



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 34 OF 2017

FM (suing as next friend to AM a Minor).....APPELLANT

-VERSUS-

MBULA KIKUVI.....RESPONDENT

(Being an Appeal from the judgment of Hon. Ruguru N. (SRM) in the Senior Resident Magistrate's Court at Makueni Civil Case No.58 of 2016, delivered on 23rd March, 2017)

JUDGMENT

1. **FM** suing as next friend to **AM** a minor was the Plaintiff in the lower court. He had sued the Respondent herein claiming special and general damages arising from injuries suffered when the minor was involved in an accident on 4th June, 2015. It was claimed that he was a passenger travelling KBU 598 M which was speedily and carelessly driven and rolled severally causing him bodily injuries.

2. The Respondent denied the claim and the matter proceeded to full hearing, after which the Appellant's suit was dismissed with no order as to costs.

3. Being aggrieved by the judgment the Appellant filed this appeal raising the following grounds:

1) **That**, the learned Magistrate erred in law and in fact when she erroneously stated that the minor Plaintiff must have appeared before the court to give evidence yet he was a minor.

2) **That**, the learned Magistrate erred in law and in fact in failing to peruse the P3 form, authority to sue, police abstract to confirm indeed the minor had not attained the age of minority.

3) **That**, the learned Magistrate erred in law and in fact in failing to appreciate the evidence given in court by the next friend to the minor and the witnesses in order to award the Plaintiff damages but chose to deny the minor his claim and rights.

4) **That**, the learned Magistrate erred in law and in fact in failing to consider that the minor Plaintiff had not attained the age of majority and thus no need for his attendance.

5) **That**, the learned Magistrate erred in law and in fact in failing to invoke the court powers under Article 159, 2(d) of the constitution including but not limited to calling for attendance of the minor if indeed she was convinced he was injured and the defendants were and are liable.

4. The appeal was disposed off by way of written submissions. I propose to do a very brief summary of the submissions.

5. M/s J.A Makau and Co. advocates for the Appellants faulted the trial Magistrate for finding that the minor Plaintiff ought to have appeared before the court to give evidence. Referring to Order 32 Rule 1 Civil Procedure Rules, counsel submits that there is no provision of law requiring a minor who has filed a suit through a next friend to appear in court to testify. That it is the next of friend who testifies on behalf of the minor. He further submits that the next of friend (Pw1) produced a police abstract which had all the necessary information to enable the trial court assess damages.

6. The submissions by the Respondent are to the effect that indeed the trial court was able to assess the minor's age from the documents produced in court. Further that there were no technicality that the court had to consider. To the Respondent, the Appellant's case in the lower court was dismissed on an evidentiary ground.

7. The Appellant in this case called two witnesses. **No.64524 Sergeant Boru Bukwe Juma** an officer based at Makueni Traffic base testified as Pw1, while the Plaintiff's next of friend testified as Pw2. Thereafter the Respondent closed his case, without calling any witness.

8. In her judgment, the trial Magistrate at page 3 lines 7 – 24 she states as follows:

“The Plaintiff minor did not testify save for his next friend. It is trite law that the Plaintiff though a minor should attend court during the hearing of the case. It is for the court to decide whether or not he will testify on depending on the circumstances of the case such as his age. No evidence was adduced by the Plaintiff to prove his age or existence. The P3 form states that he was 16 years at the time of the accident in 2015. However, no birth certificate or clinical card was adduced in support. This leaves the court wondering whether there was such a victim or not and whether he was a minor or has he now attained the age of majority. Order 32 Rule 12 of the Civil Procedure Rules is very clear and provides inter alia that on attaining the age of majority the Plaintiff minor can terminate the suit filed by the next friend or file an application substituting the next friend. Pursuant to the provisions of the rules therefore, it was mandatory for the age of the Plaintiff to be proved to clothe the next friend with locus to sue on his behalf or otherwise. Failure by Plaintiff to testify was fatal to his case and since his existence cannot be proved through his witness, this court cannot therefore award any damages under this head.

However, had the Plaintiff testified or his existence proved by way of birth certificate or clinical card, the court would have relied on the pleadings, evidence tendered, payment receipts P3 form, medical report by Dr. Loiposha, submissions by the parties and cited authorities and nature of injuries would have awarded Kshs150,000/= general damages and Kshs.1,320/= special damages proved as well as cost of the suit.”

9. This conclusion of her judgment speaks for itself. She dismissed the Appellant’s suit because the minor did not testify and his existence and age were not proved.

10. I have read through the pleadings in particular, the defence and the cross examination by the defence. I find no issue raised at all on the minor’s age. If the learned trial Magistrate had wanted to confirm that the minor was alive or had attained the age of majority she had all the powers to have the child availed in court for that purpose. Even if she wanted him to testify she would still have done that. She did none of the above.

11. It is for this reason that I will not re-evaluate the evidence as is expected of a first appellate court. The learned trial Magistrate failed in her duty by dismissing the Appellant’s suit on a non-existent issue. She had sufficient evidence to assess damages. I allow the appeal and set aside the judgment delivered on 28th March, 2017.

Order:

1) The lower court file shall be returned to the lower court for assessment of damages only. The matter to be mentioned before the Senior Principal Magistrate Hon. Mwaniki for purposes of allocation. This is an old matter and assessment should therefore be done within 45 days upon allocation of the file.

2) Cost of the appeal to the Appellant.

Orders accordingly.

Delivered, signed & dated this 29th day of November 2019, in open court at Makueni.

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Hon. H. I. Ong’udi

Judge