**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 12 OF 2020**

**GKN & LNN (Suing as personal Representatives**

**of the Estate of GNL (DECEASED).....APPELLANTS**

**VERSUS**

**CIVISCOPE LIMITED.....RESPONDENT**

***(An appeal from the judgment and decree (Hon. Nthuku SRM delivered on 25th February 2020 in SRMCC No. 20 of 2019 at the Senior Resident Magistrate's Court, Loitokitok).***

**JUDGMENT**

1. **GNL** (Deceased) and two years old, was a pillion passenger on motor cycle registration No. KMCT 263V along Loitokitok-Emali road when the motor cycle was involved in a road accident with motor vehicle registration No. KCN 504C. The deceased sustained fatal injuries and died on the spot.

2. The appellants as personal representatives of the deceased's estate, filed a suit at the Senior Resident Magistrate's Court, Loitokitok against the respondent, the registered owner of the vehicle, attributing negligence to the driver of the motor vehicle. They filed suit under both the Fatal Accidents Act and the Law Reform Act and claimed both general and special damages arising from that accident.

3. The respondent filed a defence dated 9th September 2019, denying the appellants' claim as well as particulars of negligence. The respondent on its part, attributed negligence to the rider of the motor cycle. It urged that the suit be dismissed.

4. The suit was heard by **Hon. N. Nthuku SRM** and in a judgment delivered on 21st February 2020, the trial magistrate found in favour of the appellants. The trial court held the driver of the motor vehicle 100% liable. This was because the deceased as a pillion passenger had nothing to do with the accident. The trial court awarded Kshs. 520,000/= for general damages made up of Kshs. 20,000 for pain and suffering; Kshs. 100,000 for loss of expectation of life and Kshs. 400,000 for loss of dependency. It also awarded special damages of Kshs. 50,000/=.

5. The appellants were aggrieved with the trial court's judgment and filed a memorandum of appeal dated and raised the following grounds, namely;

> ***1. The learned trial magistrate misdirected herself and file to give any due and proper consideration to the pleadings and evidence on record and submissions thereby made an erroneous judgment on quantum of damages.***
>
> ***2. The learned trial magistrate erred in law and in fact in failing to appreciate the relevant principles, case law and the submissions on record in assessing quantum thereby arrived at a very low figure.***

6. Parties agrees to dispose of this appeal through written submissions.

7. The appellants' submissions were dated 10th September 2020. They submitted on quantum of damages with regard to pain and suffering; loss of expectation of life and loss of dependency. It was submitted that the trial court erred in granting a lump sum of Kshs. 400,000/= as damages for loss of dependency in respect of the deceased who was 2 years old. They relied on their submissions before the trial court. In those submissions, the appellants had urged for Kshs. 50,000 for pain and suffering, Kshs. 100,000 for loss of expectation of life and a global figure of Kshs. 1,000,000 for loss of dependency

8. They argued that although they cited the decision in ***Daniel Mwangi Kimemi & 2 Others v G. M & Another*** [2016] eKLR where a sum of Kshs. 1,000,000 on loss of dependency had been made, for a 6 years old minor, the trial court did not take that decision into account.

9. They urged this court to set aside the trial court's award on dependency and re-assess damages on this head afresh.

10. The respondent filed written submissions dated 24th January 2021. It faulted the trial court's finding on liability at 100% against it; Kshs. 20,000 for pain and suffering; Kshs. 100,000 for loss of expectation of life Kshs. 100,000/= and Kshs 400, 000 for loss of dependency under Fatal Accidents Act, instead of Kshs. 300,000 it had suggested.

11. According to the respondent, the evidence of PW2 in Civil Suit No. 19 of 2019, was that the deceased died instantly. It urged the court to award Kshs. 10,000 for pain and suffering. It relied on ***Harjeet Singh Pandal v Hellen Aketch Okudho*** [2018] eKLR and ***Florence Awour Owuoth v Paul Jackton Ombayo*** [2020] eKLR.

12. On loss of expectation of life, the respondent relied on ***Fredrick Bundi Ruchia & Another v SMM (Suing as legal representatives for estate of SMM)*** [2019] eKLR where Kshs. 70,000/= was awarded under this head to a 5-year old deceased.

13. Turning to loss of dependency under the Fatal Accidents Act, the respondent agreed with the trial court's award of a global figure approach. It relied on ***Mwanzia Ngalali Mutua v Kenya Bus Services Limited (Msa) & Another*** cited in ***Albert Odawa Gichimu Githenji*** [2007] eKLR. The respondent also relied on ***Palm Transporters & Another v WWW*** [2015 eKLR where an award of Kshs. 400,000/= was upheld on appeal for the estate of a 13-year-old deceased.

14. The respondent again cited ***Kwamboka Grace v Mary Kimuma*** [2017] eKLR where an award of Kshs. 720,000/= for the estate of a 5 years old deceased made by the trial court was reduced to Kshs. 300,000/= on appeal in 2007.

15. The respondent relied on the principles in ***Mbogo & Another v Shah*** [1965] EA 93 and ***Butt v Khan*** [1977] eKLR that an appellate court should interfere with exercise of discretion. It urged that the appeal be dismissed with costs.

16. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and the impugned decision. This being a first appeal, it is the duty of this court as the first appellate court, to re-evaluate, reconsider and reanalyse the evidence and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

17. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR, the Court of Appeal held:

> ***[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.***

18. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court stated:

> ***Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.***

19. The 1st appellant testified, adopting his witness statement dated 8th April 2019 and filed together with the plaint of the same day. In the statement, the witness stated that the deceased, a two-year-old boy, was a pillion passenger on motor cycle registration No. KMCT 263V. The deceased's father was riding the motor cycle when it was involved in an accident with motor vehicle registration No. KCN504G. The deceased died as a result of injuries sustained in that accident. He left behind his two sisters and the appellant (his grandfather). According to the witness, the deceased used to assist him with domestic work. He produced a grant of letters of administration, death certificate, statutory notice, copy of records and receipts for expenses as exhibits.

20. The respondent did not call a witness. Parties had recorded a consent in SRMCC No. 19 of 2019, that evidence in that be suit be used to determine liability and the finding on lability would apply to this case and suit No. 21 of 2019. Parties filed submissions to enable the court determine the issue of quantum.

21. The trial court considered the evidence and held that according to the evidence of PW2 (in SRMCC No. 19 of 2019), the deceased was a pillion passenger on the motor cycle when the accident occurred and, therefore, he had nothing to do with the occurrence of the accident. The trial court held the driver of the motor vehicle wholly to blame for the deceased's death.

22. As already stated, the trial court awarded Kshs. 20,000 for pain and suffering; Kshs. 100,000 for loss of expectation of life and a global figure of Kshs. 400,000 for loss of dependency under the Fatal Accidents Act. The trial court was of the view that there were factors to assist the court determine what the deceased would be in future. It was not appropriate to use the multiplicand and multiplier in this case. The trial court cited the decisions in ***Mary Khayesi Awalo & Another v Mwilu Mulungi & Another*** (ELD. HCCC No. 19 of 1997) and ***Albert Odawa v Gichimu Gichenji*** (NKR HCCA 15 of 2003 [2007] eKLR where it was stated that the multiplier approach is just a method of assessing damages as opposed to being a principle of law, and can and should be abandoned where the facts do not favour its application.

23. The trial court stated:

> ***In the premise, there is no way of knowing what the deceased would have grown to be or hoe (sic) long he would have lived had this accident not claimed his life. Therefore, doing all I can I award a lumpsome (sic) figure of Kshs. 400,000 which I consider***

***reasonable and moderate in the circumstances for loss of dependency.***

24. The appellants faulted the trial court on two grounds. First, that it did give due and proper consideration to the pleadings, evidence on record and submissions, thus arrived at an erroneous decision on quantum of damages. Second, that the it failed to appreciate the relevant principles, case law and submissions in assessing quantum, thereby made a very low award.

25. According to the appellants, the award of Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life were inordinately low. They argued that they had proposed Kshs. 50,000 for pain and suffering and Kshs. 150,000 for pain and suffering but the trial court did not award those figures. Regarding loss of expectation of life, they argued that they had proposed a global figure of Kshs. 1,000,000 and cited the decision in ***Daniel Mwangi Kimemi & 2 Others v G. M & Another*** [2016] eKLR where an award of Kshs. 1,000,000 was made for a 6 years old deceased but the trial court did not take that decision into account.

26. The respondent contended that Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life were on the higher side. It proposed Kshs. 10,000 and Kshs. 70,000 respectively. On loss dependency, the respondent agreed with the trial court in awarding a global figure but argued that Kshs. 400,000 was on the high side. It proposed Kshs. 300,000 and cited ***Kwamboka Grace v Mary Kimuma*** (supra) where an award of Kshs. 720,000/= for the estate of a 5 years old deceased was reduced on appeal to Kshs. 300,000.

27. I have considered the respective parties' arguments, the evidence on record as well as the decisions relied on. On whether the trial court considered the evidence on record and submissions, there can be no doubt that the trial court was alive to the evidence on record. A perusal of the impugned judgment shows that the trial court considered the evidence by parties and made a determination on the matter before it. The fact that the trial court did not cite the decisions parties relied on could not on its own be taken that to mean it did not consider them.

28. On whether the awards of damages were inordinately low, I must state that it is an accepted principle of law that an appellate court will not interfere with exercise of discretion by a trial court unless it is shown that the trial court acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors thus arrived at a wrong decision that caused an injustice.

29. This was aptly put by ***De Lestang***, **Ag. VP.** in ***Mbogo v Shah*** [1968] 93 at page 94 thus:

> ***I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.***

30. Assessment of damages involves exercise of discretion. In this appeal, the trial court exercised its discretion when it assessed damages. As was stated by **Law, JA**. in ***Butt v Khan*** [1981] KLR 349:

> ***An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.***

31. A similar view was expressed in by the Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General*** (supra) thus:

> ***[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.***

32. The trial court considered the evidence before it and awarded Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life under the Law Reforms Act. The trial court further awarded Kshs. 400,000 for loss of dependency under the Fatal Accidents Act.

33. The appellants' case was that the awards on the three heads were inordinately low and asked this court to set them aside. On pain and suffering the appellants urged this court to award Kshs. 50,000 and Kshs. 150,000 for loss of expectation of life. They relied on several decisions to urge this court to reassess damages. On dependency, they thought Kshs. 400,000 was low and prayed for Kshs. 1,000,000. The respondent on its part thought the awards were high and pleaded with the court to reduce them.

34. The trial court exercised its discretion in this matter. Neither the appellants nor the respondent have shown that the awards were either extremely low or high to represent an entirely erroneous estimate of the damage the appellants were entitled to.

35. The trial court awarded also awarded a global figure of Kshs. 400,000 stating that the deceased was two years old and there was no way of knowing what he would grow up to be.

36. In ***Kwamboka Grace v Mary Kimuma*** (supra) an award of Kshs. 720,000/= for the estate of a 5 years old deceased was reduced on appeal to Kshs. 300,000. On the other hand, the appellants cited ***Daniel Mwangi Kimemi & 2 Others v G. M & Another*** **(supra)** where an award of Kshs. 1,000,000 was made for a 6 years deceased.

37. Assessment of damages 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.

38. In the present case, I am unable to find fault on the part of the trial court in awarding a global figure of Kshs 400,000 damages. It was neither low nor high to call for this court's interference.

39. In arriving at this conclusion, this court is alive to what **Kneller J.A,** stated in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia*** [1985] that:

> ***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.***

***40.*** In ***Gicheru v Morton & another*** **[2005] 2 KLR 333**, the Court of Appeal again stated that *in order to justify reversing of the trial court's amount of damages, it is necessary that the appellate court be convinced either that the trial court acted upon some wrong principle of law, or that the amount awarded is so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.*

***41.*** The same Court similarly observed in ***Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd*** [2013] eKLR, that:

> ***[M]onetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness.***

42. And ***Lord Morris*** of ***Borthy-Gest*** stated in ***West (H) & Son Ltd v Shepherd*** [1964] A.C. 326 pg. 345:

> ***But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.***

43. Applying these principles to this appeal, and considering the fact that a young life was lost, and the decisions parties relied on, I do not find reason to interfere with the trial court's awards. An appellate court should only interfere with a trial court's assessment of damages in very clear cases. It should not to impose its own view on what it would have awarded had it tried the matter in the first instance.

44. For the above reasons, this appeal is declined and dismissed with no order as to costs.

**Dated, Signed and Delivered at Kajiado this 25th day of June, 2021.**

**E. C. MWITA**

**JUDGE**