



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT ELDORET**  
**CIVIL APPEAL 31 OF 2008**

**MOI TEACHING AND REFERRAL HOSPITAL.....APPELLANT**

**VERSUS**

**CYPRIL OWUOR AURA (Minor Suing through her**

**next friend and Mother**

**CATHERINE WESONGA) .....RESPONDENT**

*{Being an appeal from the Judgment and decree of the Hon. Grace Mmasi, Senior Resident*

*Magistrate given on the 26<sup>th</sup> February, 2008 in ELDORET CMCC No. 879 of 2006*

**CYPRIL OWUOR AURA) –vs- MOI TEACHING & REFERRAL HOSPITAL}**

**JUDGMENT**

This appeal is from the judgment and decree of the learned Senior Resident Magistrate, **Grace Mmasi**, dated 26<sup>th</sup> February, 2008, in Eldoret Chief Magistrate’s Court Civil Case No. 879 of 2006. The appellant, **Moi Teaching and Referral Hospital** (hereinafter “**the appellant**”) was the defendant and the respondent **C.O.A** (minor suing through her next friend and mother **C.W**) was the plaintiff. The learned Senior Resident Magistrate awarded the respondent Kshs 150,000/= as general damages for pain and suffering and Kshs 1,500/= as special damages for injuries sustained by the respondent when she was being born at the appellant’s hospital. That decision triggered this appeal.

The respondent pleaded, *inter alia*, that on or about 17<sup>th</sup> November, 2006, the next friend, **C.W** was admitted at the defendant’s hospital to deliver a baby, the respondent, but the appellant’s staff/agents and/or servants negligently carried out the delivery at which the respondent sustained a cut on her left parietal region. In the particulars of negligence, the respondent alleged, among other things, that the

appellant's servant/agent and/or employee carried out the operation recklessly and without due care and diligence; were not adequately trained and that the appellant exposed the respondent to a risk which the appellant knew or ought to have known. As a result of the said negligence, so the respondent pleaded, she sustained a deep cut wound on the scalp about 2 cm long on the left parietal region and also lost blood.

The appellant delivered a defence in which it, *inter alia*, denied the respondent's claim and the particulars of negligence and injuries. Without prejudice, it averred that if the respondent sustained any cut,

- > the same was during an emergency operation during her delivery;
- > that the next friend (the mother) was admitted with pre-mature rupture of the membrane at 36 weeks gestation and in the course of admission developed a cord pre-lapse;
- > that the situation was critical and life threatening to both mother and child;
- > that the respondent in the process sustained a small cut on the left parietal region which was repaired;
- > that cuts are usually inevitable but the appellant's doctors diligently and successfully managed to save the life of the respondent and her mother.

At the trial, the next friend testified that on 17<sup>th</sup> November, 2005, she was admitted at the appellant's hospital; on 19<sup>th</sup> November, 2005, she was taken to theatre and operated on; when she was given the respondent, the latter had a cut on the head which was bandaged which cut was sustained during the operation. The bandage was removed after 7 days. She blamed the doctor who carried out the operation for causing the injuries. Later, **Doctor S. Aluda** prepared a medical report of those injuries. He testified at the trial and classified the degree of injury as a soft tissue injury which had healed.

The appellant's case at the trial was presented by **Dr. Joshua Kisoria** (D.W.1), a medical officer at the appellant's hospital. He admitted attending to the mother of the respondent after her admission at the said hospital. He observed active premature rupture of the membrane which in his view, was an emergency. She was then successfully delivered through operation with the respondent and herself receiving expert care. He denied being reckless in the manner he carried out the operation and stated that he in fact exercised due care and caution.

In cross-examination however, he admitted that during the operation which he carried out, the respondent sustained a cut on the head which was treated by stitching.

In the judgment delivered after the trial, the learned Senior Resident Magistrate found that D.W.1 failed to exercise caution while operating on the respondent's mother. She also concluded that the appellant was vicariously liable since its employee had acted without due care. She then awarded the sums referred to above.

That decision has triggered this appeal by the defendant (now appellant). It has put forward 8 grounds of appeal which in the main challenge the learned Senior Resident Magistrate's findings on liability and the award of Kshs 150,000/= as general damages which are said to be so inordinately high as to amount to a totally erroneous estimate of the damage suffered by the respondent.

When the appeal came up for hearing before me on 24<sup>th</sup> May, 2011, counsel agreed to file written submission which submissions were duly in place by 28<sup>th</sup> March, 2012. I have considered the record, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of the matter. This is a first appeal. That being the case, the court is obliged to subject the evidence which was adduced before the trial court to afresh scrutiny and arrive at its own conclusion bearing in mind that it did not see or hear the witnesses testify. The court should also be slow to disturb findings of facts of the trial court. (See **Selle and Another -vrs Associated Motor Boat Company Limited and others [1968] E.A. 123**, and **Peters -vrs- Sunday Post Limited [1958] E.A. 424**).

It is also trite that I am not necessarily bound to follow the trial court's findings of fact if it appears, either that the court failed to take into account particular pertinent circumstances or if the impression based upon the demeanour of witnesses is inconstant with the evidence adduced (See **Abdul Hassan Saif –vrs- Ali Mohammed Shuran [1955] 22 E.A C.A. 270**)

On the above principles, this court can only, interfere with the trial court's findings of fact if the findings were based on no evidence or were based on a misapprehension of the evidence or if it is shown demonstrably that the trial court acted on wrong principles in reaching its findings (See **Ephantus Mwangi and Another –vrs- Wambugu [1983 – 84] 2 KAR 100**)

The appellant has argued that the respondent did not prove negligence as she merely established that she had received a cut during delivery. That event *per se* is not proof of negligence according to the appellant since “**there is no negligence in law without fault**” (See **Muthuku -vrs- Kenya Cargo Services Ltd [1991] KLR 464**). The appellant further contended that expert evidence was required, and was not adduced, to establish that the said cut was caused by negligence. Reliance was placed on the English case of **Bolam -vrs- Friern Hospital Management Committee [1957] 2 All E.R. 118**, where it was held that

**“A doctor is not negligent if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in the particular art.”**

There is no dispute that the respondent received a cut wound on her scalp as she was being born at the appellant's hospital. Did D.W.1 exercise the ordinary skill of an ordinary skilled man exercising that particular art? The respondent pleaded that the operation carried out by D.W.1 was so carried out recklessly and without due care and diligence and further that the appellant and/or its employees, including D.W.1, exposed the respondent to a risk which the appellant knew or ought to have known. In her oral evidence, at the trial, the mother of the respondent stated that she expected to deliver a child without cuts on the head and blamed the doctor who performed the operation on her for causing the injuries. The gist of that testimony was that operations of the type performed on the mother of the respondent when skillfully carried out do not result in cuts upon the new born.

**Dr. Joshua Kisoria** D.W.1 who presented the case for the appellant testified that he carried out a successful operation on the mother of the respondent and ensured that both the mother and the respondent survived. In doing so, he said, he exercised due care and caution. D.W.1 however, freely admitted that during the operation, the respondent sustained a cut on the head which was treated and stitched. He did not testify that such cuts during such operations are normal; they cannot indeed be normal when skillfully carried out. **Dr. Paul Kipkorir Rono** (P.W.3) testified that it was normal for a baby to sustain a cut during such an operation. He however added that the respondent was accidentally cut.

Given the evidence adduced before the learned Senior Resident Magistrate, I have come to the conclusion that there was basis for her finding that the respondent proved negligence against the appellant. It is plain beyond peradventure that a caesarian operation professionally carried out does not cause cuts to the baby. The appellant's doctor (D.W.1) offered no explanation for the cut on the respondent. In the premises, the learned Senior Resident Magistrate cannot be faulted for concluding that negligence had been proved against the appellant. The case of **Bolam –vrs- Friern Hospital Management Committee** (Supra) is distinguishable from this case. In that case, the doctor applied an accepted procedure in treating the plaintiff which treatment unfortunately resulted in injuries to the plaintiff. That is not the position in this case. D.W.1 did not testify that he applied a known procedure which would inevitably result in cuts to the respondent. It may have been accidental as P.W.3 opined but accidents do not just happen. In this case, I agree with the learned Senior Resident Magistrate that the accident happened due to the negligence of D.W.1, the appellant's doctor who carried out the operation on the respondent's mother.

The appellant also placed reliance on the case of **Wilsher -vrs- Essex Area Health Authority [1988] 1 ALL ER 871** where it was held, *inter alia*, as follows:

**“Where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury**

**did not give rise to a presumption that the defendant had caused the injury. Instead, the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury."**

It is plain that the facts in that case are distinguishable from the facts of this case. Here, there is no doubt as to who caused the cut on the respondent. It was also not the appellant's case that some other event could have caused the cut on the respondent. In the premises, the appeal against findings on liability is without merit.

I turn now to the appeal against assessment of damages. The principles upon which a court on appeal can interfere with the quantum of damages awarded by a trial court are settled. In **Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini -vrs- A.M. Lubia and Olive Lubia [1982 – 1988] I KAR 727, Kneller J.A.** said at page 730 as follows:

**"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (See Ilango –vrs- Manyoka [1961] E.A 713; Lukenya Ranching and Farming Co-operative Society Ltd =vrs= Kavolot [1970] E.A. 414, 418, 419. This Court followed the same principles."**

The appellant has submitted that the award of Kshs 150,000/= as general damages made to the respondent is inordinately high given the injury suffered by the respondent. It is common ground that the respondent sustained a deep cut wound on the scalp about 2 cm long on the left parietal region and also lost blood. It is also common ground that the injury healed leaving a permanent scar. The respondent therefore suffered a soft tissue injury.

As stated in **Ziphorah Wambui Wambaira and 17 others –vrs- Gachuru Kiogora & 2 others [Nairobi C.A. No. 10 of 2004] (UR)**, in assessing damages, **"the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards."** In that case a sum of Kshs 50,000/= was awarded to plaintiffs who suffered soft tissue injuries and Kshs 100,000/= for fractures. That was at the end of 2004. Taking into account the incidence of inflation and the value of the Kenyan shilling, it is my view that the sum of Kshs 150,000 awarded as damages for a cut which has healed completely is so inordinately high as to represent an entirely erroneous estimate of the damage sustained by the respondent. It was not a fair and reasonable compensation for the injury she suffered. In the premises, I am entitled to interfere. I am of the view that an award of Kshs 75,000/= would adequately compensate the respondent and is commensurate with comparable awards.

Before concluding this appeal, I will briefly comment on the respondent's complaint that the appeal is incompetent because important documents, including medical evidence adduced at the trial and the decree appealed from were not incorporated in the record. The short answer to the challenge is found in **Order 42 Rule 13 (4) of the Civil Procedure Rules**. As all the said important documents are on the record of the court, the challenge was without substance and does not merit further consideration.

The upshot is that I allow the appeal against the award of Kshs 150,000/= as general damages made to the respondent. I set aside the said award and substitute therefore an award of Kshs 75,000/= as general damages. The other orders of the learned Senior Resident Magistrate are undisturbed.

The appellant has succeeded to a limited extent and the order on costs which commends itself to me is that each party pays its own costs of the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET**

**THIS 9<sup>TH</sup> DAY OF MAY, 2012.**

**F. AZANGALALA  
JUDGE**

**Read in the presence of:-**

**Mr. Kamau** for the appellant and **Mr. Kosgei** for the respondent.

**F. AZANGALALA  
JUDGE  
9/5/2012.**