REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.CIVIL APPEAL NO. 15 OF 2014

1) AL SAMAH ENTERPRISES LTD

2) ABUBAKAR OMAR...APPELLANTS

VERSUS

D M (minor suing thr' mother & next friend)

C G K...RESPONDENT

JUDGMENT

1. For consideration and determination by the court is the appeal whose grounds are contained in the memorandum of appeal dated 12th February, 2014 and a Cross Appeal whose grounds are contained in the memorandum of Cross Appeal dated 19.2.2014.

2. The two documents challenge the decision of the trial court on different grounds and rival grounds as follows:-

Memorandum of appeal

3. In brief the appellant prays that the appeal be allowed for reasons that the special damages were awarded without proof and that the sum awarded for general damages were not in consonance with the evidence adduced and therefore wholly exorbitant and exaggerated as to be wholly disproportionate to the injuries pleaded and comparable awards in the decided cases cited to court.

4. The Respondent on the other side equally seeks to have the appeal dismissed and judgment set aside for having failed to apply the applicable principles of apportionment of liability with regard to minors and children of tender years, that the trial court failed to be guided by the authoritative decided cases cited to court and therefore apportioned liability to the parent of the minor without pleading to that effect and finally that the finding on apportionment of liability were informed by misapprehension of the evidence and consideration of irrelevant factors.

5. Viewed against each other the appeal challenges the trial courts exercise of discretion in assessment of damages while the cross appeal challenges the trial court on its finding opportunity liability to the plaintiff and the next (of) friend.

6. Exercising the jurisdiction of a first appellate court, I will endeavor to reevaluate, reassess and

reappraise the entire evidence with a view to coming to own conclusions while well aware that I lack the benefit the trial court enjoyed in seeing and listening to the witness testify.

Pleadings and evidence at trial

7. By the plaint dated the 18.5.2012 the plaintiff, a minor, suing through the mother and next friend, sued the defendant and sought both special and general damages on account of a road traffic accident pleaded to have occurred on the 16.2.2012 along Airport road near Jambo village junction, when the 1st Appellant, as the 2nd Defendant driver is blamed for having negligently driven and controlled the said defendants motor vehicle Registration No. KBJ 150AZB 7610 in a negligent manner that he caused and permitted it to veer of road and knock down the minor plaintiff thereby occasioning to him severe injuries. Particulars of negligence were pleaded and the application of the doctrine of *Res Ipsa loquitor* invited. Equally pleaded was the injury sustained which was described as degloving injury measuring 25 cm x 5 cm extending from the right knee to the leg. The plaint then proceeded to plead particulars of and prayed for special damages in the sum of kshs.88,015 and that judgment be entered for her against the defendants jointly and severally for special and general damages plus costs and interests

8. To that plaint the defendant filed a joint statement of defence dated 30.6.2012 in which defense the ownership of the motor vehicle by the 1st defendant was admitted but all other contents of paragraph 3,4,5,6 & 7 were denied and strict proof invited. In the alternative it was pleaded that if plaintiff was ever involved in an accident with the defendants' motor vehicle, or suffered any injuries or damage, which were all denied, then such injuries, damage and loss, as may be proved, were caused wholly or in part by the plaintiff's own negligence. Particulars of negligence by the minor were then set forth and reinstatement made of the fact that the defendants were strangers to the allegations of negligence and made no admission on liability to the plaintiff. Filed with the statement of defence was the witness statement by the 2nd defendant which not only acknowledge the accident but also the fact that he was charged with the offence of careless driving pleaded guilty and was fined kshs.3,000/= which he paid. He went on to state that the 1st defendant offered to pay the hospital bills but the plaintiff refused. He however blamed the boy for the accident for having attempted to jump and hang onto the trailer and fell down hence getting injured.

9. The plaintiff upon being served with the defendants pleadings filed a Reply to defence in which she joined issues with all the pleadings in the defence, save for admissions, reiterated the contents of the plaint and pointed out that the statement of defence filed was an abuse of the court process as the same was at variance with the witness statement of the 2nd defendant.

10. I need to point out that the plaintiff equally filed a witness statement by the next friend and mother in which it was stated that the minor was knocked while off the road and that the driver was charged and convicted of the offence of careless driving. The minor also wrote and filed a witness statement in which he stated that he was so knocked while off the road.

11. At trial, other than the evidence by the plaintiff and his next friend, DR Ndegwa was called as Pw3, P.C.Njiru was called as Pw4 and one George Wafula, the incharge traffic Registry, Mombasa Law Courts was called as Pw5. The three were called to produce medical report, police abstract and Traffic case file NO.1212 of 2012 respectively. On their side the defendants did not call any witnesses but relied on the statement of the 2nd defendant which was adopted as evidence by consent.

12. Having reviewed the evidence adduced and in a reserved judgment, the trial court apportioned liability on the plaintiffs parent at 30% while the defendants were held 70% liable. In coming to his decision on apportionment of liability the court delivered itself as follows:

> ***"Whether the plaintiff was on the road or not, a driver of a motor vehicle owes a duty of care to all road users (pedestrians) included. Reasonable care comprises among others. Keeping a good look out. Where there are pedestrians especially children a driver must be prepared and drive more carefully knowing that they can run into the road. Also a motorist before reversing or turning must satisfy himself that it is safe to do so and must give special attention to the rear.***

The second defendant has alleged that he did not see the plaintiff which is an indication to lack of keeping a proper look out.

Pw1 the plaintiffs mother informed the court that due to the age and mental state of the plaintiff, he could not see that he could be hit. This therefore connotes that the plaintiff was at an age or alternatively his mental state was such that he should not have been left unaccompanied. On a highway... Having known that the child could not discern if a motor vehicle that was turning could hit him yet left the child unaccompanied on the road, the mother also contributed to the accident at a less degree than the 1st defendant...the court therefore apportions contributory negligence on the plaintiffs parent at 30%."

13. I have extensively quoted the trial court's decision because the question of apportionment of liability and its propriety has been heavily attacked by the Respondent in its cross appeal.

14. To help determine whether or not the trial court was justified in the findings, it is important to re-examine the evidence on record. Pw1 said:-

"What I have explained is what I was informed but did not witness."

15. This type of evidence is what one would without doubt call hearsay evidence. It is difficult to understand why the court opted to rely on it yet there was the evidence of Pw2, the plaintiff which was never questioner on doubted. Hearsay evidence is never admissible and it matter not that the adversary acquiesces to such evidence going on record. This court is guided and bound by the decision of the court of appeal in **NBI.C.A.C.A NO.6 OF 1989, KIHUNDI & ANOTHER –VS - IBERIA AIRLINES OF SPAIN SA [1991] eKLR** where it was said:-

"The only cogent admissible part of Mr. Kingori's evidence was his producing the exhibits on the admission of which there was no dispute at ll. The rest of his evidence and particularly what Ramon and the janitor told him or showed him and as to where the exhibits were recovered from by the Spanish authorities is hearsay, of no value at all, and ought to have been expunged or considered deleted".

16. To this court the finding on apportionment of liability was so critical and ought not to have been left to be grounded on hearsay by pw1 on what she was allegedly told by the owner and driver of the offending motor vehicle when neither was called to give evidence. The case having closed without the two being called to give evidence the trial court ought to have expunged the evidence from the record or considered it deleted. This was an outright error in law that invite interference by this court as a first appellate court.

17. Of equal concern is the fact that the parent to the plaintiff although named as the next friend was merely a nominal party to the proceedings with no personal interest in the matter save as such next friend. It is a cardinal principle of law and I belief, the right to a fair hearing as well as Rules of Natural justice that a court of law is not free to make a pronouncement against a party not before it in the litigation. In the matter before me CAROLINE GACHERI KIBUTI was not a party and it was therefore not open to the court to find her contributorily negligent and to transfer the burden of that negligence upon the plaintiff who was not found blameworthy.

18. These two issues alone are enough to dispose of the cross appeal as being merited. It is allowed. Having allowed it, this court is in law bound, upon reassessment of evidence to make own determination on the matter.

19. I have taken the evidence of Pw2 that he was standing off the road for the motor vehicle to pass when the motor vehicle hit him with the trailer part. Indeed the trial court was on point on the duty of every driver to be on the lookout at all times. The 2nd defendant in my assessment conceded to failure to be on the the look out when in his statement which was admitted to be taken into account without him giving evidence, he said that he was only alerted by shouts of **"umegonga, umegonga"** before he stopped. This

court finds that the 2nd defendant failed to exercise due care and attention by keeping a proper look out expected and was solely to blame for the accident. If that analysis was to be inaccurate, then the fact that the 2nd defendant was charged and pleaded guilty to the offence of careless driving is a factor to be taken into account. While the court appreciates that a conviction *per se* is not a bar to finding in contribution, the facts and evidenced in this matter do not invite any finding of negligence on the Respondent – cross appellant.

20. The totality of the foregoing is that there was no evidence to justify the finding on apportionment of liability to the plaintiff's parent and I therefore find and hold that the 2nd defendant/appellant was wholly to blame in the accident for which blame the 1st Defendant/Appellant was vicariously liable and therefore in place of the trial courts funding attributing to the Appellates only 70% of the blame, I substitute therefore a finding that both Appellants were jointly and severally liable at 100% to the Respondent.

21. On the question of assessment of damages, which is the only issue in the appellants' case, I am guided that the task of assessment of damages is purely an exercise in judicial discretion. It takes a very strong case of demonstrated error in principle, misapprehension of the evidence or short of that an outright application and consideration of irrelevant factors or failure to consider relevant factors before an appellate court can interfere with the funding of a trial court.

22. The Plaintiff/Respondent was proved to have suffered the injuries pleaded and proved to be degloving injuries measuring 25 x 5 centimetres and extending between the right knee and the leg. In the evidence of Pw3 DR.STEPHEN NDEGWA the plaintiff suffered injuries which were expected to heal with 10% disability due to scaring on the right leg and thigh. The scars ruled him out of certain jobs like the military.

23. In their duty to the court the Respondent as plaintiff proposed a sum of Kshs.450,000 while relying on the decided case of **Anna Kioko -vs- United Transport Agencies and Another, HCC. No 30 or 1996, MOMBASA**, where the court, in the year 2002, awarded the sum of 300,000 to a plaintiff who suffered comparable injuries.

24. On their side the Appellants, as defendant, proposed an award of ksh.180,000 while relying on the decision in **Susan Wairimu Mutahi -vs- Michael Njoroge, NBI HCC No. 4303/1989** in which decision the plaintiff suffered degloving injury to the thigh among other injuries. No permanent disability was established in evidence.

25. Faced with the rival submission and relying on the authorities which were clearly binding on the trial court, the court delivered itself in the following manner.

> ***"No evidence has been tendered by the defendant to dispute that the plaintiff was admitted in hospital twice for Debridement and grafting and that the injury left 10% Permanent disability……"***
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> ***"I have considered submissions by both counsel and the authorities relied on. I will however not consider submission that the plaintiffs carrier choice is limited as there was no evidence in the same. Having considered the fact of inflation, the injuries sustained by the plaintiff and treatment received, Kshs.400,000/- is adequate as damages for pains suffering and loss of amenities".***

26. I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this courts intereference with the discretion as exercised. I find no merit in the grounds of appeal impugning assessment of general damages and I dismiss the same as not disclosing an inordinately high award as to be disproportionate to the evidence on injuries suffered.

27. There is ground 3 in the memorandum of appeal which fault the trial court for awarding kshs.1,200 for P3 from and kshs.200/= for police abstract without documentary proof. This court find that ground to

be forfetched and totally unfounded. The judgment at page 84 of the Record of Appeal show that such claims although made were disallowed by the trial court.

28. In whole, the appeal is unmerited and wholly fails. It is dismissed with costs.

29. In summary, the appeal is dismissed and the cross appeal allowed.

30. I award the costs of both the appeal and cross appeal to the Respondent/cross appellant.

31. It is so ordered.

Dated, signed and delivered at Mombasa this **19th** day of **August, 2016.**

In the presence of

Mr.Amarshi for the Appellant.

Mr.Gikandi for Jengo for the Respondent.

Cross Appellant.

Mrs.Amarshi – we pray for a copy of the Judgment.

Mr.Gikandi, No objection. We also request for a copy.

Court: Let copy of the Judgment be availed to the parties upon payment of requisite court fees.

P.J.O. OTIENO

JUDGE

19/8/2016