



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO.1062 OF 1997

**DENNIS SCHUMACHER..... PLAINTIFF**

**VERSUS**

**OSTRICH PARK LIMITED ..... DEFENDANT**

**J U D G M E N T**

The Plaintiff claims damages from the Defendant arising out of the alleged breach by the Defendant of its duty under Occupier's Liability Act or as a result of negligence as a result of which he sustained injury.

The facts are that the Plaintiff went together with his parents and young son of 2½ years to the Ostrich Park operated by the Defendant. He paid the entry fee of Shs.70 for adults and 40/= for his son (See receipt Exh.1)

Within the park is an area which is a playground for children and which has as one of the attraction logs piled together for children to play on. The Plaintiff narrated what happened as follows:-

“My son want to play in the play ground. He was 2 ½ years. He climbed on an elevated log and he stood up and started to fall of log. I stepped up to hold him. Unexpectedly the whole log and structure holding it collapsed. It was caused as the structure was weakened by a termite damages”

The witnesses produced photographs taken by himself one of, which showed, the broken log which appears to be affected para.5 of Defendant only substantial defence. The Plaintiff made it clear he did sit on the log but stepped on it to rescue his son. No evidence adduced by Defendant. Failure to do so leads to the failure of the Defence. No warning at the playground.

Evidence ..... because Plaintiff gave an account of what happened. Plaintiff has disputed orally of any negligence on his part. nothing to shown of his negligence.

The Medical Report properly admitted. Their legitimacy is not doubted. Defendant cannot raise issue with them.

Special damages bear from plaint ask for Shs.450,000/=. The absence of word “Special” does not diminish the claim. Plaintiff up supported his case with two medical reports. By reasons that Plaintiff was in park lawfully and as log defective he should succeed. The Defendant must be liable. Rely on occupier's Liability Act Cap 34 Ask for Judgment in Plaintiff's favour as prayed. Judgment on the 18th October, 2001 at 9.00 a.m. By termite damages.

In cross-examination the Plaintiff agreed the equipment was exposed for children. He said he did not know the log would not hold his weight and had he known he would not have stepped on it. He did not agree it would not hold weight. He said there were other logs, which he did not examine and that by

looking you cannot see that the log has an infestation.

The defence called on evidence and the Plaintiff's evidence was not contradicted. I accept the Plaintiff's evidence as truthful and his account of what happened is an accurate report of the same.

Counsel for the Defendant attached the facts as alleged in para 4 of the Plaintiff which allude to the Plaintiff playing with his son. I accept that the Plaintiff had taken his son to the play area and consider that it was only prudent of him to monitor or what his son was doing. He should have been open to criticism has allowed his son of such young age to play by himself on the logs. I consider that para.4 although not a marked piece of pleading sets out sufficiently the facts were proved at the hearing.

The Defendant's duty of care as contained in section 3(2) of the Occupier's Liability Act.

The premises must be reasonably safe for the purpose which the visitor is permitted to be there. The children play area in this case was part of the attractive which visitors paid for the duty of the Defendant was to ensure that the areas was safe for the purpose. In particular it should have ensured that the logs put there for children to play on were in good condition and not faulty due to termite damages. It was foreseeable by the Defendant that parents might be in the play area to look after or play with their young children. The Defendant should have foreseen that an adult parent might step on to the logs to play with or rescue a young child on danger. That the log in question been free of termites and in all probability this accident would not have happened. The Defendant alleges in its Defence in para.5 that the Plaintiff was the author of his own misfortune in that he negligently sat on an elevated log without the regard for his son safety and in support of the allegation gave particulars of negligence. It also relied on the doctrine of violation not fit injuries. No evidence was called by the Defendant to support these allegations.

In his final submissions Defence counsel submitted that under OVI Rule 9(1) of the Civil Procedure Rules failure to file a Reply constituted an admission of the negligence on the part of the Plaintiff alleged and that he was thus son suited. With respect this is not the case as under O 10(1) if there is no reply to a defence, there is a jointer issue on that defence. The question of the Plaintiff negligence of any was there for in issue. It was said by pleadings of old that a Reply is only necessary where the Plaintiff admitted what was alleged and sought to a void it community called for confer and avoid.

In my view the Plaintiff did not voluntarily agree to expose heavily to any danger and as the facts as proved he acted in a manner, which attracted to no negligence to what he did. He acted properly in the event to save his child from harm. I therefore find he was not guilty of any negligence contradictory or otherwise. I find therefore that the Plaintiff has proved his case in so far as the liability of the Defendant is concerned who was negligent on this case As a result of the accident the Plaintiff suffered a severe injury to his femur sufficiency on acute post traumatic haemarthrosis to his left knee joint.

The Plaintiff gave evidence that hereby suffered severe left knee injury he was taken to the Nairobi Hospital by Mr. Gamal of the Defendant Company where he was treated in the causality Department and the operating Theatre on the 21 and 22 September, 1995. On the 21st September the doctor vacated blood from his left knee and put on a bruise. The next day his bruise was put in a caste.

The Plaintiff put in two medical reports, which were admitted after objection from the counsel for the Defendant on which I ruled against him the sec. 0 12 rule 2(2). What evidentially value are these reports. I was referred to the case of Andrew V Cordire 1947 1ACC ER of 777 and Baggs London Granding Roch C., Ltd.

In this case the doctor who saw the Plaintiff in causality Mr. Sheikh has been called at in earlier hearing but the case was not reached I was informed that Mr. Sheikh was very busy on the day in question and Mr. Sheikh who made the offer report was not available. It is only right that a party defaulting is given an opportunity to cross-examine a material wishes. In this case two things emerged had the defendant served notice that he did not admit the reports the Plaintiff could surely have proved them by bringing the matters to court, the second is that no medical report was produced by the Defendant from its own medical adverse as such there was no evidence brought by the Defendant to contradict the contends of the

Plaintiff's defaults.

The court therefore can in my view take congruence of the facts, which emerge, from the reports as the same are not contradicted. However, anything in the nature of an opinion contained in the reports is not admissible, as the Defendant has not had a chance to challenge these opinions in cross-examination.

Further at the Reports on operation Mr. Sheikh gives a report dated the 15th September, 1995, in which he set out factually what injuries were sustained by the Plaintiff and what steps were taken to rectify the damages. The report also contains an opinion on the approximate costs of further medical treatment put at shs.250, 000/= this in my view is not admissible as it is an approximation of what the cost would be. This also applies to the report from Mr. Stuart who again gives an approximate costing for future suffering. Had he been called his evidence could have been challenged in cross-examination. The Plaintiff proved some special damages and produced the following receipts.

SOURCES OF (KSHS)	DATE	NUMBER	AMOUNT	RECEIPT/INVOICE
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DR. M.A. SHEIKH	23.9.1995	-	15,000.00	
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KENYA HOSPITAL

ASS. LAB.	9.10.1995	040810	930.00	
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DEPARTMENT

THE NAIROBI	22.9.1995	063434	670.00	
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HOSPITAL XRAY

DEPARTMENT

NAIROBI HOSPITAL	22.9.1995	4493	2,880.00	
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CASUALTY DEPT.

NAIROBI HOSPITAL	22.9.1995	4481	660.00	
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CASUALTY DEPT.

NAIROBI HOSPITAL	22.9.1995	54483	4,300.00	
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PHARMACUTICAL	9.10.1995	9808	600.00	
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'85 LTD.

DR. DAVID STUART	12.10.1995	-	1,590.00	
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DR. DAVID STUART	26.4.1996	-	2,000.00	
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CREDIT CARD		044812	45,000.00	
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PAYMENT TO

DR. M.A. SHEIKH

<b>TOTAL</b>			<b>75,130.00</b>	
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I allow these special damages 75,130. I would commend at this stage that neither party have been of much assistance to the court in that no documents were agreed and put into a bundle issued receipt for special damages should be agreed by the parties and contained in a statement of the same.

The Plaintiff gave evidence that he needs further surgedly and he may get other arthritis. His knee is prove to collapse due to putting weight on it. It has altered his life style he has not been able to continue with very active sports and can now only play tennis and golf with a trace. He also claims for pain and suffering.

I am satisfied that the Plaintiff suffered a severe injuries to his left knee which a part from causing him paid has adversely affected his ability to put weight on his leg and that osteo arthritis is a likelihood at later life.

Turning to general damages I have considered the awards made in this cases of Shech Omar Dahman t/a Maludu Busir Denis Jones Kisomo C.A. No.154 of 1993. Donred Mendo Mahusu V. J.V. Statag Ball – Ag- Jama Ltd HCCC 1743 of 1994. John Kinuthia Kamau V Ag. HCCC No.2441 of 1988 and Alphonse Nyagelo Akech v Stephen Waweru HCCC No.589 of 1988. The latter two cases are now some 13 years old and the first two are between 7 to 8 years old. The courts have due regard to the loss in value of money due to inflation. Having regard to the fact that the Plaintiff suffered a bad injury to his knee which required the medical treatment outlined by Mr. Sheikh and that the injury has caused residual loss of ability in his knew together with a probability of ostea arthritis I award the Plaintiff by way of general damages a sum of **Shs.650,000/=** together with special damages in the sum of **Shs.75,130=00**.

Interest at court rates on with sums from the date of the filing of the plaint. The Plaintiff will have the costs of the suit

Finally I would hail both counsel for the excellent submissions made by there orally and in writing.

Dated and delivered at Nairobi this 18th day of October, 2001

**PHILIP J. RANSLEY**

**COMMISSIONER OF ASSIZE**