



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 89 OF 2019**

**ALBERT CHIRO BANDARI...APPELLANT**

**VERSUS**

**SSK (Suing on her own personal capacity**

**and as the administrator of the estate of the late**

**MBT (DECEASED).....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of the Honourable Mr. Patrick Wambugu delivered on 3<sup>rd</sup> April 2019 in Kwale in SPMC No. 264 of 2018)**

**BETWEEN**

**SSK (Suing on her own personal capacity and**

**as the administrator of the estate of the late**

**MBT (DECEASED).....PLAINTIFF**

**VERSUS**

**ALBERT CHIRO BANDARI .....DEFENDANT**

**J U D G M E N T**

1. This appeal attacks and challenges only the award of damages because liability was settled with the consent of the parties hence a contract incapable of being upset unless by another consent. The grounds set out are five but in reality the same can be collapsed two, heads only:-

i. The awards made for loss of expectation of life and that for pains and suffering were too high and manifestly exorbitant (grounds 1, 2 & 3).

ii. There was an error in failing to discount the multiplier employed to assess loss of dependency.

2. Having regrouped and rephrased the grounds as above I remind myself that the duty to assess damages upon a court is in the realm of judicial discretion and it takes a strong case for an appellate court to interfere. The only window for interference is opened where the award is manifestly too high or too low as to depict an overtly erroneous exercise of power to assess damages<sup>[1]</sup>.

3. As said before the issue of liability was settled by the consent of parties at 90:10% in favour of the respondent. When the court set to determine the only task left for it; assessment of damages, it delivered itself in the following words:-

**“Damages under the Fatal Accidents Act:-**

**i. Pain and Suffering**

**The Plaintiff avers that Ksh.150,000/= would be adequate under this head. The Defendants aver that Kshs.20,000/= would be adequate.**

**I have considered final submissions and authorities. I do find that the Deceased died on the same day of the accident.**

**I thus find the Plaintiffs proposition too high and the Defendant too low.**

**I find that Kshs.80,000/= will be adequate under the circumstances.**

**Loss of expectation of life, the Deceased was a child aged three years.**

**The Plaintiff submit that Kshs.200,000 would be adequate. I have considered the authority quoted.**

**The Defendant on the other hand submit that Kshs.50,000/= would be adequate.**

**I have considered the above and the submissions and authorities I do find that Kshs.130,000/= would be adequate under this head.**

**Loss of Dependency:**

**The Deceased died aged 3 years of age.**

**The Plaintiff proposes Kshs.1,400,000/= for loss of dependency I have considered the authority relied on  $10,000 \times 35 \times 12 \times \frac{1}{3} = 1,400,000/=$ .**

**The Defendant's on the other hand submit that Kshs.513,244/= would be adequate.**

**They apply the wages of unskilled labour Minimum wage Amendment order 2017 Ksh.6415.55  $\times 12 \times \frac{1}{3} = 513,244$ It's my considered opinion since the wage and skill of the child cannot be ascertained and also since the preponderances of life might also have given a different result. On longevity and dependency I will grant a global figure of Kshs.1,000,000/= under this head".**

4. That is the entire excerpt that reveal the decision of the court now challenged before me. It is that decision that has to be interrogated in line with the evidence adduced and the law applicable to determine if the challenge is merited to justify interference with the trial court's decision arrived upon trial.

**Was trial court expected to discount the multiplier owing to the age of the deceased?**

5. The record reveal that the parties agreed to produce the plaintiffs documents as exhibits P1- 9 and the defence case closed without any evidence on its side. That is explicable when regard is paid to the fact that parties on the same day agreed on apportionment of liability between the plaintiff and the defendant. It thus must be remembered that the only evidence to assist court come up with an award was the nine documents by the plaintiff.

6. Those documents, particularly the death certificate, page 10 of the Record of Appeal, showed that the deceased was aged 3 years.

The court opted to make a global sum instead of employing the multiplier formula. That is the decision the appellant seem to challenge in rather difficult language to understand. The failure to discount the multiplier is the expression I find difficult to understand. However a glimpse of what that ground entails is discernible from paragraph 24 to 29 of the Appellants submissions.

7. In those paragraphs the fault upon trial court appear to be that both parties having proposed the multiplier formular, the court needed not depart therefore and that upon departure the sum awarded was excessive. To demonstrate exorbitant nature, the Appellant cited to court three decisions, two by the High Court made in 2018 and 2019 and one by the Court of Appeal made in 2019. All the three decisions agree that the task of assessment of damages is a discretion and it takes a strong case for an appellate to interfere like where the award is demonstratively excessive or too low.

8. However, what is instructive is that in the Court of Appeal decision, the deceased was a baby aged 1 ½ years and the award was upped from Kshs.200,000/= to Kshs.500,000/= while in the High court decisions the deceased's were aged between 3 and 3 years and six months and the awards were reduced from 800,000 and 1,000,000/= to Kshs. 500,000/= respectively.

9. Even though the language of the ground is rather clumsy and not succincts, I do understand the same to challenge the award of Kshs.1,000,000/= for damages for loss of dependency. That I do taking into account that my mandate is to review the evidence wholly and come up with my own decision all the applicable principles as a first appellate court being duly observed. Exercising such mandate I do agree that comparable injuries should attract comparable awards, and that the sum of Kshs.1,000,000/= awarded in this matter seems to have not been justified. Failure to so justify it makes me question how judiciously the discretion was exercised. With such question, I do the difficult task of interfering with a decision on discretion, set aside the award and on its place substitute an award of Kshs.600,000/=.

10. For the heads of awards under pains and suffering and loss of expectation of life, I do consider that the awards made were within the parameters expected for such awards. The appellants' point that there was no evidence of how long it took between injury and death is not a good reason enough to upset the award made. But the record reveal, from the witness statement of SSK, that from the scene of accident, mwisho wa shamba, the deceased was transported to Msambweni county referral hospital where she died.

11. That evidence tell me that the death was never instant and therefore the deceased must have suffered pains between the injury and death. The argument advanced by the appellant is that other court had awarded lower sums and that awards for pains and suffering would be nominal. My decision and answer to that complaint is that the mere fact that a different court would make a different award is not a good reason to substitute an appellate courts discretion for that of the trial court.<sup>[2]</sup> It is also an established principle of law that nominal award does not mean an insubstantial sum<sup>[3]</sup>. Accordingly, I do not find the award of Kshs.80,000/= and 130,000/= for pains and suffering as well as loss of expectation of life to be excessive. The two challenges fail and are dismissed.

12. The upshot is that the award of damages by the trial court is interfered with to the extent and regarding loss of dependency only by which the sum of Kshs.1,000,000/= is substituted with a sum of Kshs.600,000/=. To that extent the appeal succeeds. I consider that to be a partial success for which reason the appeal is allowed with ½ of the costs to be paid to the appellant.

13. On the sum due to the respondents interest shall be computed at court rates from the date of judgment of the lower court till payment in full.

**Dated, signed and delivered at Mombasa this 6th day of March 2020.**

**P.J.O. OTIENO**

**JUDGE**

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<sup>[1]</sup> Bashir Ahmed Butt vs Gwais Ahmed Khan [1982 – 88] KAR

2. In West & Sons Ltd vs Shepherd [1964 AC] No. 326; Daniel Mwangi Kimemi vs JGM [2016] eKLR

3. In Nunet Kenya Ltd vs Telkom Kenya Ltd [2012] eKLR the Court awarded Kshs.1,000,000/= for

nominal damages.