REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 149 OF 2017

BETWEEN

TERESIAH NDUTA MUCHIRI..... 1ST APPELLANT

KENNEDY MUCHIRI KAMANDE .....2ND APPELLANT

AND

JOHN MBITIRI NDUNG'U

(Suing as the administrator and the legal representative of the Estate of

AGNES NJOKI NDUNG'U (DECEASED)..... RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Githunguri (Hon. Kutwa – PM) delivered on the 8th day of November 2018 in Githunguri Principal Magistrate's Court Civil Case no. 59 of 2018)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appeal arises from the judgment of the learned Principal Magistrate Hon. C. Kutwa, delivered on 8th November 2018 in Githunguri Principal Magistrate's Civil Suit number 59 of 2018. In the court below, the respondent in this appeal was the plaintiff while the two appellants were the defendants. The respondent sued the two appellants for recovery of damages suffered by the estate of the deceased as a result of a road traffic accident which occurred on or about 8th October 2017 along the Githunguri – Gakoe road at Kwa Marira when the 2nd appellant, who was the driver of the motor vehicle registration number KCM 610P allegedly so negligently drove, managed and/or controlled the said motor vehicle that he caused the same to hit motor cycle registration number KMEF 695H on which the deceased was being carried as a lawful pillion passenger and as a result thereof, the deceased suffered fatal injuries.

2. It is alleged in the plaint that after the said accident the 2nd appellant was charged with the offence of causing death by dangerous driving. The respondent thus filed the suit under both the Fatal Accidents Act and the Law Reform Act on his own behalf and for the benefit of the deceased's widow and other dependants namely:-

a. John Mbitiri Ndung'u – son – Adult

b. George Kinuri Ndung'u – son – Adult

c. Joseph Mbugua Ndungu – son – Adult

d. Teresiah Wariara Ndung'u – Daughter – Adult

e. OWN – son- Minor

3. The deceased was said to be 51 years old at the time of death and enjoyed good health with normal expectations of life. She was said to be

a dedicated farmer and by her death, her estate suffered loss and damage. The respondent therefore prayed for general damages under the two Acts and Special damages in the sum of Kshs.1,500/- plus costs of the suit and interest.

4. The appellants neither entered appearance nor filed defence. There was interlocutory judgment on liability and thereafter the case proceeded to formal proof.

Judgment of the Learned Trial Court

5. In the impugned judgment dated 8th November 2018, the learned trial magistrate made the following awards:-

a) Loss of dependency – Kshs.720,000/-

b) Loss of expectation of life – Kshs.100,000/-

c) Special damages – Kshs.1,500/-

Plus costs of the suit and interest at court rates.

The Appeal

6. Being aggrieved by the whole of the said judgment, the appellants filed this appeal which is premised on grounds:-

a) That the learned magistrate erred in law and fact in making a finding as to liability as against the appellants in the respondent's favour while disregarding:-

i. The consequence of no eye witness having been called by the respondent to testify as to the exact occurrence of the accident and the consequence of no police investigations as to the causation of the accident.

ii. The respondent had not discharged their burden of proving that the appellants were wholly negligent, and/or liable for the accident.

b) That the learned magistrate erred in law and fact by awarding exorbitant and excessive quantum of damages not based on any authority.

c) That the learned magistrate erred in law and fact by adopting an excessive dependency ratio not based on any evidence and/or authority.

d) That the learned magistrate erred in fact and law by failing to discount the award on loss of expectation of life under the Fatal Accidents Act.

e) That the learned magistrate erred in law and fact by awarding special damages when the same were not strictly proven.

f) That the learned magistrate erred in fact and law by relying on receipts in support of the special damages when the same had not complied with the mandatory statutory provisions of law and thereby relying on inadmissible evidence.

7. The appellants pray that this appeal be allowed with costs to themselves.

8. This is a first appeal and as such, this court is under a duty to carefully reconsider and evaluate afresh the evidence on record with a view to reaching its own conclusions in the matter, except to remember that in doing so it has no opportunity of seeing and hearing any of the witnesses who testified during the trial and to make an allowance for the same. This court has also to remember that it is not a small thing for appellate court to overturn the judgment of a court that has had the benefit of observing witnesses during the trial, hence the need for caution by an appellate court of first instance in deciding whether or not to interfere with the judgment of a trial court. Generally, see ***Peters versus Sunday Post Limited & Another [1958] EA 424.***

The Respondent' Case

9. The only witness for the respondent was John Mbitiri Ndung'u who gave evidence as PW1. His written statement dated 20th July 2018 was adopted as his evidence. The list of documents numbered 1-8 were adopted as exhibits 1-8.

10. In his brief written statement, John Mbitiri Ndung'u (John) stated that on 8th October 2017, the deceased was lawfully riding on motor cycle registration number KME 691H as a pillion passenger along Githunguri – Gakoe road at Kwa Marira area when motor vehicle registration number KCM 610P was so negligently driven resulting into an accident in which the deceased suffered fatal injuries. He also stated that the deceased was survived by himself, John's three brothers and a sister. He also stated that at the time of her death, the deceased was enjoying good health and supported her family from her labours as a farmer from which she earned Kshs.20,000/- per month.

11. The exhibits produced by John in support of this case were the following:

a. Police abstract

b. Death certificate and receipt

c. Post mortem report and receipts

d. Limited grant

e. Letter from the chief

f. Copy of motor vehicle records and receipts

g. Demand letter

h. Statutory notice dated 25th June 2018

The Appellant's Case

12. Since the case proceeded by way of formal proof, there was no evidence tendered on behalf of the appellants.

Issues for Determination

13. The issues for determination arise directly from the 6 grounds of appeal raised by the appellants, though the more critical issue is whether the entire proceedings of the trial court should be set aside to give the appellants an opportunity to defend the suit.

Submissions

14. The rival submissions are on the file. I have read through the same. Highlights of the submissions will come out during the analysis and determination.

Analysis and Determination

15. From the record, and as set out by the appellants in their submissions, the plaint herein was filed on 18th July 2018 and summons to enter appearance were issued on 19th July 2019. Though served, the appellants did not enter appearance nor did they file defence within the stipulated time. Once the summons reached the hands of the appellant's lawyers, attempts were made between 17th and 20th October 2018 to enter appearance, and file defence, but by then, interlocutory judgment on liability had already been entered. For the above reason, the suit was fixed for formal proof and this was done on 20th September 2020.

16. By an application dated 17th October 2018, the appellants' insurers sought to set aside the interlocutory judgment and have leave to enter appearance but the said application filed before the trial court was never heard. The appellants thereafter moved the High Court here at Kiambu vide HC Misc. Application no. 190 of 2018 dated 29th October 2018 filed under certificate of urgency. On the same 29th October 2018, the High Court granted exparte orders staying any further proceedings. The stay orders were served upon the defendant's advocates and upon the Executive Officer of the Githunguri Principal Magistrate's Court along with a letter dated 31st October 2018, addressed to the Executive Officer of the court with a request to bring the said order to the knowledge of the trial court. The above order notwithstanding, the trial court proceeded to deliver its judgment on 8th November 2018, the very day on which the interpartes hearing of the appellant's Notice of Motion for leave to defend suit was to be heard; hence this appeal.

17. The issue that arises, for determination in light of the above history is whether this Honourable court should set aside the proceedings, judgment and decree entered on 8th November 2018 in Githunguri PMCC No. 58 of 2018 and grant leave to the appellants to defend the suit. In my considered view, this court has no other option but to do so.

18. Counsel for the appellants have put up a spirited fight against the impugned judgment. First and foremost, it is clear that the appellants were not notified of the date for the hearing of the formal proof as can be seen from the respondents advocates letter dated 28th August 2018 to the respondent's insurers M/S APA Insurance Co. Ltd. The respondents counsel had a legal onus to serve the appellants with the said notice since interlocutory judgment had already been entered against the appellants. I note from the respondent's submissions that this particular issue was not addressed, and I do agree with appellants that the trial court's failure to confirm service of notice of the formal proof hearing when the matter came up for hearing resulted in the appellants being condemned unheard.

19. The appellants have submitted that being condemned unheard was a fundamental breach by the trial court of ***Article 50(1) of the Constitution***. And I agree with this submission. ***Article 50(1) of the Constitution*** provides:-

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal."***

20. In this regard, the appellants placed reliance on the Court of Appeal case of ***JMK versus MWN & Another [2015] eKLR*** where the Court held, *inter alia*, that:

"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO VS ATTORNEY GENERAL (1986-1989)EA 456, Nyarangi JA asserted at page 459:-

"I would say that the principle of natural justice applies whether ordinary people who would reasonably expect those making decisions, which will affect others to act fairly."

21. The learned judge in the ***Onyango case (above)*** went further to state at page 460 thus:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.."

22. In the present case, there is no doubt that the decisions of the learned trial magistrate were bound to adversely affect the appellants, because it was clear to the learned trial magistrate that the appellants had neither entered appearance nor filed a defence in answer to the case against them. The appellants' legitimate expectation that the learned trial magistrate would act fairly in the matter were not met, and it does not matter that the learned trial magistrate may have been right. In fact, as I have considered the entire record, which includes a High Court order being saved upon respondent's counsel and the court as well, I have taken the view that someone in that chain acted with extreme impunity.

23. It is also my finding that the moment the attention of the trial court was drawn to the appellants' application for stay and for leave to enter appearance and file defence, the trial court should have heard and determined the said application even without waiting for the High Court order compelling it to stay proceedings. This was the only channel through which the learned trial court would have known whether or not the appellants' defence raised triable issues; in other words whether the appellants' defence was reasonable in the circumstances. The Court of Appeal in the case of ***CMC Holdings Limited versus James Mumo Nzioki [2004] eKLR*** summarizes this position thus:-

"……..what we feel the trial court should have done when hearing an application to set aside exparte judgment, was to ignore her judgment on record and look at the matter afresh, considering the pleadings before her (i.e. plaint, defence and counterclaim) and see if on their face value, a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, whether the reasons for the applicant's appearance were weak, she was in law bound to exercise her discretion and set aside exparte judgment so as to allow the appellant to put forward its defence……"

24. With the above authorities in mind, I find and hold that the trial court fell into error when it proceeded to deliver the judgment in the matter as if nothing else mattered, as if he learned trial court would perish if it did not deliver the judgment on the date it did. The appellants were crying to be heard. They were not given an opportunity when they begged, the trial court to give them that opportunity. They were not even heard after the High Court ordered the trial court to hear them on 8th November 2018. That was the date on which the impugned judgment was delivered.

25. I also find the conduct of respondent's counsel somewhat strange, because a consent order setting aside the exparte judgment would have been a more amicable and less costly approach for all concerned.

Conclusion

26. Having reached the conclusion that the appellants herein were condemned unheard, I find it not necessary to deal with the other grounds raised by the appellant in their Memorandum of appeal dated 22nd November 2018 and filed in court on the same day.

27. Consequently, I allow this appeal and set aside the proceedings judgment and decree entered on 8th November 2018 in ***Githunguri PMCC no. 59 of 2018.*** The appellants are hereby granted leave to enter appearance and file their defence within 14 days of delivery of this judgment. Once the pleadings are closed, the suit shall be heard afresh by a court other than Hon. C. Kutwa who heard the case in the first instance.

28. As regards costs, I order each party to bear its own costs for this appeal.

29. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned electronically at Kiambu on this 21st day of May, 2020

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CHRISTINE W.MEOLI

JUDGE