REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 138 OF 2005

MOSES NJENGA.....1ST APPELLANT

MOTURI ANOKS T/A THE ROCK MIRROR SCHOOL.....2ND APPELLANT

VERSUS

I.B. THRO' HER FATHER AND NEXT FRIEND B. B.....RESPONDENT

JUDGMENT

1. **I. B.**, a minor alleged that she was in the process of doing her end of primary class 7 Kiswahili examination when one **MOSES NJENGA** who was a teacher in the process of invigilating the said exam wrote on I. B.'s question paper ***"Unione leo"*** (Kiswahili for See Me Today). I. B. promptly replied in writing **"Mimi siji kwako sijui utakacho nifanyia;"** translated, (I will not come I don't know what you might do to me). After the examination I. B. reported the incident to her head teacher. She was crying as she reported. Later her father became aware of the incident through friends at a pub and from his daughter. He engaged the school administration and Moses Njenga was made to apologize. I. B.'s father wanted a written apology to his daughter and when none was forthcoming he instructed his advocates to proceed to court and seek redress. In the meantime he removed I. B. and her brother from the school where Moses Njenga taught and whose proprietor was the 2nd Defendant now the 2nd Appellant.

2. In the plaint I. B. through her father and next friend sought exemplary and general damages for the actions of Moses Njenga which were described as indecent advances that caused I. B. emotional and psychological trauma forcing her transfer from that school. The proprietor of the school that employed Moses Njenga was sued as the 2nd Defendant and alleged to be vicariously liable to I. B. for the wrongful actions of the said Moses Njenga. The Defendants denied every allegation in the plaint in their defence.

3. At the hearing of the suit I. B.'s father gave evidence in support of the case. The 2nd Defendant gave evidence for the defence. The parties then closed their cases and tendered written submissions and the court set a date for the delivery of judgment. On that date however, the trial court did not deliver judgment instead it ordered that the minor I. B. be called to give evidence to clarify certain issues. Thereupon the defence refused to participate in the proceedings. The trial court proceeded and interviewed the minor. A date for judgment was set and judgment was entered for the Plaintiff in general

and exemplary damages to the tune of Kenya Shillings one hundred and eighty thousand (Kshs. 180,000/=). Being dissatisfied the Defendants brought this appeal raising some seventeen (17) grounds of appeal which are summarized herein below;

4. That the learned trial magistrate erred in law and fact in failing to dismiss the suit for want of jurisdiction; for being fatally defective; in taking the Plaintiff's further evidence without an application from either party and denying the Appellants to similarly tender further evidence in response to that tendered by the Respondent/Plaintiff; the reopening of the case was erroneous and unprocedural; the trial court canvassed the case with the Plaintiff/Respondent in chambers while the case was pending judgment; the allowing of an amendment of the plaint by the trial court while awaiting judgment was wrongful; in awarding damages when liability was not proved and that such an award was excessive and erroneous; failing to take the Appellant's evidence and submissions into account; in taking extraneous issues into account; in awarding the Respondents the costs of the suit and in exercising the court's discretion wrongly. The Appellants pray that the appeal do succeed and the Lower Court's case be dismissed with costs.

5. The Appellants filed written submissions in support of the appeal and the same were highlighted before me at the hearing of the Appeal. I have taken those into consideration to arrive at the determination of this Appeal. The Respondents opposed the appeal through the oral submissions of their counsel. Similarly those submissions have been considered.

6. Admittedly liability is so primary an issue that I must start at that point. Liability is everything, without which no steps would be taken by the trial court. The Appellants' attack on the trial court's jurisdiction to hear and determine the case before it is in my considered view, without an iota of merit. The Children's court was properly constituted. Further, that court was a Magistrate's Court with the requisite civil and criminal jurisdiction to hear and determine the matter before it. All one needs to look at are the **Magistrates' Courts Act** and the **Children Act**. To suggest that the trial court became divested of her civil jurisdiction because the matter before her concerned a child is, with respect, to split hairs. My finding is that the trial court was clothed with the necessary jurisdiction.

7. There clearly was a defect in the failure to date and sign the plaint. That defect was made all the worse by the fact that the plaint was drawn and filed by Learned Counsel for the Plaintiff, now Respondent. Parties are agreed that the trial court ordered the plaint to be dated and signed in court. The issue taken therefrom is that such signing and dating was unprocedural. To that I have the following to state; this was a Children's case. Legal Notice No. 77 Children's Act No. 8 of 2001 empowered the court to disregard technicalities. Due regard to Substantive Justice would frown on the face of procedural technicalities and would support due dispatch of speedy justice. In any event no prejudice was shown to have been suffered by the appellants because of such dating and signing of the plaint as they had every opportunity to defend the allegations against them and indeed they had grasped such opportunity. My finding therefore is that no miscarriage of justice was occasioned by the signing and dating of the plaint in court.

8. I have meticulously perused the Lower Court's record and was unable to come to the conclusion arrived at by the Appellants that the trial court ignored the Appellants evidence and Submissions. On the contrary the trial court properly analysed all the material placed before her and gave reasons for the court's finding.

9. The Lower Court's record clearly shows that the Plaintiff closed his case through Counsel on 24/10/2005 at 4.05 p.m. or thereabouts in the following recorded words:-

"Last time we indicated we were to call one (1) more witness but intended witness is a standard 8 pupil who is to sit for her exams in short while (sic). We feel she shouldn't be distracted by coming to testify on a mater (sic) likely to be emotional on her part. I therefore wish to close Plaintiff's case."

Whereupon the defence opened and closed its case. The defence did their part and after submissions the

court set a judgment date only to turn around and write a ruling requiring the minor to be brought to court for purposes of giving evidence. This was most unprocedural, unusual and strange. Parties are bound by their pleadings and the evidence adduced in court. It cannot be the business of the court to reopen the case with the sole purpose of strengthening a party's case or for whatever other reason as clearly appears to have been the case here. That was wrong. And the court did not take heed when the defence refused to participate in any further proceedings in those circumstances. And the defence may be forgiven when they allege that the trial court was compromised although that is a matter I would hesitate to discuss at length as not much was done towards enforcing any rights that were seen as having been breached at the appropriate time. I will deal with it, though, when considering the quantum of damages. The re-opening of the Plaintiff's case by the court *suo moto* was definitely wrong and unprocedural and it does not seem to have been done for the sole purpose of doing justice to all the parties in the case. In the premises I hereby order struck out of record the evidence of the minor I. B.

10. Was liability proved in the circumstances of the case? There was documentary evidence – the examination paper on which the 1st Defendant admitted having written the offending words **"nione leo."** If his explanation given in his letter of apology were to be believed, then surely he would not have had to wait for I. B. to continue answering questions on the wrong paper but as a responsible teacher he would have corrected the child on the spot and there would not have been the need for the child to see him later. And if he was innocent what then was he apologizing for? And why did he not wish to give evidence and the veracity of his evidence be subjected to cross-examination? On a balance of probability I find, as did the trial court, that such failure was indicative of guilt.

The child Irene reported the incident to another teacher – the Principal – and she was crying as she reported. She was clearly affected by such advances and her answer as on the exam paper spoke volumes of her fears. The evidence of PW1 was clear, the child was traumatized and that is to be expected. How was she to be expected to continue relating to the teacher after the incident? And hence the parent's decision to transfer her from the school was well advised and was the only available option. My finding is that liability was proved by documentary evidence, admission of the 1st Defendant and the evidence of PW1. The absence of the evidence of the victim did nothing to water down the available evidence.

11. Such liability is purely that of the 1st Defendant, Moses Njenga. In the circumstances of this case, does vicarious liability arise? Firstly it was not denied that the 1st Defendant was the employee of the 2nd Defendant. That clears the issue of who was entitled to tell the employee the way in which he was to do the work upon which he was employed **see NAIROBI CITY COUNCIL V PATEL KLR (1976 – 80) Vol. 1.**

That was the 2nd Defendant. The task that the 2nd Defendant gave the 1st Defendant was to teach I. B. and her fellow schoolmates and to invigilate their examinations. The task that Moses Njenga was not given by the 2nd Defendant was to ask pupils to **"see him today"** which was clearly improper and was correctly interpreted as indecent advances **see KHAYIGILA B GIGI & GO LITD & ANOTHER KLR (1987) 76**.

Moses Njenga was not doing what he did on the instructions of his employer and he most definitely was not doing so in the performance of the task or duty assigned to him by his employer. I find therefore that no liability attached to the 2nd Defendant now the 2nd Appellant on the principle of **Respondent superior** and hereby do absolve him of any liability. The court below was wrong and such wrong is hereby righted.

12. That a wrong was committed by the 1st Defendant is proved. What then would appropriate damages have been? I am alive to many authorities that an appellate court will not lightly interfere with the exercise of a court's discretion unless it is shown that such discretion was wrongly exercised or that there was an error in principle. And the award of damages is an exercise of discretion which discretion must be guided by comparable awards for similar losses so as to arrive at a reasonably fair compensation. In the instant case an award of Ksh. 180,000/= during 2005 for this wrong was clearly based on an error of principle and/or on extraneous matters and hence the issues of canvassing and reopening the case by the court become relevant. Yes the child was wronged and suffered trauma psychologically and had to be

transferred to a new school one year to a national examination. That was the wrong suffered by the child and it is the child who is the Plaintiff. It may well be that the father suffered loss in the transfer of his children to a new school and even if that were to be a consideration, the adequate compensation cannot rightly have been assessed at Ksh. 180,000/=. I feel constrained to differ from the trial court's assessment of damages. In the premises I find that the award of those damages was entirely erroneous and so inordinately high as to represent an entirely erroneous estimate. Consequently I set aside the award in general and exemplary damages of Ksh. 180,000/= and substitute there for an award of Ksh. 40,000/= as against the 1st Appellant only. The Respondent shall have the costs of the suit in the Lower Court and of the appeal. There will be orders accordingly.

DATED AND SIGNED AT NAIROBI THIS **7TH** DAY OF **MAY 2012.**

P.M. MWILU
JUDGE

DELIVERED AT ELDORET THIS 22ND DAY OF **MAY 2012**.

F. AZANGALALA
JUDGE
In the presence of:-

N/A Advocate for Appellant

CHEGE H/B FOR BULUMA Advocate for Respondent
LIMISI Court Clerk

F. AZANGALALA
JUDGE