REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 200 OF 2016

JAMES MBUGUA ICHUGO (Suing as the personal

Representative of the Estate of WAIRIMU MATHU.....APPELLANT

VERSUS

DAVID MUGO KIHARA.....RESPONDENT

(Being an appeal from the Judgment of Kituku, Principal Magistrate delivered on 23/11/2016 in Kiambu CMCC No. 38 of 2016)

J U D G M E N T

1. This appeal emanates from the judgment in **Kiambu CMCC No. 38 of 2016.** The suit was filed on 2/02/2016, by the Plaintiff (now the Appellant) in his capacity as the personal representative of the estate of **Wairimu Mathu** (deceased), and against the Defendant, now Respondent. The claim was for compensation in respect of fatal injuries sustained by the deceased on or about 12th September 2014. The Appellant averred that on the said date, the deceased was a lawful passenger in the Respondent's motor vehicle registration number **KBX 086Q** which was being driven along **Kiambu-Githunguri** road and that the Respondent and /or his agent so negligently drove the said motor vehicle that he caused the same to lose control, veer off the road and roll several times . And that as a result the deceased sustained fatal injuries.

2. The Respondent denied liability for the accident and key averments in the plaint. The matter was determined without calling witnesses. It appears there was a consent judgment recorded on liability in the ratio of 85:15% in favor of the Appellant as against the Respondent.

3. On quantum, the trial court entered judgment as follows:

General damages

a. Law Reform Act-	Nil
b. Fatal Accident Act	Ksh. 78,270/=
c. Special damages	Ksh. 99,810/=
Total	Ksh. 178,080/=
Less 15%	Ksh. 26,712
Net	Ksh. 151,368

4. The Appellant, being dissatisfied with the lower Court's judgment has preferred the present appeal based on the following grounds:

"a) That the learned magistrate erred in law and fact in failing to award damages to the Plaintiff for pain and suffering despite the deceased enduring pain for 2 days before her death

b) The Learned Magistrate erred in law and fact in failing to award damages under the Law Reform Act.

c) The Learned Magistrate erred in law and fact in relying on a wrong salary contrary to the gazette minimum wage and also considering a wrong multiplier.

d) The Learned Magistrate erred in law and fact in failing to award the Plaintiff damages for loss of expectation of life.

e) The Learned Magistrate erred in law and fact in awarding the Plaintiff damages for loss of dependency that was manifestly low by considering the wrong multiplier."

5. The court directed that the appeal be canvassed by way of written submissions. Through his advocate, the Appellant submitted that the trial court erred in failing to award damages for pain and suffering and loss of expectation of life under the law Reform Act. He asserted that he had obtained and tendered letters of administration authorizing him to file the suit. It was his submission that the trial court arrived at an erroneous assessment of damages for lost dependency by applying the minimum salary payable to a general laborer in respect of the deceased.

6. The Respondent defended the decision of the trial court in his submissions. Stating, that the trial court correctly dismissed the claim for damages under the Law Reform Act as the Plaintiff had not obtained letters of administration *ad litem* to empower him bring a claim on behalf of the estate of the deceased. He cited the case of **Lydia Ntembi Kairanya & Another vs Attorney General (2009) eKLR.**

7. The court has considered the submissions raised on this appeal. In addition, it has perused the proceedings in the lower court. Although both parties admit to the recording of a consent judgment on liability on 21st September 2016, the record of the lower court for the day only reflects the date, the name of the trial magistrate and the clerk. There is no evidence on the record of a further consent for the adoption as evidence, of the respective documents filed by the parties in the proceedings. The judgment refers to such further consent but none of the parties made any such reference in their submissions in the lower court. Before this court, the parties refer to certain filed documents but not to the alleged further consent.

8. The issues raised on this appeal are primarily issues of fact and law relating to the capacity of the Appellant to bring the suit, and proof of damages under the Law Reform Act and the Fatal Accidents Act. On this appeal, the Appellant has asserted that he had filed a copy of a grant *ad litem* empowering him to file the suit. No such grant is on record. The only documents filed by the Appellant are attached to the submissions filed on 10th October, 2016 in connection with the claim for special damages. The Appellant was duty- bound to ensure that all the documents he intended to use in proof of his claim were on record prior to the recording, if any, of a consent for adoption of such documents as evidence. The trial court was also under a duty to ensure that the record of proceedings captured the terms of the consent of the parties. This was all the more important because the matter did not proceed by way of calling of witnesses.

9. Without the benefit of the terms of the alleged further consent on the admission of documents, it is difficult to tell which documents were on record on the date of the Further consent, if any. Moreover from the body of the judgment it seemed that the trial court did not allow the claim for special damages. However an award is included in the final orders. The state of the record of the lower court is totally unsatisfactory and renders the determination of the factual and legal issues arising on this appeal difficult.

10. In order that justice may be done between the parties, and pursuant to the provisions of Order 42 rule 26 of the Civil Procedure Rules this court makes the following orders:

a) The judgment delivered on 23rd November 2016 and subsequent decree are set aside.

b) The matter is remitted back to the lower court for the purpose of a new trial before a different magistrate.

c) For the avoidance of doubt the consent judgment on liability admitted by the parties is not affected and is deemed to subsist between the parties.

d) The costs of this appeal will abide by the outcome of the new trial.

DELIVERED AND SIGNED AT KIAMBU THIS 8TH DAY OF NOVEMBER, 2018

C. MEOLI

JUDGE

In The Presence of:

Appellant - No appearance (with notice)

Respondent – No appearance (with notice)

Court clerk - Nancy