IN THE COURT OF APPEAL

AT KISUMU

(Coram: Law JA, Kneller & Hancox Ag JJA

CIVIL APPEAL NO 8 OF 1983

BETWEEN

MAKUBE.....APPELLANT

AND

NYAMURO.....RESPONDENT

JUDGMENT

This is a very sad case in which the infant plaintiff sued by his father and next friend for damages for the loss of his right eye during an incident at his school on October 18, 1979. The defendant was his Swahili teacher and also, at times, his handiwork teacher. I say “incident”, because the manner of its taking place was disputed on the facts, Aganyanya Ag J finding these in favour of the defendant (now the respondent) and he dismissed the action. The plaintiff now appeals to this court against that dismissal.

The boy, to whom I shall refer as “Bundi” was, it appears, aged fourteen at the material time, said in effect that his teacher was always picking on him and had in the past whipped him. On the day in question the teacher returned to mark the class Swahili exercises and Bundi collected his book. As he returned to go the teacher whipped him three times with a piece of rope, the third blow causing this tragic injury.

The learned judge remarked that the other two pupils called on his behalf as witnesses did not fully support his story. Koroso Marube, PW 2, his brother, said that there was an altercation between Bundi and the teacher as to Bundi’s writing, whereupon the teacher pushed him to the desk and whipped him three times round the neck, while Charles Mageto, PW 6, said that on being told by Bundi that he had forgotten one letter the teacher held him by the neck and whipped him three times with the rope. Both agreed that immediately afterwards Bundi urinated on himself. Koroso said that the teacher used to instruct other pupils how to work, but not Bundi, and Charles said that he “only caned the plaintiff and not other pupils,” thus supporting Bundi’s suggestion of victimisation. They all agreed that on this particular morning there was a Swahili lesson in the classroom and not an arts and crafts lesson.

The defendant denied any assault and said it was an accident; that he was teaching arts and crafts to Standard 3; and that he was collecting the ropes made by his pupils from sisal and stretching each to see who made the longest for marking purposes. As he did so Bundi, who previously had a white spot on his eye, (not confirmed by the other witnesses) “crossed” him and the piece of rope which he then had

struck him in the eye. Bundi did confirm that when they had handiwork lessons, which they had the previous day (which was a Wednesday), the pupils used to make ropes from sisal, which were inspected by the teacher who then gave them to the pupils to take home. The respondent however said handicraft was taught on Tuesdays and Thursdays.

While there were differences between the pupils, this is sometimes only to be expected where an accident takes place in front of several witnesses and some see and depose to some things and others see and depose to other things. Moreover, Bundi was clearly *in extremis* after this happened and, speaking for myself, I would not take too harshly against him any shortcomings in his evidence. Nevertheless the judge disbelieved Bundi and rejected his evidence, and accepted that of the teacher. He accordingly dismissed the claim for assault, as the case had been pleaded. He did so on the basis that he was not satisfied that the defendant's admitted act was deliberate "to the extent of holding the defendant liable in a civil suit". I note that the defence purported to deny that the defendant was criminally responsible for the plaintiff being maimed, but I take it that such denial is intended to and does not include any civil liability, an assault being a crime as well as a tort. I also note the defendant's version of the facts was nowhere put forward in the defence.

However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. I therefore now turn to the criticisms made in the memorandum of appeal that he so misdirected himself in material respects that the decision ought not to stand.

The case for Bundi was very ably presented by Mr Osoro, who did not appear at first instance. The first ground in his memorandum of appeal was that there was a misdirection when the judge held that all three boys, the plaintiff, Koroso, who was his brother, and Charles Mageto, were children of tender years and that it was "necessary" that their evidence be corroborated by other evidence of an independent nature implicating the defendant. It is possible that, since an assault can be a tort as well as a crime, and since there was express mention of criminal responsibility in the pleadings, that the learned judge thought the case should be treated in the same way as a criminal prosecution.

If that were so then if the evidence of a child of tender years is admitted by the court under section 19 of the Oaths and Statutory Declarations Act, cap 15, because he does not understand the nature of an oath, then that evidence requires corroboration as a matter of law by virtue of section 124 of the Evidence Act chapter 80. Mr Osoro dwelt on both these sections, and he also referred us to *Kibangeny Arap Kolil v R* [1959] EA 92 at p 94, a criminal case, where this court's predecessor said that in the absence of special circumstances a child of the age or apparent age of under fourteen years should be treated as within the section.

Unfortunately there was no specific finding made by the learned Judge that any of these boys were children of tender years, and it seems from the record they were not, because although at the very beginning of the plaintiffs' evidence he said he was aged fourteen, later on he said he had told the staff at Keroka that he was fourteen years old in 1979 and was in Std III. Moreover the Out-Patient card dated October 18, 1979 states that Bundi was then fourteen years old, as does the police P3 form dated October 24. Since both the other three boys were also in Std III at the material time, even though Koroso, PW 2, according to Mr Bwokara, who appeared for the teacher, both in the court below and in this court, was the younger brother of Bundi, it is a reasonable inference on the evidence that the three boys were of comparable ages at the material time. This means that the plaintiff, Bundi, was at least sixteen, when giving his evidence, with Charles Mageto, PW 6, who had progressed to Standard IV of similar age, and Koroso slightly younger. There would therefore seem to have been no basis whatsoever

for the learned judge's finding that these boys were of tender years, at the time of giving evidence. Indeed had he thought so, on the *voir dire*, that is to say his visual observation of them when each came to give evidence, I think he would have carried out the usual enquiry before receiving the evidence of such witnesses. While as a matter of law the evidence of children of tender years in a criminal case would require corroboration, this was neither a criminal case, nor were the children of tender years. Even so, had they been of tender years it would have been prudent to look for corroboration, as is indicated by the second authority Mr Osoro cited, namely *Erukana Kyakulagira v AG of Uganda* [1959] EA 152 at p 155 where the two children were aged nine and seven respectively. In these circumstances I have no doubt that the reference by the learned judge to the necessity for corroboration of the evidence of the boys, and of each of them, was a misdirection.

Mr Bwokara sought to argue that the question of corroboration was immaterial in any event, because the trial judge disbelieved the plaintiff's case that there was an assault. But it would nevertheless have arisen, had corroboration been necessary, in order to arrive at a proper finding as to whether what the teacher did amounted to an assault, or was an accident, as he said.

The next ground argued by Mr Osoro was that the learned judge having made one error, went on to commit another, in that having erroneously required corroboration he failed to examine the available evidence to see if it amounted to corroboration. Mr Osoro referred to instanced material which he said could have amounted to corroboration had the learned judge thought about it. First was Mr Amiami, PW 5, a clinical officer of eighteen years' experience and who had an appropriate diploma. It is quite obvious, Mr Osoro said, from this witness' evidence, that considerable force was used to inflict the damage to the plaintiff's eye, with severe bleeding, the tissues destroyed and the vision already lost. It was at the very least consistent with an assault and inconsistent with the blow having occurred by pure chance as the teacher described. Moreover the initial error in requiring corroboration led the learned judge, so Mr Osoro submitted, into the error of treating Koroso and Charles Mageto as needing corroboration when in fact they themselves could have corroborated Bundi.

Mr Osoro continued by saying that, furthermore, the learned judge failed to evaluate the evidence before him, that had he done so he would inevitably have made a finding in favour of the boy. For one thing it was very material to decide whether the class that was taking place that morning, namely Thursday October 18, 1979, was a Swahili class or an Arts and Crafts class. The defendant's own witness Lucy Obiero said that Arts and Crafts were taught twice a week, on Wednesday and Fridays, towards lunch time. This accorded with Bundi's evidence. The teacher, however, said that handiwork took place on Tuesdays and Thursdays, and was thus being taught on October 18. This in turn leads to another point, because the Arts and Crafts lessons took place in a field, the sample ropes made by the pupils being constructed by them out of sisal, whereas the Swahili lessons took place in the classroom. Obviously it was very material, in a case of this kind, with disputed facts, that the place where the incident occurred should be certain so that all the surrounding circumstances could be clear.

I do not think there was any merit in Mr Osoro's criticism of the judge's mention of the police not coming to testify. He just mentioned this matter, probably because it was referred to by the counsel, and there is in my opinion no justification for saying that the judge took this against the plaintiff. Neither do I think the point about the gap in the medical attendances of the plaintiff merits serious consideration; obviously he would need to be examined as to his condition immediately before the action came on. I do not think there is any justification either for Mr Bwokara's criticism that this was done purely with a view of enhancing the expected damages.

Finally Mr Osoro said that the judge paid too much attention to differences in detail between the boys' evidence. It was quite obvious, he said, that where events happen quickly, then different stages of the

sequence of events would have been seen by the witnesses. Any minor differences should not be too closely criticised as they were only to be expected. Were there not differences on the sequence and in details it might be grounds for suspicion.

As regards quantum, we were referred to a local case where Cotran J awarded a woman Kshs 60,000 for the loss of an eye as a result of an assault in April 1978. He submitted the figure should be greater for a child who had, amongst other things, lost his schooling because of the loss of an eye. In any event the judge should have estimated the damages, so that in the event of the appeal being allowed that matter could have been fully canvassed.

Mr Bwokara supported the judge's conclusions and asks us to dismiss the appeal. He said that the plaintiff's case from the beginning was that the teacher had a personal grudge and was taking it out on the boy. This he said was not supported by the evidence, and it was up to the plaintiff to prove the malice which he had alleged, the onus being fairly and squarely on him, and this he had not done. The judge had exhaustively examined the evidence in the course of his judgement, and since the incident took place in the presence of all the three boys, there should not have been the differences in the evidence that there were. The whole matter, he said, was a frame-up. As regards damages, in the event of the court allowing the appeal he submitted that they should not even come to Kshs 10,000.

I have considered the submissions with anxious care, and I would hesitate long before differing from the learned judge's findings of fact, particularly in this case because he clearly took so much trouble in dealing with the evidence. Nevertheless I have very regretfully come to the conclusion that had the judge not misdirected himself on the legal necessity for corroboration of the evidence of the three boys he would then have been left with three substantive witnesses as to fact, plus other evidence which Mr Osoro indicated in his submissions as supportive of them. Had he correctly appreciated that these were not children of tender years and did not require corroboration, in my view he would have approached the evidence from a different standpoint. Then there is the other material factor to which I have referred, namely whether this was a Swahili class or a handicraft class, and, following on from that, whether the incident took place in the classroom or out in the field. This conflict was never resolved. All these matters, I regret to say, are so unsatisfactory, that it leads me to the conclusion that if the judge had correctly directed himself he would inevitably have reached a different finding on liability from that to which he did.

I would hold on the evidence in this case that the only reasonable conclusion is that this injury was inflicted as the result of an intentional act by the defendant in the course of an assault and battery.

Before dealing with the quantum I propose to say a few words about the other possibility that arose in this case, namely that the defendant's act was a trespass to the person, unintentional yet negligent, on the defendant's part. This matter was never pleaded (as in my opinion it could have been) as an alternative cause of action, possibly joining the school as a codefendant, but it was touched on in the appeal, and it may therefore be of assistance to set out that which I apprehend to be the law on this aspect of the case.

While 'assault' is frequently the generic term used to cover both assault and battery, they are two distinct torts, the one being an overt act indicating an immediate intention to commit a battery (*Clerk & Lindsell* 14th Edition para 679), and a battery being the direct application of force to the person of another without lawful justification; and that includes intentionally to bring any material object into contact with another person (*Salmond on Torts* 17th Edition page 121). Both constitute that species of trespass known as trespass to the person. The common law liability for trespass was strict:

"No man shall be excused of a trespass … Except it may be judged utterly without his fault" (*Weaver v Ward* 80 ER 284)".

In the same case (which was cited with approval in *National Coal Board v Evans (JE) & Co (Cardiff) Ltd* [1951] 2 All ER 310 at p 317), it was said:

"As if a man by force takes my hand and strikes you, or, if here the defendant had said that the plaintiff ran across his piece when it was discharging … so that it appeared, it was inevitable, and that the defendant had committed no negligence …"

it would be an accident "purely accidental", *Davies v Saunders* 1770 2 CHIT 639.

That is what the defendant teacher had said here. It was a pure accident "as the plaintiff was crossing". It is perfectly plain on the authorities, the most recent of which appears to be *Fowler v Lanning* [1959] 1 All ER 290, that trespass may be intentional or unintentional. If it is unintentional it may yet be negligent (as distinct from the tort of negligence) or it may be pure accident or misadventure. If the latter, there is no liability, see the authorities above quoted, but if the former, ie unintentional yet negligent, it was laid down in *Fowler v Lanning* (a shooting case) by Diplock J (as he then was) that the onus of proving negligence lay on the plaintiff, and that he must give particulars thereof. He said, at P 298 B to C:

"If, as I have held, the onus of proof of intention or negligence on the part of the defendant lies on the plaintiff, then, under the modern rules of pleading, he must allege either intention on the part of the defendant, or, if he relies on negligence, he must state the facts which he alleges constitute negligence. Without either of such allegations the bald statement that the defendant shot the plaintiff in unspecified circumstances with an unspecified weapon in my view discloses no cause of action. This is no academic pleading point. It serves to secure justice between the parties."

and further on:

"But I have today to deal with the pleading as it stands. As is stands, it neither alleges negligence in terms nor alleges facts which, if true, would of themselves constitute negligence; nor, if counsel for the plaintiff is right, would he bound at any time before the trial to disclose to the defendant what facts he relies on as constituting negligence."

However, since I have reached the conclusion, on my own evaluation of the evidence, that this was an intentional assault, the omission to plead a negligent trespass to the person is not material in this case. The plain fact is that those legally advising the plaintiff chose to put his case on the footing of intentional, and not unintentional, trespass. In my judgment the evidence established this allegation on the balance of probabilities and accordingly, the appellant is entitled to succeed.

I return to the aspect of the quantum of damages. The decision of Cotran J which was cited, is distinguishable in that the judge expressly found that the female plaintiff suffered from an unsightly deformity, which would occasion loss of earning power and diminish her marriage prospects. There are no such considerations in this case. Doing the best I can on the available material, I would award to the plaintiff Kshs 30,000 as damages for the tort of assault and battery that the defendant committed against him. As to costs, the appellant is entitled to his costs in the appeal and in the High Court, and I would so order.

Law JA. I have read in draft the judgment prepared by Hancox Ag JA. I agree with him that had the learned trial judge not misdirected himself as to the necessity for corroboration of the evidence of the

plaintiff and the other two boys, he must have found in favour of the plaintiff. These witnesses were not children of tender years, but young persons aged sixteen. Their evidence did not require corroboration, it was consistent, and in my view fully discharged the onus of proving a wilful assault and battery, as against the respondent's unsupported story of a pure accident.

As regards damages, it was not proved that the appellant's schooling came to an end because of his injury. He was apparently, normally occupied as a herdsman, and there is no evidence that the loss of sight in one eye will interfere with that or other agricultural pursuits. I consider that he would adequately be compensated with an award of Kshs 30,000 for loss of the sight of one eye, pain and suffering.

In the circumstances of this case, as the plaintiff is now approaching the age of majority, there is no need to make the usual orders as to the investment of any damages which may be recovered from the respondent. Such damages may be paid to the plaintiff's father and next friend, to be applied for the plaintiff's benefit, any balance remaining being paid to him on reaching the age of eighteen years.

I agree that this appeal, must be allowed, with costs both in this court and in the High Court. As Kneller and Hancox Ag JJA agree, it is so ordered. The judgment and decree of Aganyanya Ag J are set aside, and as Hancox Ag JA agrees, a judgment and decree awarding the plaintiff general damages of Kshs 30,000 substituted.

Kneller Ag JA. I agree with Hancox Ag JA that the appellant and his witnesses proved on the balance of probabilities the wilful assault and battery upon him by the respondent. Their account of the event, on a simple reading of all the evidence, begins with the merit of seeming to be the more likely way it happened but this was lost sight of by the learned judge requiring unwanted consistency in the recollection of what happened about two and a half years before the appellant and his classmates and over and about that corroboration which was not required and which he did not discover though it was, in fact, all there.

These are sufficient reasons for not being persuaded that the trial judge's assessment of the credibility of the parties and witnesses, based on the usual advantage he has in having seen and heard them, should prevail.

Only one local earlier award of damages was cited and that was unhelpful because the facts were far from similar. We are not confined to the paucity of material put before the judge or this court.

Ideally the issue of damages should be referred to the High Court judge at Kisii for submissions and decision for he could then see the appellant and call for further medical or other evidence if he thinks it necessary but we have been implored by both parties to do this here.

A boy aged 10 ½ years who suffered an injury to an eye which had to be removed was awarded Kshs 500 for pain and suffering (a low sum because the nerve of that eye was also destroyed) and Kshs 35,000 for the loss of the eye by Jones J in the High Court of Uganda in 1961: *Patel v AG* HCCC 602 of 1960. He awarded a thirteen year old girl Kshs 45,000 general damages for the loss of an eye in an accident in 1966: *Lukiya Nasejje v HH The Kabaka's Government* HCCS 6 of 1960. Rusell Ag J chose a figure of Kshs 35,000 in 1967 for a girl aged twelve who lost an eye in an accident and took into account the possibility and fear that something might happen to the good eye. No evidence was led however of pain and suffering: *Akongo Ayo v AG* HCCS 6 of 1967. General damages of Kshs 40,000 for pain and suffering was Musoke J's award in 1971 for a girl aged eleven who lost the sight in her left eye when it was injured. *Janet Asamo v Soroti Town Council* HCCC 469 of 1970. The same award of Kshs 40,000 for a school girl aged eleven for the loss of her left eye was given by Phadke J in 1970 in *Safina Bogga v*

AG HCCS 519 of 1970. Musoke J put it up to Kshs 45,000 for a school boy aged seven who lost his right eye when he caught it on a hook on a lavatory door at his school in 1971: *Visensiyo Kyohbera v West Mengo District Association* HCCC 697 of 1970 and in 1971 Youds J raised it to Kshs 50,000 for a schoolgirl of fifteen who lost an eye as the result of the negligence of her school. It would have been greater had she not refused to have it removed and replaced with an artificial one.

These are decisions of a court in a neighbouring country (*Quantum of Damages for Personal Injuries* by Michael Wilkinson, 1973, 3rd Edition, pages 49 to 54) and of about a decade or more ago. They are awards of a foreign court and helpful as a guide but no more because conditions in Kenya now are very different from those in Uganda between 1959 and 1972 (see Law JA in *Kimothia v Bhamra Tyre Retreaders* [1971] EA 81 (CA-K)). The value of money has fallen very greatly since 1959 (almost everywhere in the world) and as a consequence awards of damages in Kenya have increased.

The only recent Kenya award I have had brought to my notice is one of Kshs 150,000 by Cockar J on March 9, 1982 in *Lubia and Lubia v Kemfro Africa Limited and Gathogo Kamini* Nairobi HCCS 2382 of 1979.

Olive Lubia was eight years old at the time of the accident and twelve at the time of the trial. She sustained a fracture on the right side of her frontal bone and her right eye was destroyed in the accident.

It was replaced with a glass eye which the learned judge noticed was not the same as the other one and dribbled tears when she gave evidence. He was referred to English decisions between 1974 and 1980 relating to awards of damages for girls of the same age for the loss of one eye and they range from Kshs 90,000 to Kshs 200,000. The injury was not shown to have affected Alex's progress at school but it would probably affect her marriage prospects and her chances of a good job in a difficult labour market. The learned judge also considered the young girl's feelings about the cosmetic effect of being one-eyed. A notice of intended appeal was filed in this suit in March this year so I will say no more about it.

The appellant was a youth of fourteen when the respondent injured his eye and he lost sight in it there and then. The shock was such that he urinated over himself and he leant in agony over a desk. Nothing can be done to restore his sight in that eye. When he reads his left eye waters. This (and more particularly an understandable desire to avoid meeting the respondent again) probably led to his ceasing to attend this school. He could have and still mitigate damages by having treatment and or spectacles for the left eye and attending a school which does not employ the respondent. He was not doing well at school before this happened and he had had to repeat class 2 but the fact that he herded his father's cattle when he was not at school does not mean he was bound to return to this task had the respondent not given him a marked distaste for that school. All children save those of the rich in that area have this chore to perform. The plaintiff's advocate submitted the damages should be Kshs 60,000, at least, and the defendant's put it lower than Kshs 10,000.

Weighing one thing with another and doing the best I can on the material before us I would assess the appropriate award of damages for this injury at Kshs 60,000 for the loss of sight in one eye, pain and suffering. I regret having to differ with the majority of the court, but I have to add, with great respect, that I think my figure may still be on the low side.

The appellant succeeds in this court in having the judgement of the High Court reversed so he should have his costs here and below.

Dated and delivered at Kisumu this 29th day of March, 1983.

E.J.E LAW

……

JUDGE OF APPEAL

A.A KNELLER

……

JUDGE OF APPEAL

A.R.W HANCOX

……

Ag.JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR