



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R.MWONGO, J.

CIVIL APPEAL NO. 51 OF 2017

WINNIE NJERU MBURU.....1ST APPELLANT

SAMUEL WAMBUGU GITHINJI.....2ND APPELLANT

-VERSUS-

KAA (suing as the legal representative

of the late FLA (deceased)).....RESPONDENT

(Being an Appeal from the judgment of Honorable E. Kimilu, Principal

Magistrate delivered on the 7th October, 2014 in Naivasha CMCC No 874 of 2012.)

JUDGMENT

Background

1. This appeal challenges the quantum of damages awarded to the respondents following a fatal road traffic accident that occurred on 26th February, 2011. The deceased was the 16 year old minor child of the respondent, who was killed whilst cycling along Moi South Lake Road.
2. The hearing in the lower court proceeded with the evidence of only the plaintiff. At the conclusion of the trial, the trial Magistrate found the appellants 100% liable and made an award as follows:

Pain and Suffering - Kshs. 40,000/=

Loss of expectation of life - Kshs. 200,000/=

Loss of dependency - Kshs. 1,560,000/=

Special damages Kshs. 80,081/=

Total Kshs, 1,880,081/=

3. Dissatisfied with the judgment, the appellants' grounds of appeal are:

1. That the learned trial Magistrate erred in law and fact in finding that the Respondent was entitled to gnarl damages that were too high and without considering the Provision of CAP 405(Amended) which gives a guideline on how compensation ought to be compensated and the available authorities on similar cases.

2. That the learned trial Magistrate erred in law and fact in finding that the deceased aged 16years would have completed education and gotten employed at age 25 years and thereafter use 2/3 of his salary to maintain his parents.

3. That the learned trial Magistrate erred in law and fact in failing to apply the correct principles in assessment of damages of particulars on the question of multiplier and dependency ratio and therefore reached a wrong finding on award on general damages.

4. The learned trial Magistrate erred in law and in awarding damages under Law Reform Act being i.e. Pain and suffering and Loss of expectation of life and at the same time awarded General Damages for Loss of dependency under Fatal Accidents Act yet it was clear in the facts of the case the beneficiaries under both acts were the same.

5. That the learned trial magistrate erred in law and in fact in failing to consider conventional awards for general damages in similar cases.

6. The learned Magistrate erred in law and in fact in holding the appellant 100% liable for the accident yet the facts and circumstances of the case did not support such a finding.

4. In summary, the appellants' submissions were that:

a. The awards on loss of dependency of Kshs 1,560,000/= and loss of expectation of life of Kshs 200,000/= were inordinately high, excessive and unmerited for a child aged 16 years. That it was wrong for the court to adopt a multiplier of 30 years and a ratio of 2/3 as the deceased was a minor and in class eight and any prospects were illusory and speculative. They suggest a ratio of 1/3 and a review on the multiplier of 30 years or a global figure be made for the award under this head.

b. They were not contesting the award of Kshs. 40,000/= awarded in pain and suffering under the Law Reform Act, as it was fair and shall not contest the same.

c. The award of Kshs. 200,000/= awarded for loss of expectation of life was excessive; should be reduced to Kshs 100,000/= and should be deducted from any award made under the Fatal Accidents Act since the beneficiaries in both are the same, to avoid double compensation.

d. Since it is not possible to predict how a child may turn out to be when they mature despite good grades in school and high expectations of parents, the award, an award of a global figure would have been most appropriate to avert speculation on the multiplier/ the dependency ratio and the multiplicand in computation for the award of loss of dependency under the Fatal Accidents Act.

e. The amount of Kshs 1,560,000/= for loss of years for a minor aged 16 years was too high and should be substituted with a global sum of Kshs 300,000/= - 600,000/=.

5. From the foregoing, the Issues for determination are as follows:

1. Whether the award on loss of dependency should have used using a multiplier and multiplicand method or global figure;

2. What is the proper award for loss of expectation of life

3. Whether a deduction of the award under Law Reform Act from the award under Fatal Accidents Act should be done to prevent double compensation

Analysis and determination

Award on loss of dependency, using a multiplier and multiplicand method or global figure

6. In the case of **Eliud Mwale Lewa & Another vs. Paka Tours Limited & another [2009] eKLR** that:

“When a child dies the parents do suffer a quantifiable loss. It is established custom in both African and Asian communities that children are educated and raised in the expectation that they will in turn provide for their parents in their old age. There are several instances where courts have indeed proceeded to make awards for lost years under the Fatal Accidents Act Cap 32 Laws of Kenya.”

7. It has been the practice for a long time for the courts to award parents of deceased minor's loss of dependency based on either the multiplier method or the global figure approach. Each case must, however, be determined on its own merits.

8. Thus, in **Kenya Power & Lighting Company v EKO & Another [2018] eKLR**, Prof Ngugi J stated, and I agree with the same, that:

“So there is no longer a question in Kenya whether the parents of a minor child can recover for loss of dependency under the Fatal Accidents Act. The only question that seems to divide the courts is whether the multiplier method is an appropriate one to use when the deceased is a minor”

9. In light of the above, a trial court's decision cannot be interfered with merely because the court used one method and not another in calculating the quantum of the award. As a parent of the deceased child, the plaintiff is entitled to loss of dependency. In the present case, the trial magistrate worked out the dependency as follows: $30 \times \frac{2}{3} \times 12 \times \text{Kshs. } 6,500 = \text{Kshs. } 1,560,000$.

10. Ringera J (as he then was) put it quite aptly in the case of **Mwanzia Ngalali Mutua vs. Kenya Bus Services (Mombasa) Ltd & Another HCCC No. 1628 of 1988** that:

“The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

11. Whether it was appropriate in this case to use the multiplier method in assessing damages for the deceased, is really a matter of discretion for the trial magistrate, although it bears pointing out that in the case of **Oshivji Kuvenji & Another v James Mohamed Ongenge (Suing as a representative of the estate of Samuel Ongenge) [2012] eKLR** it was stated:

“I would, in the instance hold the view that the future of a minor is uncertain and it might be risky to assume what life he/she would have lived into adulthood. As such, I would award a global figure under the head of loss of dependency.”

12. In this case, there is no way of ascertaining what the deceased would have become or what his earnings in his future would be from the record of the lower court and evidence adduced. The scope of dependency is too uncertain in such circumstances. Accordingly, this is a perfect case in which the trial court would have best served justice by comparing similar cases where sixteen year olds were granted awards.

13. In **D M M (Suing As The Administrator and Legal Representative of the Estate of L K M v Stephen Johana Njue & Another [2016] eKLR** the court on appeal enhanced an award of Kshs. 700,000/- to Kshs. 1,200,000/- for a 16 year old who was in school. The learned judge set aside the award for loss of dependency awarded by the trial court and held as follows:

“[12] In the circumstances, the sum of Kshs. 700,000 was a product of, and was an erroneous estimate of damages. Taking all factors into account, a 16 year old in school and doing well would receive a compensation of between Kshs. 1,000,000 to 1,500,000. In my discretion, I find the sum of Kshs 1,200,000 to be adequate compensation for loss of dependency. Accordingly, I set aside the award of Kshs 700,000 awarded by the trial court for loss of dependency and in its place I award a sum of Kshs 1,200,000 for loss of dependency”.

14. In light of the foregoing, I am persuaded that there is no rationale for interfering with the award made for loss of dependency in this case.

Loss of expectation of life

15. The appellants challenge the trial court’s award of Kshs 200,000/= as being too high and seek that the sum be reduced to Kshs 100,000/=.

16. In **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR**, Emukule J, held:

“In common law jurisprudence of which Kenya is part, the courts have enrolled the principles loss of expectation of life and pain and suffering by the deceased: for award of damages under the Fatal Accidents Act for pain and suffering.....determined what is commonly referred to as continual sum which has increased over the years from Ksh.10,000/= to Ksh.100,000/= currently the basis of the increased has basically been based upon the increase of life expectancy from 15 years to run 60 years currently, that life itself was until cut short by the accident ...something to the estate?”

17. And in **Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased) [2015] eKLR**, the Learned Judge stated:

“...the generally accepted principle is that very nominal damages will be awarded on these head claims of the death followed immediately after the accident. Higher damages will be awarded of the pain and suffering was prolonged before the death in this case, the antetional figure for loss of expectation of life is Ksh.100,000/=.

Similarly, since deceased died more or less immediately after the accident judging from the death certificate which states she died on 15th January 2011 same day the fatal accident causing death, occurred. The trial court’s award on pain and suffering for Ksh.20,000/= was in order.”

18. In the present case, the trial magistrate relied on the case of **Kuria Kanyuku v Osman Gabaire & Another Nakuru HCCC No 409 of 1990** in making the award of 200,000/=. I have not been able to access that authority. The appellant relies on **Nyeri Focus Self Help Group v Monica Njeri Kimani (Suing as the legal administrator of the estate of late Nancy Wairimu) [2018] eKLR** where an award under this head for a 19 year old was Kshs 100,000/- .

19. In my view awards under this head have been shown to have been made at Shs 100,000/= and also at 200,000/=. The applicable principle is that the court should not be quick to disturb an award as stated in **Bashir Ahmed Butt** case:

“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.” See Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5”

In light thereof I see no reason to interfere with the lower court’s award.

20. There is a perennial argument used by appellants against awards whereby they assert that an award made under the **Law Reform Act** should be deducted from that made under the **Fatal Accidents Act**. It is usually premised on the reasoning that since the beneficiaries under both statutes are the same, the deduction is necessary to avoid double compensation.

21. I can do no better than to quote what I recently said in the consolidated appeals in **HCCA Nos 16 & 20 of 2018 Joseph Ndegwa & Another v Japhet Muboro**:

“ 31. On awards under the Fatal Accidents Act and the Law Reform Act, the position is as follows. An award for loss of dependency is for the benefit of the deceased’s dependants. They are defined under section 4(1) of the Act as the wife, husband, parent and child whose death was caused.

32. Under the Law Reform Act, section 2 provides for recovery by the estate of a deceased person arising from any cause of action, for the benefit of such estate. In particular, section 2(c) provides that the damages recoverable for the benefit of the estate of that person:

“(c) Where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death

33. And section 2(5) provides that:

“ 2(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).” (Underlining added).

*34. Clearly, therefore, and it is common practice, that awards under both the Fatal Accidents Act and the Law Reform Act can be made by the court. In **Kemfro Africa Ltd via Meru Express Services 1976 & Another v Lubia & Another (No.2) [1987] KLR 30**, the Court of Appeal held:*

“An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act. It appears that legislation intended it to be taken into account.

.....

....

35. The above position has given guidance to the courts for many years in respect of conflicts raised concerning the two statutes. In light of the above, I am unable to see any error made by the trial court in regard to making awards under both the Law Reform Act and the Fatal Accidents Act.”

22. In light of the foregoing, I see nothing wrong in the trial court having given awards under both heads, and there is no evidence that the trial court did not take into account that it was making awards under both heads. In **Hellen Waruguru Waweru (Suing as legal representative of Peter Mwenja Vs Kiarie Shoe Stores Limited Appeal No. 22 of 2014** the Court of Appeal sitting in Nyeri made a finding that damages should be awarded under both heads and the court should not discount an award under the Law Reforms Act.

23. In conclusion, I have found no basis for interference in the trial court’s decision which is hereby upheld.

24. The appeal is therefore dismissed.

25. Orders accordingly.

Dated and Delivered at Naivasha this 28th Day of January, 2020

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Bitok holding brief for Mutonyi for the Appellants

2. No representation for Kairu McCourt for the Respondent

3. Court Clerk - Quinter Ogutu