REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 16 OF 2011

SECURICOR SECURITY SERVICES KENYA LTD …..APPEALLANT

VERSUS

MF

(Minor suing thr' mother and next friend

FAA…….....RESPONDENT

J U D G M E N T

Introduction

1. In this appeal, the appellant Securicor Security Services Kenya Ltd, challenges the judgment and decision of Hon. R. Kirui, Principle Magistrate, delivered on 26/01/2011 in Mombasa RMCC No. 1919 of 2008 on both liability and quantum of damages. The Memorandum of Appeal raises 6 grounds of appeal as follows:-

- **THAT the learned trial magistrate erred in law and infact in finding that the defendant was liable at 100%.**
- **THAT the learned trial magistrate erred in law and in fact in holding that the defendant was vicariously liable without vicarious liability having been pleaded in the plaint or even proven by evidence.**
- **THAT the learned magistrate erred in law and fact in holding the defendant liable for negligence yet the evidence of PW 3 – Police Officer was not conclusive on whether the defendant was to blame for the occurrence of the accident.**
- **THAT the learned magistrate erred in awarding the plaintiff the sum of Kshs.600,000 as general damages for pain and suffering. Kshs.200,000 for replacement of lost teeth and Kshs.24,915 as special damages.**
- **THAT the learned magistrate erred in law and fact in awarding an amount of damages that is so high as to be an erroneous and an unjust estimate.**
- **THAT the learned trial magistrate erred in law and fact by totaling disregarding the submissions of the defendant and thereby arriving at a wrong decision.**

2. It is evident that grounds 1-3 touch on the liability of the Appellant, while grounds 4 & 5 attack the assessment of damages. Ground 6, is an all-encompassing and omnibus, if not nebulous, ground that ideally fit and transcends the entire appeal. I will not seek to deal with it in a distinct manner but I will consider it as I consider the rest of the grounds.

3. In considering the appeal, only two issues present themselves for consideration and determination. They can be framed as:-

- **Was the trial court right in finding the Appellant liable at 100%?**
- **Was the assessments and award of damages merited or erroneous?**

4. I will deal with the two issues seriatim but before then the facts of the appeal as disclosed in the pleading, proceedings and judgment appealed against need to be summarized and brought out

Pleadings

5. In the plaint, the plaintiff now Respondent, then aged 8 years, alleged that on the 31/10/2007 he was lawfully walking along Mwembe Tayari Road when near Saphiere Hotel the defendants' driver negligently drove the defendants motor vehicle Registration No. KAR 630E that he caused and permitted, it to collide with the plaintiff, a minor, as a result of which the plaintiff sustained severe bodily injuries for which he blamed the Defendant, now appellant. Particulars of negligence, injuries, special damages as well as costs of future medical expenses were all given in the plaint.

6. Against that plaint, the defendant filed a statement of defence dated 27/10/2008 and denied the ownership of the pleaded motor vehicle and the occurrence of the accident. He equally denied that its agent, servant or driver was negligent together with all particulars of negligence, injuries, loss or damage as well as the special damages particularized and then put up an alternative prayer, without prejudice to the denial, that if indeed any accident ever occurred then it was accused wholly or substantially by the negligence of the plaintiff. Particulars of alleged negligence were then set out and a further defence of inevitable accident was added equally in further alternative and without prejudice to the previous pleadings.

Evidence at trial

7. When the trial commenced, the plaintiff called a total of 5 witnesses who include the father to the minor, an eye witness, a police officer who was called to produce a police abstract and two doctors who examined the minor and prepared two medical reports. The defendant on its side did not call any evidence even after having been granted adjournments to do so. The trial court therefore was presented with only the version of the accident and its effect on the minor by the plaintiffs side. In his Judgment, delivered as aforesaid, the trial court said at relevant areas:-

> "**The defendant tendered no evidence thus leaving the plaintiff's unchallenged. I have therefore considered the same and am satisfied he (plaintiff) has proved his case to the required standard. Plaintiff's exhibit 7 (copy of KRA records) confirmed the accident motor vehicle belongs to the defendant while PW 1 confirmed the same was overspeeding when it knocked down the plaintiff who was then a child of tender years to whom no contributory negligence could be apportioned or attributed. I therefore find the defendant's driver to have been wholly negligent, entirely to blame and hence the defendant 100% vicariously liable".**

That is the judgment which has provoked this appeal.

Analysis of evidence and determination:-

Finding on liability

8. An appellate court will be slow to interfere with a finding of facts by a trial court and can only so interfere where there is demonstrated consideration of irrelevant facts or failure to consider relevant ones and which failure leads to an injustice. When that principle is applied to this case, can it be said that the trial courts finding on liability was unjustified on the causation of the accident? That question is best

answered by an analysis of the evidence tendered.

9. Having read the proceedings, the evidence that is critical for that analysis is that of PW 1. PW 1 said in his evidence in chief:

> **"I proceeded there and was asked to wait for a Securicor vehicle to pick money from there. That vehicle was already there and waited. After collecting the money it sped off and there were some school children passing. Then I heard a scratching tyres and a bang. I went to check, I found one of the young boys had been hit and was down. I recognized the boy a son of a friend. The Securicor vehicle had stopped some distance ahead. Those present and AP Officers who were escorting the money picked the boy and put him in their vehicle".**

10. I have said that the Defendant did not call any witness hence the only account how the accident occurred is only available from PW 1. Maybe more light would have been shed had the defendant availed his driver or indeed any of the AP Officer who were in the chase car escorting the money, but the court was denied that chance.

11. The plaintiff's onus of proof was and remain on a balance of probabilities. Towards the discharge of that duty the plaintiff led evidence by PW 1 how the accident occurred. There was evidence that the motor vehicle was at a high speed, its tyres screeched before a bang and indeed the plaintiff was hit and the motor vehicle stopped.

12. That evidence, on a balance of probabilities, established that the accident occurred between the defendants motor vehicle and the plaintiff. There was no rebuttal of that evidence as the defendant offered no evidence at all. The suit having been based on negligence and there being uncontroverted evidence, that the plaintiff was a minor, any judicial mind applying itself to the law and facts could not have come to any conclusion different from that which the trial court came to. The law in this area has been settled and it may serve same purpose to quote the Court of Appeal in **Nandwa -vs- Kenya Kazi Ltd [1988] KLR 488**.

> **"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a <u>set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in favour of the plaintiff unless the defendants' evidence provides</u> some answer adequate to displace that inference.."**

13. There was no evidence at all to attribute any negligence on the plaintiff who was in any event, admittedly a child of tender years and against whom contributory no negligence should, ordinarily and normally attach. That coupled with the evidence of PW 2 producing the records of the motor vehicle from the Registrar of Motor Vehicle showing that the Appellant was the registered owner thereof was enough and remains enough to justify the finding by the court on liability of the Appellant at 100%. I find no justification to interfere with the finding and I therefore dismiss the appeal on liability in its entirety.

<u>Award of damages</u>

14. Having reviewed the evidence and considered the submission offered by both parties, the trial court delivered himself as follows:-

> **"I have considered the said authorities together with the nature of the plaintiff's injuries herein and award general damages of Kshs.600,000/= (six hundred thousand) for pain, suffering and loss of amenities. In addition I award Kshs.200,000/- for the replacement of the lost teeth.**
>
> **I also award special damages of Kshs.24,915/- which brings the total award to Kshs.824,915/=(eight hundred thousand nine hundred and fifteen)".**

15. The evidence of injury on the plaintiff is as explained by the evidence of PW 2, PW 4 & PW 5 and supported by the exhibits produced and marked 3 and 9. The medical reports, particularly the latest by Dr. Ndegwa (PW 4) detailed the plaintiffs injuries, the need to replace the lost tooth at Kshs.40,000 every 5 years and assessed the permanent disability at 20%. It is noteworthy that the report was compiled some eight months after the accident and was produced without protest. Both the evidence of PW 4 & 5 were never shaken even on cross-examination and it is fair to describe same as having been cogent and reliable.

16. Noting that the task of assessing damages for personal injuries is indeed a very difficult task and involved judicial discreation, it is indeed the duty of an appellant court to exercise circumspection and be very slow before venturing to interfere with such a decision. On the material availed including the decisions cited which were clearly binding on the trial court, I am unable to find that the assessment of general damages was to any extent or evidently inordinately high as to amount to an error in any principle in assessment of damages. That being my finding I uphold the finding by the trial court and decline to interfere. See **H. West and Sons Ltd -vs- Shepherd [1964] AC 326 at page 364 and Maean JA, in Ugenya Bus Service -vs- Gichui [1976 -85] EA 575 & 579.**

17. On special damages, the same is by law bound to be specifically pleaded and strictly proved. The plaintiff indeed pleaded with exactitude the sum of Kshs.24,915 and produced receipts at trial for the same amount. He equally pleaded the need to replace the lost front teeth every five years and the court apparently was convinced that he was entitled to five replacements. To this court, the threshold on proof of special damage was met and I think even in the submissions, both oral and written that point was never taken up serious and deemed abandoned. I find no merit on the complaint on both general and special damages and I do dismissed grounds 4 & 5 of the memorandum of Appeal as well.

18. In totality the entire appeal fails and the same is hereby dismissed with costs to the Respondent.

Dated and Delivered at Mombasa this **16th** day of **December 2016**.

HON P.J.O. OTIENO

JUDGE