in which case the sum of Kshs 50,000 was awarded for the loss of four ringers of the left hand, for the useless left hand.

From the general to the particular. The question to ask is what have the injuries suffered in the accident done to and what will be their after-effects on the plaintiff. I will give a resume of the evidence. The plaintiff has lost at least half his mental capability; has he become half-witted! There is a blank look about his face, 'he is not there' with it. He has no expression of the face that could reflect his intelligence. He cannot do intelligent thinking. He can speak but the contents of his speech is practically useless, and he talks nonsense. He has a tendency to overeat and has no control over the eating of food. He cannot take part in serious sporting activities.

A part of the plaintiff's brain cells are dead due to the accident and they do not regenerate. The plaintiff had a severe mental involvement and his disability is at least 50%; his future is like that of mentally retarded people. He would be absolutely useless in the academic field, he might be able to do a manual job like gardening. He could not do any work requiring intelligence, he will never be able to achieve a responsible position. In social life also he would not be able to participate in anything intelligent.

When the plaintiff joined his school in 1972, he was an average normal student and a bright child; after the accident he has become poor and his performance has deteriorated. On one occasion after the accident he scored only thirty six marks out of a total of four hundred. He is a weak learner in the class, talkative and playful. His handwriting is below standard. His chances of passing CPE are considered absolutely nil; therefore, his secondary education would be impossible. His mental age was assessed at 7 when he was already 11 years old. His memory lets him down and he is unable to concentrate. He is an abnormal child.

The doors of leading a normal life are at least half closed to him forever. His economic progress has become blocked.

I respectfully agree with Law JA that the learned judge erred in fixing the chances of the plaintiff developing epilepsy in later years at 25%. It is an arbitrary figure which is not justified by the evidence. Had the learned judge fixed it at the figure of 5%, the figure indicated by consensus of medical opinion, would necessarily have awarded a very much reduced sum than Kshs 400,000, would have been less by £500 or £1,000 or perhaps a little more. I certainly would not go as far as Kshs 100,000 I very much doubt that the learned judge would have reduced his figure of Kshs 400,000, and if he did so that the reduction would have been substantial. Neither do I see any error on the part of the learned judge which makes his award inordinately high as to represent an erroneous estimate. I think the way to look at the award is to treat it as a global sum, and say that it is reasonably fair compensation for a normal child who has been turned into an abnormal individual who has a life span of about fifty years left to him during which period his life will perforce live as quite a useless and unwanted member of the human society because the world of normal people will remain closed to him.

With respect while I would be prepared to take judicial notice of the fall in the value of money, I would not attempt to equate the award of damages in this case with an award in a similar case in England even though we take a great deal of our legal inspiration from there, on the basis that Kenya money, in the parlance of economic theories, is worth more or less than the English pound. Each case depends upon its own facts. In arriving at the figure for an award of general damages the paramount consideration would be the conditions prevailing in Kenya.

I fear that from the point of view of the general public and the profession the result of this appeal may be considered satisfactory. With respect, Law JA is of the opinion that the award of Kshs 400,000 general damages should be reduced to Kshs 300,000. Wambuzi JA though he accepts this new figure, considers it is on the high side. I am of the opinion that the award made by the learned judge should be upheld. I appreciate that litigants and those who advise them do not want a lottery in this matter. (Per Kneller J in *Bhogal v Burbridge* [1975] EA 285 at 292.) In the words of Lord Denning MR in *Ward v James* [1965] 1 All ER 563 at 571:

“From time to time the considerations may change as public policy changes, and so the pattern of decision may change. This is all part of the evolutionary process.”

Only time will tell.

I would dismiss the appeal against the quantum of damages also. As Wambuzi JA and Law JA are both of the opinion that the award of general damages be reduced from Kshs 400,000 to Kshs 300,000, the order will be to allow the appeal to this extent, and the decree of the High Court will be amended accordingly.

I concur in the order for costs proposed by Law JA.

Dated and Delivered at Nairobi this 1st day of February 1978.

C.B.MADAN

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JUDGE OF APPEAL

S.W.W.WAMBUZI

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR