



**IN THE COURT OF APPEAL  
AT NYERI**

**(CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, JJA)**

**CIVIL APPEAL NO. 328 OF 2005**

**BETWEEN  
W.K(MINOR SUING THROUGH NEXT FRIEND AND MOTHER L. K .....  
APPELLANT**

**AND**

**GHALIB KHAN NEER CONSTRUCTION ..... RESPONDENTS**

***(An appeal from a Judgment and Order of the High Court of Kenya at Meru (Ong'udi, J) dated 9<sup>th</sup> May, 1995***

***in***

***H. C. C. C. No. 475 of 1993)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal against the judgment and decree of the High Court dismissing the appellant's suit for damages arising out of injuries sustained by the appellant in a road traffic accident.

The appellant being a minor filed the suit through her mother L.K as the next friend.

By the amended plaint the appellant averred, among other things, that in 26<sup>th</sup> January, 1993 when she was walking by the road side along Ring Road Ngara in Nairobi, Ghalib Khan (1<sup>st</sup> defendant) so negligently drove motor vehicle registration no. KZW 450 owned by Neer Construction (2<sup>nd</sup> defendant), that it hit the plaintiff and occasioned her serious injuries. The particulars of negligence were specified as, driving at excessive speed in the circumstances; failing to keep proper look out, failing to see the plaintiff in time to avoid the accident and failing to stop, slow down or swerve.

The plaintiff pleaded that she would rely on the doctrine of *res ipsa loquitur*. Further she pleaded that as a result of the accident she sustained bruises on the buttock and knees; fracture of the left superior pubic rami and bruises on the right head and neck.

L.K (PW 1) testified that the plaintiff was 11 years at the material time and that she was working as a house maid in Nairobi. The trial Judge examined the plaintiff orally and was satisfied that she possessed sufficient intelligence but nevertheless, she did not understand the meaning of the oath. Consequently, the plaintiff was allowed to give unsworn evidence.

The **appellant – W.K** (PW 2) testified, among other things, that she was employed as a house maid in Nairobi; that on the material day she was sent by her employer to buy paraffin; that before crossing the road she looked at both sides but saw no vehicle; that after crossing the road and while at the other side of the road, she was hit by a vehicle; that the road is a very busy road; that she had crossed the road once before; that she crossed the road slowly and did not run; that she had been in Nairobi for four months before the accident; that she does not know how to read and that the driver took her to Aga Khan Hospital.

The defendants admitted in the amended defence that the accident occurred but denied negligence. They pleaded, among other things, that the accident was solely caused or substantially contributed to by the negligence of the plaintiff; that the plaintiff was negligent in walking directly on the path of the oncoming vehicle; in failing to keep any proper look out; in failing to see or heed the presence of the motor vehicle; and by “*standing on the middle of the road holding hands with another girl totally oblivious of the oncoming motor vehicle*”.

The defendants alternatively pleaded that the accident was contributed to by the negligence of the parent or guardian of the appellant by allowing a child of tender years to walk unaccompanied on a major highway, and by failing to have any regard to the safety of a child of tender years.

The first respondent testified, *inter alia*, that he was driving along Ring Road, Pangani towards Kariokor at 6.00 pm on the material time; that the road is a single carriage way; that there was heavy traffic; that he was driving at 15 Kph; that he saw four girls on the right side lane of the road; that there was a car in front and one car had just passed from the opposite direction; that he saw a girl run from right to left; that he applied emergency brakes and swerved to the left; that the girl was knocked by right rear side of the vehicle and that the vehicle stopped one metre or two away. He testified on cross-examination that he saw two girls standing by the road side on the right hand side – about 10 metres away and that they were not in the middle of the road holding hands.

The trial Judge evaluated the evidence and concluded thus:

***“I find that the plaintiff has not proved any negligence on the part of the 1<sup>st</sup> defendant which contributed to the accident. I am satisfied that she ran into the road, leaving behind her companions and if it had not been for the alertness and evasive action by the 1<sup>st</sup> defendant, she would have suffered fatal injuries. I dismiss her claim with costs.*”**

***If her claim had been successful I would have found that she was 90% liable for the accident and would assess her contributory negligence as such leaving 10% to the 1<sup>st</sup> defendant. I would have awarded her Kshs.60,000/= or thereabouts for the injuries sustained in general damages”***

There are five grounds of appeal which Mr. Kariuki, learned counsel for the appellant, argued together. They in essence challenge the Judge’s findings of fact. He submitted that this is a case of an illiterate girl aged 11 years who had been in Nairobi for only four months and that the trial Judge erred in attributing negligence to her. He relied on the case of ***Butt v Khan [1981] KLR 349*** where Law, JA considering the law regarding liability of children for negligence at page 352 para 20, referred to ***Gough v Thorne [1966] 1 WLR 1387*** where the court declined to attribute any contributory negligence to a girl aged 13½ years who was knocked down while crossing a road and stated:

***“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 finding of contributory negligence should only be made if blame could be attached to the child.”***

In that case it was held that the action of a child aged 7½ years who was hit by a vehicle while crossing the road was at most guilty of a slight error of judgment which did not constitute contributory negligence, and Madan, JA expressed the view that normally a person under the age of 10 years cannot be held guilty of contributory negligence, and, there after a young person can be guilty of contributory negligence only upon 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.

Mr. Mahan learned counsel for the respondent, on his part, submitted that the Judge's findings of credibility of the child was correct and that this was a case of inevitable accident.

We appreciate as an appellate Court that the trial Judge had the advantage of seeing the witnesses give evidence and in assessing their credibility which we do not have, and, that, the circumstances in which an appellate court can interfere with findings of fact by a trial court are limited.

There was the evidence of the appellant that there was a road traffic accident where the 1<sup>st</sup> respondent's motor vehicle knocked her down as she was crossing the road. The evidence was that she was hit by the vehicle at the side of the road after crossing the road. On the other hand, there was the evidence of the 1<sup>st</sup> respondent that the appellant ran into the road from right to left and was knocked by the right rear side of his vehicle. The first respondent testified that he had seen the appellant and other girls standing beside the road. The appellant did not plead in his defence that the appellant ran into the road. Rather, he pleaded that the appellant walked directly on to the path of his vehicle. He also attributed negligence to the appellant for standing on the middle of the road holding hands with another girl totally oblivious of oncoming vehicles. However, he denied in his evidence in cross-examination that the appellant was standing in the middle of the road holding hands with another girl. Thus his evidence is inconsistent with his pleadings. There was no independent evidence in this case such as evidence of investigations of the accident by traffic police. Thus, there was no concrete facts on which a finding would be made that the appellant was solely negligent. This was a case of conflicting evidence and the finding of the trial Judge that the appellant had not proved negligence and that had she proved her claim he would have apportioned liability 90% against her and 10% against 1<sup>st</sup> respondent shows indecision.

In *Haji v Marair Freight Agencies Ltd [1984] KLR 139* it was held that where it is proved by evidence that both parties are to blame and there are no means of making a reasonable distribution between them, the blame can be apportioned equally on each.

In this case, the Court is faced with three practical alternatives, either to find, as the trial Judge did, that the appellant had not proved negligence or to find that due to her age and the circumstances of the case no negligence was attributable to the appellant and therefore the respondents were wholly to blame, or, lastly, to find that both parties were negligent but that the respective degree of negligence could not be ascertained and hence apportion blame equally. Any other hypotheses would be in realm of speculation and arbitrary.

In this case, the accident occurred on a busy City road in the evening. The traffic was heavy. According to the 1<sup>st</sup> respondent's evidence he had seen the appellant and another girl standing beside the road. We have already shown that the 1<sup>st</sup> respondent's evidence is inconsistent with the amended defence as to how the accident occurred but his evidence shows that his vehicle knocked down the appellant inside the road. The 1<sup>st</sup> respondent was in charge of a lethal machine and was obligated to keep a greater look out for other road users. The appellant was an uneducated, naïve village girl who had been in the City hardly for six months. She had crossed that road once before. On that analysis, either no contributory negligence would be attributed to the appellant or if she was guilty of contributory negligence her blameworthiness would relatively be to a lesser degree than that of the 1<sup>st</sup> respondent.

However, in the absence of clear evidence of the contribution of each to the accident, justice of the case would have been met by apportioning blame equally. We are satisfied and we find that the trial Judge misdirected himself in finding that the appellant was solely to blame for the accident.

The trial Judge held that if the appellant had proved her case he would have awarded her Kshs.60,000/=.

The medical report from Aga Khan Hospital dated 25<sup>th</sup> February, 1993 and the medical report prepared by Dr. Michael Osala Kwena dated 13<sup>th</sup> September, 1994 show that the appellant sustained bruises and fracture of left pelvis bone. Dr. Kwena observed that she had slow progress due to extensive pelvic injury;

that the fracture of pelvis had healed leaving behind pain in the hip joint which would leave her with osteo arthritis requiring prolonged anti-inflammatory treatment. There was evidence from both the appellant and her mother that after discharge from Aga Khan, she was admitted at Kenyatta Hospital for two weeks although medical evidence was not produced. In the circumstances the trial Judge misdirected himself in finding that the appellant did not receive serious injuries.

Although the appellant's counsel has not suggested what a reasonable award would be, the award of Kshs.60,000/= suggested by the trial Judge if it is not related to the 10% liability would be so manifestly low as to indicate an error of principle. The fracture of the pelvis, particularly of a young girl, with the attendant disabilities such as pain in the hip joint and osteo arthritis is a serious injury. Dr. Kwena indeed noted that the healing was slow due to the extensive pelvic injury. A reasonable award in the circumstances would be Kshs.600,000/=. The total special damages claimed was Kshs.1,600/=.

The result is that the appeal is partly allowed. The judgment of the High Court is set aside. We substitute therefore a finding that the appellant and respondents were equally to blame for the accident and apportion liability **50%:50%**. The appellant is awarded Kshs.600,000/= less 50% contributory negligence that is: Kshs.300,000/= net as general damages and Kshs.800 net as special damages. The appellant is awarded the full costs of this appeal and of the suit in the court below. Judgment is entered accordingly.

**Dated and delivered at Nyeri this 2<sup>nd</sup> day of December, 2011.**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**