



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 32 OF 2010

JOSEPHAT NYINGI PETER.....1ST
APPELLANT

JAMES NYINGI MATOLO.....2ND
APPELLANT

VERSUS

WILFRED KAMAU NJAU

(A minor suing thro' his father and next friend Hezekiah Njau Njoroge).....RESPONDENT

(Being an appeal from the judgment and decree of the Honourable Mrs G.L. Nzioka, Senior Principal Magistrate,

made on 15th January 2010 in Thika Chief Magistrate's Court Case No. 559 of 2007)

J U D G M E N T

I. BACKGROUND

1. Evidence before the subordinate court clearly disclosed that Wilfred Kamau Njau, a minor aged 11 years old was a pillion passenger on a bicycle along the Thika – Kiganjo road. A huge tankard vehicle that had been driven to the junction took a wide corner and left its side of the lane thereby causing the cyclist together with the pillion passenger to be knocked down. The driver of the motor vehicle KAN 682H was stopped by members of the public. The minor sustained injuries to his right thigh 1/3.
2. “The next of friend” filed for damages in tort on 18th June 2007 for general damages. There was no prayer for special damages that had been pleaded.
3. After trial, the Hon. Magistrate gave an award of Ksh. 150,000/= as a fair award in damages.

II PROCEDURE

4. The trial was conducted by two magistrates. The first magistrate acting Principal Magistrate heard three witnesses. The second magistrate heard four witnesses. The defence called no evidence.
5. In a trial where a minor is involved, the court room must be cleared and evidence is heard “in camera.” The minor must at all times be examined as to his capability of taking an oath. The trial magistrate would warn herself or himself of admitting evidence of a minor. If the minor, due to his age understands the meaning of an oath, he may be affirmed, sworn or address the court.
6. The acting Principal Magistrate is to ensure that this procedure is adhered to.
7. Where a case is taken over by a new trial magistrate, the former Order 17 r 10 Civil Procedure Rules would be adhered to. The new magistrate must ask the parties to elect to begin the trial from where it left off or to begin the trial by recalling all the witnesses who had given evidence. In such a situation, the trial magistrate must record on the file why they are taking over the case, namely the other magistrate has either died, been transferred or unable to take over the proceedings.
8. In this case, the trial magistrate are required to have adhered to this rule.

III PLEADINGS

9. The advocate for the defendant took issues with the pleadings that the same was at discrepancy with the main evidence given. This was raised at the closing submissions.
10. In the defendant’s particular of negligence, on the plaintiff’s part, it was pleaded that the plaintiff was cycling recklessly.
11. The evidence of the defendant was not given. This is not in issue. A defendant need not attend court to give evidence. If he or she does not attend court to give evidence, you do not treat it as “a no case to answer.” You must indeed accept that the advocate represents the defendant at all times and the defense would duly be so accepted.
12. The defendant should have made use of “further and better particulars” during the pretrial but did not.
13. The evidence before court discloses an accident did occur where the minor and another were involved in an accident. The pleadings as to the particulars of the 2nd defendant was stated that the “plaintiff, while he was cycling” failed to give way.
14. The pleadings to this end failed to disclose the plaintiff as a pillion passenger. He infact should not only have sued the defendant one and two but the cyclist also.
15. The evidence herein did not support the pleadings before court. The defence relied on the case law of

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what was pleaded was at variance with the plaint and evidence given.

16. I would find that a party is bound by its pleadings. The trial magistrate award is in order and is a probable award.

17. The award herein is set aside. The judgement of the case is dismissed with costs to be borne by each party at the appeal and the subordinate court.

Dated this 3rd Day of October 2011 at Nairobi

M. A. ANG'AWA

JUDGE

Advocates :

iii) *C.N. Ngugi instructed by M/s Mohammed & Kinyanjui & Co Advocates for the appellant/
original plaintiff*

iv) *T M Kinyanjui holding brief for M/s N. Kinyanjui & Co Advocates for the
respondent/original defendant*