REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 19 OF 2000

MICHAEL MAKENYE MUTURE …….APPELLANT

VERSUS

MALEZI PREPARATORY SCHOOL LTD……..RESPONDENT

J U D G M E N T

The appellant, a minor, suing through his father Muturi Kigano, was a pupil in the Nursery Unit of the respondent having been admitted there on 2nd May 1996.

On 24th May 1996 he was injured in an accident in which his right index finger was injured when a toilet door slammed on it.

The minor's father blamed the respondent for the incident and filed a suit in the court of Chief Magistrate at Nairobi on 10th

September, 1977 to claim from it both special and general damages for the injuries saying that the accident occurred as a result of the negligence or breach of duty of care on the part of the respondent.

The particulars of the respondent's negligence or breach of duty of care were set out in paragraph 5 of the plaint and those of the injuries sustained and special damages set out in paragraph 6 of the same plaint.

In a defence filed by the respondent on 24th October 1997 the said respondent denied all the allegations set out in the plaint and put the appellant to the strict proof thereof.

The case was set down for hearing before the Senior Principal magistrate (J.R. Karanja) on 5/2/98, 15/6/98, 23/2/99, 25.11.99, 8/12/99 and 17/12/1999 when judgment was delivered, dismissing the suit with costs.

This decision did not find favour with the appellant who filed an appeal to this court in a memorandum of appeal dated 17th and filed in court on 18th January 2000. It listed five (5) grounds of appeal.

All of these grounds related to the failure by learned magistrate to find the respondent liable in negligence or for want of duty of care for the accident.

The appeal was fixed for hearing in this court on 19th November, 2002 when counsel for the parties appeared and submitted either for or against the appeal taking regard of the grounds set out in the memorandum of appeal. The appellant's case in this matter was dependant on the evidence of one Clement Muturi Kigano (PW1) and Dr. Safwat Saleh Andrawer (PW2).

Dr. Safwat came to testify as to how he examined the minor Michael Makenye Muturi who had suffered a crush of the right index finger on 24th May 1996 at Nairobi Hospital. That he examined the child, treated him and later prepared a report which he produced as part of the plaintiff's evidence.

The witness did not have the X-ray reports when asked about their whereabouts.

However, the evidence of the minor's father was most crucial in this case because when he believed in mind in filing the case subject to this appeal in court was that this child as well as other pupils were not well taken care of by the respondent's servant's and/or agents.

But the crucial parts of his evidence were as follows:-

> ***"On 27 th May 1996 I visited the defendant school and met the Secretary. I made inquiries as to how my son was injured. The Secretary informed me that I had earlier signed a disclaimer of liability. I denied t he fact. I was informed by the Secretary and a teacher called Christine that the plaintiff was injured in the school toilet. I found unaccompanied nursery kids in the toilet. I was informed by the teacher Christine that the plaintiff had been injured by a door. I was shown the door and realized that it did not have any rubber stoppers. I then went home ."***

In cross examination, the minor's father had this to say:-

> ***"It was indicated that the minor was not accompanied by a teacher to the toilet. This w as on the basis of the information given to me by a minor pupil called Sydney. I corroborated the information when on the 27th May 1996 I visited the school and found about 20 kids in the toilet unaccompanied. I also indicated that the plaintiff was inju red as a result of other kids banging the door. I got this information from the teacher Christine."***

So the case of the appellant was based on the information given to his father – witness by a minor called Sydney that on 24th may 1996 he had gone to the toilet unaccompanied by a teacher.

But there was the evidence of the teacher at the school Jane Onyach (DW3) who herself testified that she is the one who took the pupils including the appellant to the toilet on the date of the incident.

According to this teacher, the appellant, amongst six boys was taken to the boys toilet but that he moved to the girl's toilet. That when he ran out of the girl's toilet he banged the door which hurt him. This witness knew the plaintiff as a naughty boy. She testified that she even tried to run to prevent the door from hurting the plaintiff but in vain.

This evidence was not seriously challenged, or at all during cross examination. The magistrate accepted this evidence and particularly that the plaintiff was a naughty boy and that this is what made him dash from the boy's toilet to the girl's one.

That the plaintiff's witness went to the school on 27th May 1996 and observed that there were 20 kids in the toilet unaccompanied was irrelevant evidence. The lower court was concerned with what happened on 24th May 1996 and not on 27th May 1996 even if the appellant's witness went to the respondent school at all to make such an observation.

On the other hand, I would want to believe that children of parents who live in the city of Nairobi are well acquainted with how to attend and look after themselves at the modern toilets save some of those who live in places like Kibera or Kawangware or Mathare valley where pit latrines are the order of the day, and to which class the appellant's father does not fall, and that if the appellant school can assign a teacher to take kids to the toilet, then this shows how extra careful it is for the welfare of those kids.

The learned magistrate acknowledged that if the teacher Josephine who had taken the boys including the appellant to the toilet had testified she could have shed more light as to why the appellant dashed from

the boy's toilet to the girl's toilet.

Counsel for the appellant picks on this and says in his submission that it was for the respondent to call Josephine to testify in the lower court; that since it failed to call this witness, the lower court should have held that adverse evidence had been withheld.

Why go to that soul searching exercise when there was a much simpler way of doing it?

In all civil cases, it is upon the plaintiff to allege and prove the allegations otherwise the appellant has nothing to prove once he/she/it has denied an allegation.

If the defendant thought crucial evidence was being withheld, by the appellant the simplest way out was to opt to call Josephine as a defence witness, not to come to this court to insist that the appellant should have called Josephine as a ground of appeal.

The learned magistrate does not appear to have made any finding about rubber stoppers which the appellant's witness alleged were not on the toilet doors subject to this appeal.

Here I must confess that throughout the more than 40 years I have spent in urban centers, I have only seen one or two doors with rubber stoppers; and these were in hotels. I have seen nothing like that in a residential house or a school.

What I am driving at here is that the appellant witness was trying to set very high standards of care in this case which is unknown in cases of this nature.

It is true as ***Clerk & Lindsell on TORTS" 14 th Edition*** put it.

> ***"The standard of care which a school teacher is expected to show is such care towards a child under his charge as would be expected of a reasonably careful parent who applies his mind to conditi on of school life as distinct from home life; and has many children as in the class."***

This passage must have been referring to ordinary and not special school life where one begins thinking of rubber door stoppers.

And what measures would a teacher take to prevent a mishap where a child dashes into a girl's toilet and then out banging the door behind him, probably because he had found the teacher (Gladys's) there?

This shows the boy had realized his folly and should not have turned back to blame the respondent for it on account of negligence or want of duly of care.

The facts of the case subject to this appeal were quite different from those of **Williams Vs Eady Law Times Report Volume X – 1893 – 94 at page 5** where Eddy, a school master of Kenley left a bottle of phosphorus, a dangerous substance not in a secure place, and when one of the school boys Scypanski, picked and started playing with it; it burst and a flame therefrom severely burned Williams.

That even where an accident claim has been dismissed, the lower court should endeavour and show what damages would have been awarded if the case succeeded was I think, only a suggestion by the Court of Appeal and not that if this was not done then a ground of appeal aroses.

In my view, the lower court decision was proper and that the case was rightly dismissed; save that since the case involved a minor, there should have been no order for costs.

This appeal is hereby dismissed with no order for costs.

Delivered, dated and signed this 3rd day of December, 2002.

D.K.S. AGANYANYA

JUDGE