REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 15 OF 2020

ROBERT KENNEDY MATHENGE KARIITHI…....…………1ST APPELLANT

CHARLES OUMA AKONGO………………………………….2ND APPELLANT

-VERSUS-

BEATRICE MALIA MWINZI…………………......………………RESPONDENT

(*Suing as legal administrator of the estate of the late* **ZIPPORAH MWENDE)**

(Being an appeal from the original judgment of Hon. Mayamba C. A (P.M) in Kilungu Principal Magistrate's Court PMCC Case No. 126 of 2018 pronounced on 12th May, 2020).

JUDGMENT

1. This is an appeal from an undated judgment of the magistrates' court delivered on 12th May 2020, wherein judgment was given by the court in favour of the respondent (*plaintiff in the trial court*) in the following terms –

I do make the following orders –

a) Liability 80% to 20%

b) Pain and suffering Kshs.40,000/=

c) Loss of expectation of life Kshs.100,000/=

d) Loss of dependency Kshs.2000,000/=

e) Special damages Kshs.8,475/=

f) Less 20% (429,695) Kshs.1,718,780/=

g) Costs and interests.

2. Aggrieved by the decision of the trial court, the appellants who were the defendants in the trial court, have now come to this court in appeal on the following grounds –

1) That the trial magistrate erred in law and fact and misdirected himself in finding that the appellants were 80% liable against the weight of the evidence.

2) That the trial magistrate erred in law and facts in awarding manifestly excessive and un-deserved general damages to the respondent under the Fatal Accidents Act of Kshs.2,000,000/=.

3) The trial magistrate erred in law and fact by awarding an exorbitant global sum without giving any reasoning for it.

4) That the trial magistrate erred in law and in fact in awarding the respondent Kshs.2,000,000/= under loss of dependency when the respondent did not prove the dependency or render any credible proof to ascertain their relation or that of the said child.

5) That the trial magistrate erred in law and in fact by failing to consider, convectional awards in cases of similar nature.

6) That the trial magistrate erred in law and in fact in failing to consider the submissions made on behalf of the appellant in arriving at his decision.

7) That the trial magistrate erred in law and in fact by failing to apply the proper principles of law and/ or misapprehending the evidence while assessing damages thus arriving at a bad decision.

8) That the trial magistrate erred in law and fact by failing to take into consideration the award under the Law Reform Act while making the award under the Fatal Accidents Act.

3. The appeal was canvassed through filing of written submissions. I have perused and considered the submissions of both the appellants' counsel M/s Kinyanjui Njuguna & company and the submissions of Waiganjo Wachira & company for the respondents. Both counsel relied on a number of decided court cases.

4. This is an appeal challenging the quantum of damages awarded by the trial court. In this regard, I am bound to apply the principle that has been stated and restated by courts over and over again that appellate courts have to be slow in interfering with a ward of damages, as such awards are an exercise of discretionary power by only trial courts. In my view, it will suffice if I cite the case of **Kenfro Africa Ltd –vs- Lubia & Another (1987) KLR 30** wherein Kneller J.A stated as follows –

> ***"….. the principles to be observed by an appellate court in determining with whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal for 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 .."***

5. In the present case, the appellants have complained against the trial court's finding that the appellant was 80% to blame and the respondent was 20% liable. That ground of appeal is not sustainable as the 80%:20% liability was entered by consent of the parties and was not a determination made by the court.

6. I note that at the trial, the respondent called one witness Pw1 Beatrice Maria Musila who tendered a short testimony on oath and was cross examined. She relied on her oral evidence and a few documents which had been exchanged earlier. The documents relied upon were not challenged in cross examination. The appellant on the other hand did not call any evidence. Based on the evidence of respondent on record, both counsel for the parties then filed written submissions and left it to the trial magistrate to pronounce judgment.

7. The standard of proof in civil cases is on the balance of probabilities, which simply means the court is to go by what is more probable to have happened than not.

8. In my view therefore, when Pw1 said that she was the mother of the deceased a woman in her 20s and that there were two surviving young children of the deceased and relied on a chief's letter and the letters of administration issued in the estate of the deceased, if the appellants' counsel wanted to tilt the balance of probability in the appellants' favour, then he should have at least challenged the documents relied upon, in cross examination. From the record counsel for the appellant never raised any shed of doubts on the documents, when they were initially exchanged before pre-trial directions, or challenged them during trial. Thus the appellant cannot raise issues on proof of the contents of those documents on appeal. Consequently, in my view the magistrate was correct in finding that the respondent was the mother of the deceased and that the deceased was survived by two young children after her death.

9. From the grounds of appeal and the written submissions, the major complaint of the appellant is the global figure of damages of Kshs.2,000,000/= for loss of dependancy. In this regard, I will go by the reasoning in the case of **Albert Odawa –vs- Gichimu Githenji – Nakuru HCCA No. 15 of 2003 – (2007) eKLR** wherein the court held that in cases where the multiplier approach is not appropriate, a global sum may be awarded in the interest of justice in each particular case. Thus the multiplier/multiplicand rule is not universal and each case has to be considered on its own facts and circumstances.

10. In the present case, the respondent said in evidence the deceased earned Kshs.30,000/= per month from her small business of selling coffee and porridge. The trial court found no evidence to support that statement, but noted that the deceased must have been earning some income to support her two children. The global figure of Kshs.2,000,000/=, being for an income of about approximately Kshs.6,000/= per month, for 25 years, in my view was not manifestly excessive.

11. Again, whether the award under the Fatal Accidents Act should have been reduced by the award under the Law Reform Act, that depends on the justice of each case based on whether the estate might benefit twice. In the present case, the awards are so conservative or small that I do not see any double benefit to the estate resulting from the award.

12. For the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold the award of the trial court. I award the costs of the appeal to the respondent.

Delivered, signed & dated this 24th day of November, 2021, in open court at Makueni.

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George Dulu

Judge