



Mwaniki & another v RMN & JWM (Suing as the representative of the Estate of MNM - Deceased) (Civil Appeal 89 of 2015) [2022] KEHC 11143 (KLR) (10 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 89 OF 2015
J WAKIAGA, J
AUGUST 10, 2022**

BETWEEN

JOHN MWANIKI 1ST APPELLANT

MOHAMED AHMED 2ND APPELLANT

AND

RMN & JWM (SUING AS THE REPRESENTATIVE OF THE ESTATE OF MNM - DECEASED) RESPONDENT

(Being an appeal from the judgement delivered by Hon. NDITIKA SRM in SRMCC No 110 of 2005 KANDARA)

JUDGMENT

1. By a plaint dated 9th April 2014, the respondent sued the Appellants for general and special damages arising out of road traffic accident on 29th December 2013 involving the appellants motor vehicle registration number KBL 631J wherein the deceased was travelling as passenger along Thika –Kangari road .
2. It was pleaded that the said accident and subsequent loss was caused by the negligence of the 1st Appellants driver, servant and of agent, the particular whereof were pleaded. It was further pleaded that at the time of death, the deceased was aged four (4) years in good health, a pre-unit student of good performance, who could have attained further education and later be employed at a salary of Ksh 30000 per month, 2/3 thereof would have gone to the respondents for their upkeep.
3. By a defence dated 14th May 2014, the appellants denied that the deceased was a lawful passenger in the said motor vehicle and further denied that the same was driven by the 1st appellant. The appellants denied the particulars of negligence as pleaded and in the alternative stated that the said accident if any was caused by the negligence of the deceased, the particulars whereof were pleaded.



4. The appellants further denied the particulars of special damages as pleaded.
5. The parties herein entered consent on liability at 10;90% in favour of the respondent and thereafter the matter proceeded for formal proof at the end of which the court for purposes of this appeal rendered judgement as follows;

“liability having been agreed on, I would turn to the issue of general damaged. The deceased was five (5) years old at the time of the accident. The child died the same day she was hit by the(sic). She must have suffered pain. I would award Ksh 50000 for pain and suffering. The deceased was five years in school. It was not indicated what she would have wanted to do in life. It was submitted that she would have gone all the way to the university, she would not as we have not been told what she desired to do.

However, she would perhaps live over 50 years. I would apply a multiplier of 30. However, as it is not known what she would have been in life, I would settle on a minimum wage which is 4,000

I would therefore award as follows = $4,000 \times 30 \times 12 = 1,440,000/=$

For loss of Expectation of life, I would award Kshs. 10,000/=.

6. Being aggrieved by the said judgment, the appellants filed this appeal and raised the following grounds of appeal;
 1. The learned Magistrate erred in law in failing to consider the Provisions of Insurance (Motor Vehicle Third Party Risk (Amendment) Act 2013 CAP405, which clearly provides the formulae for calculating award for fatal claims
 2. The learned trial Magistrate erred in facts and in law in failing to appreciate that under the above act compensation for a minor aged 5 years is 10% of the total compensation of three million (3,000,000) which translates to Kshs, 300,000 (three hundred thousand)
 3. The learned Magistrate erred in fact and in law in awarding Kshs. 1,372,500 for a minor who was aged 5 years contrary to the Act
 4. The learned Magistrate erred I fact and in law in failing to apply the above act despite the matter having filed on 9th April 2014 and the act commenced on 28th January 2014
 5. The learned Magistrate erred in fact and law in failing to deduct the award under the Law Reform Act from the award under Fatal Accidents Act and therefore made a double award.
 6. The learned Magistrate erred in fact and in law in failing to apply the jurisprudence on double awards as was developed in kemfro Africa ltd vs A.M Lubia (1982-88) 1KAR 727
 7. The learned Magistrate erred in fact and in law in failing to consider conventional award for general damages in cases of similar injuries

Submission

7. Directions were issued that this appeal be heard by way of written submissions which were duly filed. On behalf of the appellants, it was submitted that award on lost years was inordinately high and that the magistrate erred in calculating the same using minimum wage. It was contended that a global award well within the bounds of Insurance (Motor Vehicle Third Party Risks) act would have sufficed, which provides for a percentage of 10 of the minimum amount and that comparable injuries should be



- compensated by comparable awards for which *Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd* [2013] e KLR, was cited.
8. The following cases were cited in support of what the appellant considered to be an appropriate award herein: *Rosemary Onyango & another vs Mohamed Jenjewa Ndonyo & another* [2019] e KLR, where an award of kshs. 1,000,000 was reduced to kshs 500,000 in respect of a minor aged 7 years 8 months.
 9. On pain and suffering it was contended that the sum awarded was sufficient, for which the following cases were cited in support; *Mercy Muriuki & another vs Samuel Mwangi Nduati & another* [2019] e KLR, *James Gakinya Karienyé & another Vs Perminus Kariuki Githinji and Harjeet Singh Pandal vs Hellen Aketch Okudho* [2018] e KLR.
 10. On double award, it was submitted that the court in *Hellen Waruguru Waweru vs Kiarie Shoe Stores Ltd* [2015] e KLR explained the principle by stating that duplication occurs when the beneficiaries of the deceased estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same and consequently the claim for lost years and dependency will go to the same persons. It was submitted that there was no indication that the trial court took into account or consideration the awards under both Acts.
 11. On behalf of the respondent, it was submitted, that the appellate court would not disturb an award of damages unless it is inordinately high or low as was stated in the case of *Bahir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR* and that the appellate jurisdiction to review facts should be exercised with caution as stated in *Peters vs Sunday Posts Limited (1958) EA 424*.
 12. On loss of dependency reference was made to the case of *Daniel Mwangi Kimemi & 2 others vs J.G.M & S.M.M* [2016] eKLR where the court awarded kshs. 1,000,000, in respect of a nine-year-old minor as award compensation. It was contended that award of general damages was at the discretion of the trial court which the appellate court should not interfere with unless the court acted on wrong principles for which the case of *Gicheru vs Morton & Another (2005) 2KLR* was cited. On double award, it was submitted that Section 4(2) of the Act provided that it should be taken into account and not to be deducted.
 13. Ms Mbabu for the appellant submitted that the provision of the Insurance (Motor Vehicle Third Party Risks) Act relied upon by the appellant had been declared unconstitutional in the case of *Law Society of Kenya vs Attorney General & Others* [2016] eKLR and that to follow the calculation therein would amount to interfering with the discretion of the court and will be against article 47 the right to fair hearing.

Determination

14. From the submissions by the parties herein, I have identified only three issues in contention for determination in this Appeal;
 - a) whether the trial court was justified in applying a multiplier in respect of claim of a minor
 - b) whether the court should have used the calculation provided for under the Act in assessing the award
 - c) whether there was a double award.
15. The jurisprudence on award of damages in respect of minors, is unsettled in Kenya. Since it is not possible to ascertain what the future hold for minors, the superior courts in Kenya, are however in agreement that, whereas the minors could not make contribution, parents of deceased minors are entitled to some form of compensation, based on the Court of Appeal decision in *Shaikh Mushaq v*



- Nathan Mwangi Kamau Transporters & Five Others [1985-1986]4 KCA 217 where the court stated that in Kenya children were expected to provide for their parents when they are in a position to do so and therefore damages are clearly paid to the parents of a deceased child irrespective of the age of the child and irrespective of whether there is or there is evidence of pecuniary contribution.
16. In assessing an award in damages, Courts have adopted both global and mixed or a more scientific basis for the same as was stated in Beatrice Wangui Thairu vs. Hon. Ezekiel Bergatuny & Another Nairobi HCCC NO 1638 of 1988 (UR) where the court stated thus: “The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”.
 17. In the case of GKN & LNN vs CIVISCOPE LTD [2021] eKLR the court stated that assessment of damage for personal injury is a difficult task and not an exact science. It requires the court to apply its mind and heart to achieve a reasonable, just and fair compensation of the total loss suffered by the claimant, as far as money allows. This requires a balanced approach but not artificial intelligence. In that regard, all a trial court does is award damages that are reasonable in the circumstances of each case.
 18. Whereas it was submitted by the appellant that the trial court should have in assessing an award payable in respect of loss of dependency, used the structured compensation of liability schedule under section 10 of The Insurance (Motor Vehicle Third Party Risk) Cap 405, based on the decision of the court in Law Society of Kenya vs Attorney General & others [2016] e KLR ,where the court held that those figures only limits the amount to be paid by the insurers and can be used by the court as a guide should the same as in the case herein decide to use the more scientific award as opposed to the global sum .
 19. The issue in dispute, therefore is whether the trial court fell into error in using the multiplicand approach as opposed to the global sum? Whereas there is no law that bars the court in using the scientific approach, the same must be based on the evidence on record. In this case upon analyzing the record of the proceeding, I find and hold that no evidence was tendered to support the use of the minimum wage of KShs 4000 and multiplier of 30 years and that the same was based on speculation as the court found as a fact that it was not indicated what the deceased would have wanted to do in life and that it was not submitted that she would have gone all the way to the university and is therefore not supported by law and fact and to that extent would allow the appeal and set aside the award under .
 20. On the issue of double award, I am in agreement with the submissions by the respondent that there is no legal requirement for the court to deduct the amount awarded under the *Law Reform Act* from the award under the Fatal Accident Act and that all that the court is required to do is to take it into account and that the award under both headings did not amount to double award as submitted by the appellant.
 21. Having set aside the award under the heading of loss of dependency, I have come to the conclusion and hold that the justice of this case should have been met had the trial court used the global award approach. Since it is not disputed that the deceased was aged five (5) years as at the time of her death and there being no evidence on record as to what she desired to be in life, I am of the considered view



and find and hold that a global sum of Kenya shillings six hundred thousand (Kshs. 600,000) is an adequate award herein.

22. In this holding, I find support in the following similar and relevant cases:
- A) Anthony Kondo & Another v RMC [2020] e KLR where a seven (7) year old was awarded kshs. 900000
 - B) GKN&LNN v CIVISCOPE LTD [2021] e KLR the deceased who was two (2) years old was awarded kshs 400,000
 - C) Harrison Mwangi Wanaurua v AKK [2019] e KLR an award of Kshs 500,000 in respect of the deceased who was aged five (5) years at the time of death.
23. I have taken into account the circumstances of this case and the rate of inflation and similar decisions stated herein.

Disposition

24. I therefore allow the appeal herein, set aside the trial courts determination on the award for loss of dependency and in exercise pf the powers of the first appellate court substitute the same with a global award of ksh 600,000 (Kenya shillings six hundred thousand).
25. I find no fault with the trial courts award under the remaining heads which I hereby affirm and therefore enter judgement for the Respondent against the Appellant as follows
- A) pain and suffering Kshs 50000
 - B) loss of expectation of life 10000
 - C) loss of dependency 600000
 - D) cost and interest from the date herein
 - E) Subject to consent on liability at 10% - 90%.
25. The appellant is entitled to cost of this appeal and it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 10th DAY OF AUGUST 2022

J. WAKIAGA

JUDGE

