REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 70 OF 2013

ANTHONY MATHENGE WARAGA.....1ST APPELLANT

EPHANTUS MACHARIA GACHURU.....2ND APPELLANT

VERSUS

AW.....RESPONDENT

JUDGMENT

1. The appeal arises from the judgment of Honourable M. W. Murage, Senior Resident Magistrate in Mukuruweini PMCC No.33 of 2012; the respondent herein being the father and legal representative of the Estate of the late LNW sued for damages arising out of an accident that occurred on 9th February, 2012.

2. After a full hearing, judgment was awarded by the trial court in the following terms:-

(i) Liability – 100% against the appellants

(ii) Pain and Suffering – Kshs.20,000/=

(iii) Loss of expectation of Life –Kshs.100,000/=

(iv) Lost years – Kshs.720,000/= Kshs.19,995/=

3. The appellants being dissatisfied with the trial Court's whole judgment filed this appeal and seeking to have it set it aside; the appellant listed seven (7) grounds of appeal in their Memorandum of Appeal dated the 15th September, 2015 which are as summarized hereunder;

(i) The findings were based on irrelevant issues not supported by evidence adduced;

(ii) The general damages were inordinately high in the circumstances;

(iii) Liability was based on the evidence of an unreliable witness;

(iv) The written submissions of the appellants were disregarded by the trial magistrate;

(v) The respondent failed to prove their case to the desired threshold; that is on a balance of probabilities;

(vi) The findings on liability and quantum were supported by facts or law;

4. The appellants prayed that the appeal be allowed with costs; that respondents suit be dismissed with costs and the judgment dated the 27th August, 2013 be set aside and proper findings be made;

ISSUES FOR DETERMINATION

5. After reading the written submissions filed by Counsels for both parties together with the annexed authorities, the issues found and framed for determination are on;

(i) Whether liability was proved; and

(ii) Whether the quantum was inordinately high;

ANALYSIS

6. In determining this appeal this court is guided by the Court of Appeal decision in the case of **Selle & Another vs Associated Motor Boat Co. Ltd &Another (1968) EA 123**, which sets out this court's duty which is to re-evaluate and re-examine the evidence adduced in the trial court in order to reach an independent finding, taking into account the fact that this Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, this Court will normally as an appellate court, not interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in the above case further held that:

> *"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."* **(See also LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).**

Whether liability was proved;

7. At the trial in the lower court, the respondent produced the proceedings in the traffic case that arose out of the accident. He also produced the abstract and called an eye witness **PW2** to give evidence on the occurrence of the accident.

8. The appellants have submitted that the said **PW2** was not a reliable witness as she could not remember her age; however having perused the typed Court Proceedings it has been noted that **PW2** actually gave her exact age to the trial court as being 49 years; this therefore negates the inference of her being an unreliable witness;

9. According to **PW2**, the 2nd appellant hit the deceased at [Particulars Withheld] Primary; the deceased minor was off the road at the time; the 2nd appellant then proceeded to drive off but was however eventually stopped. **PW2** testified that the injured minor was placed into the said motor vehicle and that she followed the said motor vehicle to hospital wherein the minor succumbed to her injuries; **PW2** also confirmed that she had testified in the traffic case against the 2nd appellant.

10. Upon perusal and reading the proceedings in the traffic case number SPMCC No.21 of 2012 – Mukuruweini it is noted that after a full hearing the 2nd appellant was indeed convicted of the offence of causing death by dangerous driving.

11. It is the appellants' submission that the said proceedings have no bearing on this instant matter and they have relied on the case of **Philip Keipto Chemwolo & another v Augustine Kubende** [1986] eKLR to buttress their assertion.

12. It is this court's considered opinion after having had occasion to study the said case that the Justices on Appeal held that a traffic conviction is not a bar to a party claiming contributory negligence in a civil case. Justice Platt stated thus:-

> **"…….Now, it was correct for the learned judge to refer to Mr Chemwolo's conviction because Section 47A of the Evidence Act (Cap 80) declares that where a final judgment of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter, because it may also be that Mr Kubende was guilty of carelessness, and if were to be so, then the position would be as explained in** *Queen's Cleaners and Dyers Ltd. v EA Community and others* **(***supra***); and despite Mr Chemwolo's conviction, the issue of contributory negligence may still be alive if the facts warrant it."**

13. The upshot of the decision is that despite the 2nd appellant's conviction, he could still claim contributory negligence from the deceased.

14. In the defence, to the respondent's plaint the appellants do indeed attribute negligence to both the deceased and her guardian. They however did not call any witnesses or adduce any evidence in support of the averments in their defence. It is trite law that averments in a written statement of defence are not evidence. They are only averments which have to be proved by evidence.

15. Section 107 of the Evidence Act, Chapter 80 Laws of Kenya provides:-

> ***'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.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'***

16. It therefore follows that the appellants had to prove contributory negligence against the deceased. It is this court's finding that they did not; the respondent's evidence was therefore uncontroverted; this court finds no good reason to interfere with the trial magistrate's finding that the appellants were completely to blame for the accident.

17. This ground of appeal is found lacking in merit and is disallowed.

Whether quantum was inordinately high;

18. With regard to quantum, the appellants have only taken issue with the award given for lost years.

19. The appellants in their submission to this appeal have relied on various authorities; one such case is that of:- **Kenya Breweries Ltd v Saro** [1991] eKLR wherein the Court held:-

> ***"1. The issue of some damages being payable 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.***
>
> ***2. Damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution."***

20. The Court further held that when giving an award under this head, the age of the minor has to be taken into consideration. The deceased was aged 6 years old.

21. For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions. In the case of **Kenya Breweries Ltd vs Saro 1991 eKLR (supra)** it was held that,

> **"….It is now well established that this Court can only interfere with a trial judge's assessment of damages where is it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred…..**"

22. In arriving at the award of Kshs.720,000/=, the trial magistrate applied a multiplier of 30, a multiplicand of 3,000/= and a ratio of 2/3; the trial magistrate did not give a rationale for tabulating lost years in this manner; therefore this court finds that there is no explanation given for the multiplier or the multiplicand awarded; the same is only applicable for the dependency ratio.

23. The minor was aged 6 years when she died; considering the vicissitudes of life, the minor's future was uncertain; it would be difficult to determine what direction her life would have taken; it is because of this that it is this court's finding that a global award would have been most ideal.

24. This court is satisfied that the trial magistrate proceeded on the wrong principles in awarding Kshs.720,000/= for lost years; that the award is therefore inordinately high;

25. This court is satisfied that the trial magistrate proceeded on the wrong principles on the award for lost years; the award is found to be inordinately high; a global award of Kshs.420,000/= is found to be sufficient.

26. This ground of appeal is found to have merit and is hereby allowed;

FINDINGS AND DETERMINATION

27. It is for the above reasons that this court finds that the appellants failed to prove that the respondent was negligent;

28. The ground of appeal on liability is found lacking in merit and it is hereby dismissed.

29. This ground of appeal on quantum is found to have merit and it is hereby allowed;

30. This court finds that the trial magistrate proceeded on the wrong principles on the award for lost years; the award is found to be inordinately high; the trial Court's award is hereby set aside and substituted with a global award of Kshs.420,000/=.

31. Each party shall bear their own costs on appeal.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 27th day of September, 2018.

HON.A. MSHILA

JUDGE