



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 95 OF 2013**

**MOMBASA MAIZE MILLERS LIMITED.....APPELLANT**

**VERSUS**

**ROSELYNE ATIENO OUMA and JACOB OMONDI OWUO**

*[suing as legal representatives of the estate of*

**OLIVER OWUOR OUMA [DECEASED].....RESPONDENT**

***[An Appeal from the Judgment and Decree of the Chief Magistrate's Court, Kisumu in***

***Civil Suit No. 94 of 2012 delivered on the 1st October 2013]***

**JUDGMENT**

The Respondent had sued the appellant for General damages under the Fatal Accidents Act, Special damages as pleaded, interest and costs of the suit. The record shows that on 5th July 2012 a consent was filed on liability in the ratio 70%:30% in favour of the Plaintiff. What went on trial therefore was the quantum of damages.

The Plaintiff testified that the deceased who was her husband and who was a “boda boda” rider used to earn 3,000/= daily from the business and out of that he gave her 2,000/= per day for her upkeep and that of their two children. She did however clarify that the motor cycle did not belong to her husband and he was an employee of the owner. The Respondent did not testify in the lower Court. After considering the evidence before her, the trial Magistrate noting that there was no strict proof of the deceased's earnings but that it was proved the deceased was in gainful employment, used the minimum wage then 8000/= as the multiplacand, a multiplier of 22 years and a dependancy ratio of two-thirds and subtracting the 30% contributory negligence awarded the respondent Kshs.985,600/= as general damages under the Fatal Accidents Act. She did not award Special damages as none were pleaded but she awarded costs of the suit and interest to the Respondent.

The Respondent being aggrieved filed this appeal on the following grounds:-

***“1. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same;***

***2. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant;***

**3. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable;**

**4. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-avis the Respondent's claim;**

**5. The Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.”**

The appeal was canvassed through oral submissions. Mr. Nyamweya Advocate for the appellant submitted that the suit ought to have been filed by the spouse of the deceased but not together with the brother of the deceased; That the Respondent did not prove she was a widow of the deceased and did not have her identity card during the hearing and there was no way of knowing that she was the person introduced in the Chief's letter as the widow of the deceased. He also took issue with the fact that the birth certificates of the deceased's alleged children were not produced and neither were the children presented to the Court at the hearing. He contended that the omission by the Respondent to prove her identity and the existence of the children was fatal as dependancy was not proved. On the quantum of damages Mr. Nyamweya submitted that the source of the figure used by the Court as the minimum wage was not proved and had been left to the Court. On the ratio of dependancy he stated that since there were only three dependants a ratio of one third should have been more appropriate. He urged this Court to allow the appeal and submitted that the real dependants can always file another claim as the Respondent here may just be someone picked from the street.

On her part Ms Nannuei, Advocate for the Respondent, submitted that the Appellant had an opportunity to stand down the respondent since she did not have her identity card; That the respondent relied on the Chief's letter which indicates her as the wife of the deceased and that in the judgment the Trial Magistrate had clarified that the brothers of the deceased were not dependants. She submitted that the award was reasonable. She noted that the appellant's Advocate did not file submissions in the lower Court. She urged this Court to dismiss this appeal.

In reply Mr. Nyamweya submitted that they owed no duty to the Plaintiff to prove her case. He reiterated that the Chief's letter is but an introduction and is not conclusive if doubts are not cleared. He further submitted that a case is not won on submissions and that they are just a summary of the ease of writing the judgment. He once more urged this Court to allow the appeal.

As the first appellate Court I have considered the evidence adduced in the Lower Court. As I had noted earlier the parties herein had recorded a consent on liability and the case went on trial only in respect of the quantum of damages. That being the case it is surprising that Counsel for the appellant is in this appeal raising the issue of the locus of the Respondent. Given that the defendant had at paragraph 2 of the defence disputed the Plaintiff's locus the issue ought to have been allowed to go for trial because a consent on liability presupposes that even the locus of the persons bringing the suit is admitted. In any event the Chief's letter suffices to prove that fact on a balance of probabilities more so as there is no evidence rebutting it. As for the brother of the deceased being a Plaintiff the Trial Magistrate did well to clarify that he is not a dependant and hence not a beneficiary of the sum awarded under the Fatal Accidents Act. That Act clearly provides that the beneficiaries could only be a spouse, child or parent of the deceased. As to why he was a co-plaintiff the Law of Succession Act requires that where the deceased left minor children as in the case here then a continuing trust arises and letters of administration cannot be issued to one person. It therefore follows that when the administrators file suit to recover damages as is the case here they sue together.

The Chief's letter as I have stated proves the status of the estate of the deceased as well as who his survivors were. The fact that a brother of the deceased is also a Plaintiff or that the widow did not have her identity card in Court or that the children were not presented to the Court are not fatal.

As for the quantum of damages the principle that guides this Court is that held in **Selle & Another V. Associated Motor Boat Company Limited [1968] EA 123** that:-

*“the assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts, or has for these of other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge on the wrong principle.”*

See also **Mariga V. Musila [1984] KLR 251** at page 252.

The trial Magistrate made a finding of fact that the deceased was employed in the “boda boda” business and because the Plaintiffs were not able to tender strict proof of his earnings she resorted to the minimum wage. No evidence was placed before her and indeed this Court has not been told that the figure of 8,000/= she used was not the minimum wage at that time. As for the dependancy ratio it has generally been accepted since the case of **Nyokabu V. Public Trustee [1965] EA 530** that the two-thirds ratio is a fair proportion for a married man. The ratio of dependancy does not depend on the number of people for who the suit is brought.

I am not therefore persuaded that the Trial Magistrate acted on a wrong principle of the law, or that she misapprehended the facts in assessing the damages awarded in this case or that the award was so high as not to represent the real damage to warrant me to interfere with it.

Accordingly I find no merit in the appeal and it is dismissed with costs to the Respondent.

**Signed, dated and delivered at Kisumu this 9th day of February 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Ms. Kyamazima for the Appellant (H/B for Menezes)

Mr. Okwoyo for the Respondent

C/A: Serah Sidera