REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 190 OF 2007

GEORGE KIBOI WAITHAIGA …….……. APPELLANT

-VERSUS-

KEVIN OINO SIMBA
(Suing through the next friend
JOSEPH SIMBA ……... RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Hon. J. D Jwebi , Senior Resident Magistrate in Ogembo SRMCC No. 25 of 2005 and delivered on 7th September, 2007)

Kevin Oino Simba, the respondent in this appeal, hereinafter called ***"the plaintiff"*** through his next friend, **Joseph Simba,** sued **George Kiboi Waithaiga,** the appellantand two others**,** hereinafter called ***"the defendant"*** in the Senior Resident Magistrate's court at Ogembo. He sought to recover damages for personal injuries he claimed to have sustained in a road traffic accident on 17th March, 2005, involving motor vehicle registration number KZP 641 Isuzu Lorry and himself. He claimed that the lorry was owned by the defendant and was at the material time being driven by one, **Stephen Murithi Ndugu,** as its driver, agent and or servant whom he sued as the 2nd defendant.

According to his amended plaint dated 5th December, 2006 and filed in court on 11th December, 2006, he averred that he was on 17th March, 2005 on his way from school lawfully walking along Kisii-Migori road on his correct side of the road, when the defendant's driver, servant, agent or employee aforesaid negligently drove the said lorry that it veered off the road, lost control and knocked him and as a result he sustained serious injuries. The particulars of negligence he associated the defendant with were that he drove the motor vehicle at a speed that was excessive in the circumstances, drove without due care and attention, failed to slow down, swerve, keep proper position, or in any way manage or control the lorry though defective so as to avoid causing the accident, failed to have any or any sufficient regard for other road users who were or could reasonably be expected to be on the said road and especially the plaintiff, drove off the road and finally failed to properly service or maintain the lorry. The plaintiff further pleaded that the doctrine of ***Res Ipsa Loquitor*** applied

Through **Messrs Okongo & Company Advocates** the three defendants filed a joint amended defence on 29th August, 2006 in which essentially they denied ownership of the lorry, the occurrence of the accident and the negligence and particulars thereof attributed to them. They also denied the plaintiff's injuries which included fracture of left femur and head contusion. According to paragraph 8 of their defence, the doctrine of ***res ipsa loquitor*** did not apply to the circumstances of the accident which they

claimed was substantially contributed to by the negligence of the plaintiff as he aimlessly and carelessly walked on the road, idling himself at the accident scene, failed to move off the road and failed to heed the approach and warning of the lorry. The defendant also romped in the owners of motor vehicles KAQ 339H, KAQ 659V and KAR 987C as having had a hand in the accident and assigned them their respective negligence and the particulars thereof.

At the trial before **Hon. J. D Kwena**, then Senior Resident Magistrate, only the plaintiffs testified. No evidence in other words was led by the defence on the grounds that they had no nice defence to offer.

In his evidence, the plaintiff told the trial magistrate that on the material day he was going home from Nyachenge Primary School. He was walking on a side road as he faced Kisii along Kisii-Migori road. The lorry came from infront and thinking that it would pass, it suddenly veered off the road and hit him. He was aged 12 years then. Before it hit him, he had seen it zigzagging. He was taken to Tabaka Hospital and treated. Later his father and next of friend obtained a police abstract from the police. He was issued with P3 form as well. Later his father took him to Doctors **Ajuoga** and **Raburu** in Kisumu. He saw the motor vehicle about 50 metres and ran away from the road to the side. However the motor vehicle followed him there and collided with injuring him on the left thigh.

Cross-examined he stated that the motor vehicle was being driven at a fast speed. There were many motor vehicles at the scene as prior to that there had been an earlier accident. The scene of the accident was on a slope.

On his part, the plaintiff's father testified that whilst his son was coming from school on 17th March, 2005, at Corner Mbaya bridge, a lorry hit him. The plaintiff was taken to Tabaka Hospital and hospitalized for 2 days. He paid kshs. 28,490/= initially and later 43,240/=. He later reported the accident to the police and was issued with a police abstract as well as P3 form. Later he took the plaintiff to **Dr. Ajuoga** who examined him and prepared a medical report. The plaintiff was again seen by **Dr. Raburu** at the instance of the defendant for a second medical report. He subsequently, searched the motor vehicle registry and established that the motor vehicle belonged to the defendant. He was therefore seeking compensation on behalf of his son, costs of the suit and interest. The plaintiff though had a metal plate in his left leg and kshs. 50,000/= will be required for the operation to remove the same though in private hospitals it may cost kshs. 100,000/=. He tendered in evidence payment statement, discharge summary, police abstract, P3 form, the two medical reports and the search certificate.

Cross-examined, he stated that he had been called and informed about the accident, the spot of the accident was sloppy and he was not aware that the plaintiff was crossing the road at the time of the accident. Both doctors recommended that the plaintiff required further treatment.

With that the plaintiff closed his case. As already stated the appellant offered no evidence in rebuttal. In a reserved judgment delivered on 7th September, 2007, the learned magistrate found the defendants 100% liable for the accident. On quantum, she awarded the plaintiff general damages of Kshs. 500,000/= and special damages of Kshs. 57,000/=. The defendant was aggrieved by the judgment and decree aforesaid and therefore lodged the instant appeal on six grounds to with:-

"1. The learned trial magistrate erred in both law and fact when without finding that the respondent had proved negligence against the appellant, he proceeded to award to him damages.

2. The learned trial magistrate erred in both law and in fact when he held that contributory negligence can never be applied against a minor, which is a misconception of the law and applicable principles.

3. The learned trial magistrate erred in both law and in fact when he held that motor vehicle KZP 641 belonged to the appellant when no evidence in that regard was tendered in evidence.

4. The learned trial magistrate erred in both law and in fact when he awarded kshs. 50,000/= as future

medical expenses. Kshs. 6,000/= as cost of medical legal report which amount was neither pleaded nor proved at the trial.

5. The learned trial magistrate erred in both law and in fact when he awarded a sum of kshs. 500,000/= as general damages for the alleged injuries which amount is manifestly high and excessive in the circumstances thereby constituting an erroneous estimate of the damages suffered.

6. The learned trial magistrate erred when he assumed that there can be liability without fault and in failing to dismiss the suit in the court below with costs".

When the appeal came up for directions before me on 30th November, 2010 **Mr. Odhiambo** and **Mr. Nyangwecha for Mogire**, learned counsels for the appellant and respondent respectively agreed that the appeal be canvassed by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them as well as cited authorities.

The defendant's six grounds of appeal can actually be crystallized into two broad ones, liability and quantum. It is the case of the defendant that the plaintiff did not establish that the defendants and or their driver was negligent in the sense that the particulars pleaded in the plaint were never proved by evidence. That submission cannot possibly be correct. The plaintiff was categorical in his evidence that the accident was as a result of over speeding and that prior to the accident the lorry was zigzagging suggestive of lose of control. The lorry too followed him to where he ran to, off the road and collided with him there. These aspects of the case were specifically pleaded in the particulars of negligence. Ordinarily a motor vehicle does not just zigzag unless someone and in particular the driver is negligent and has as a matter of fact lost control of the same. There was no evidence from the defendants to counter the plaintiff's aforesaid assertions or offering an explanation as to why the lorry zigzagged, left the road and hit the plaintiff, unless it was due to negligence on the part of its driver, agent and or servant. It was up to the defendants to counter the plaintiff's assertion that speeding was the sole cause of the accident. They did not do so.

The defendant has raised the issue that the ownership of the lorry was not proved as required by law. However, in the light of the evidence from the motor vehicle registry and the police abstract tendered in evidence without any objection from the defendants, the ownership of the lorry is settled and a non-issue. In any event the issue was never canvassed before the trial court for determination. It is only being raised in this appeal and from the bar which is not permissible.

There may have been inconsistencies between the evidence of the plaintiff and his father as to whether the plaintiff was hit by the lorry from behind or infront and the registration details of the lorry. However this is not wholly unexpected. The plaintiff's father was not present at the time of the accident. The plaintiff was. However he was not cross-examined on both issues in the trial court. Between the evidence of the two, the court was entitled to go by the evidence of the plaintiff. With regard to the registration details of the lorry, nothing much really turns on this going by the details in the police abstract and the search certificate from the motor vehicle registry tendered in evidence. In any event at the time of the accident, the plaintiff was aged about 10 to 12 years. It cannot be expected that a child of such age would master such details.

The learned magistrate having evaluated the evidence on record came to the conclusion that the defendants were wholly to blame for the accident. On the pleadings and uncontroverted evidence on record, I do not think that she can be faulted in reaching that conclusion.

In this appeal I am also being urged to interfere with the award of damages made by the trial court. In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini –vs- A. M Lubia and Olive Lubia (1982 – 88) 1 KAR 727 at pg 730 Kneller J.A** said:-

"…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 either 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 –vs- Manyoka (1961) E.A 705, 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd –vs- Kavoloto (1970) E. A, 414, 418, 419…".

This court follows the above principles in this appeal as the said decision is in any event binding on this court. In other words the above stated principles shall continue to be applied by this court.

The respondent sustained injuries as a result of the accident. According to the plaintiff, he sustained fracture of the left femur bone, cerebral contusion and bruises on the head. **Dr. Ajuoga** was of the professional opinion that the plaintiff suffered serious fracture of the femur bone which required surgical management, using plating. The operation had to be repeated due to complication of Osteomilitia. The plaintiff has still to undergo a 3rd operation for the removal of the plates which operations are expensive. As for **Dr. Raburu**, he also confirmed that the plaintiff sustained Trauma to the head with bruises of the scalp and fracture of the left femur. The fracture was treated with open reduction and internal fixation with plate and screws. Unfortunately the plate got broken with re-fracture. Repeat surgery had to be done. Though the fracture had united well, there was a shortening of the leg of one centimeter though insignificant. However, the plates insitu will need to be removed at a cost of kshs. 50,000/= in private hospital but much less in a government institution.

Having evaluated the pleadings, the evidence adduced, the medical reports and the conclusions reached by the learned magistrate, I would observe that she did not take into account irrelevant factor or left out of account a relevant one when she awarded the plaintiff kshs. 500,000/= as general damages for pain, suffering and loss of amenities. At the time when the award was made, those kind of injuries attracted awards ranging from as low as Kshs. 180,000/= to as high as Kshs. 700,000/=. What the plaintiff was awarded, being Kshs. 500,000/= cannot by any stretch of imagination be deemed to be so inordinately high that it must be a wholly erroneous estimate of damages. It was definitely within the range for those kind of injuries at the time. The special damages awarded had been proved to the required standard.

The end result of this appeal is that it lacks merit and is accordingly dismissed with costs to the plaintiff.

Judgment dated, signed and **delivered** at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA
JUDGE