REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 7 OF 2018

MOMBASA MAIZE MILLERS LTD......................................1ST APPELLANT

ABASS ATHMAN .... 2ND APPELLANT

VERSUS

JOHN KAINGU AND RACHEAL KASICHANA suing as legal representatives

of the estate of Blessing Furaha John..RESPONDENTS

(**An Appeal from the Judgment of Hon. S. Wewa, Principal Magistrate made on 29.1.18 in Malindi CMCC NO. 176 of 2016)**

JUDGMENT

1. The Appeal herein arises from the judgment of Hon. S. Wewa, Principal Magistrate, delivered on 29.1.18 in Malindi CMCC NO. 176 of 2016, John Kaingu and Racheal Kasichana suing as legal representatives of the estate of Blessing Furaha John v Mombasa Maize Millers Ltd & Abass Athman. The Respondents, John Kaingu and Racheal Kasichana instituted the suit in the trial Court, as legal representatives of the estate of Blessing Furaha John (the deceased) against the Appellants, Mombasa Maize Millers Ltd and Abass Athman claiming both general and special damages arising from a road traffic accident. The deceased was travelling as a passenger in motor vehicle registration number KAZ 325J from Malindi to Kilifi which collided with motor vehicle registration number KBQ 549T driven by the 2nd Appellant from Mombasa to Malindi occasioning her fatal injuries. The latter motor vehicle is owned by the 1st Appellant. Following a hearing, the trial Magistrate entered judgment in favour of the deceased for the sum of Kshs. 986,225/= in general damages less 10% contribution. The Respondents were also awarded special damages of Kshs. 36,225/=, costs and interest.

2. Being aggrieved by the said judgment, the Appellants preferred the Appeal herein. The summarized grounds of appeal are that the Honourable Magistrate erred in fact and in law in that she:

1. disregarded vital evidence adduced by the Appellants and inconsistencies thereby arriving at a wrong finding.

2. failed to correctly evaluate the testimony of the defence witnesses thereby making an inordinately/astronomically high award to the Respondents

3. disregarded and or failed to evaluate the evidence adduced by both the plaintiffs and the Defendants in apportionment of liability putting in mind the entirety of the circumstances.

4. failed to consider the entirety of the circumstances of the case.

5. having found that the driver of motor vehicle registration number KAZ 325 J contributed and or led to the occurrence of the accident proceeded to make a wrong finding by punishing the defendant.

6. delivered judgment based on wrong principles of law and fact.

3. The Appellants prayed for the following orders:

i. The appeal be allowed.

ii. The judgment in favour of the Respondents be set aside and the suit against the Appellants be dismissed.

iii. The Appellants be awarded the costs of this Appeal and costs in the lower Court be shared between the parties.

4. The accident gave rise to claims in Civil Cases Nos. CMCC No. 177/2016; CMCC No. 176/2016; CMCC No. 178/2016 and CMCC No. 170/2016. These cases were consolidated for the purpose of determining liability. CMCC No. 177/2016 became the main file. The cases generated Civil Appeals Nos. 7/2018; 8/2018; 9/2018 and 10/2018. The issue of liability has been determined in Civil Appeal No. 10 of 2018 Ibrahim Gumbao Gona v Mombasa Maize Millers Ltd & Abass Athman. This Court upheld the trial Court's apportionment of liability at 90:10 in favour of the Respondents.

5. I have given due consideration to the record of appeal, the grounds of appeal as well as the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> **An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).**

6. Although the Appellants raised 6 grounds of appeal, the only issues to be determined are whether the learned Magistrate erred on liability and quantum. As indicated above, the issue of liability has been determined. I now turn to the issue of quantum.

7. According to the Plaint filed by the Respondents in the lower Court, the deceased was a child of 3 months and in good health prior to the accident. As a result of her death her estate and dependents suffered loss and damage. The suit was filed for the benefit of the Respondents who are the deceased's parents who claimed general damages under the Fatal Accidents Act and the Law Reform Act.

8. Parties filed their written submissions which I have considered. The Court notes that the Appellants' written submissions erroneously indicate that the general damages award was Kshs. 152,000/= while that for special damages was Kshs. 2,000/=. It was also erroneously stated that liability was apportioned at 85% and 15%. Additionally it was erroneously stated that the Plaintiff sustained severe injuries. The date of judgment was indicated as 5.3.18. This clearly is not the correct position. It would appear that the part of the submissions containing the errors was meant for another matter! Further the Court notes that no submissions were made by the Appellants on the issue of quantum. The Appellants only referred to the case of Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR, where the respondent therein suffered soft tissue injuries. With respect, this case has no relevance whatsoever to the circumstances in the present case.

9. On their part, the Respondents submitted that the amount awarded was not exaggerated or excessive but fair under the circumstances. For pain and suffering, the Respondents relied on the case of Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others [2013] eKLR. On loss of expectation of life and loss of dependency, the Respondents placed reliance on the case of Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD) [2016] eKLR.

10. As I consider the request for review of the award of general damages, I am guided by the following principle set out by Law J.A., in the case of Butt v Khan (1977) KAR 1:

> **"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 at a figure which as either inordinately high or low."**

11. The Court is also guided by the decision in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia(1982 –88) 1 KAR 727 at p. 730 where Kneller J.A. said:-

> **"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 that 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 a wholly erroneous estimate of the damage."**

12. In her Judgment the learned Magistrate awarded damages under the various heads. For pain and suffering, the learned Magistrate stated:

> **"The deceased was on treatment for prolonged period of time for 4 hours. She suffered a long pain (sic). I do award Kshs. 100,000/=."**

For loss of expectation of life the learned Magistrate stated:

> **"She was three months and she had many more years to live to achieve her expectations. I do award Kshs. 150,000/=.**

On loss of dependency, noting that the deceased was a child who had not even started school, the learned Magistrate stated:

> **"…she had not even started school to know her academic performance to be able to even assume that she was university material… However she would be depended upon as a young girl who would also help in the household chores on the day to day basis. In this regard, 1/3 × 30/12/5000= 600,000/=**

13. It is noted that the Appellants do not challenge the computation of damages. Their complaint is are concerned that the same is excessive.

14. As regards, pain and suffering, I note that in the Alice O. Alukwe case (supra) the deceased therein died on the spot. The amount awarded is Kshs. 50,000/=. That was a 2013 case. In the present case, the deceased endured pain and suffering for 4 hours before succumbing to her injuries. Consequently I find an award of Kshs. 100,000/= in 2016 to be fair compensation.

15. In the cited case of Daniel Mwangi Kimemi (supra) the deceased therein was a 9 year old child at the time of her death. The sum of Kshs. 100,000/= was awarded for loss of expectation of life. 2 years later in 2018, bearing in mind the effluxion of time and the rate of inflation, the sum of Kshs. 100,000/= awarded under this head, albeit the deceased herein was 3 months old, is not excessive.

16. I now turn to loss of dependency. The deceased was an infant of 3 months. Nobody knows what her capabilities would have been or what she would have become. In Kenya Breweries Ltd v Saro [1991] eKLR, the Court of Appeal stated:

> **We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.**

17. Although the deceased was just but an infant, it cannot however be discounted that as a child born in an African home, she was a great blessing and a valuable asset to the Respondents. She would have been of great assistance to the family in household chores. Upon becoming an adult she would invariably have been expected to take care of her aged parents as is expected in the African context.

18. In the 2016 case of Daniel Mwangi Kimemi (supra), the deceased therein was 9 years old. She was a bright pupil who topped her class and had expressed her desire to become a doctor upon completion of her education. The learned judge awarded Kshs. 1,000,000/= as compensation for loss of dependency. My view is that the award of Kshs. 600,000/= in 2018 for loss of dependency is reasonable and not excessive. Accordingly, I find no reason to interfere with the assessment of general damages.

19. The upshot is that the Appeal is devoid of merit and is hereby dismissed with costs to the Respondents.

DATED this 26th day of February 2020

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M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

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NJOKI MWANGI

JUDGE

In the presence of: -

…………………………………………………………… for the Appellants

…………………………………………………………… for the Respondents

…………………………………………………………..……. Court Assistant