



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 112 of 2003**

**MBURU MUNGAI (A minor suing thro his next friend)**

**TIMOTHY NJOROGE WAMUHU..... APPELLANT**

**VERSUS**

**MUMAKA CONSTRUCTION CO. LITD.....RESPONDENT**

**R U L I N G**

Mburu Mungai, a minor suing through his next friend Timothy Njoroge Wamuhu (hereinafter referred to as the appellant), was the plaintiff in a suit filed in the Principal Magistrate's Court at Nairobi. The appellant sought judgment against the defendant Mumaka Construction Company Ltd (hereinafter referred to as the respondent) for special and general damages, for personal injuries suffered by the minor plaintiff as a result of the negligence of the respondent.

The respondent filed a defence denying the plaintiff's claim and putting the appellant to strict proof. Hearing of the suit proceeded before the Senior Principal Magistrate. Three witnesses testified for the appellant whilst the respondent called no witness.

In his judgment, the Senior Principal Magistrate dismissed the appellant's suit contending that the appellant had failed to establish his claim against the respondent and that the respondent was therefore not liable.

Being dissatisfied with that judgment, the appellant has filed a memorandum of appeal raising four grounds as follows: -

- (1) The learned magistrate erred in law and in fact in finding that the appellant had not proved his case in liability as against the respondent.
- (2) The learned magistrate erred in law and in fact in disregarding the evidence of the appellant and his witness.
- (3) The learned magistrate erred in law and in fact in disregarding the fact that the appellant's evidence had not been controverted by the respondent as the respondent had not called any evidence.
- (4) The learned magistrate erred in law and in fact in dismissing the appellant's claim with costs.

In support of the appeal, counsel for the appellant has contended that evidence was adduced before the trial magistrate which confirmed that the minor plaintiff was injured by stones which fell on him and that

the defendant was the one responsible for the construction and the stones. It was contended that the trial magistrate was wrong in rejecting the evidence for the appellant when there was no evidence adduced by the respondent to controvert the appellant's evidence. The court was therefore urged to find for the appellant and award general damages of Kshs.600,000/=.

For the respondent it was pointed out that the appellants' witnesses contradicted themselves and their evidence was not sufficient to establish the appellant's claim. With regard to quantum of damages, it was contended that there was no witness to the actual injury. The court's attention was also drawn to the contradiction between the oral evidence of the doctor and the doctor's written report with regard to the alleged deformity of the minor plaintiff. The court was therefore urged to dismiss the appeal.

I have carefully considered the record of the lower court and the evidence which was adduced before the trial magistrate. Serah Wanjiku (Pw2) stated that she was in her house when she heard the minor plaintiff screaming. On going out she found that some building stones had fallen on the back of the child and on his leg. The child was not able to walk. Serah Wanjiku testified that the stones were arranged in a line against the wall where people were passing. She did not however know who placed the stones on that site nor did she know the owner of the stones. Timothy Njoroge Wamuhu (Pw3), the minor plaintiff's next friend testified that the owner of the stones is one Mumaka who was staying nearby and who was constructing at the site. He maintained that the said Mumaka gave him Kshs.4,000/= after the incident. Dr. George Kungu Mwaura (Pw1) was the doctor who examined the minor plaintiff and prepared a medical report. He testified that the minor plaintiff sustained injuries on the left leg and sustained fractures which had healed with a resultant deformity. No evidence is on record on behalf of the respondent. The record does not appear to show any reason for this, but it would appear from the subsequent submissions that were filed by both the advocate for the appellant and the advocate for the respondent that the respondent opted to call no evidence.

From the evidence which was adduced before the trial magistrate, it is apparent that although Serah Wanjiku did not actually see the stones falling on the minor plaintiff, she heard the minor plaintiff scream and on rushing out found that the stones had fallen on the child injuring his leg. There was therefore sufficient evidence confirming that the minor plaintiff was actually injured by the stones. Neither Timothy N. Wamuhu nor Serah Wanjiku knew who had deposited the stones at the site where the minor plaintiff was injured. However, Timothy Wamuhu maintained that the stones belonged to Mumaka. His evidence in that regard was as follows: -

***“The owner of the stones is called Mumaka. The owner came and informed me plaintiff had been injured. I went back to the defendant, he accepted to pay me Kshs.4000/=. I took the Kshs.4,000/=. The defendant was the one constructing at the site. The defendant was staying nearby.”***

As per the plaint, the defendant is a limited liability company who is currently the respondent in this suit. In his evidence Timothy Wamuhu did not specify whether there was any connection between the Mumaka whom he claimed to be the owner of the stones and the respondent company. Moreover, the plaint did not refer to any other person either as an officer of the respondent or a director of the respondent for whose negligence or responsibility the respondent could be held vicariously liable. Under these circumstances, the appellant's evidence was insufficient to connect the respondent to the plaintiff's claim. It is true that the respondent did not call any evidence however, under Section 107 and 108 of the Evidence Act, any person who desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exists. The burden of proof lies on the person who would fail if no evidence at all were given on either side. In this case, the burden of proof was entirely upon the appellant and the respondent was under no obligation to call any evidence. Liability not having been proved the trial magistrate was right in dismissing the appellant's suit as the appellant failed to discharge this burden of proof.

With regard to quantum the trial magistrate assessed general damages at Kshs.250,000/=. I find no reason to interfere with this assessment as it was neither based on wrong principle nor is it so low or excessive as to justify the intervention of this court.

For the above reasons I find no merit in this appeal and do therefore dismiss it with costs.

**Dated and delivered this 19<sup>th</sup> day of September, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the appellant absent

Miss Opondo for the respondent