REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 218 OF 2007

KENYA WILDLIFE SERVICES……...……1ST APPLICANT

JOHN WACHIRA……..……2ND APPLICANT

VERSUS

D O S***[Minor suing Through the father and next of friend one S M***]……RESPONDENT

JUDGMENT

1. This is a civil appeal by Kenya Wildlife Service- the appellant herein. The respondents are D O S(minor, through the father as a next friend, S M .
2. The matter started in Senior Resident Magistrate's court at Kilgoris as civil suit No. 23 of 2008. The plaintiff who suffered bodily injuries when the accident involving motor vehicle KAR 799L and the plaintiff who was a pillion passenger on cycle on the 13th day of February, along Lolgorian-Kehancha road.
3. In her judgment the learned principal magistrate, Mrs. R.A. Oganyo, made a finding for the plaintiff and found both defendants 100% liable to the plaintiff. In her assessment she awarded damages as follows:-

a. *General damages for pain*

and suffering……Kshs.600,000

b. *Medical expenses……Kshs. 451,010*
c. *Special damages……Kshs. 7,500*

*Plus interest on **(a) (b)** and **(c)***

4. The defendant appealed, hence this appeal case No. 218 of 2010. In his memorandum of Appeal filed on the 11th of September, 2011, the appellant sets out their grounds of appeal as follows:-

1. *The learned trial magistrate erred in fact and in law in holding that the Appellant was 100% liable for the occurrence of the accident and in failing to apportion liability against the Respondent.*

2. *The learned trial magistrate erred in law and infact in awarding to the Respondent a sum of kshs. 451,010/- as Medical Expenses in the nature of Special Damages which amount had neither been pleaded nor proved at the trial.*

3. *The learned trial magistrate erred in fact and in law when he awarded to the Respondent, against the Appellant the sum of kshs. 600,000/- as General Damages for pain and suffering which amount is manifestly high, excessive and inordinately high in the circumstances.*
4. *The learned trial magistrate erred infact and in law in holding that the Respondent had proved negligence against the Appellant.*

5. *The learned trial magistrate erred infact and in law when she failed to appreciate that in failing to file a reply to defence that had alleged and pleaded negligence against the Respondent, the Respondent is deemed to have admitted that he was himself negligent and no liability therefore could attach against the appellant in the circumstances.*

5. In his written submissions the Appellant advances that the Respondent, D O S, testified that he(S) was a pillion passenger on a bicycle ridden by one I O. No where does this name occur, neither in the pleadings nor in the police abstract. In both these documents the plaintiff is the rider of the bicycle.
6. However, in his testimony PW1, D O S, testifies that he was not riding the bicycle but was a pillion passenger of one I O.
7. The appellant therefore contends that this variance between the pleadings and the testimony should lead to the dismissal of the suit. He says the inconsistency is not a mere technical mistake but a fatal one which cannot be undone at this juncture.
8. I disagree with the appellant's submission on this point, in the light of **Article 159** of the **Kenya Constitution 2010**. In the business of dispensing justice, the court must not be held back by technicalities, or indeed procedural technicalities. Despite the variance referred to which the learned principal magistrate must have been aware of, she nevertheless found for the plaintiff. The constitution in refusing to rely on procedural technicalities had in mind the technicalities, the lawyers use to draft pleadings in the practice of law. These pleadings though necessary for better management of civil practice, more often than not, also act as impediment to justice. The history of the law of Equity as a branch of law, arose from the procedural rigidity of common law.
9. The Appellant cites **Order 2 r 6(1)** of the **Civil Procedure** to buttress his claim in that a new ground of claim is inconsistent with a previous pleading in the same suit must not be entertained. However, the wording is "**may**" not "**shall**". Be that as it may, all these are collectively called technicalities, which the Kenya Constitution envisaged as impeding proper flow of justice to the litigant who, in fact, has suffered bodily damage and is being told due to technicalities of pleading, not his area of speciality, he cannot recover damages.
10. The second attack by the Appellant on the learned magistrate judgment is that, the Defence/Appellant having raised certain particulars of negligence as enumerated in his defence at the lower court, the Plaintiff/Respondent failed to **reply** to the **Defence** in order to deny the particularities of negligence then raised. Thus non reply means admission, the Defendant/Appellant contends.
11. He cited two authorities:

a. *Benedict Mwasighe vs. Bandari Transporters Limited and David Wambua, Mombasa Court of Appeal Civil Appeal No. 284 of 2000 and*

b. *Mount Elgon hardware vs. United Millers Limited, Kisumu Court of Appeal, Civil Appeal No. 19 of 1996.*

Both cases cited are subsumed by the Kenya Constitution's need that technicalities of procedure need not be relied on in the business of dispensing justice in Kenya. The court holds the same view.

12. The third attack by the Appellant is that the way the accident occurred when the Respondent/Plaintiff found himself under the vehicle, means the expected point of impact should be on the left side facing Masurura off the road. The testimony was that the motor vehicle was moving in a zig-zag manner and to escape impact of a zig-zagging motor vehicle it is not improbable that the Respondent could find himself underneath the vehicle. The driver of motor

vehicle, it must be noted, did not give evidence.

13. Finally, the driver of motor vehicle KAR 799H was charged for careless driving contrary to section 4 a(1) of the Traffic Act. It was not confirmed whether this driver was convicted of the offence charged.
14. I however, agree with this citation that a conviction in a traffic case does not bar one from apportioning liability to the plaintiff.
15. In the absence of the evidence by the driver to contradict the Plaintiff's testimony, this court upholds the findings of the lower court.
16. This matter is be proved on balance of probability. I hold therefore that on liability I uphold the findings of the lower court on 100%.
17. **The Issue of Damages**- general and special.

The lower court award;

Kshs. 600,000 for injuries suffered and

Kshs. 451,010 for medical expenses

Having looked at the authorities by the appellant and his submissions thereon. I, feel that the figure of kshs. 600,000 was on the higher side. In substitute it with kshs. 400,000 in general damages taking into account inflation.

18. As to the special damages of kshs. 451,010, there is no evidence that the same had been paid. What is there, is that the Plaintiff/Respondent incurred it as an expense and agreed to pay it later. I allow the same and uphold the same.
19. Therefore the comprehensive reasons I have given above, the grounds of appeal on page 3 of the record of appeal, as enumerated, from 1 to 5 are hereby dismissed. Therefore the appeal is hereby dismissed. No orders as to costs.
20. The Respondent general damages is now made up as follows:

a. *General damages ……...Kshs.400,000*
b. *Medical Expenses.……...Kshs.451,010*
c. *Special damages.……....Kshs. 7,500*
d. *Total.……* ***Kshs.858,510***

21. Orders accordingly.

Judgment dated and delivered at **KISII** this 2nd day of October 2014

C.B. NAGILLAH,

JUDGE.

In the presence of:-

……Applicant

…….Respondent

……..Court Clerk.