REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 31 OF 2018

EMC (A minor suing through MNC.....APPELLANT

VERSUS

JAMES IRUNGU NYANJA.....RESPONDENT

(Being an Appeal from the judgment of Hon. M. Kurubu, R.M. in the Senior

Resident Magistrate's Court at Kandara Civil Case No. 174 of 2017 delivered on 21st June, 2018).

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial Court. Conversely, the Respondent was the defendant therein. The Appellant had brought the suit suing as next of kin and friend of a minor who was involved in a road traffic accident on or about 31 st December, 2016. It was alleged that she was then walking along Kenol-Sagana Road when at Kambiti area the Defendant and or his servant, agent or driver negligently drove motor vehicle registration No. KAS 262E and caused the same to knock the minor who sustained mild head injury and multiple cut wounds on the scalp and forehead. The reliefs sought in a plaint dated 7/9/2017 were;

A. General damages.

B. Special damages of Kshs. 10,535/=.

C. Costs and interests of the suit.

2. Despite the Respondent being served with the plaint and summons to enter appearance he failed to do so consequent which the Appellant requested for entry of interlocutory judgement on 16/10/2017 under Order 10 Rule 4 of the Civil Procedure Rules, 2010. An interlocutory judgement was consequently entered on 14/12/2017. Thus, the hearing in the Court below proceeded by way of formal proof.

3. In her judgement delivered on 21/6/2018, the learned trial magistrate dismissed the claim without costs on holding that the Court could not proceed to hold liable a party whose capacity and involvement in the accident was not proved. This gave rise to the instant Appeal.

4. In a Memorandum of Appeal dated 5/7/2018, the Appellant has raised the following grounds of Appeal;

a. That the learned trial magistrate erred in law in dismissing the suit when there was already interlocutory judgement in place.

b. The learned magistrate erred in law by failing to assess general damages and dismissing suit for lack of proof.

5. The Appeal was canvassed before me on 1/9/2020 with Miss Njiru appearing for the Appellant. Whilst reiterating the grounds of Appeal, she submitted that interlocutory judgement having been entered the trial Court's duty was only to assess the damages awardable to the Plaintiff. She submitted that to this end the Appellant had called witnesses and discharged the burden under the limb. She went on to state that the trial Court dismissed the suit but proceeded to give a figure on the amount of damages that the Appellant would have been entitle to had she succeeded on liability. She referred the Court to Order 10 Rule 6 of the Civil Procedure Rules in adding that the trial Court ought to have exercised its discretion by doing justice. In this regard the Court had no alternative but to proceed to enter damages awardable to the Appellant. That by dismissing the suit, the trial Court had taken into account extraneous matters thus occasioning a miscarriage of justice. She emphasized that the court could not, on its own motion, ignore a regular judgement that had been entered by the trial Court.

6. Counsel referred to the case of **Nairobi High Court Civil Case No.205 of 2015 - Kenya Broadcasting Corporation vs National Authority For Campaign Against Alcohol and Drug Abuse** in which the case of **Patel versus East African Cargo Handling Services EACA (1974)** was cited. The Court in the latter case stated that ***"The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules."***

7. Counsel urged the Court to accordingly enter judgement in accordance with the assessment of damages made by the learned trial magistrate.

DETERMINATION

8. I have considered the submissions made before me and the Record of Appeal. Of worth noting is that the request for judgement was made under Order 10 Rule 4 of the Civil Procedure Rules whilst counsel for the Appellant in submission referred to request for judgement under Order 10 Rule 6. My view is that the Request for Judgment ought to have been made under Rule 6 in that Rule 4 provides for entry of judgement upon a liquidated sum. Nevertheless, there is no ambiguity as regards the nature of the judgement that was entered and therefore, the fact that the Appellant's counsel mentioned Rule 4 as opposed to Rule 6 does not lessen the fact that an interlocutory judgement was entered in default of entry of Summons to Enter Appearance and filing Defence. Furthermore, under Article 159(2)(d) of the Constitution the Court is obligated to administer justice without regard to procedural technicalities.

9. In that regard, I hold that the proceeding with the hearing on formal proof was proper and was not fettered by the citing of the wrong Rule under Order 10. Consequently, the Appellant was only required to adduce evidence for purposes of assessing damages awardable to her.

10. At this point, the onus of this Court is to determine whether the learned trial magistrate erred in dismissing the suit upon holding that the Appellant did not establish the nexus between the Respondent and the accident.

11. The Court must emphasize one undeniable fact; that in as much as the Appellant's obligation at formal proof hearing was to adduce evidence for assessment of general damages, this did not lessen her (Appellant's) burden to demonstrate not only how the damages would be arrived at but also the relationship of the defendant with the alleged liability. More so, bearing in mind the cardinal principle that he who alleges must proof in cases where negligence is alleged. This was aptly set out by the Court of Appeal in the case of **East Produce (K)Limited v Christopher Astiado Osiro, Civil Appeal No.43 of 2001** which held that:

"***It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged, the position was laid in the case of Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd (1991)….. in which the Court held that:***

> *'There is as yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence."*

12. A look at the proceedings attest that the Plaintiff through her friend and next of kin MNC testified as follows;'

> ***" I am the Plaintiff. I recorded this statement on 7/9/2017. I wish to adopt it.***
>
> ***Mrs. Njiru: Statement filed on 7/9/2017 be adopted I also filed all my documents on 7/9/2017 I wish to produce all the documents***
>
> ***Demand letter - Exh. 1***
>
> ***Certificate of posting - Exh. 2***
>
> ***Medical report dated 4/5/2017 – Exh.3***
>
> ***Receipt for 2,500/= - Exh.4***
>
> ***Police abstract - Exh.5***
>
> ***P3 form - Exh.6 (copy)***
>
> ***Hospital Referral - Exh. 7***
>
> ***Impatient discharge summary – Exh. 8***
>
> ***Receipts for Kshs.8.035/- Exh.9***
>
> ***The child usually gets ty54headaches. She is at school. I seek compensation. That is all"***

13. From that brief evidence it is clear that the Appellant adopted her statement filed on 7th September, 2017 as evidence. Looking at the statement it only bears two paragraphs recorded as follows;

> ***"I MNC ID/No xxxxxxxx a resident of Makuyu state as follows; -***
>
> ***That I am the Plaintiff in this suit and I have sued the Defendant as the next of kin and friend of EMC, a minor aged 17 years old.***

That I remember on 21/12/16, EMC was walking along Kenol-Sagana road, Kambiti area when she was knocked down by vehicle registration number KAS 262E which was negligently driven. She sustained injuries and was treated at Kenol Hospital and Kimkan Hospital".

14. From the above excerpt it is clear that the Appellant did not allude to how the accident occurred and more so to what extent the Respondent could be apportioned the blame. Interestingly, at Paragraph 5 of the plaint dated 7/9/2017 it is alluded that the accident in which the minor was injured was caused by the negligent driving of motor vehicle registration No KAS 262E by the Defendant and/or his servant, driver or agent as a result of which the minor was knocked and sustained injuries.

15. The Particulars of the negligent driving of the afore stated motor vehicle were spelled out at paragraph five of the plaint namely;

a) Driving at an excessive speed in all the circumstances.

b) Failing to brake, swerve, stop so as to control the motor vehicle.

c) Failing to keep a proper look out for pedestrians using the road.

d) Failing to exercise due care and attention.

e) Driving in a careless, reckless manner thus endangering pedestrians using the road.

f) Failing to adhere to the Highway Code and Traffic regulations.

16. It follows that from the oral evidence and the statement of the Plaintiff nothing close to how the accident occurred was asserted. Further, it was never evidenced who was driving the subject motor vehicle; either the Defendant or his servants, agents or driver as pleaded in the Plaint. As earlier observed by this Court there can never be liability without fault. It begs therefore, how the Plaintiff's sued the Respondent yet she could not demonstrate how he was linked to the vehicle said to have caused the accident or how he participated in the accident.

17. It is gain said that the burden also lay with the Appellant to demonstrate the acts of negligence on the part of the Respondent. Clearly, from the statement it was only stated that the vehicle was being driven along a particular road. Nothing about the negligent manner in which the vehicle was being driven was alluded to. The law is well settled at Section 107 of the Evidence Act that the burden of proof lies;

"(1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must proof that those facts exist.

(2) When a person is bound to proof to the existence of any fact it is said that the burden lies on that person."

18. It is further clear from Section 108 of the Evidence Act that "***The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by either side."***

19. Therefore, I need not to belabour to emphasize that the Appellant failed to discharged her burden in demonstrating how the Respondent was linked to the causation of the accident, notwithstanding that the suit was uncontested and an interlocutory judgment entered against the Respondent.

20. No doubt that an interlocutory judgement was entered against the Respondent. But on introspecting the general meaning of the word "*Interlocutory"* it merely means 'on the interim'. What this implies is that the Court had *prima facie* entered an interim judgment against the Respondent for his failure to enter appearance and file a defence. But then, at the formal proof hearing it was incumbent upon the Appellant to demonstrate how the accident occurred, who caused the accident and to what extent liability for the accident could be apportioned to the Respondent. To this extent the Appellant totally failed.

21. In fact, a look at both the oral evidence in Court and the Appellant's statement are a clear testimony of the casual manner in which the Plaintiff's case was conducted. A glimpse of it attests that the Plaintiff, more so her Counsel assumed that merely because an interlocutory judgment had been entered, there was no need to demonstrate how the Respondent was liable. Hence, the casual manner in which the evidence was recorded and adduced. Far from this because the law is spelt out in clear black and white that the Plaintiff still bore the onus of discharging her burden of proof of her liability against the Respondent. In this regard therefore, I find no fault in the learned trial magistrate's finding that the Court "cannot proceed to hold liable a party whose capacity and involvement in the alleged accident is not proved".

22. In sum, I come to the unfortunate conclusion that notwithstanding once again, that this Appeal was uncontested the Appellant failed to establish the link of the Respondent to the causation of the accident. Accordingly, I find the Appeal without merit and the same is dismissed with no orders of costs.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 4TH DAY OF SEPTEMBER, 2020.

G.W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. Miss Njiru for the Appellant.

2. No appearance for the Respondent.