REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 32 OF 2009

FRANCIS WACHIURI MURAGE…….....…….....1ST APPELLANT

PWANI UNITED BUILDERS …….....…….2ND APPELLANT

VERSUS

P G K (minor suing through) P M G (As next friend)……..RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Honourable Murigi (SRM) in Muranga CMCC NO. 402 of 2004 delivered on 17th December 2008.

2. The plaintiff in the lower court was **P M G suing as next friend of P G K.** She is the respondent herein.

3. The respondent /plaintiff had sued the appellants herein **Francis Wachiuri Murage** and **Pwani United Builders** vide a plaint dated 6th September 2004 and amended on 29th May 2007 claiming for general damages and special damages arising from an alleged road traffic accident which occurred on 11th September 2011 along Kenol Sagana road, while the respondent was travelling as a passenger in motor vehicle registration No. KAK 344F.

4. It was alleged by the respondent that the driver of the accident motor vehicle negligently drove, managed and or controlled the 2nd appellant's motor vehicle registration No. KAH 441U as a result of which it collided with motor vehicle KAK 344F as a consequence of which the plaintiff minor was seriously injured. The injuries sustained involved:

a) Cut wound on the left forehead and eyebrow.

b) Pelvic fractures involving left superior and inferior public ramii.

c) Fracture of right olecranon –elbow

d) Blunt injuries over the abdomen with tenderness.

5. The respondents blamed the 1st appellant for the negligence on account that :- he drove the motor vehicle KAH 441U at excessive speed in the circumstances; failed to keep any proper look out or to have any sufficient regard for other traffic that was or might reasonably be expected on the road

and in particular the plaintiff's motor vehicle KAK 344F; failing to give any or any adequate warning of his approach; failing to stop, to slow down, to swerve or in any way so manage or control –the said motor vehicle so as to avoid the collision; causing the said accident; failing to obey the Highway Code; and also relied on the doctrine of *Res ipsa loquitur.*

6. The appellants herein filed a defence to the plaintiff's claim denying the claim and contending that the respondent allowed an unlicensed driver to driver motor vehicle KAK 344F; driving KAK 344F in an excessive speed; attempting to overtake without ascertaining the safety of so doing and failing to heed the lawful presence of other vehicles on the road more particularly KAH 441U.

7. This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to re evaluate and re examine the lower court record and the evidence before it and arrive at its own independent conclusion. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

8. And in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

9. Applying the above principles to this case, and reviewing the evidence in the lower court, the plaintiff/respondent testified before the trial magistrate and stated on oath that her minor son P G K then aged 5 years and 3 months old was with her in the accident motor vehicle. He was seated behind.

10. As the issue of liability was determined in CMCC 402/2004 the next friend plaintiff did not testify in the trial record on how the accident occurred since CMCC No. 402/2004 had been selected as a test suit on liability and in that matter liability was determined, and a finding of the appellants herein liable 100% was reached.

11. The trial magistrate in this case therefore only assessed damages for the injuries sustained after adopting judgment on liability in CMCC 402/2004.

12. The plaintiff testified that the minor suffered injuries involving a fracture and a cut on the fore face and his pelvis was injured. She showed to the court the visible injuries. He was admitted at Jamii Hospital at Karatina and moved to Avenue Nursing Home the following day.

13. He remained admitted in hospital for 2 weeks. The plaintiff produced discharge summary, P3 form and medical reports by Dr Maina Kigo and Dr R.P Shah. That the minor had not fully recovered because he complained of numbness in his legs. He also suffered trauma. He also lost his brother in the accident and that his mother; the next friend hereto too suffered serious injuries.

14. In cross examination by Ms Gichohi, the plaintiff responded that the minor fractured his right hand and that he had no proper control of his hand.

15. However, as the issue of liability is also raised in this case, it is important to review the evidence as adduced in the test case matter In CMCC 402/2004 where the issue of liability was determined since that was a test suit. The plaintiff testified that they were passengers in KAK 344F heading towards Kagumo. As the vehicle was going downhill at Kambiti area, a vehicle from Nyeri direction tried to overtake others and in the process, hit motor vehicle Registration No. KAK 441U hit KAK 334F at the door behind the driver. The plaintiff in that suit further testified that KAH 441U was being driven at a high speed and therefore she blamed its driver for the accident. Further, that the driver of KAK 334F was charged at Kagumo Law Courts but was acquitted of a traffic offence. She produced court proceedings from Kagumo Law Courts to show that indeed, the driver of KAK 334F was acquitted.

16. The appellants herein never adduced any evidence in the test suit and in CMCC 404/2004 to challenge the respondent's testimony on how the material accident occurred.

17. trial magistrate found that the appellants were wholly liable for the accident on the evidence adduced. Further, that although the appellants had enjoined a third party, they did not adduce any evidence to prove negligence against the said third party.

18. In CMCC 404/2004 which is the subject of this appeal, the trial magistrate after adopting the judgment on liability in CMCC 402/2004 and considering evidence on the injuries sustained by the respondent, relying on several cited authorities, awarded the plaintiff kshs 400,000/- general damages plus costs and interest.

19. It is the above judgment and decree which provoked this appeal by the appellants who were the defendants in the trial court challenging the decision of the trial magistrate vide the Memorandum of Appeal dated 2nd February 2009, which sets out three main grounds of appeal namely:

> *1. That the learned trial magistrate erred in law and in fact in finding the defendants 100% liable for causing the accident and in failing to apportion liability between the defendants and the third party.*
>
> *2. That the learned trial magistrate erred in law and in fact in assessing general damages at kshs 400,000 for the plaintiff considering the injuries pleaded and proved, the same was manifestly excessive in the circumstances.*
>
> *3. That the learned trial magistrate erred in law and in fact in failing to consider or have sufficient regard to the submissions filed on the appellant's behalf.*

20. The appellants prayed for apportionment of liability and setting aside of judgment on general damages and special damages under the Fatal Accidents Act and the Law Reform Act and or that quantum be set aside and be substituted with an award that is commensurate with the nature of the injuries sustained by the respondent.

21. In this appeal, both parties' advocates agreed to dispose of the appeal by way of written submissions. The appellants filed theirs on 8th April 2015 and submitted on both issues of liability and quantum.

22. On liability, it was contended that in the test suit vide CMCC 402/2004 the trial magistrate erred in law and fact in failing to consider evidence showing that the accident was caused by the negligence of the third party as he was the one charged with the offence of causing death by dangerous driving while the appellant's driver has never been charged with any traffic offence. Further, that although the third party driver was not convicted, PW6 PC No. 39842 Ismael Odeny inTraffic case no. 2489/2001(sic) at Kigumo testified that he blamed the third party.

23. The appellant's counsel also submitted that the respondent herein had testified that it is the third party driver who had swerved and hit the appellant's motor vehicle and that it was the third party who encroached on the lane of the appellant's driver thus causing the accident. That the

respondent's version of how the accident occurred was contradictory and that therefore liability should have been attached to the third party at 100%.

24. Reliance was placed on **Wainaina Nganga Gakuu V Jael Oduor & 3 Others [2008] e KLR** where the court held that the trial court erred in failing to consider evidence contained in the police file which established on a balance of probabilities that the fourth respondent third party was the culprit in the causation of the accident by his careless manner of driving which led to his vehicle veering into the wrong side of the road and into the path of the appellant's vehicle.

25. The appellants further contended that the trial magistrate should, in the alternative, have apportioned liability equally between the appellant's driver and the third party driver.

26. Reliance was placed on the Court of Appeal decision in **Lakhanshi Vs Attorney General [1971] EA page 120** where Lutta JA cited with approval the judgment of Lord Denning in **Baker V market Harborough Industrial Co-operative Society Ltd [1953]** that :

> ***" in a situation where a collision had occurred, and it was not reasonably possible on the evidence adduced to decide who was to blame, that liability should be apportioned at 50:50 % as between the two motor vehicles."***

27. In her submissions filed in court on 17th April 2015 the respondent urged the court to uphold the decision of the trial magistrate on liability. It was submitted that although the appellants blame the third party for the accident, the appellants did not call any evidence to rebut the respondent's claim and neither did they adduce any evidence to prove the liability or contribution of the third party hence they cannot at this stage be heard to seek apportionment of liability.

28. On the second ground touching on general damages of kshs 400,000/- It was submitted that the trial magistrate was correct in assessing damages the way she did owing to the serious injuries sustained by the minor. The respondent urged the court to uphold the judgment of the trial court and dismiss this appeal.

29. The respondent's counsel simply reproduced submissions in HCCA 30/2009 and filed them herein which submissions I find do not concern this case.

30. The third party Joseph Thiongo Chege filed his submissions on 28th April 2015. It was submitted that only the 1st appellant instituted third party proceedings. That at the hearing, only the respondent in Muranga CM CC 402/2004 adduced evidence to prove negligence of the appellants. That the appellants never adduced any evidence to prove the negligence of the third party hence the court could not have apportioned liability against the third party who, it was not proved contributed in any way to the occurrence of the accident.

31. Reliance was placed on **Francis Munyua Wanyoike V Sobhagchand Gosar Shah [1999] e KLR HCC 2283 of 1995** where Angawa J stated that:

> ***"I believe that the defendant has a good defence namely, that the 3rd party was an unauthorized driver. But it is not good enough to state this in the defence. This allegation must be proved…."***

32. The third party maintained that the onus of proving negligence of the third party lay with the 1st appellant and that in this case no evidence was adduced against him hence the allegations remained mere allegations which were never substantiated. The third party urged this court to uphold the judgment and decree of the trial magistrate and dismiss this appeal with costs.

33. In the present case, it must be made clear that in the lower court, in the test suit CMCC 402/2004, the appellants, despite enjoining a third party, a Mr Joseph Thiongo Chege and pleading that the third party was wholly to blame for the material accident, the appellants herein chose to close their case

without calling any witness to controvert the respondent's evidence that the third party driver was to blame for the accident, or to prove that it was infact the third party who was wholly to blame for the accident or that it substantially contributed to the occurrence of the material accident, or what measures the 1st appellant who was the driver of he blamed motor vehicle undertook to avoid the said accident.

34. Although Sections 107-109 of the Evidence Act are clear that he who alleges must prove, and therefore in this case the respondent claimant was under a duty to prove the negligence of the appellants, equally, it was upon the appellants to prove that the third party was wholly to blame or substantially to blame for the material accident.

35. In addition it is a presumption of the law that a party who has in his/her possession evidence which he fails to adduce, that evidence is presumed to have been adverse to him.

36. In the instant case, the appellants only laid claim against the third party but opted not to testify to prove the third party's liability. Neither did they controvert the respondent's testimony as to how the accident occurred.

37. It has been held severally that answers in cross examination do not build a party's defence. A party must adduce evidence to rebut the adverse party's evidence. Further, that pleadings and submissions are not evidence.

38. In this case, the appellants denied the plaintiff's claim and shifted blame to the third party. The appellants neither called evidence to controvert the plaintiff's testimony nor called evidence to prove their claim against the third party. In other words, what was in the appellants' defence and claim against the third party remained mere allegations devoid of proof.

39. The consequences of failure to furnish evidence in rebuttal was canvassed in **Karuru Munyoro V Joseph Nduma Murage & Another [Nyeri HCC 95/1988]** by Makhandia J (as he then was) as follows:

> ***" the plaintiff proved on a balance of probabilities that she was entitled to the orders sought in the plaint and in the absence of the defendants, and their counsel to cross examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was this credible and it is kind of evidence that a court of law should be able to act upon."***

40. Odunga J in **Linus Nganga Kiongo & 3 Others V town Council of Kikuyu[2012] e KLR** stated:

> ***" what are the consequences of a party failing to adduce evidence? In the case of Mole Knit wear Ltd V Gopitex Knitwear Mills Ltd Nairobi HCC 384/2002 Lessit J citing Autar Sigh Bahra & Another V Raju Govindji HCC 548/98 stated:***
>
> ***" Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim must fail."***

41. In **Trust Bank Ltd V Paramount Universal Bank Ltd & 2 Others Nairobi HCC 1243/2001** it was held that:

> ***" It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and unchallenged."***

42. In the instant case, it was not contended that the respondent's evidence was conjecture. The plaintiff was an eyewitness to the material accident. She testified as to what she saw and heard. There were no obscure circumstances which would justify a contrary finding or apportionment of liability between the appellant and the third party.

43. Although it was contended that the third party driver was charged in Kagumo traffic court with causing death by dangerous driving, the proceedings showed that he was not convicted. Further, although it is submitted that the prosecution witness PC Ismael blamed the third party, the court exonerated the third party driver from criminal liability.

44. The appellants herein did not make any effort to adduce any evidence to prove otherwise since the standard of proof in criminal cases is higher than the standard of proof required in civil cases.

45. Nothing prevented the appellant from adducing evidence to prove the liability or contribution of the third party to the material accident.

46. Section 112 of the Evidence Act Cap 80 Laws of Kenya is clear that:

> *" when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."*

47. In the instant case, if it was within the knowledge and conviction of the appellants that the third party was wholly to blame for the accident or that it substantially contributed to the occurrence of the accident, then it was incumbent upon the appellants to adduce evidence to prove that liability or the extent of the third party's contribution to the occurrence of the material accident, on a balance of probabilities.

48. The 1st appellant who was the driver of the offending motor vehicle would have been the most crucial witness as he would have given direct evidence on the events that took place that material day of the accident giving rise to these proceedings. The occurrence of the accident is not denied. The appellant's driver would have been in a better position to tell the trial court what happened and why. Pleadings that deny negligence are not evidence of being blameless. Evidence must be adduced. In the absence of that evidence of the driver of the accident motor vehicle to shed light on what the appellants claim was an accident solely caused by the third party, this court finds that the trial magistrate did not err in CMCC 402/2004 when she found that the appellants were wholly to blame for the material accident at 100% jointly and severally. I therefore uphold the trial magistrate's finding and decision and dismiss the challenge by the appellants herein on liability.

49. In my humble view, the case of **Baker Vs Market Harborough Industrial Corporation Society** is only applicable where there is a collision and it was not reasonably possible on evidence to decide who was to blame. In the instant case, it was possible, on evidence adduced by the respondent, and which evidence was not rebutted, that the appellants herein were to blame for the accident.

50. Furthermore, although the appellants complain that the trial magistrate did not rely on the traffic proceedings, it is clear from the evidence that the third party driver in the traffic proceedings was acquitted and in the absence of any evidence in this case by the appellants to establish a *prima facie* case against the third party on a balance of probabilities, the allegations that the third party was to blame remained just allegations which were never substantiated (see **Francis Munyua Wanyoike V Sobhagchand Gosar Shah** (supra) case.

51. I would, in this case, without hesitation agree with Mabeya J in HCCA 30/2009 where he relied on **Janet Kaphiphine Ouma & Another V Marie Stopes International (K) HCC 68/2007** by Abida Aroni J that:

> ***"In this matter, apart from filing the statement of defence the defendant did not adduce any evidence in support of assertion made therein. The evidence of the 1st plaintiff and that of***

the witness remain uncontroverted and the statement in the defence therefore remains mere allegations……Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

52. I am further in total agreement with the respondent's and third party's submissions that in the absence of any evidence to rebut the respondent's evidence, it follows that the respondent, on the evidence I have reviewed, proved her case against the appellants on a balance of probabilities. Accordingly, I find that the trial court was correct in finding the appellant 100% liable jointly and severally since they did not adduce any evidence to shift blame onto the third party.

53. There is absolutely no basis in case, upon which I can interfere with the finding of the trial court to apportion liability at 50:50% since no such basis was laid by the appellants by way of evidence in the trial court.

54. On the ground that the learned trial magistrate erred in law and fact in assessing general damages at shs 400,000 it was submitted by the appellant's counsel that the trial magistrate relied on a medical report of Dr Maina Ruga dated 5th July 2004 about 2 years from the date of the alleged injury. Reliance was placed on **Susan Wangu Ngugi V Nganga Thuku and Edward Mbugua Kungu HCC 455/2001** where the plaintiff sustained fracture of the pelvic with rapture of the urinary bladder, fracture of three ribs and fracture of the right collar bone and was awarded kshs 200,000 general damages.

55. Further reliance was placed on **Patrick Muchangi Ngoroi V David Gitau and Another Nairobi HCC 950/2002** where Angawa J on 27th April 2004 awarded shs 200,000 general damages for a cut wound on the head and fracture of the left pelvis to both pubic ramii and for pain and suffering (sic).

56. The appellants s urged this court to consider the warning by the Court of Appeal against high awards in the case of **Kigarari V A. Mary Arya (1982-88) 1 KAR** where Nyarangi JA at page 770 stated:

"……..As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees……"

57. The above warning, it was submitted, was echoed in **Tayab V Kananu [1982-88] 1KAR 90** that:-

" ……if the sums get too large, we are in danger of injurying the body politic….as large sums are awarded so do premiums for insurance rise higher and higher. The appellants urges the court to find that a shs 150,000 general damages award would be fair and just compensation for the injuries suffered by the plaintiff/respondent."

58. In a rejoinder on the issue of quantum of damages, the respondent maintained that the award by the trial magistrate was commensurate with the injuries sustained by the respondent minor and urged this court to uphold the award made by the trial magistrate.

59. My determination of this issue of quantum of damages is that an assessment of damages is a matter of judicial discretion which can only be interfered with by an appellate court if it is shown that the trial magistrate acted on wrong principles of law or misapprehended the facts or made a wholly erroneous estimate of the damages. This is a principle of law espoused in many cases including **Loice Wanjiu Kagunda V Julius Gachau Mwangi CA 142 of 2003** where the Court of Appeal stated that:

" we appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless is it satisfied that the judge acted on wrong principles of law of had

misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles(see Mariga V Musila [1984] KLR 257."

60. Applying the above principles to this appeal, the appellant's ground No. 3 was that the award of kshs 400,000 was manifestly excessive considering the injuries pleaded and proved. In their submissions, the appellants cited several decisions wherein the Court of Appeal has warned against high awards. I am in total agreement with those decisions that warn courts against making high and unjustified awards.

61. Awards of general damages should indeed be commensurate with the injuries sustained, having regard to past decisions and inflation, albeit no two cases can be the same.

62. In the instant case, the trial magistrate in awarding kshs 400,000 general damages, I note that the respondent had sought for shs 700,000 relying on **Machakos HCC 1998/97 Caleb Otieno Omondi V James Mutua Mulinge & Another** where the plaintiff sustained fractures of the pelvis, shock and concussion, injuries to the abdomen and fracture of the left ribs, and **Nakuru HCC 161/2001 Peter Njuguna(*suing for* Hanna Gathoni Nganga) V Franco Paglabia & Another** where the plaintiff sustained injuries to the right and inferior pubic ramii, head injuries with concussion and soft injuries among others. In both cases the plaintiffs were awarded kshs 600,000 general damages.

63. The appellants on the other hand had submitted for an award of kshs 160,000/- based on the decisions of **James Njuguna Nderitu V Elijah Mulinge & Another HCC 1332/90** where the plaintiff aged 27 years sustained a fracture of the right elbow and bruising of the forehead, bruising of the right shoulder and right hand. The fracture was immobilized for 2 months. The elbow had healed well but the plaintiff who was a bus conductor was still unable to carry heavy things with his right hand and there was restriction in the rotation movements although flexion was normal, full range and painless. He was awarded shs 150,000 general damages for pain and suffering and loss of amenities. They also relied on **Zipporrah Wambui Kibi V Joseph Bett Karogo HCC 607/96** where the plaintiff sustained fracture of the third metacarpal bone of the right hand, superficial skin injuries on the left leg and contusion to the back, shs 150,000 general damages was awarded.

64. The trial magistrate considered all the decisions cited by both the parties' advocates before arriving at her decision. The plaintiff/respondent was aged about 6 years at the time of the accident. The discharge summary shows several injuries including fractures. The P3 form was also filled on 21st April 2004 about 3 years after the accident and shows a tear on the right eyebrow, a fracture of the right pubic ramus and fracture of left olecranon-elbow. The medical report by Dr Maina Karuga dated 5th July 2004 summed up the respondent minor's injuries as pleaded namely:

i. Cut wound on the left forehead and eyebrow.

ii. Pelvic fractures involving left superior and inferior pubic ramii.

iii. Fracture of right olecranon-elbow

iv. Blunt injuries over the abdomen with tenderness.

65. The fractured olecranon-elbow was treated through open reduction. The wound on the forehead was satured and he was put on antibiotics, analgesics and bed rest. He remained in hospital from 11th September 2001 -20th September 2001. Three years after the accident in 2004, on being examined, he complained of numbness of walking for long. He had a scar on the left side extending to the eyebrow 5cm. He also had a scar over the posterior aspect of the right elbow measuring 8cm and movements were normal. He had no pain or tenderness in the pelvis and he walked normally. He had

suffered a temporary incapacity for 3 months.

66. On the other hand the medical report by Dr R.P. Shah dated 10th January 2006 confirmed the injuries and the only complaint was numbness of legs on walking although the Doctor concluded that in view of the fact that the respondent minor had completely healed, there was no cause for the numbness of legs.

67. On the injuries sustained, although Dr Maina stated that there was fracture of left superior and inferior pubic ramii, the medical report by Dr. R.P. Shah omitted the double fracture which is apparent in the discharge summary from Avenue Hospital that the X ray showed Lt Superior/inferior pubic ramus.

68. In other words, I find that the medical report by Dr R. P Shah underestimated the injuries sustained by the plaintiff/respondent minor especially on the fracture of the superior/inferior pubic ramii. Nonetheless, it be appreciated that the latter Dr. R.P Shah examined the plaintiff about 2 years after the first examination by Dr Maina and almost 4 years after the accident.

69. The trial magistrate in her judgment considered the evidence on record and the injuries suffered by the plaintiff minor. She had the opportunity to hear the witness first hand and see the minor. I did not. That being the case, I do not find any reason why I should interfere with the judicial discretion of the trial magistrate as it has not been demonstrated that she acted on wrong principles or that she failed to consider factors applicable in awarding general damages. In addition, I do not find that the award of shs 400,000 made was excessively or manifestly high in the circumstances as at 2009 when judgment was delivered, since the award was, in my view, commensurate with the injuries sustained by the respondent minor in the comparable cases cited by the respondent's counsel. In my humble view, the authorities cited by the appellant's were not commensurate with the injuries sustained by the minor as compared to the authorities cited by the respondent's counsel. The authorities cited by the appellants, the injuries sustained were not as serious as those sustained by the minor respondent.

70. Accordingly, I dismiss the ground of appeal on quantum of damages and sustain the award of shs 400,000 awarded by the trial court.

71. In the end, I find that the appeal herein is without any merit both on liability and on quantum of damages. I dismiss this appeal and uphold the judgment and decree of the trial magistrate both on liability and on quantum of damages.

72. I award to the respondent costs of the appeal to be paid by the appellants.

Dated, signed and delivered in open court at Nairobi this 28th July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss Abok h/b for Mereka for the Appellants

Mr Njagi h/b for Mrs Kiarie for the Respondent

CA: Adline