REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 8 of 2002

THE CHAIRMAN, BOARD OF GOVERNORS KANGEMA HIGH SCHOOL.....
APPELLANT

VERSUS

FRANCIS IRUNGU KAMENJU ….....….…..…
RESPONDENT

J U D G M E N T

By an amended plaint filed in court on 6th April 2001, the plaintiff, one Francis Irungu Kamenju sued the Defendant, the Chairman Board of Governors, Kangema High School claiming:

"(a) Reimbursement of the Kshs.11,100/= as particulised (sic) in paragraph 4 herein.

(b) Cost of this suit"

The suit was premised upon the fact that "…… **In January 1999 the students of he school unlawfully damaged the Plaintiff's one florescent tube and motor vehicle registration number KSM 798 that had been parked at Kanorero shopping centre at the material time..."** It would appear that in the month of January, 1999 the students of Kangema High school went on rampage, invaded Kanorero trading centre at around 8 p.m. and reigned havoc on the traders and their property. They stoned their shops and any property in their sight including the Respondents motor vehicle aforesaid. As a result of the damage, the respondent commenced the suit against the school seeking to be reimbursed the costs he incurred in repairing the motor vehicle and replacing the florescent tube which were all damaged by the students. He put the total cost incurred at Kshs.11,100/=.

The appellant denied liability in its defence filed in court on 11th April, 2001. Among the issues raised in the defence were that the school cannot be held liable for the tortuous Activities of the students, and that the plaint did not disclose any cause of action known in law against the appellant.

The learned magistrate having heard the testimony of two witnesses in support of the claim and two witnesses in opposition to the claim, eventually found for the respondent. In so doing the learned magistrate delivered herself thus:

"……. **The defendants promised to reimburse the claimant's and I am satisfied that plaintiff being one of them and having proved that he incurred the Kshs,10,000/= to repair his car, the defendant is liable to compensate him. I am satisfied that the plaintiff has proved his claim for**

Kshs.10,000/= against the defendants on a balance of probabilities. The claim for Kshs.1,100/= for the damaged light has not been proved……"

It is this finding and conclusion that has instigated this appeal.

Through **Messrs Waiganjo Gichuki & Co. Advocates**, the appellant has listed eight grounds of appeal upon which the judgment of he learned magistrate can be impugned.

They are:

1. The learned Resident Magistrate erred in law in holding the appellant, on behalf of Kangema High School (hereinafter referred to as "the School", liable for the actions of persons allegedly identified as students of the School when clearly such persons were not and could not have been acting on behalf of or on the direction of the School Management; in the circumstance the lower court was imposing liability on an innocent party when there is no law to back the judgment.

2. The plaintiff proved in court that the persons who destroyed his property were all persons who had attained the age of majority and the learned Resident Magistrate erred in not finding that the School could therefore not be held liable for the actions of such persons.

3. The judgment of he lower court is against public policy and also contrary to law.

4. The learned Resident Magistrate erred in finding that the School had offered to compensate the respondent for his loss when it was clear from the evidence that the respondent as a person was never the subject of such a promise and had never quantified his claim before the filing of the suit so as to be the subject of any promise to compensate; in any case there never was any promise to compensate as the learned Resident Magistrate seems to have erroneously found.

5. The learned Resident Magistrate ought to have found that any alleged promise to compensate the respondent, and the existence thereof had been denied by the appellant, would have amounted to a gratuitous promise not capable of being enforced in law.

6. The learned Resident Magistrate erred in finding that the School was never bound to compensate the respondent for any damage caused by its students.

7. The learned Resident Magistrate erred in taking isolated incident of compensation to a teacher in the school as a ground for finding the appellant also liable to compensate the respondent.

8. The judgment of he learned Resident Magistrate is against the weight of the evidence on record and set a dangerous precedent.

The appeal was then list before me for hearing on 18th September, 2007. When the appeal was called out for hearing, whereas the appellant's counsel was in court ready to prosecute the appeal neither the respondent nor his counsel was present. Being satisfied that the respondent's counsel had been duly served with the hearing notice as there was an affidavit of service on record and therefore there was no reason for his failure to attend court on that day I directed that the appeal do proceed to hearing the absence of the respondent and or his counsel notwithstanding.

In support of his appeal, the appellant through **Mr. Gichuki**, learned counsel submitted that the evidence on record showed that the damage was caused by unruly students who had escaped from school but were never identified. In causing the damage they were not acting on behalf of the school and the school cannot therefore be held vicariously liable for their actions. They were not employees of the school. The doctrine of **Rylands v/s Fletcher** is also inapplicable in the circumstances of this case as well. Counsel further submitted that the students all being over the age of majority should have been held individually liable. It would be contrary to public policy to hold institutions of learning liable for actions of their students. As to the offer by the school board to compensate the traders, counsel submitted that the offer

was gratuitous and incapable of enforcement. And even if there was such promise, counsel continued the name of the respondent did not feature among those to be compensated. No promise was therefore made to the respondent directly that he could enforce. In conclusion Counsel submitted that the whole reasoning in the judgment was erroneous. It was the view of counsel that the judgment cannot be supported by law and sets a dangerous precedent.

I have subjected the evidence tendered during the trial to fresh and exhaustive re-evaluation and analysis as required of me as the first appellate court, the non input of the Respondent and or his Counsel notwithstanding. I have no doubt at all in my mind that the findings of the learned magistrate were erroneous and unsupportable in law. I cannot fathom how a school can in law be held liable for the wrongful and tortuous acts of its students when they run amok and act in breach of the school's own rules and regulations. The students are not employees of the school so as to attract the doctrine of vicarious liability. Neither can it be said that by so acting, they were agents of the school for the doctrine of vicarious liability to attach. Even if for once we were to assume and agree that the students were agents of the school there is a cardinal principle of law that the principal will not be liable for the tortuous acts of his agent if the agent acts outside the terms of his agency without the authority and sanction of the employer. If the agent goes on a frolic of his own and commits destructive acts which are outside the scope and duties of his agency, then the principal shall not be held liable for the actions of the agent. Rather the agent shall be personally liable for his actions. In the circumstances of this case when the students rioted and went on rampage and damaged the shops and other property in the shopping centre nearby they were not acting as agents of the school. The school does not encourage, approve and or condone strikes and riots. It is not part of the curriculum. By engaging in such unlawful acts, the students ceased to be agents of the school. They went on a frolic of their own and consequently the school cannot be held liable for their actions. This is a very simple doctrine or principle of law that even a first year student of law will no doubt appreciate. How it escaped the mind of the learned Resident Magistrate I cannot fathom. Further there was no cause for the magistrate to find the school liable for the actions of the students as they were all over 18 years. The should have been held individually liable for their tortuous actions.

How about the doctrine of **Rylands v/s Fletcher**? Students are not perse by their very nature, dangerous substances or matter, so that if they escape and cause damage to the neighbour as in the circumstances of this case then the person responsible for them should be held to account for their actions. I note however and as correctly submitted by the learned counsel for the appellant that the said principle was neither pleaded nor evidence led in support thereof during the trial.

There is correspondence on the record showing that at some point the traders approached the school management over the damage caused to their property by the students and agreed that for the sake of good neighbourliness, some reimbursement be paid to the traders who sustained damage caused by the students. The magistrate held that on the basis of this agreement the school was thereby liable. However the learned magistrate failed to note that nowhere in the correspondence did the name of the Respondent feature. No promise was therefore made to the respondent directly that he could enforce. In any case even if the promise had been made to him it was not made in return for any valuable consideration, meaning that the expected goodwill of the local community had no quantifiable monetary value. The offer was a promise to reimburse and therefore at best was gratuitous and did not amount to a contract capable of enforcement in a court of law.

I note that in his written submissions in support of the claim, the respondent alluded to the principle of Estoppel. It was his case that the board of governors of the school met and agreed to reimburse the respondent and other claimants. By so agreeing they caused and or permitted the respondent and other traders to belief that actually the school was responsible for tortuous acts of the students. The appellant was thereby estopped from denying that it was responsible for the damages suffered by the respondent. I do not think that the respondent can hinge his claim on the principle of Estoppel. The Respondent neither pleaded the same nor led any evidence alleging or proving estoppel. Further it is quite evident that the Respondent was not the subject of any acts which directly could raise Estoppel in his favour. He was never, as a person in the contemplation of the defendant and neither had he quantified his claim in a way that the defendant could be said to have promised anything concrete to him. See "**Modern Equity"** by

H.G. Hanbury, 9th Edition page 664 – 673. Moreover the liability in law of the appellant must have been established first before any estoppel could be claimed. It is also a requirement before estoppel can be invoked that the person in whose favour it operates must have acted on the facts alleged to constitute estoppel to his detriment in reliance to those facts. In this particular case the respondent did not show what it is that he did nor did not do in reliance to the gratitious offer of reimbursement, which he would or would not have done otherwise. He did not show that he acted on the offer to his detriment.

It is also apparent to me that the plaint as filed did not disclose any cause of action known in law against the school. This is so because the plaint does not state in express terms or by implication, whether the claim against the school is based on a tort or contact or any other cause of action known to law. The plaint merely stated that the students of the school damaged the plaintiff's property. That averment without more cannot find a cause of action.

Finally, I would agree with the submissions of he leaned counsel for the appellant that it would be contrary to public police to condemn and make schools liable for the actions of riotous students who disobey school rules, and regulations with impunity and commit actionable acts outside the school premises. If every time students riot and damage property of neighbours the school boards were to be called upon to pay for the damages caused, God knows whether such school would have any money left to run their programmes. In those cases I think it would only be fair, practical and makes good sense for such students to be personally and individually held liable for their actions. It should not be lost on us that not all students engage in riots. There are those who in the same school would disapprove of the strike. Why should the innocent be condemned alongside the guilty and be forced to pay for the damage caused by their riotous colleagues? It would be harsh and unconscionable to do so!

In the result I find that the appeal has considerable merit and it is allowed with costs to the Appellant. The judgment of the subordinate court is hereby set aside and substitute therefore with an order of dismissal with costs again to the appellant.

Dated and delivered at Nyeri this 22nd day of October 2007.

M. S. A. MAKHANDIA

JUDGE