REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.32 OF 2018

MS (Suing through father and next of kin)

SSB.....APPELLANTS

VERSUS

FRANCIS KALAMA MULEWA.....RESPONDENT

(Being an Appeal against the Judgment of Hon. Nyakweba PM delivered on the 7th March, 201 in Mombasa CMCC No.2372 of 2014)

JUDGMENT

1. The Appellants, filed a suit before the Chief Magistrate's Court, Mombasa vide a **Plaint** dated **27th November, 2014**, against the Respondent herein. They stated therein, that on or about **14th April, 2013**, the Defendants' authorized driver carelessly and dangerously drove **Motor Vehicle Registration No.KAT 952K** Mitsubishi Saloon which knocked down the minor and occasioned him severe injuries. The Appellant then sought for special damages of Kshs.56,555/= as general damages, costs and interest incidental to the suit against the Respondent in the foresaid **Plaint**.

2. The Defendants in their written **Statement of Defence** filed on the **26th June, 2015** denied that at the material time to the suit they were not the beneficial owners of the suit **Motor Vehicle Registration No.KAT 952K**.

3. After the case was heard, the court found that Appellant failed to prove their case on a balance of probabilities and hence dismissed their case with costs.

4. Dissatisfied with the said Judgment and Decree, the Appellant herein, filed this Appeal setting out **seven (7) Grounds of Appeal** vide a **Memorandum of Appeal** dated **9th March, 2018**. The Grounds of Appeal precisely are as follows:-

a. That the Trial Learned Magistrate erred in law and fact in his failure to take into consideration the evidence of witnesses and exhibits brought by the Appellant/Plaintiff.

b. That the Trial Learned Magistrate erred in law and fact in his failure to appreciate that in Civil matters proof is to be on a balance of probability and by his Judgment, raised the bar to that of proof beyond reasonable doubt.

c. That the Trial Learned Magistrate erred in law and fact in his failure to appreciate evidence tendered thereby reaching a wrong conclusion.

d. That the Trial Magistrate erred in law and fact appreciating that the evidence brought by the appellant/Plaintiff was uncontroverted.

e. That the Trial Magistrate erred in law and fact by failing to appreciate the Appellant's/Plaintiff's written submissions.

f. The Trial Magistrate erred in law and fact in failing to consider and deal with the issue of 'Res Ipsa Loquitor' as raised in the Appellant's/Plaintiff's final written submissions.

g. That the Trial Magistrate erred in law and fact and misdirected himself as to the exact nature of the Appellant's injuries and therefore erred in law in his assessment of damages awarded to the Appellant which award is so inordinately low that it

must be a wholly erroneous estimate of the damages.

5. By the directions issued by the court on the **31st October, 2018**, the Appeal was canvassed by way of written submissions.

Submissions

6. **Mr. Mwangunya**, learned Counsel for the Appellant, submitted that the issues raised in the Judgement had gone beyond the issues raised by both the Plaintiff and the Defendant in the primary suit in so far as raising the issue that the 2nd Defendant was not the registered owner, hence by the Trial Magistrate raising it in his Judgment was prejudicial.

7. Counsel further submitted that in the case that a minor's negligence could not be imputed and that the Plaintiff's testimony was never rebutted, the same was thus uncontroverted.

8. Counsel also submitted that the doctrine of *Res Ipsa Loguitor* was applicable in this instant case since the Plaintiff's three witnesses blamed the driver of the subject vehicle for the reason that it was in a residential neighbourhood and the driver was not careful. Counsel urged this court to make a finding that the award on quantum was so inordinately low that it must be a wholly erroneous estimate of damages, the Appellant having suffered multiple fractures.

9. The Respondent had not filed any written submissions as directed by court at the time of this Judgment.

Analysis and Determination

10. This being a first Appeal, this Court is under a duty to re-evaluate and assess the evidence so as to make its own conclusions. It must however, keep at the back of its mind that a trial court, unlike the appellant court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle –vs- Associated Motor Boat Company Ltd [1968]EA 123** and **Peters –vs- Sunday Post Limited [1085]EA 424**.

11. Having considered the Appeal and the submissions filed, it is my view that the issues for determination are as follows:-

a. Whether the Appellant proved his case on a balance of probabilities;

b. Whether the doctrine of res-ipsa-loquitor is applicable in this case;

c. Whether it was mandatory for the Trial Magistrate to consider the parties' written submissions;

d. Whether the damages awardable in case the Appellant had succeeded were inordinately low.

a. Whether the appellant proved his case on a balance of probabilities.

12. In Civil cases, the burden of proof is usually on a balance of probabilities:-

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

Section 108 ***of the Evidence Act, Cap 80 Laws of Kenya is clear that:-***

" The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".

13. The **Halsbury's Laws of England, 4th Edition, Volume 17, at paragraph 13 and 14**, describes it as thus:-

[13]"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

[14] "The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the condition which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegations is an essential of his case. There may therefore be separate burdens in a case with separate issues".

14. Similarly, in the case of **Susan Mumbi Waititu –vs- Kefala Greedhin, NRB HCC 3321 of 1993**, the Court stated that:-

"The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that he who alleges has to prove. It's for the Plaintiff to prove her case on the balance of probability and the fact that the Defendant doesn't adduce any evidence is immaterial".

15. In the case of **Mary Wambui Kabugu –vs- Kenya Bus Services Ltd, Civil Appeal No.195 of 1995**, Bosire JA expressed himself as hereunder:-

> **"The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed".**

16. In the present case, the Respondent filed a Defence but did not call any evidence to rebut the allegations in the Plaint on negligence. PW1, who is a Police Officer did not visit the scene of the accident and neither, did he have the Police File in court and he could not tell how the accident happened or who was to be blamed for the same. His evidence was all hearsay as he relied on the version of how the accident happened that had been given to him by PW3 when he visited Likoni Police Station. In fact, PW3 was also not an eye witness to the accident. He stated that at the time of the accident he was at Tijara doing his chores when he received a call from his father, Salim Said informing him that his sown had been involved in an accident.

17. From the foregoing, I find and hold that PW3's evidence was all hearsay, as his father was never called as a witness to corroborate his version of how he came to learn of the occurrence of the accident. Consequently, I uphold the finding of the Trial Magistrate on liability.

b. Whether the doctrine of res-ipsa-loquitor is applicable in this case.

18. In the case of **Pi-v-zena Roses Ltd & Another[2015]eKLR**, the court held as follows:-

> **"It is my view that the appellant rely on the doctrine of res-ipsa-liquitor if he was able to demonstrate the following:-**
>
> **1. If he established a prima facie case**
>
> **2. If his case is not rebutted.**
>
> **3. If he established that the defendant is the owner of the subject motor vehicle.**
>
> **4. If he demonstrates his locus standi in the case".**

19. The Court of Appeal in the case of **Joyce Mumbi Mugi –vs- The Co-operative Bank of Kenya Limited & 2 Others, Civil Appeal No.214 of 2004**, expressed itself as hereunder:-

> **"In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of res ipsa loquitor…If a "matatu" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle."**

20. In this case, it is true there was no eye witnesses to the accident, and there was no credible evidence on which negligence would be inferred since the testimonies by PW1 and PW3 were all hearsay. Further, the Appellant herein never pleaded the doctrine of *res ipsa loquitor* in the Plaint dated and filed on 27th November, 2014, a result of which the doctrine of *res ipsa loquitor* was not an issue that was to be determined by the Trial Magistrate.

21. Consequently, it is my finding that the Appellant in failing to furnish the Trial Court with credible evidence of what might have led to the accident, meant that the Appellant never established a *prima facie* case for the doctrine of *res ipsa* loquitor to be inferred by the Trial Court, especially when it was not pleaded.

22. In the case of **Mary Njeri Murigi –vs- Peter Macharia & Another[2016] eKLR,** Aburili J held as follows;-

> **"In addition, pleadings, answers in cross examination and or submissions do not amount to evidence or defence. If therefore follows that however well-choreographed the submissions are and however serious the cross-examination was and however fervent and vehement the statement of defence is, are not evidence".**

23. This Court wishes to associate itself with the reasoning in the above stated decision and reiterate that submissions are not evidence.

c. Whether the damages awardable in case the Appellant had succeeded, were inordinately low.

24. It is trite law that the award of damages by the trial court is discretionary and the Appellate Court can only interfere with any, if the award is inordinately high or low based on an irrelevant matter or factor having been taken into account or left out of account a relevant factor when arriving at such a decision. The said principles are well settled in the case of **Kemfro African Ltd –vs- T/A Lubia & Another, No.2 of 1987KLR 30**, **Bahir Ahmed Butt –vs- Khan 1982-88 1 KAR page 5**. These principles will form the basis of the decision of this Appeal and they are as follows:-

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage"**.

25. In awarding damages, the Trial Court always exercised its discretion. The law is quite clear as to when an appellate court can interfere with the trial court's exercise of discretion in arriving at quantum of damages. The Court of Appeal in the case of **Butt –vs- Khan[1982-88]KAR 1** set the parameters as follows;-

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect. And arrived at a figure which was either inordinately high or low."**

26. **Mr. Mwangunya** urged this Court to award the Appellant Kshs.2,500,000/= as general damages for pain and suffering. He relied on the case of **Sabina Nyakenya Mwanga –vs- Patrick Kigoro & Another [2015]**, where the court awarded Kshs.3,000,000/= for injuries suffered including multiple soft tissue femur right thigh bone, fracture of the right patella knee, fracture of the pelvic and fracture of the distal radial wrist.

27. According to the Medical Report produced by PW2, the minor suffered head injuries (impaired consciousness and convolution), fracture of the skull, fracture of left humerus arm bone, fracture of the left thigh bone, cuts on the forehead and face and blunt object injury to the left thigh and left eye.

28. In the case of **Edward Mzamili Katana –vs- CMC Motors Ltd[2006]eKLR**, the court therein awarded the Plaintiff therein a sum of Kshs.2,000,000/= as general damaged for pain, suffering and loss of amenities for having sustained a head injury leading to a concussion, cut wound and bruise on the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injuries with multiple fractures of left 5th, 6th and 7th ribs and fracture of the left femur.

29. In the case of **Mary Pamela Oyioma –vs- Yess Holdings Limited [2011 eKLR**, the court therein awarded the Plaintiff a sum of Kshs.900,000/= as general damaged in pain, suffering and loss of amenities for having sustained a comminuted fracture of the right femur, compound fracture of the left tibia, soft tissue injuries of the right shoulder and multiple cut wounds all over the body.

30. In the case of **Boniface Njiru –vs- Tohel Agencies & Another [2011]eKLR**, the Plaintiff therein sustained a blunt head injury with loss of consciousness for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries. The court therein awarded him a sum of Kshs.1,000,000/= as general damages for pain, suffering and loss of amenities.

31. The decision in the case of **Mary Pamela Oyioma –vs- Yess Holding Limited [2011]** carry injuries comparable to the injuries suffered by the Appellant herein. In light thereof, I find the award made by the Trial Court in the sum of Kshs.500,000/= in general damages to be inordinately low. In view of the award in the other cases that have been cited and considered by the court, an award of damages in the sum of Kshs.1,000,000/= is reasonable. On special damages, I will award a sum of Kshs.13,750/= or the amount that has been specifically pleaded and proved.

Disposition

32. For the reasons foregoing, the upshot of this Court's Judgment is that the Appellant's Appeal is not merited, the same is hereby dismissed. Since the Respondent did not participate in the Appeal or even file its submissions, there shall be no order as to cost of the Appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF OCTOBER, 2019.

D. O. CHEPKWONY

JUDGE