**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 70 OF 2007**

**M N W** *(minor suing through the next friend L W M)*
**…….APPELLANT**

**VERSUS**

**BONIFACE MUSYOKA MUNYAO…….....**
**…….RESPONDENT**

***(Being an appeal from the judgment of Hon. Mr. E. K. Makori-SRM delivered at Kitui Law Courts on 20-3-2007 in CMCC No. 346 of 2005).***

**J U D G M E N T**

**1).** In the suit before the lower court, the appellant, M N W, a minor suing through her father and her next friend was injured on 23-5-2005 by an ox drawn cart. The appellant blamed the accident on the alleged negligent manner in which the oxen were managed. The respondent was sued as the owner of the oxen and the cart. The appellant claim was for damages.

**2).** The claim was denied as per the statement of defence dated 18-10-2005.

**3).** The appellant called three witnesses in support of her case. PW1 L W the appellant's father found the five year old appellant already injured. The appellant had sustained a fracture of the right leg and was taken to hospital where she was admitted for one day. A P3 form was issued by the police and filled by PW2 Dr. Peter Maliti who also prepared a medical report.

**4).** PW3 Kimanzi Wambua a passerby who found the appellant, the oxen and the cart at the scene named the respondent as the owner of the oxen and the cart and the people attending to the ox drawn cart as the children of the respondent's brother. The said children were said to be about 12 – 15 years of age. The respondent subsequently sued.

**5).** The respondent called two witnesses in support of his case. DW1 Francisca Boniface Munyao the respondent's wife testified that they did not send anybody to use their bulls or their cart. That they live in a big homestead with 14-20 family members. She further stated that the roads where the incident occurred is a busy road used by many people who use ox carts. She blamed this suit on family disputes between her family and that of the appellant.

**6).** DW2 Reuben Mumo Munyao a brother to the respondent gave evidence that he owns two cattle, the respondent two and the other brother has several. He was not aware of the accident and stated that he was not called to record any statement. He blamed the suit on family disputes.

**7).** At the conclusion of the trial the lower court held that the appellant's case was not proved on a

balance of probability and dismissed the same with costs.

**8).** The appellant was dissatisfied with the judgment and appealed to this court. During the hearing of the appeal, the appellant's counsel canvassed his grounds of appeal as follows:

a. **Whether the appellant's case was proved on a balance of probabilities.**
b. **Whether the doctrine of *Res Ipsa Loquitor* was applicable.**
c. **Whether it is mandatory to enjoin a tort fears or for the master to be held liable for negligence.**
d. **Whether the trial court relied on issues which were not pleaded.**
e. **Whether there was admission by the respondent's witnesses.**
f. **Whether the trial court disregarded the doctrine of *stare decisis*.**

**9).** The appeal was argued by way of written submissions which I have duly considered.

**10).** It is clear from the evidence of PW1 that he was not at the scene when the appellant was injured. The evidence that links the respondent to the accident is that of PW3, the passerby. It was the evidence of PW3 that he found the injured appellant at the roadside. PW3 did not witness the accident. His evidence was that the cart was with the children of the respondent's brother. He further testified that he knew the cart as the property of the respondent. During cross examination, PW3 gave the age of the boys who were with the cart as 12-15 years. He could not tell whether the said boys had the respondent's authority to use the ox-cart. He described the oxen as black and brown in colour but did not state who owned them.

**11).** The evidence of PW1 and PW2 failed to link the ownership of the oxen to the respondent. On the question of ownership of the cart, although PW3 stated that the same belonged to the respondent, he did not point out what specific features on the cart helped him to identify that cart as belonging to the respondent. It is also clear from the evidence of PW1 and PW2 that the accident happened at a public road. It was therefore important to establish that the ox-drawn cart was that belonging to the respondent and not the property of any other road user.

**12).** The evidence of DW1 the wife to the respondent and DW2 the brother to the respondent shows that there were many cattle in their large homestead. Although the appellant's counsel submitted that DW1 admitted that the cart and the bulls were his during cross examination, the context of that answer is in relation to the homestead. During re-examination, DW1 explained that it was not her cart or bulls that injured the appellant. Indeed her contention was that there were over five people in the area who own ox-carts. With the reservations that I have expressed above concerning the question of the identification of the oxen and the cart, I am not satisfied that the appellant proved her case on a balance of probabilities. I agree with the judgment of the trial magistrate on that finding. Consequently, the other issue raised concerning the doctrine of ***Res Ipsa Loquitor*** would not help the situation.

**13).** If the finding arrived at by the court was that the ox-driven cart belonged to the respondent and was under the control of his servant or agent who were not on a frolic of their own, then I would have found the respondent vicariously liable.

**14).** The trial magistrate ought to have addressed the issue of quantum that he would have awarded if the appellant's case was successful. The doctor described the appellant's injury as a simple fracture of the right femur which had healed well. The appellant had submitted in the lower court for an award of Kshs. 250,000/=. He cited three authorities which reflects awards of between Kshs. 170,000/= to Kshs. 200,000/=. The respondent's counsel did not submit on quantum. There were no submissions on quantum made before me. Taking into account the authorities cited in the lower court were over twenty years old but also taking into account the injuries therein were more severe but that inflation must also be taken into account, a figure of Kshs.200,000/= as general damages would have been reasonable. The special damage of Kshs. 3,150/= claimed for the medical expense and for the preparation of the medical report were proved as per the receipts that were produced.

However, for the reasons stated above, I find no merits in the appeal and dismiss the same with costs.

**Dated, signed and delivered at Machakos this 15th day of December, 2015.**

**B. THURANIRA JADEN**

**JUDGE**