REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 12 OF 2017

ANTHONY ANGWENYI OKOBA.....APPELLANT

VERSUS

THOMAS KIPKURUI LANGAT & LILY SITIENEI (suing as Legal

Representatives of FAITH CHEPKOECH (Deceased).....RESPONDENT

(Being an Appeal from the Judgment of Hon. M.C. Nyigei (SRM) dated 10th May 2017 in the Bomet Principal Magistrate's Court Civil Suit Number 91 of 2014)

JUDGMENT

1. The plaintiff in this case filed suit in the Magistrate's court seeking damages under the Law Reform Act and the Fatal Accidents Act. The suit was brought on behalf of the estate of Faith Chepkoech (deceased) who sustained injuries along Bomet-Kaplong Road when she was hit by motor vehicle Registration No. KAT 052L owned by the defendant.

2. The plaintiff's case proceeded before Hon. G. Kiage R.M after which parties elected to enter a consent on liability at the ratio of 80:20 in favour of the plaintiff. The trial court delivered its judgment on 10th May 2017 in the following terms. On liability, the court adopted the consent of the parties recorded on 8th March 2017. On quantum, and under the Law Reform Act, the court awarded Kshs.75,000 for pain and suffering and Kshs.150,000 for Loss of Expectation of life. Under the Fatal Accidents Act, the Court awarded Kshs.2,400,000 for loss of dependency and made no award for lost years.

The total award less 20% contribution came to **Kshs.2,100,000.** The court also awarded Special Damages, of **Kshs.67,840,** costs of the case and interest at court rates.

3. Being dissatisfied and/or aggrieved with the judgment, the Appellant filed his Memorandum of appeal on 29th May 2017 and further the record of appeal on 20th June 2018 and he relied on 11 grounds reproduced as follows;-

i. The learned Magistrate erred in law in making a finding of damages against the Defendant.

ii. The learned Magistrate erred in law and fact on holding that the Defendant was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

iii. The learned magistrate erred in law and fact in awarding unreasonable loss of dependency of Kshs.2,400,000 by taking a multiplicand of 25 years without taking into consideration the vagaries of life.

iv. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to damages of Kshs.2,400,000 by taking an income of Kshs.20,000 without any tangible proof of the same.

v. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to special damages of Kshs.67,840 without concrete documentary evidence.

vi. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to net damages of Kshs.2,100,000.

vii. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby

arriving at a wrong and erroneous conclusion condemning the Defendant to excess general and special damages without concrete documentary evidence.

viii. The learned magistrate erred in law and fact in failing to appreciate the long established principle of ***stare decisis*** precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.

ix. The learned magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.

x. The learned magistrate erred in law and fact in entering Judgment in favour of the Plaintiffs against the Defendant despite of the Plaintiffs' miserable failure to establish their case especially on Quantum.

xi. The learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The court award is unsustainable and baseless in the circumstances.

4. The Appellant filed his Supplementary Record of Appeal on 17th February 2020 where he attached the lower court proceedings, judgment and ruling.

5. A Consent was filed in court on 11th November 2020 and adopted as an order of the court. The parties agreed to among others, have the Record of Appeal dated 28th May 2018 and filed on 20th June 2018 and the Supplementary Record of Appeal dated 13th February 2020 and filed on 17th February 2020 be deemed as complete and that the Appeal be canvassed by way of written submissions.

6. I have perused the Appellant's grounds of appeal and read and considered the Appellant's written submissions filed on 1st December 2020 and the Respondent's written submissions filed on 13th January 2021.

7. It is clear from the grounds of appeal that the Appellant has listed grounds which question liability despite the parties having entered a consent on liability. Such grounds and in particular grounds ix, xi must be disregarded. All the other grounds of appeal can be summarized into one which suggests that the award was inordinately high. I therefore proceed to address the issue whether or not the award was inordinately high whether the special damages were proved.

8. The Appellant faulted the trial court on the damages awarded, stating that the award was inordinately high. He submitted that as a matter of principle, damages must be within limits set out by previous comparable decided cases and also within the limits the Kenyan economy can afford. The appellant further submitted that there must be uniformity in awards in cases involving similar injuries. He relied in the Court of Appeal case of **Stanley Maore –VS– Geoffrey Mwenda (Nyeri CA NO. 147 OF 2002).**

9. The Respondents on the other hand submitted that the appellate court can only interfere with the trial court's discretion on award on quantum where it is satisfied that the trial court took into account an irrelevant factor or left out a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence. They relied on the case of **Kemfro Africa Ltd VS A. M. Lubia & Another (1982-88) 1 KAR**

10. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both in points of law and fact and come up with its own findings and conclusions. This position of law was restated by the court of Appeal in the case of **Johnson Evan Gicheru VS Andrew Morton & Another (2005) eKLR** as follows:-

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled".6***

11. The Appellant argues that the award went up because the loss of expectation of life was not subtracted from the award under Fatal Accidents Act i.e. the loss of dependency and that the trial court therefore went against the conventionally accepted principle of avoiding double entitlement.

12. In the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) Vs Kiarie Shoe Stores Limited (2015) eKLR** the Court of Appeal stated:-

> ***"This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and the 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 does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as those are only awarded under the Law Reform Act hence the issue of duplication does not arise."***

13. Guided by the authority above, this court finds that the Respondent was entitled to pain and suffering and loss of expectation of life available under the Law Reform Act and the Loss of Dependency available under the Fatal Accidents Act.

14. With regard to the pain and suffering, the trial court awarded Kshs.75,000. Relying on the death certificate, the court stated that the

deceased had died due to severe intracranial hypertension due to close head injury. The court further stated that the deceased must have suffered some pain before she died. The discharge summary produced as P-Exhibit 1(a) from Tenwek Hospital indicated that the deceased was admitted on 3rd June 2014 at 6.32p.m and died later that day ay 9.45p.m.

15. In the case of **Sukari Industries Limited Vs Clyde Machimbo Jumba (2016) eKLR** the court stated:-

> ***"On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged after death. According to various decisions of the High Court, the sums have ranged from Kshs.10,000 to Kshs.100,000 over the last 20 years hence I cannot say the sum of Kshs.50,000 awarded under this head is unreasonable".***

16. I agree with the finding of the trial court that a young life was snuffed out. The deceased also endured prolonged pain and suffering before her death. As earlier indicated, the deceased was admitted at Tenwek Hospital at 6.32 p.m. and died at 9.45 p.m. Bearing in mind the circumstances of the accident and the time the accused suffered before she eventually passed on, this court finds the award of Kshs.75,000 for pain and suffering as reasonable.

17. With regard to the loss of expectation of life, the Respondents in the lower court prayed for Kshs.150,000 as the award for the loss of expectation of life. They relied on the case of **Dorca Kwamboka Vs George M. Ondieki & Another (Kisii HCCC NO. 79 OF 2008)** where the court awarded Kshs.120,000 for the deceased who died aged 28 years. The Appellants had proposed a conventional figure of Kshs.100,000 in the lower court. The trial court awarded conventional sum of Kshs.150,000 and relied on the case of **MMG Vs Muchemi Teresa (2015) eKLR.**

18. The deceased's expectation of life was diminished by reason of injuries sustained in an accident and is entitled to be compensated in damages for loss of expectation of life. In the case of **Mercy Muriuki & Another Vs Samuel Mwangi Nduati & another (suing as the Legal Administrator of the estate of the late Robert Mwangi) (2019) eKLR** the court stated:-

> ***"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000 while for pain and suffering the awards range from Kshs.10,000 to Kshs.100,000 with higher damages being awarded if the pain and suffering was prolonged before death."***

19. On loss of dependency, the Respondents in the lower court stated that the deceased died at the age of 10 years and was in class 5 performing very well and wanted to be a teacher. The Respondents stated that the lowest paid primary school teacher earns about Kshs.27,000. They urged the court to adopt a multiplicand and a multiplier of 25 years. The Respondents urged the court to award them Kshs.2,700,000 as damages for loss of dependency. They relied on the case of **MMG Vs Muchela Teresia (2015) eKLR** to support their submission. The Appellant in the lower court proposed a sum of Kshs.350,000.

20. In its assessment of damages for loss of dependency, the court stated that there was no documentary evidence of what earning the deceased would have had had she lived to realise her dream and further stated that the issue had been settled in the Court of Appeal case of **Jacob Ayiga Maruja & Another Vs Simeon Obayo (2005) eKLR.** It was the court's finding that the deceased was not too young for the expectation of her adult life to be purely speculative without any hope of realization. It further stated that in our Kenyan society, parents regularly invest in their children in order that they may eventually secure good jobs through which such children may maintain the parents in old age. Consequently, the court used a multiplicand of Kshs.20,000 and used a multiplier of 25 years. The court therefore awarded Kshs.2,400,000 as damages for loss of dependency.

21. It was the appellant's submission that the amount awarded as damages for loss of dependency be considered inordinately high. They submitted that the court should have used the lump sum approach in assessing the damages compared to the multiplicand approach. The Appellant proposed Kshs.700,000 as a sufficient award for general damages.

22. The bone of contention under this head is the trial court's use of the multiplicand of Kshs.20,000 and the multiplier of 25 years.

23. Section 4 of the Fatal Accidents Act, provides:-

> ***"Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct".***

24. In **Kenya Breweries Limited Vs Saro (1991) Mombasa Civil Appeal No. 441 OF 1990 eKLR** the court of appeal pronounced itself on the assessment of damages for loss of dependency as follows:-

> ***"We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would be naturally higher than those awardable in the case of a four year old one who has not been to school and whose abilities are not yet ascertained. That, we think, is a question of common***

sense rather than law. But the issue of some damages being payable in both cases 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 whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for young followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have homes for the 'aged' ; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a 'home' while he or she is still able to look after them."

25. In the persuasive authority of the matter of **Chabhadiya Enterprise Limited & Another Vs Gladys Mutenyo Bitali (suing as the Administrator and Personal Representative of the estate of Linet Simiyu now deceased) 2018 eKLR** the court stated:-

"I take the view that the multiplier method where it involves minors is merely speculative. In this appeal, the minor died at the age of 12 years. The court cannot know what the minor would have turned out to be in life. There was no basis for the trial magistrate holding that the deceased would have earned anything less than Kshs.10,000. Though he adopted the multiplier of 30 years he did not consider the age of the dependant (the mother to the deceased) so as to determine the proper multiplier. The multiplier and the multiplicand were therefore speculative."

26. A look at various case law on the award of damages for loss of dependency indicate awards for deceased minors are issued based on the global sum approach. For example, the case of **David Mawangi Kimemi & 2 Others Vs J G M & Another (the personal representatives of the estate of N K (DCD) 2016 eKLR** where the court awarded Kshs.1,000,000 for loss of dependency in the case of a minor (deceased).

27. In the case of **Chabhadiya** (*supra*) the court awarded the global sum of Kshs.700,000 for loss of dependency in the case of a class 4 pupil who died aged 12.

28. Further in the case of **Transpares Kenya Limited & Another Vs S M M (suing as legal representatives for and on behalf of the estate of E M M (Deceased) 2015 eKLR** the court awarded Kshs.500,000 to the estate of a 5 year old child for loss of dependency.

29. It is this court's finding that the trial magistrate relied on speculation in determining what the deceased would have earned. I find that the award for loss of dependency inordinately high. This court is therefore justified to interfere with the award. Accordingly, the award for loss of dependency is reduced from Kshs.2,400,000 to Kshs.1,400,000.

30. I have considered the submissions and the record with respect to special damages. I find that all the sums awarded were proven. With respect to the funeral expenses, the trial court was not in error to award Kshs.50,000/= as guided by **Premier Dairy Limited Vs Amarjit Singh Sagoo (2013) eKLR.** There was also no objection on the production of **P-Exhibit 7** as receipt for payment of legal fees and I consequently allow the same.

31. In the final analysis, the award shall be as follows:-

Pain and suffering	75,000
Loss of Expectation of life	150,000
Lost years	0
Loss of dependency	1,400,000
	1,625,000
Less 20%	325,000
	1,300,000
Special damages	67,840
	1,367,840

32. As the appeal has partially succeeded, each party shall bear their costs of the appeal. The Plaintiff/Respondent shall have costs of the suit in the lower court and interest at court rates until payment in full.

33. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30TH DAY OF JUNE, 2021.

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R. LAGAT-KORIR

JUDGE

Judgement delivered to the parties electronically as per their consent at the following addresses:-

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