REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 273 OF 2017

JH (Minor Suing thro' mother and next friend NMT.....APPEALLANT

VERSUS

SIMON NDIRANGU.....RESPONDENT

(Being an Appeal of the Judgment of Honourable E.K. Makori, CM,

delivered on the 22nd November, 2017 in SRMCC No. 598 of 2015)

BETWEEN

JH (Minor Suing thr' mother and next friend NMT.....PLAINTIFF

VERSUS

SIMON NDIRANGU.....DEFENDANT

J U D G M E N T

1. The suit before trial court was one for recovery of general and special damages allegedly suffered by the Appellant, as plaintiff then, and arising out of a road traffic accident pleaded to have occurred on 18/12/2014 along Mombasa-Nairobi Highway, at Kenya Box area, in which the Appellant is said to have suffered bodily injuries pleaded and particularized at paragraph 6 as large degloving injury on the right foot.

2. The suit was founded on the tort of negligence and the particulars thereof were set out under paragraph 5 of the plaint. In defending that suit the respondent, as the defendant then, filed a statement of defence in which the ownership of the motor vehicle as well as the occurrence of the accident were all denied together with the particulars of negligence and injuries and strict proof invited from the Appellant.

3. There was then an alternative and without prejudice pleading that if any accident ever occurred and any injuries inflicted upon the respondent minor then the same was occasioned or substantially contributed to by the plaintiff's reckless, want of care and or negligence whose particulars were then set out. It was then added that the suit was incurably defective for raising no reasonable cause of action, a preliminary objection was reserved it being contended that there was no demand made prior to the filing of the suit and the defendant never resides nor carries out business in Mombasa but Nakuru and therefore the jurisdiction of the court was denied. In reply to the said defence, a Reply to defence was filed whose purpose was to deny the averments at paragraphs 3, 4 & 5 of the statement of defence.

4. When the matter came up for hearing, the appellant called three witnesses, being the doctor who examined the minor and prepared a medical report, the mother to the minor who received the word of the accident, visited the scene and found blood everywhere, the child had been taken to hospital but the subject motor vehicle was still at the site and PW 3, CPL George Nyamweya, who never investigated the matter but attend court to produce P3 form and the OB extract. Even though the Respondent had filed witness statement and list witnesses and requested for an adjournment to call one witness, it did not call any evidence on the due date when it opted to close its case.

5. In his judgment, the trial court found that there had not been proof on the causation of the accident and therefore dismissed the suit and assessed damages he would have awarded, had the suit succeeded, at Kshs.500,000/= for general damages and Kshs.6,000/= special damages.

6. That in the decision which has provoked the current appeal in which the appellant faults the court's judgment on some five grounds. The essence of the grounds are that there was an error by the trial court in finding no proof on the occurrence of the accident yet the evidence of PW 2 & PW 3 was sufficient; that the statement of defence filed admitted the occurrence of the accident; that there was failure to consider

the entire evidence on record and that there was no concise reason for dismissal of the case. Those four grounds can be actually be collapsed into one ground to the effect that the decision leading to the dismissal was contrary to and against the weight of evidence adduced. I will therefore consider the appeal on liability under that single ground then consider the other ground on assessment of damages separately.

7. Accordingly in determining the appeal, I will address only two issues:-

i. Whether the appellant led evidence to prove the tort of negligence against the respondent?

ii. Whether the damages assessed and awarded were commensurate with the injuries pleaded and proved?

Proof of neglegence

8. The trite position of the law in civil matter is that the plaintiff as the person who would lose if no evidence at all is availed, has the onus or burden to prove his case to the requisite standards. The cause of action pleaded having been that of negligence whose particulars were given, it was incumbent upon the plaintiff (now appellant) to prove at least one of the particulars set out to within the balance of probabilities.

9. In this appeal as said before, none of the three witnesses who gave evidence ever witnessed the accident. In fact the person who come nearer to the scene and could have given in rough explanation as to how the accident occurred by explanation of the state of the road and the point of impact were PW 2 and 3. However neither was led to give any relevant evidence in that regard. It would appear that the plaintiff's party was content with the proof of the occurrence of the accident. It would further appear that it was taken for granted that so long as the occurrence of the accident was proved, the causation was unimportant. That was a fatal position to be taken for the plaintiff case. The author of **Halburys Laws of England** explain this duty succinctly in the following words:-

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, maintains the action, must show that he was injured by the negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty and an injury to the plaintiff between which and the breach of duty a casual convection must be established".**
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> **(4th edition, para 662)**

10. On the same line, the author of CLERK & LINDSEL ON TORTS, 20th edition page 55 write of this burden and the standard thereof. The book says:-

"The burden of proving causation rest with the claimant in almost all instances. The claimant must adduce evidence that is more likely than not the wrongful conduct of the defendant infact resulted in the damage of which he complains".

11. Put in the context of this matter, the appellant availed no evidence at all on what it is that the respondent did or failed to do that led to the injury of the appellant. In those circumstances there is no justification in faulting the trial court on its finding that the plaintiff never adduced evidence at all on the causation of the accident.

12. On my part as a first appellate court and having reviewed the evidence as is mandated, I do find no error, as to entitle me to interfere with that finding for which reason I find no merit in the ground of appeal which I order to be dismissed.

Assessment of damages

13. The duty to assess damages in a personal injury claim is in the discretion of the trial court and is governed by the crystalized principle that comparable injury should attract comparable damages and that damages should be kept at the levels that may not hurt the economy while care is taken that the award made should suffice to compensate the claimant without appearing to enrich him.

14. Once a trial court exercises its undoubted discretion and assessed damages, it takes a strong case for an appellate court to interfere with such an award unless and until it be proved that the award is too low as to qualify as a misery or that it is so exorbitantly high in the circumstances and short of that it is overtly apparent as an outright misapprehension and error in the duty to assess damages. It is never a reason enough to disturb an award just because another judge could have awarded differently.

15. Being guided by the position of the law in this area, and having paid regard to the evidence led, on the injuries and their residual effects when considered alongside the decided cases cited to the trial court and here, I find no merit even on this ground of appeal which is equally dismiss.

16. The ultimate outcome is that the entire appeal lacks merit and the same is hereby dismissed with costs to the respondent.

Dated, signed and delivered at **Mombasa** this **4th** day of **March 2020**.

P.J.O. OTIENO

JUDGE