REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 93 OF 2008

SWEET INSPIRATIONS CO. LTD

T/A NYERI GOOD SHEPHERD ACADEMY…..…….APPELLANT

VERSUS

S W

(Suing through the mother and next friend

F G)…….....RESPONDENT

(Being an appeal from the judgment delivered in Nyeri Chief Magistrates Court Civil Case No. 169 of 2007 (Hon. M.K.K. Serem) on 31st October, 2008)

JUDGMENT

The appellant was a defendant in a suit in which the respondent sued for general and special damages, costs of the suit and interest thereof at court rates. The suit was instigated by injuries the respondent is alleged to have sustained when she fell from a double deck bed on or about the 18th January, 2007; at the material time, the plaintiff was a pupil boarding at the appellant's school, Good Shepherd Academy. The respondent claimed that even after the alleged accident, she was never attended to until three days thereafter when her condition grew worse. It was the respondent's case that due to the appellant's carelessness or negligence, she sustained bodily injuries and thereby suffered loss and damage for which she sought compensation in the suit in the magistrates' court.

The appellant in its defence denied the respondent's claim and in particular denied that any of its agents or servants was negligent. The defendant further stated that, without prejudice to its denial, the injuries sustained by the respondent were self-inflicted and were concealed from the appellant's agents or servants.

In his judgment delivered on 31st October, 2008 the learned magistrate found for the respondent and made an award of **Kshs 317, 935/=** comprising:

1. **General damages**

   for pain and suffering……Kshs 250,000.00

2. **Special damages……...Kshs 67, 935.00**

The respondents were also awarded interest at court rates on the decretal sum till payment in full.

Being dissatisfied with the lower court's decision, the appellant appealed against the judgment on the following grounds:-

1. That the trial magistrate erred in law and in fact in failing to find that the respondent had in law admitted the allegations of negligence as set out in the appellant's statement of defence by her failure to traverse the said allegations by way of reply to defence;

2. That the trial magistrate erred in law and in fact in arriving to the conclusion that the minor had sustained injuries after falling from a high bed yet the evidence on record showed the contrary.

3. That the trial magistrate erred in law and in fact in coming to the conclusion that the school was negligent yet there was no causal link established by the respondent in their evidence between the alleged appellant's negligence and the minor's injury.

4. That the trial magistrate erred in law and in fact in finding that the plaintiff's claim under paragraph 6 of the respondent's plaint was a loss recoverable at law and went ahead to give an award of Kshs 67,935 under this head.

5. That the learned magistrate erred in law and fact in assessing general damages and making an award thereon that was so high for the injuries sustained, that it amounted to miscarriage of justice.

6. That the learned magistrate erred in law in disregarding the appellant's evidence on record and her submissions thereof in his judgment.

The appellant has asked this court to allow the appeal and dismiss the respondent's suit.

As always, this court, being the first appellate court, has a legal obligation to reconsider the evidence and evaluate it afresh before coming to its own conclusions which may or may not be consistent with the trial court's findings of fact. Regardless of the conclusions this court comes to, I am mindful that the lower court had the advantage of seeing and hearing the witness and thus was able to assess with some degree of accuracy such elements of the evidence as their demeanour. I draw this legal position from **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

F W (PW1)(F) the mother and the next friend of **S W (PW4) (S)** testified that her daughter was slightly over eight years old and as at January, 2007, she had been a pupil at Nyeri Good Shepherd Academy for the past six years. It was Florence's testimony that while at appellant's school, and in particular on 18th January, 2007, Stacy fell from the upper deck of a double-decked school bed and sustained an injury on the forehead.

Although S was hurt, all the school did, according to the respondent, was to administer painkillers to her

daughter without any regard to the extent of her injury and without considering that she might have required specialised treatment from a hospital. In fact, so the respondent testified, she only came to know of her daughter's sickness through her sister-in-law, **S M (PW2) (S)** who was informed of the incident on 19th January, 2007 at 5.00 pm.

Stella took the child to hospital and at that time, S's face and eyes were swollen. She was admitted in hospital for four days and even after she was discharged, she had to remain at home for one more week for observation.

After she got well, S was transferred by her mother to a different school where she had to pay for her fees afresh.

The respondent produced in court the treatment notes of S and the receipts for the payment for treatment of her daughter and also for payment of fees both at the appellant school and the subsequent school to which she transferred. She also produced the P3 form with which she was issued by the police and duly filled by the doctor who examined Stacy. It was her case that as of 12th July, 2007 when she testified S had not fully recovered and that she still suffered bouts of headaches and dizziness.

Stella (PW2) told the court that she was called and informed of the child's sickness on 18th January, 2007; when she went to school, the matron told her that Stacy had fallen from the upper deck of the bed in which she used to sleep. She brought S and together with her luggage. Stacy, according to her evidence, was 'crying hysterically' and her face was swollen. When she informed S's mother, she travelled from Nairobi and took S to the hospital. In cross-examination the witness told the court she was not only the child's aunt but that she was also her guardian.

Dr Francis Maina (PW3), the Medical Officer of Health attached to Mathari hospital testified that he examined Stacy on 21st January, 2007 though she had been treated on 20th January, 2007 when she arrived at the hospital for the first time. According to this witness, the child sustained trauma on the head. A head scan done but it revealed that the head was normal. It was his opinion, however, that the child may experience post trauma complications such as epilepsy. The witness produced the report in which his findings and opinion were contained.

Stacy herself testified under oath, though there is no evidence that she was examined for purposes of the court satisfying itself whether she understood the nature of an oath before she testified. The court appears to have overlooked this step but the appellant does not appear to have taken issue with that omission since its counsel proceeded to cross-examine the witness without any objection as to the manner her evidence was taken. Just as it was a non-issue at the trial, the manner of taking of the evidence of this witness has also not been raised as an issue in this appeal and I will not attempt to make it one.

For whatever it was worth, Stacy's evidence was that she fell from 'a high bed' at night; her head was swollen as a result. She said that she was alone in her cubicle when this happened but she informed the matron the following morning. The matron gave her 'panadol' tablets and apparently was to rest till 5.00 pm. She was still feeling sick at that time and so her aunt was summoned; later her mother came and took her to hospital where she was treated and discharged. Her head was still swollen after this treatment and thus she went for what appears to be further treatment at Mathari hospital where she was admitted.

The appellant called four witnesses two of whom were pupils at the school. The first of these was **Y N (DW1)** who was then aged 12 and who testified that she shared a cubicle with the S at the material time. Of all the pupils in that cubicle S was the youngest; she was in class four while the rest of her mates were in class seven.

According to this witness, there was electricity blackout on the material night and therefore pupils went to bed early, at around 8.25 to 8.30 pm. She testified that she did not hear anything unusual at night; she did not hear Stacy fall or cry. S, however, did not wake up with everybody else the following day. When, later she came to the cubicle, she found S crying; she also noticed that she had a swollen forehead. She did not bother to ask her what could possibly have happened. She confirmed, however, that Stacy slept on

the upper decker above her.

L M (DW2) also shared the same cubicle with Stacy and testified that when the latter came to the cubicle on 17th January, 2007 she looked sickly. Just like **Yvonne (DW1)** she did not hear Stacy fall or cry at night. She confirmed, however, that Stacy had a swollen forehead the following day and that she occupied one of the upper decks in the cubicle. She testified that Stacy could possibly have fallen from her bed but it was her testimony that she could not have sustained the alleged injury.

The matron of the school **Tabitha Wanjiru (DW3)** testified that on 17th January, 2007 at around 8.00 to 8.30 pm she switched on the generator when the lights went off. Pupils went to the dormitories but their teachers left. The witness testified that at 9.30 pm she did the rounds in every cubicle including the cubicle in which Stacy slept and confirmed that all was well.

It was **Wanjiru's (DW3's)** evidence that Stacy did not wake up the following day and that when she went to check on her she found out that she had a swollen head.

She confirmed having given Stacy some painkillers after which she went to class but that at 1.00 pm she came back to her and complained that her head was aching. The witness added Stacy more painkillers but she asked her to call her aunt (PW2). At 3.30 pm Stacy came back to her office crying and that at that time her temperature had risen to $39^{O}C$.

It is at this point that this witness went to the head teacher and reported that Stacy was sick. She then called **Stella (PW2)** who came at 5.00 pm and took Stacy away. The witness testified that Sylvia, one of the pupils who shared the cubicle with Stacy had said that Stacy could probably have fallen down and injured herself. She agreed that Stacy slept on the upper deck though she had been allocated a lower deck.

In answer to questions during cross-examination, the witness stated that she was not a qualified nurse and that she left school at form three level.

The last defence witness who was one of the directors of the appellant company and also a teacher at the school was **Peter Gatheru (DW4).** He testified that indeed Stacy had been one of his pupils.

He got information from **Wanjiru (DW3)** on 19th January, 2007 that Stacy was unwell and 'they' called Stella (PW2) to take her to hospital. He testified that Stacy had sustained a minor injury. It was also his evidence that the alleged accident was bound to occur in school and that whenever it occurred or a child fell sick, the school would first administer first aid and if the situation gets worse, the child would be taken to hospital. The witness testified that the Stacy was withdrawn from school voluntarily and that the fees that had been paid was not refunded because the procedure of withdrawing a child from school was not followed.

The witness however denied that Stacy had been injured; according to him, the child had an infection on the forehead. He, however, admitted that since he was not a doctor, he could not tell extent (or the nature) of the injuries Stacy had sustained.

From the entire evidence on record, there is no dispute that Stacy was a pupil at the appellant school at the time material to the respondent's suit. Her age was also not in dispute. It is also common ground that one morning she woke up with a swollen forehead. What appears to have been in dispute was, first, the cause of the swelling. The question before the trial court appears to have been whether the swelling was as a result of an injury or it was just a symptom of an infectious decease as the appellant seemed to suggest. If the swelling was as result as of an injury was it self-inflicted or was it out of the appellant's negligence? If it was established that indeed Stacy was injured at school, what was the extent of the injury and accordingly what was the extent of damages payable? Depending on the answers to the forgoing questions, the inevitable question was, who was liable to pay for the damages, whether general or special damages or both? And finally who was to bear the costs of the suit?

For avoidance of doubt on the state of Stacy's forehead on the morning of 18th January, 2007, it is apparent that the appellants' witnesses themselves acknowledged that the head was swollen. **Y N (DW1)** attested to Stacy's swelling of her head when she went back to the dormitory on 18th January, 2007 and found Stacy still in bed when everybody else was up. **Lavina Mwangi (DW2)** also testified that Stacy's head was swollen on 18th January, 2007**. Tabitha Wanjiru (DW3)**, the matron was concerned that Stacy had not woken up on 18th January, 2007 like the rest of the pupils; she went to check on her and established that she had a swollen head. **Peter Gatheru (DW4)** initially admitted in his evidence that Stacy had sustained an injury and if I understand his evidence correctly, he testified that accidents in school are bound to occur. Later in his evidence he turned around to say that what appeared to be an injury was as a result of an infection. In the sick sheet issued by the school, the nature of Stacy's sickness is indicated as 'fever and headache because of swelling'.

Only medical evidence would establish the cause of the swelling on Stacy's head. According to the medical examination report in the P3 form admitted in evidence in support of the respondent's case, the patient had a history of having fallen from a bed and sustaining injury to the eyes and the face. The examination established that the patient had established a "peri-orbital swelling with cellulitis (inflammation)". The probable weapon that caused the injury was classified as "blunt object" and the injury itself was classified as "harm".

This evidence was consistent with the medical report by **Dr Francis Maina (PW3)** which indicated that the patient had a history of having fallen from a high bed and that when she was brought to hospital she was complaining of headache, swelling on the face and swelling of the left eye. Upon examination she was found to have periorbital haematoma with cellulites and a swelling on the face. The patient was managed by, among other things, incision and drainage of the abscess.

In my humble view, the available medical evidence suggested that the injury sustained by the patient was consistent with hitting her head on a "blunt object"; I would therefore suppose that the floor upon which the patient probably fell would for all intents and purposes be what one would regard in medical terms as the "blunt object". At least there was no evidence to the contrary that "the blunt object" in these circumstances would be anything other than the floor on which the patient must have fallen and hit her head.

There was a suggestion by the appellant that the swelling must have arisen from an infection but there was no evidence and none was tendered by the appellant to prove that Stacy's swelling was an infectious disease. More importantly, no evidence was tendered to contradict the respondent's medical evidence that the swelling was as a result of an injury caused by a blunt object.

Peter Gatheru (DW4) himself alluded to the possibility of Stacy having fallen and injured herself as a result of an accident which, in his own words, is bound to occur in school. I would agree with him that there existed such a possibility and indeed in this particular case an accident did occur and one of his pupils was injured.

Having established that Stacy sustained the head injury at school the next question to consider is whether the injury was occasioned as a result of carelessness or negligence of the appellant.

In answering this question it is important to bear in mind that Stacy was only aged eight at the time of the accident. Being a pupil at the appellant's school at the material time, she was under the school's care. In these circumstances, the appellant had the responsibility to ensure that she is safe and secure; in legal parlance, the school owed her the duty of care.

The circumstances under which the accident occurred suggested that the school failed to exercise this duty of care. For instance, it was negligent for the school to assign Stacy an upper deck bed without any protective measure that would restrict her movement or prevent her from falling. Granted, the child may have insisted on sleeping on the upper deck as the appellant's matron suggested in her evidence but even if that was the case, it was reckless of the appellant to leave an eight year old child to her own devices and hurt herself. A reasonable man would have taken the necessary precautions to ensure that the child's

safety was guaranteed irrespective of where she slept.

Taking her age into account, I would be hesitant to take it on the minor and blame her for the accident; in law, she cannot be said to be contibutorily negligent unless the appellant proved that the child had the capacity to know that she ought not have slept on the upper deck or that she ought to have slept on the lower deck. This, the appellant did not do. This question was addressed in **Butt versus Khan (1981) 1KAR 1982-1988** at page 349 where Justice Madan said:-

> ***"I respectfully agree and I would also dismiss the appeal in so far as it relates to contributory negligence. Indeed, I am of the opinion the practice of the civil courts ought to be that normally, a person under the age of ten years cannot be guilty of contributory negligence and thereafter, in so far as the young person is concerned, only upon clear 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."***

This is consistent with the general principle that whoever is in charge of or in the custody of children must be prepared for the children to be less careful than adults.

There was a suggestion from the appellant's witnesses that there may have been an electricity blackout on the material night. Although **Wanjiru (DW3)** testified that she switched on the generator it appears that generator did not run or perhaps was not meant to run for a longer period. This would explain why pupils retired to bed earlier than usual. It is logical that there must have been some episodes of darkness in the entire school and in this particular case, in the dormitory. In these circumstances accidental slips or falls occasioned by poor visibility would be a probable occurrence so that even if liability was to be apportioned, there would be no basis to bring the pupils or any of them into equation.

I would agree with the learned magistrate that the appellant was solely liable for the accident.

The last question in this appeal is whether the award made was so high as to amount to miscarriage of justice.

According the medical report by Dr Francis Maina (DW3), all that the child complained of was:-

i. Headache
ii. Swelling of the face
iii. Swelling of the left eye

Her treatment constituted incision and drainage of the abscess and doses of antibiotics. Upon treatment the swelling subsided and the child was discharged after being admitted for four days.

In his award the learned magistrate took into account the doctor's oral evidence in court, which appears to a departure from his medical report submitted in court, that the child was likely to "have epilepsy, headaches and nightmares throughout her life."

Without citing any particular decision the learned magistrate made an award of Kshs. 250,000/= as general damages.

The general principle applicable in considering an award of damages at this appellate stage is that while the assessment of damages is within the discretion of the trial judge, the appellate court will only interfere where trial judge, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms:-

"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

There are two reasons why I would disturb the learned magistrate's award; first, no reason was given why the doctor omitted such information as the future prognosis of the patient from his report; if that information was so crucial that it influenced the extent of the award made, it ought to have been part and parcel of the medical report that was submitted in court. It was simply not enough for the doctor to tell the court from the bar that his patient is likely to suffer such a serious condition as epilepsy or bouts of headaches and nightmares for the rest of her life. For a good measure these allegations were inconsistent with the medical report that was placed before the court for its consideration.

As the report itself would show, the patient was subjected to a head scan; her head was found to be intact and normal and if that was the case, one would wonder and legitimately so, the basis for fear of epileptic fits or bouts of headaches and nightmares in future. All I gather from the medical report was that the patient sustained a soft tissue injury that was managed and treated. There was no evidence that as at the time the report was prepared the minor was still being treated of the effects of this injury.

To the extent that the learned magistrate was carried away and based his award on what one would consider as wild allegations, he misapprehended the evidence in some material respect and arrived at a figure which was inordinately high in the circumstances.

Apart from misapprehending the evidence, the award was not supported by any previous decision where similar or near similar injuries had been sustained; in other words there was no legal basis of the learned magistrate's estimate. In this regard I would say that the learned magistrate acted on the wrong principles or was not guided by any principle at all.

The appellant urged that a sum of Kshs 50,000/= in general damages would be adequate compensation for the respondent; its counsel relied on the decision in Nakuru High **Court Civil Appeal No. 99 of 2003**, **Sokoro Saw Mills Limited versus Grace Nduta** where the court (Kimaru, J) awarded the sum of Kshs. 30,000/= where the claimant suffered soft tissue injuries on the right hip joint and the back. The award was made in 2006. The appellant also relied on the **Nairobi High Court Civil Case No. 1309 of 2002**, **Pamela Ombiyo Okinda versus Kenya Bus Services Ltd** where the court (Ang'awa J) awarded the sum of Kshs.50,000/= for a cut wound on the forehead, on both shins, blunt trauma to the right eye, neck and hips and loss of consciousness.

The respondent, on the other, hand asked for Kshs 500,000/= for general damages and the only decision cited in support of an award of this sum was that of **Nyeri High Court Civil Case No. 81 of 2002**, **Geoffrey Mburu Theuri (A minor suing through the next friend James Theuri Wangari versus Board of Trustees Arch Diocese of Nyeri & Another** where the court (Okwengu, J) awarded the of Kshs 550,000/= to a minor who suffered a deep cut on the head with a depressed fracture that left the minor with a 7cm long scar and an oval bone defect on the left frontal anterior bone.

In this latter award, the judge noted that Dr Wokabi who initially examined the minor was of the opinion that the minor was predisposed to high chances of developing epilepsy but that three years down the line the minor had not exhibited any symptoms of epilepsy. The learned judge therefore opted to go by the second medical report which showed that chances of developing epilepsy were negligible.

The injuries sustained in these latest decisions were obviously severer than those that the respondent sustained in the instant case. They cannot by any stretch of imagination be described as soft tissue injuries and therefore an award of Kshs 500,000/= would have been inordinately high. The awards by Kimaru J and Ang'awa J in the earlier decisions are closer to what one would award in this case; they were soft tissue injuries. Of the two awards, however, the latest of them was made in 2006, almost ten years ago. The appellant suggested a figure of Kshs. 50,000/=. I would consider the inflationary incidence for the past ten years and award the sum of Kshs 90,000/= as general damages.

As far as special damages are concerned the learned magistrate awarded the sum of Kshs 67,935/= made up of the school fees that had been paid for the respondent in the appellant school and also the amount paid as fees in the subsequent school she was transferred to.

I am of the view that the learned magistrate also fell into error in this regard; I say so because having withdrawn the plaintiff minor from the appellant school, the most the minor could get was a refund of part of the fees paid in that school for that particular term. There is no rationale, at least I do not see any, for ordering the appellant school to pay the fees that was paid to the school that the respondent was subsequently transferred to. The appellant did not assume the obligation to cater for the minor's education as a result of the unfortunate incident in which she sustained a bodily injury. I would therefore tamper with the award of special damages by deducting from that award the amount the respondent paid to her subsequent school.

Peter Gatheru (DW4) testified that the school fees paid to the appellant school as fees for the respondent was not refunded because the respondent did not fill certain forms and follow the normal procedure; what I read from this is the appellant school had no qualms refunding the fees as long as the right channels were followed. There was no suggestion from Gatheru's evidence that the school was going to deduct any sum from the amount due to the respondent. I would have therefore award the sum of Kshs 26,500/= being fees paid to the appellant school as special damages.

I note the learned magistrate did not award the amount paid to cater for the treatment of the minor. I also note that no cross-appeal was filed asking for this amount and it will be logical to assume that the respondent was satisfied with this omission. I will not impose on her what she has not asked for.

In the final analysis I would vary the lower court's award and in its place make the following award:

1. **General damages……..Kshs 90,000/=**
2. **Special damages……Kshs 26,500/=**

Total……Kshs 116,500/=

The decretal sum shall attract interest from the date of delivery of the judgment in the lower court. The respondent shall have the costs of the suit and interest thereof.

Since the appeal has only partly succeeded each party will bear its costs. Orders accordingly.

Dated, signed and delivered in open court this 14th day of December, 2015

Ngaah Jairus

JUDGE