REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO.15 OF 2017

SIMON BABU MOGI.....APPELLANT

VERSUS

KIPKURUI BERNARD CHERUIYOT

MORUSOI RONALD

(Suing as Legal representatives of the Estate of IVONE CHERONO.....RESPONDENTS

(Being an appeal from the Judgment and Orders of Hon. M. C. Nyigei (SRM)

at Bomet PMCC in Civil Suit No.20 of 2016 delivered on 14/06/2017)

JUDGMENT

1. This is an appeal from Judgment and Decree by MC Nyingei in PMCC No.20 of 2016 between Kipkurui Bernard Cheruiyot and Morusoi Ronald (suing as legal representatives of the Estate of Yvone Cherono) versus Simon Bobu Mogi.

2. The Plaintiffs in PMCC No.20 of 2016 who are now the Respondents were awarded damages of kshs. 1,533,000/- against the appellant in respect of general damages for a fatal claim for an accident that occurred on 28/6/2015.

3. The deceased was a pedestrian when she was involved in the accident with motor vehicle Reg. No.KCC 871F along Bomet-Sotik road.

4. The parties entered into a consent judgment on liability on 25/1/2017 and apportioned liability at 70:30 and parties filed written submissions for the court to access general damages.

5. The Appellants are aggrieved by an award of general damages for loss of dependency of kshs. 1,533,000/ and they have filed this appeal on the following grounds;

i. **That the learned trial magistrate erred in law by applying the wrong principles in arriving at an award of general damages of kshs.1, 533,000/- for loss of dependency.**

ii. **That brothers and a sister of the deceased are not categorized as dependants under Section 4 of the Fatal Accidents Act.**

iii. **That the learned trial magistrate applied a dependency ration of 2/3 instead of 1/3 as submitted since the deceased was unmarried and had no children.**

iv. **That the learned trial magistrate erred in applying a multiplier of 25 years which was too high and did not take into account the vagaries of life that would shorten the deceased's working life having regard to her nature of work.**

v. **That the learned magistrate erred in failing to scrutinize/evaluate the evidence tendered and did not give reasons for awarding kshs. 1,533,000/-.**

vi. **That the award is inordinately high as the learned magistrate did not consider the award under the Law Reform Act and also failed to uphold the doctrine of precedent.**

6. The parties filed written submissions which I have duly considered. The Appellant submitted that the award of kshs.1,533,000/- was inordinately high, and that there was no evidence to warrant a dependency ration of 2/3 to be adopted and further that a multiplier of 25 years was too high.

7. The Respondents in their submissions maintained that kshs. 1,533,000 was awarded to the estate of the deceased and that the dependency issue was proved by evidence and that the multiplier of 25 years was reasonable.

8. The first duty of the Appellate Court's to re-evaluate the evidence and to arrive at its own conclusion.In **Kiilu& Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus;

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."**

9. In the current case, I find that the issue of liability was settled by entry of a consent judgment on 25/1/2017.

10. I find that there is no evidence that the trial court proceeded on the wrong principles on the issue of assessing damages.

11. In the Court of Appeal Case of **Bashir Ahmed Butt –vs- Ahmed Khan (1982-88) KAR,** it was held;

> **"An appellate court will not disturb an award of damages unless it's 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 on some material respect and so arrived at a figure which was rather inordinately high or low…"**

12. I find that in the current case there is no basis for interfering with the discretion of the trial court.

13. There is evidence that the deceased had younger siblings who were depended upon her for upkeep.In the case of Benedeta Wanjiku Kimani vs Changwon Cheboi& Another [2013] eKLR the court therein relying on the case of **HCCC No 1438 of 1998Beatrice Wangui Thairu vs Hon Ezekiel Bargetuny(unreported)** stated that:-

> **"…there is no rule that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case."**

14. The dependency ratio of 2/3 was therefore justified and a multiplier of 25 years was reasonable considering that the deceased was aged 25 years at the time of the accident and she was in gainful employment.he definition of "dependency" given in Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act as "that part of the deceased's earnings that he/she spent on the maintenance or financial support of his/her dependants."

15. I find that the Appeal herein lacks in merit and I accordingly dismiss the same and uphold the award of kshs. 1,533,000/-.

16. I further direct that each party bears its own costs of this appeal.

17. Any party aggrieved by this judgment has a right of Appeal within 28 days of this date.

Delivered and signed at Bomet this 5th day of August 2020.

A. N. ONGERI

JUDGE