REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 8 of 2002

NAKURU NURSERY SCHOOL……..……..APPELLANT

VERSUS

BILHA WAMAITHA MAINA…….……RESPONDENT

JUDGMENT

The respondent filed a suit against the appellant claiming that on 13th November 1998, while the plaintiff was lawfully playing in the appellant's playground with other pupils, he was injured by a chopper machine that caused him serious injuries. The injuries led to amputation of the last two phalanges of the respondent's right index finger. He alleged that the said injuries were caused by the appellant's negligence and the particulars of negligence that he pleaded were as follows:-

"***(i) Exposing the plaintiff to danger and/or injury which he knew or ought to have known in the circumstances.***

(ii) Permitting the plaintiff to be injured.

(iii) Failing to warn the plaintiff of the imminent danger.

(iv) Leaving the machine exposed where the plaintiff was playing.

(v) ***Failing to take prior precaution of the plaintiff's welfare."***

The respondent claimed special damages amounting to Kshs.2,000/- and general damages for pain suffering and loss of amenities.

In the original plaint, the plaintiff had named the defendant as J. M. PATEL t/a NAKURU NURSERY SCHOOL. A statement of defence was filed by the said defendant and he denied that he was the owner of any Nursery School as alleged or at all. He further denied any knowledge of the said accident and put the plaintiff to strict proof thereof.

An amended plaint was filed and the defendant was named as BOARD OF GOVERNORS, NAKURU NURSERY SCHOOL. Save for that amendment, all the other pleadings remained unchanged. During the hearing, the respondent's mother, Bilha Wamaitha, (PW1), testified that her son, Stanley Maina Kibui, was six years old and was attending the aforesaid nursery school. On 13th November 1998 she

took him to the school after 2.00 p.m. and left him in his class and went to the market where she was doing some business. After about thirty minutes she saw the head teacher who came and requested her to accompany her to the school. When they arrived there, they found three teachers in the office and one of them was holding her son who was bleeding seriously. That is when PW1 realised that her son had been injured on his fingers. The boy was taken to hospital where he was treated and amputation of the last two phalanges of the right index finger was done. The following day PW1 went back to the Nursery School to find out what had exactly happened to her child and she learned that it was a chopper machine that had cut his fingers. The machine was in the school field near a place where there were swings. PW1 said that she had entrusted her child to the school and she blamed the school for the injury that her child had suffered. She stated that it was wrong for the school to keep that kind of machine in the compound.

In cross examination, she denied a suggestion that was put to her by the defendant's counsel that the plaintiff had not gone back to the school in the afternoon of the material day. She stated that she personally took back the plaintiff to the school and she saw him enter his class room. It was further put to her that she had not paid a sum of Kshs.200/- which could have entitled the child to be in the school in the afternoon of the material day and she denied the suggestion saying that she had paid the said sum.

The plaintiff's medical report was produced by Dr. Willington Kiamba and he confirmed the injuries as stated herein above.

The plaintiff/respondent also testified and told the court that on the material day at around 2.00 p.m. he was in school with other children. He explained that there was a machine in the school field and he was playing near the machine together with other children. He further stated that some children touched the machine and his right hand fingers were caught by the said machine. His teacher was in the office at the material time, he stated. His friend by the name Morris Kairu, aged seven years, also testified and he corroborated the evidence of the plaintiff in all material respects. In cross examination by the defendant's counsel, he said that their teacher had warned them not to touch the machine.

Lilian Wanjiku Githinji, who was the Headmistress of the Nursery School, told the court that on the material day she had taken the children for a school tour at Coca-Cola Bottlers and he was picked up by his mother at 1.00 p.m. She said that the school hours were 8.15 a.m. to 12.15 p.m. but there were some pupils who were supposed to go back to school in the afternoon and those ones used to pay Kshs.200/- per month for the afternoon sessions. She said that no payment had been made for the plaintiff for the afternoon sessions in the month of November 1998. She produced a book which contained the names of the pupils who had paid for the month of November 1998. However, she admitted that the plaintiff was injured by the said machine in the school compound on the material day. She said that the machine was owned by the Patel community and it was within a hall inside a counter and not in the field. The machine was about ten metres away from the plaintiff's class. She further testified that the school had issued a warning to the pupils about the danger of touching the machine. She denied that the machine had been left exposed and she said that it was in a secluded place. She said that the plaintiff was supposed to be under his mother's care on the material afternoon.

In cross examination by the plaintiff's counsel, the Headmistress said that the school did not keep a record of the children who had reported to school or a record as to when a child was picked from school and that they used to operate on trust. She said that the compound of the nursery school was about 1½ acres and in the afternoon there were about thirty pupils. She admitted that parents took their children to the school expecting utmost care to be taken on them but stated that the plaintiff was not under the care of the school at the time when he was injured. She further stated that the machine that injured the plaintiff had been in the school compound for more than five years and was used for grinding sugarcane.

The plaintiff's teacher, Alice Mbuka, testified that the plaintiff was in school in the morning hours only and did not report back after 2.00 p.m. because his parents had not paid Kshs.200/- for the month. She however admitted that she saw the plaintiff a few minutes to 5.00 p.m. after he had been injured. She said that he was not injured in the field but was injured inside the hall where the machine was kept. The place was easily accessible, she added. The machine was also not properly covered. She said that she did not know how the plaintiff and the other children got to the place where the machine was.

The trial court visited the nursery school and was shown the place where the machine in question was kept. The school Headmistress explained that the machine was kept in an enclosed hall and she demonstrated that the machine could be easily operated. In cross examination by the plaintiff's counsel at the locus, she explained that the hall was close to the field where the children used to go for their physical education and that if a child was ontop of another he could easily land the inside of the hall that housed the machine. She reiterated that the machine was not in an open place but it was accessible.

In his submissions, the plaintiff's counsel stated that the school was negligent in the manner in which it kept the machine in its premises because the same was kept in a place which was easily accessible to children and was not covered. He further submitted that the plaintiff was lawfully entitled to be in the school on the material afternoon when together with Morris Kairu and other children they went playing near the machine. There was nobody who was taking care of them at the material time. He further submitted that the machine had exposed blades and the school was under a duty to ensure that its pupils were safe. He urged the court to award general damages in the sum of Kshs.300,000/-.

On its part, the defendant submitted through its counsel that it had not sufficiently been proved that the plaintiff was supposed to be at the school at the time when he was injured and therefore the school did not owe him any duty of care. He further submitted that the plaintiff and his friend Morris Kairu were minor children and their evidence had not been corroborated and in the circumstances it was not right for the court to rely on the same.

Regarding the amended plaint, it was submitted that there was no legal entity known as "***the Board of Governors, Nakuru Nursery School"*** and therefore the suit had been brought against a non existing person. He urged the court to dismiss the suit in its entirety but in the event that the court found that the defendant was liable, a sum of Kshs.10,000/- was sufficient compensation for the injuries suffered by the plaintiff.

In its judgment, the trial court held that the plaintiff had established that he was in the school premises legally and that the defendant owed the plaintiff a duty of care which was breached. It apportioned liability at 90% as against the defendant and 10% as against the plaintiff. On quantum of damages, the trial court awarded a sum of Kshs.120,000/- on full liability and Kshs.2,000/- as special damages. The judgment sum after contribution on the part of the plaintiff was Kshs.109,800/- plus costs and interest.

The appellant was aggrieved by the said decision and preferred an appeal to this court. The appellant's counsel set out the following grounds in the memorandum of appeal:-

"1. That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that the respondent was not under the duty and care of appellant as at the time of the accident and hence arrived at the wrong conclusion that the appellant was liable.

2. That the learned trial magistrate erred in law and in fact in failing to appreciate that there is no such entity known as Board of Governors Nakuru Nursery School and hence the suit and resulting judgment are not enforceable.

3. That the learned trial magistrate erred in law and in fact in her qualification of the respondent's injuries and hence arrived at a figure which was not only exaggerated and excessive but harsh and oppressive in the circumstances.

4. That the learned trial magistrate erred in law and in fact in failing to appreciate that the respondent's evidence and that of his witnesses was completely at variance with his pleadings and the same ought to have been dismissed with costs to the appellant.

5. That the learned trial magistrate erred in law and in fact in failing to appreciate that the respondent had failed to prove his case against the appellant and hence the same ought to have been dismissed with costs.

6. That the learned trial magistrate erred in law and in fact in failing to consider and/or appreciate the appellant's submissions.

7. That the learned trial magistrate generally misdirected herself and hence arrived at the wrong conclusion that the respondent was entitled to any payments from the appellant."

In his submissions before this court, Mr. Gachui for the appellant chose to argue grounds 1 and 2 only and left the rest for the court's determination. On the first ground of appeal, he submitted that the appellant was not under any legal obligation to take care of the respondent at the time when the accident occurred because the respondent had gone to the school when he was not supposed to be there. He submitted that the sum of Kshs.200/- that was supposed to have been paid for his afternoon attendance had not been paid.

On the second ground of appeal, counsel submitted that the respondent should have brought the suit against the Secretary to the Board of Governors of Nakuru Nursery School and not as against the Board generally. He cited the provisions of the **Section 10** of the **Education Act Cap 211**. Due to that default, the amended plaint was defective and should have been struck out, he submitted.

Mr. Gachui submitted on another issue that had not been raised before the trial court and which had not been made a ground of appeal. He stated that the plaint was defective in that **Order XXXI rule 1** of the **Civil Procedure Rules** had not been complied with in that no written authority to the respondent's advocate had been given and filed in the court file before the name of the respondent's mother was used in the action as next friend of the respondent as he was a minor. He urged the court to hold that the plaint was fatally defective and could not stand in law.

Mr. Gekonga for the respondent responded by stating that it had been proved that the respondent was lawfully present in the appellant's premises at the time when he was injured. He attacked defence exhibit 3, that is, the book that was relied upon by the appellant in an effort to show that the respondent had not paid the sum of Kshs.200/- for November 1995. He said that the evidence was prepared after his client had testified and that is why it was not shown to the respondent and his witnesses when they were testifying. Further more, no receipts had been issued to confirm who had paid and who had not. He submitted that the appellant owed the respondent a duty of care as he was lawfully present in the school premises.

Regarding the argument that the suit should have been brought against the Secretary to the Board of Governors of the appellant's institution, Mr. Gekonga submitted that there was no need to do so as the suit was competent even when the defendant had been named as the Board of Governors for the school.

On the alleged non compliance with the provision of **Order XXXI rule I** of the **Civil Procedure Rules**, counsel submitted that the issue had not been raised before the trial court and, in any event, he had complied with that legal requirement. He therefore urged the court not to interfere with the judgment of the trial court.

Starting with the issue regarding non-compliance with the mandatory provisions of **Order XXXI rule 1**, I agree with Mr. Gekonga that it did not form one of the grounds of the appeal. That notwithstanding, the required authority had been filed as required under the law. It was therefore improper for the appellant's counsel to raise that argument on appeal.

The major ground of appeal that has to be determined is whether in the circumstances of the case, the appellant owed the respondent any duty of care and if so, whether there was any breach thereof. It was not in dispute that the respondent was a pupil at Nakuru Nursery School. He was 6 years old. It was also not in dispute that he was in school in the morning hours of 13th November, 1998. It was however disputed whether he was lawfully in school on the afternoon of the aforesaid day.

The respondent was a child of tender years. The respondent was aware that it had in its premises a dangerous machine which was kept in a place which was easily accessible to children. The school had

even warned the children about the attendant danger of touching the machine which was not properly covered. In law, negligence can simply be defined as failure to exercise care which particular circumstances demand. The respondent was under a legal duty to take care of all the pupils in its school. It ought to have reasonably foreseen the dangers that were likely to occur by leaving a dangerous machine in a place which was easily accessible to children. From the evidence that was tendered before the trial court, I agree with the learned trial magistrate that on a balance of probabilities, it was established that the respondent was lawfully present in the school at the time of the accident. Defence exhibit 3 was not conclusive evidence that the respondent was a trespasser to the school and was thus not owed any duty of care. Even assuming that the respondent had not paid the sum of Kshs.200/- that was required to be paid so that he could remain in school in the afternoon of 13th November, 1998, if he went back to school contrary to the appellant's expectation, the appellant was still under an obligation to ensure that he was safe while in its premises. In any event, the respondent was playing with Morris Kairu, PW4, against whom there was no dispute that he had paid the sum of Kshs.200/- and was, according to the appellant, lawfully present in the school on the material afternoon. Was anybody taking care of Morris Kairu at the material time? I do not think so. At Common Law, a duty of care is imposed upon an educational institution with regard to its pupils. The duty owed by the appellant to the respondent was to take such care of him as a careful parent would exercise in like circumstances, see ***RICH AND ANOTHER VS LONDON COUNTY COUNCIL [1952] 2 ALL ER 376***. I believe the same duty of care applies to any school in Kenya, and more so, a nursery school. A careful parent will not let his or her six year old child to play, while unattended by an adult, anywhere near a dangerous machine.

The appellant, being a nursery school, had, in my view, a higher duty of care than a primary or a secondary school which have much older pupils. The appellant should therefore have ensured that there was a teacher or a care taker attending to its pupils at all times, be it during class hours or when the pupils were out in the play grounds or any other place within its compound. The appellant should reasonably have known that the ordinary curiosity of children of 6 to 7 years was likely to lead them to touch an uncovered machine which was in a place that was easily accessible to them. I therefore dismiss the first ground of appeal.

Turning to the second ground of appeal, no amended defence was filed by the appellant to deny its description in the amended plaint. No evidence was adduced by the appellant to show that it was non existent in law. The school headmistress testified but did not say anything about ownership of the institution. That issue was raised for the first time during submissions by the appellant's advocate. In the circumstances, I agree with the findings of the trial magistrate that if indeed the appellant was disputing its legal status, then it should have raised that issue in its pleadings and in its evidence rather than wait upto the time of submissions. Order **VI rule 3** of the **Civil Procedure Rules** requires all pleadings to contain a statement in summary form of the material facts on which the party pleading relies for its claim or defence.

With regard to the findings of the trial court on the issue of quantum of damages, it is trite law that an appellate court will not disturb the quantum of damages awarded by a trial court unless it is satisfied that the court, in assessing the damages took into account an irrelevant factor or left out of account a relevant factor or where the amount awarded is so inordinately low or so inordinately high that it must be a whole erroneous estimate of the damages, see ***KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICES (1976) & ANOTHER VS LUBIA & ANOTHER No. 2 [1987] KLR 30.*** None of the above was shown to have been the case herein. I cannot therefore disturb the trial court's assessment of damages.

Consequently, I dismiss this appeal with costs to the respondent.

DATED, SIGNED and DELIVERED at Nakuru this 12th day of October, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Ogola holding brief for Sheth & Wathigo for the

appellants and Mr. Nyagatha holding for Mr. Gekonga for the respondent.

D. MUSINGA

JUDGE