REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 119 OF 2017

GEORGE DOLLA.....1ST APPELLANT

GILBERT BABU NDETA.....2ND APPELLANT

VERSUS

GI (SUING THROUGH VA).....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. F. MUNYI (SRM)

DATED 18TH AUGUST 2017 IN NAKURU CMCC NO. 544 OF 2015)

JUDGEMENT

1. The minor respondent herein was two and half years at the time she was involved in a road traffic accident on 5th May 2015 along Nakuru Nairobi highway while she was travelling with her mother aboard motor vehicle registration number KCB 280J owned by the appellants. According to the plaint she sustained blunt injuries to the nose leading to epistaxis and soft tissue injuries of both upper and lower lips.

2. When the matter came up for trial both parties agreed on liable at 90:10 percent in favour of the respondent. The trial court after full hearing awarded the respondent general damages of Kshs. 80,000 and special damages of Kshs.5000 less contributory negligence.

3. The appellant was dissatisfied with the said judgement and has filed several grounds of appeal. The central ground is that the respondent was unable to prove that the injuries that she sustained were as a result of the said accident.

4. When the matter came up for hearing the court directed the same to be determined by way of written submissions which the parties have complied.

APPELLANTS SUBMISSIONS.

5. The appellants did not deny that the accident occurred as per the consent on lability which was already on record. Their concern however was that the injuries sustained by the minor was not as a result of the said accident and may have been sustained elsewhere. The appellants poked holes into the evidence of the next friend, the mother of the appellant who claimed that she was carrying her during the said accident.

6. She told the court that they went to Mediheal hospital but the treatment notes remained at the said hospital. She only identified the patient card number xxxx which apart from being blank did not have any details of the injuries.

7. The appellants went ahead to submit that PW2 although she was a records officer at the said Mediheal hospital only produced the card which was blank and without any details of the injuries suffered by the respondent. PW3 Dr. Obed Omuyoma essentially when he examined the respondent relied on the P3 form from provincial general hospital(PGH) which according to the appellant did not aid much as the primary source of the details of the injures were not available.

8. It was therefore the appellant's case that although the respondent may have been involved in the accident she did not sustain the injuries enumerated in the plaint and that she did not satisfy the provisions of **Section 107, 108 and 109 of the Evidence Act**. They prayed that the appeal be allowed and the trial court's judgement be set aside with costs.

RESPONDENTS SUBMISSION

9. The respondent's supported the trials courts finding and that indeed the injuries sustained by the minor were proved to have occurred at the said accident. That the fact that the applicant has admitted liability was prove also that the accident occurred. That the witnesses brought by the respondent especially the medical ones clearly explained that when they examined the minor she was found to have sustained the injuries.

10. That the records officer from Mediheal hospital clearly explained herself on the reasons why the treatment notes are kept and are properties of the hospital. That she was categorical that the said documents were at the said hospital where the minor was seen.

11. The respondent in the premises prayed that the appeal be dismissed and at any rate the award of Kshs. 80,000 was very modest.

ANALYSIS AND DETERMINATION.

12. Having perused the appeal herein as well as the submissions and the attendant authorities the only question for determination is whether the minor sustained the injuries indicated in the plaint as a result of the said accident. It appears in my view that by conceding liability the appellant admitted that they caused the accident. Further that the minor was involved in the same together with the rest of the family members.

13. That limb of the claim was satisfied. The next limb was whether she was injured during the said accident. This is where the real contest was both at the trial court and in this appeal. Perhaps it shall be necessary to look at the evidence as presented during trial concerning specifically the injuries sustained by the minor.

14. PW1 her next friend, explained how the accident occurred and told the court that the child was injured on the nose and the mouth and was bleeding profusely and they were taken to Mediheal hospital. The child was given card no. xxxx which indicated attendance at the said hospital. They went to the police and the P3 Form was issued to her. The medical notes remained at the hospital.

15. At the police station she was given a P3 form which was filled at provincial general hospital (PGH) and later given a police abstract. She also took the child to Kibera south health centre but the medical notes were as well left at the hospital.

16. On cross examination she said that she did not have the medical notes to show that the child was injured.

17. PW2 Njuguna Caroline Wangechi a medical records officer from Mediheal hospital produced the medical card and stated that the medical records always remained with the hospital.

18. PW3 Dr. Obed Omuyoma prepared the medical legal report on behalf of the minor by relying on his observations and the card from Mediheal hospital and the P3 form from PGH.

19. PW4 Dr. Njoroge Kanyotu from PGH Nakuru produced the P3 form on behalf of Dr. Dida his colleague and upon cross examination he said that there were no treatment documents relied upon when the P3 form was filled but he opined that the injuries may have been caused by a road traffic accident.

20. The burden of proof lies always on the person who alleges as is well captured by the provisions of **Section 107 of the Evidence Act.** In this case it was the respondent to establish that as a result of the accident the minor who was two and half years sustained the injuries. It was not enough to state that she was bleeding profusely as they took her to the hospital.

21. The court will always rely on the material available before it and nothing more. In this matter it is evident that there are two documents which were presented to court namely the medical card No. xxxx from Mediheal hospital Nakuru and the P3 form filled at PGH Nakuru. Other than that the other exhibit is Dr. Omuyomas medical legal report which he also produced.

22. The medical card from the Mediheal hospital does not show the injuries suffered by the patient. Other than her name and other details including her age, there is nothing indicating the injuries suffered. During her evidence in chief PW2 stated that;

> **"…. this card is that given to a patient when he /she comes to the facility. The patient is allowed to retain the card. The other records are retained at the hospital. We have outpatient register which nurses capture the patients who attend the hospital. We have another at the reception. I do not have it today. We record the name age of the patient and the date of the visit. The nurses register captures information about the diagnosis. The child was seen at the hospital."**

23. Whereas it could be true that the child was seen at the hospital, in the absence of the records of diagnosis and treatment she received, how can one know that she had sustained any injuries during the accident. What was difficult in getting the register used by the nurses when carrying out prognosis.?

24. Even if the records belonged to the hospital at least what is usually referred to as a *"discharge summary"* would in my view sufficed. The evidence from the other witnesses who were doctors that is Omuyoma and Kanyotu, PW3 and PW4 did not aid much. They carried out their observation some few days after the incident and they relied for example on the physical examination of the minor and the card as explained by PW3.

25. Dr Dida on his part relied on the P3 form and nothing else. In my view these were not sufficient as they are simply secondary documents. None of it was filed at the period when the patient was taken to the hospital after the accident. All were filled post the initial hospital treatment. The patient, one would argue, may have even sustained the injuries elsewhere.

26. This was the position explained by Maraga J (as he then was) in the case of **TIMSALES LIMITED V. WILSON LIBUYWA NAKURU HCCA NO. 135 OF 2006** where he stated that;

> **"This being my view of the matter, Dr. Kiamba's report does not help the Respondent. In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the Plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examines him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether."**

27. In essence therefore the observations by the other medics after the initial treatment minus the original notes is usually insufficient as they were not the first "port of entry" as it were. Theirs is secondary. They needed original records. More importantly the respondent ought to have produced the original records from Mediheal hospital.

28. In any case nothing stopped the respondent from seeking orders from the trial court to have the same availed by the said hospital. At worst they should have produced the patients discharge summary.

29. In the premises, this court finds the appeal valid. The respondent was unable to establish the source of the injuries and in particular that she sustained at the very accident. This is adversarial system and he who alleges must prove.

30. For now, the respondent failed the provisions of **Section 107, and 108 of the Evidence Act** which states respectively that;

> **1. "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**
>
> **(2)" When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person". And**
>
> **"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."**

31. The appeal is allowed, the lower court's judgement set aside with no orders as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 11TH DAY OF NOVEMBER, 2021

H K CHEMITEI

JUDGE