



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.E005 OF 2020

TITUS ZEBEDEE OMONDI1ST APPELLANT

CORNEL JUMA OWINO2ND APPELLANT

VERSUS

GPOO & PAO (suing as the legal representatives of the estate of the late LAO)..RESPONDENT

J U D G M E N T

[1] This appeal arises from the judgment of the Resident Magistrate in **Busia CMCC No.129 of 2019**, in which the appellants, **Titus Zebedee Omondi** and **Cornel Juma Owino**, were sued by the respondents, **GPOO** and **PAO**, in their capacity as the legal representatives of the estate of the late **LAO (deceased)** for damages arising from a road traffic accident which occurred on the 21st January 2019 along the Bumula – Butula road and in which the deceased was hit and knocked down by the appellants m/v registration No.KCC 459T Mazda matatu thereby suffering fatal injuries.

[2] The appellants filed a statement of defence in which they denied the claim and contended that if the accident occurred then it was solely caused and/or substantially contributed to by the negligence of the deceased. However, in the course of the hearing of the matter in the trial court, the parties recorded a consent on liability to the effect that liability be apportioned at the ratio of 85% against the appellants and 15% against the respondents.

The matter therefore proceeded to hearing on the quantum of damages only.

[3] In that regard, evidence for the respondents/plaintiffs was led by the first respondent (**PW 1**), a court official, **Mohammed Hassan (PW 2)** and a traffic police officer, **P.C Zedekiah Mbovi (PW 3)**

The appellants/defendants did not lead any evidence. Ultimately, the trial court rendered its judgement on quantum as follows:-

(1) Pain suffering	-	Kshs.30,000/=
(2) Loss of expectation of life	-	Kshs.120,000/=
(3) Lost years	-	Kshs.1,000,000/=
15% contribution	-	Kshs.850,000/=
(4) Special damages	-	Kshs. 66,000/=
Grand total	-	<u>Kshs.1,066,880/=</u>

[4] Being dissatisfied with the award, the appellants preferred the present appeal on the basis of the grounds set out in the memorandum of appeal dated 19th October 2020 filed herein by **Kimondo Gachoka & Co. Advocates**. The hearing of the appeal proceeded by way of written submissions which were duly filed by both sides and which have been given due consideration by this court in the light of the grounds in support of the appeal which were opposed by the respondents.

[5] Basically, the appeal is on quantum of damages and the principles to be observed by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial court were set out by the Court of Appeal for Eastern Africa in **Kemfro Africa Ltd Trading as Meru Express Services & Another Vs. A.M. Lubia & Another (1982 – 88) KAR [2]** to the effect that the appellate court must

be satisfied that either the trial court 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.

[6] Herein, the appellants complaint is generally that the award made by the trial court was excessive, unjustified and unsupported by evidence in particular the award of ksh.1 million for lost years.

As was held in **Butt Vs. Khan [1981] KLR 349**, assessment of damages involves exercise of discretion such that 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 trial court 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.

[7] Whilst the appellants contended herein that the trial court's assessment of damages was neither sound nor based on the evidence presented before the court, the respondents contended that the trial court applied the proper principles of Law in assessing the damages awarded to them. That, the award was neither erroneous nor excessive to justify interference by this court.

[8] In its judgement the trial court made the award under various heads such that for pain and suffering, the award was set at **ksh.30,000/=** and for loss of expectation of life it was set at **ksh.120,000/=** while it was set at **kshs one (1) million for lost years**. All these were essentially general damages made under the Law Reform Act. The award of special damages was set at ksh.66,880/= based on the evidence provided by the respondents.

[9] In making the awards, the trial court was guided by the applicable Law and the authorities cited by both the appellants and the respondents at the trial. Therefore, the contention by the appellant, that the award on special damages was unsupported by evidence or that their submissions on general damages were disregarded by the trial court (see, grounds three (3) and four (4) of the appeal) was clearly baseless.

[10] As for special damages, the trial court clearly relied on the relevant receipts submitted by the respondents as exhibits (**P.Exs 5,6,7,9 and 10**) and found that they amounted to a figure of ksh.66,880/=. This was the amount which was pleaded by the respondents and duly established or proved by necessary documentary evidence at the trial.

[11] As for general damages for pain and suffering as well as loss of expectation of life the general trend is to make awards which are conventional guided by the age of the deceased, the degree of the fatal injury and the period of time the deceased endured pain and suffering prior to demise. The awards made under those heads by the trial court are indeed conventional and were based on relevant case Law and the factors alluded hereinabove. It is clear from the appellants submissions that they have no substantial objection to those awards save to imply that they are excessive merely because they were awarded under various heads rather than globally considering that the deceased herein was a minor aged nine (9) years at the time of this demise.

[12] The claim herein was essentially for compensatory damages which are meant to award the claimant for damage, injury or loss incurred as a result of another party's negligence. Such claims are mandated by relevant statutes like the Law Reform Act and the Fatal Accidents Act.

Under the former Act, the damages are recoverable for the benefit of the estate of the deceased and under the later Act they are recoverable for the benefit of the dependants of the deceased.

[13] The claim here was brought under both the Law Reform and Fatal Accidents Acts. It is therefore axiomatic that the awards should be made under the applicable heads of the damages and assessment thereof would be dependant on the facts and evidence of each particular case.

The respondents were indeed entitled to general damages under the Law Reform Act for pain and suffering as well as for loss of life expectation. The trial court's assessment thereof was in the opinion of this court sound and proper inasmuch as it was based on proper exercise of judicial discretion and proper principles of law.

[14] The respondents were also entitled to general damages under the Law Reform Act for lost years but they did not claim the same under the Act. They erroneously claimed damages under the Fatal Accidents Act yet the deceased was a minor under the care of his parents on whom he depended for his livelihood and welfare. The parents were not his dependants and therefore, the claim inasmuch as it was brought under the Fatal Accidents Act was a misconception.

[15] The Fatal Accidents Act provides for damages for loss of dependency. Damages for lost years are payable to the estate of the deceased whose life was shattered by the tortious act of another party. The two sets of damages are separate and distinct such that factors to be taken into consideration in assessing damages for loss of dependency are distinct from factors to be taken into consideration in assessing pecuniary loss to the estate of the deceased.

[16] Where minors are involved, the multiplier or dependency ratio approach in the assessment of damages for lost years would not be appropriate nor would it be appropriate to make a conventional award under the head. In such circumstances the global approach would be ideal.

In **Sheikh M. Hassan Vs. Kamau Transports (1982 – 88) 1 KAR 946**, it was stated that for lost years under the Law Report Act, the sum to be awarded is never a conventional one but compensation for a pecuniary loss, it must be assessed justly with moderation. That, a young child's present or future earnings in most cases would be nil.

[17] In **Kenya Breweries Ltd Vs. Saro (1991) eKLR**, it was stated by the court of appeal 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 naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, it is a question of common sense rather than Law.....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.”

[18] The Court further stated that:-

“In our view damages are clearly payable to a parent of a deceased child irrespective of the age of the child and irrespective of whether, there is or there is not evidence of pecuniary contribution”

In this case, undisputed evidence was led by the respondents that the deceased was aged nine (9) years at the time of his death and was a primary school pupil whose performance was good. All the factors were given due consideration by the trial court in assessing the damages for lost years. However, the global sum of ksh. 1 million under the head was rather excessive in the circumstances as the future of a child and what he/she may become in later years as an adult is not a matter of certainty.

[19] In the premises, the award of damages respecting lost years as made by the trial court is hereby reduced by a sum of ksh.300,000/= to become kshs.700,000/= less 15% contributory negligence i.e. ksh.595,000/=.The remainder of the award, as made by the trial court were reasonable and adequate compensatory damages under the respective heads.

[20] Ultimately, this appeal succeeds only with regard to damages for lost years. In the premises, the judgment of the trial court on quantum of damages is hereby upheld with necessary modification or alteration. Instead of the total award made by the trial court in the sum of ksh.1,066,880/=, judgment in favour of the respondents against the appellant hereby reduces to the total sum of ksh.811,880/= inclusive of costs and interest.

Each party shall meet own costs of the appeal.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 26TH DAY OF OCTOBER 2021]