



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. 09 OF 2020

BETWEEN

FIXED INVESTMENTS.....1ST APPELLANT

RAYMOND OLENDU.....2ND APPELLANT

AND

WILSON MIULA OMBEK & HELLEN ATIENO MIULA

(Suing as personal representatives of the estate of

CHARLES MIULA-DECEASED).....RESPONDENTS

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. 21 of 2018 by Hon. R.B.N. Maloba –Principal Magistrate).

JUDGMENT

1. The appellants herein were the defendants in Homa Bay Chief Magistrate's CMCC No. 21 of 2018. This was a claim that arose from a road traffic accident where Charles Miula died. The respondents obtained letters of administration ad litem and sued on behalf of the estate of the deceased. The learned trial magistrate delivered judgment dated 6th November, 2019 and gave an award of Kshs.1, 820, 000.

2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of L.G. Menezes & Company advocates. They raised grounds of appeal as follows:

- a) That the learned trial grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.
- b) That the learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
- c) That the learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence on behalf of the appellant.
- d) That the learned trial magistrate proceeded on the wrong principles when assessing the damages and failed to apply precedents and tenets of the applicable law.
- e) That the learned trial magistrate erred in awarding damages that was inordinately high in the circumstances of the case.

3. The respondents were represented by the firm of Everlyne Kuke & Company, Advocates. They opposed the appeal on the following grounds:

- a) That the award was fair and reasonable.
- b) That the learned trial magistrate sufficiently analyzed the evidence and applied the law correctly.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. This appeal is on the quantum of damages. There are principles which ought to guide an appellate court before interfering with an award by the trial court. These principles were spelled out by the Court of Appeal (Law **JA**) in the case of **Butt vs. Khan [1981] KLR 349** at page 356, 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 so arrived a figure which was either inordinately high or low.

I will therefore be guided by this authority in this case.

6. The appellants had an issue with the multiplicand of Kshs. 10,000/= and proposed that a multiplicand of Kshs. 5,436.90/= ought to be adopted for the deceased was unskilled. Though it was testified that the deceased was a mason, no evidence to that effect was adduced. The death certificate described him as a casual labourer. The learned trial magistrate was therefore justified to treat him as a casual labourer.

7. The Regulation of Wages (General) (Amendment) Order, 2013 gives Kshs.5, 218 as the minimum wage for general labourer. The award under the head of dependency will be as follows: $5,218 \times 12 \times 20 \times \frac{2}{3} = 834,880$.

8. It is trite law that where an award has been made under the Law Reform Act and Fatal Accidents Act and beneficiaries are the same, the loss suffered under the latter Act must be offset by the gain from the estate under the former Act. The Court of Appeal in the case of **Kemfro vs. A. M. Lubia & Another [1982-1988] KAR 727** as follows:

The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

9. In the instant case, the learned trial magistrate ought to have discounted the award of loss of expectation of life under the Law Reform Act.

10. I therefore set aside the total award by the learned trial magistrate and substitute it with the following award:

a) Pain and suffering	Kshs. 20,000.00
b) Loss of expectation of life	Kshs. 200,000.00
c) Loss of dependency	Kshs. 834,880.00
d) Subtotal	Kshs. 1,054,880.00

11. Less damages under the Law Reform Act. Kshs. 200,000.00

Net award Kshs. 854,880.00

The total award is therefore substituted with a figure of Kshs. 854,880.00. To that extent the appeal succeeds with half the costs.

DELIVERED and SIGNED at HOMA BAY this 29th day of June, 2021

KIARIE WAWERU KIARIE

JUDGE