REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO. 3 OF 2018

CHINA NATIONAL AERO-TECHNOLOGY

INTERNATIONAL ENGINEERING CORPORATION.....APPELLANT

- V E R S U S –

RAPHAEL LENAMBOYO (Suing as the legal representative of the estate of the late)

NALMALUMALU LENAMBOYO.....RESPONDENT

J U D G M E N T

This appeal arises from the decision of CM Hon. Wanjala which was delivered on 11/10/2017 in Nyahururu CMCC 192/2016. The appellant *China National Aero-Technology International Engineering Corporation* was the defendant in the subordinate court. The respondent is *Raphael Lenamboyo* is the legal representative of the estate of Naimalumalu *Lenamboyo* formerly the plaintiff. The appellant is dissatisfied with the decision of the Chief Magistrate and filed this appeal on 09/01/2018. The court directed that the parties file written submissions for purposes of highlighting. The matter came up for highlighting on 05/03/2020. Mr. Makori Advocate, appeared for the Respondent and highlighted his submissions. Though Counsel for the appellant, Wangari Mucheru had filed submissions, she did not appear. It was reserved for judgment.

A background of this case is that the deceased Naimalumalu Lenamboyo was a minor aged 8 years. She slipped and fell into a hole filled with water which was said to have been negligently and recklessly left open and unattended or secured by the appellant leading to the minor's death. Liability was agreed upon at the ratio of 70:30 in favour of the respondent. The matter proceeded by way of the Counsel filing submissions on the issue of quantum only. After considering the pleadings and submissions, the Hon. Magistrate entered judgment for the respondent in the following terms;

1. Loss of dependency	*1,000,000/-*	*-*	*700,000.00*
2. Loss of expectation of life	*100,000/-*	*-*	*70,000.00*
3. Pain and suffering	*30,000/-*	*-*	*21,000.00*
4. Special damages	*10,000/-*	*-*	*7,000.00*
Total	*1,140,000/=*		*798,000.00*
Less 30% contribution	*798,000/=*		

The appellant cited 7 grounds of appeal which I have condensed into two broad grounds namely;

1. *Whether the trial Magistrate applied the correct legal principles in assessing the general damages;*

2. *Whether the damages awarded were excessively high as to amount to an erroneous estimate.*

The appellant submitted that the damages awarded were not commensurate with other awards for a deceased minor; that no evidence was tendered to support an award for lost years since the deceased was a minor and no dependants were pleaded nor did they testify to prove dependency; that no evidence was tendered to prove that the minor was a pupil or how bright she was; that the court applied the wrong

approach by applying the multiplier approach instead of applying the lump sum approach; that the trial court failed to consider the authorities tendered by the appellant but only considered the respondents submissions and authorities; that the award is not supported by evidence and should be reduced to Kshs.800,000/- or less.

As respects the award of Kshs.30,000/- for pain and suffering, Counsel urged that there was no justification for making that award when the death was instantaneous; that the award of Kshs.100,000/- for loss of expectation to life was also exaggerated.

Counsel further argued that the court did not take into account comparable awards and that though assessment of damages is an exercise of discretion, the appellate court can interfere with an award if the lower court failed to take into account a relevant fact or took into account an irrelevant fact that resulted in the inordinately high award. Counsel urged that there is good ground for this court to disturb this award.

The appeal was opposed. Mr. Makori relied on the decisions of;

1. *Kenya Power & Lighting Company Ltd vs Nehemiah Wachira [2014] eKLR;*

2. *Burhani Decorators & Contractors vs Morning Foods Ltd & Another CA 604/2012 [2014] eKLR.*

In the above decisions, the courts emphasized the fact that the court will be reluctant to disturb an award of damages unless particular principles have not been met which are inter alia, that the Magistrate failed to take into account relevant factors that led to the court arriving at an erroneous award. Counsel argued that the appellant has not demonstrated that the court failed to consider relevant factors or took into account irrelevant factors, as to make the award excessive and that no authorities were cited in support of the appellant's arguments.

Counsel also argued that it is evident from the court's judgment that the court did refer to the authorities cited and that it is upon the counsel to avail authorities that are relevant to the case in order to assist the court in arriving at its decision; that the appellant cited very old cases and did not cite comparable awards and for this argument, Counsel relied on the decision of *Kenya Wildlife Services vs Isabella Kendi [2018] eKLR* where the court observed that counsel must cite relevant authorities that will be helpful to the court in arriving at a fair award. Counsel urged this court to dismiss the appeal because the appellant has not demonstrated that the awards were excessive.

The first issue for determination is;

1. *Whether the trial Magistrate correctly applied the applicable principles of the law in assessing damages payable for the deceased minor.*

I have carefully considered the submissions of both parties. The applicable law has been laid down in several authorities. In *Ali vs Nyambu T/A Sisera Stores [1990] KLR 534 at page 538,* quoted with approval, the principles laid down by the Privy Council in *Nance vs British Columbia Electric Railways Company Ltd [1951] AC 601* at page 613 to be that;

> *"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or Jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the Judge, in assessing the damages applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint vs Lovell [1935] IKB 354) approved by House of Lords in Davis vs Powell Duffryn Associated Collievers Ltd. [1941] AC 601."*

The court in applying the finding in the above decision in *Bashir Ahmed Butt vs Uwais Ahmed Khan [1982 – 88] KAR,* the Court of Appeal said;

> *"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."*

These principles have been applied by the courts in many other decisions. See *Mbogo & Another vs Shah, EA 1968, Mariga vs Musila [1984] KLR 251, Arrow Car Ltd vs Bimomo & 2 Others CA 344/2001, Kemfro Africa Ltd T/A Meru Express Ltd vs Lubia Olive Lubia [1982 – 88] IKAR 727 and Burhani Decorators & Contractors vs Morning Foods Ltd & Another [20140 eKLR.*

The deceased was 8 years old at time of death and it was pleaded by the respondent who was her father, that she was school going and a bright student. The respondent did not disclose which school she went to. No evidence of her performance in school was availed. In the present Kenya, Primary School Education is free and compulsory. The deceased was said to be healthy and not suffering from any ailments that may have reduced her life expectancy. It must be remembered that this case did not proceed to hearing for assessment of damages because the parties agreed to proceed by way of written submissions.

The appellant's Counsel has submitted that the respondent did not prove that the deceased had any dependants. At paragraph 5 of the plaint it was pleaded that the deceased was survived by her parents. The person who filed this suit is the deceased's father and therefore the deceased's dependants were pleaded.

In the case of *Kenya Breweries Ltd vs Saro [1991] Mombasa CA 441/1990 eKLR* the Court of Appeal rendered itself thus;

"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 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, 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 of 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 younger 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. At the national level, the concept now finds expression in the popular phrase 'being mindful of other people's welfare'. If any legal authority is required in support of our views we would quote this court's decision in Sheik Mushaq vs Nathan Mwangi Kamau Transporters & 5 Others [1985 – 1986] 4KCA 217, where in the late Nyarangi, delivered himself as follows;

"In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial Judge's contemptuous remarks about the custom of the people is contrary to Section 3(1) of the Judicature Act Cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religions of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial Judge's view that it is 'outrageous and pernicious' is not well founded and must be rejected."

In the same case, the court further said:

"In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution. The High Court authorities which were cited to us, such as Abdullahi vs Githenye [1974] EA 110, Maurice Miriti vs Firoze Construction Co. Ltd HCC No. 1979, Nairobi, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In Abdullahi vs Githinye, supra, the deceased girl was only 7 years old. Kneller, (as he then was) awarded Kshs.8,000/- in 1974. In Miriti vs Firoze, supra, the boy was in a nursery school. Nyarangi J. (as he then was) awarded a total of Kshs.70,000/- in 1972 for loss of expectation of life. We are satisfied that the learned Judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned Judge erred in holding that the respondent was entitled to claim damages under the Fatal Accidents Act. The respondent was entitled to do so under Section 3 and 4(1) of that Act and under the authorities to which we have referred.

The court confirmed in the above case, that damages are payable for a deceased person irrespective of age and that in Kenya children are expected to grow and provide for their parents or assist them. The appellant's submission that there was no proof of dependants and dependency cannot hold.

On loss of dependency, the trial court applied the global award method in determining what the respondent was entitled to. The respondent's Counsel had suggested an award of Kshs.5,700,345.00 but counsel instead calculated the entitlement as $10{,}107 \times 12 \times 47 \times 1/3$ – meaning that the deceased may have lived for another 47 years and earned a minimum wage of 10,107/- and ratio of dependency would be $1/3$. The respondent's Counsel urged that the court should have adopted a global award method of calculating the dependency and awarded about Kshs.800,000/=. In *Kwanza & Ngalah Mutua & Another* Justice Ringera stated as follows on the method of calculating damages, *"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 facts 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 alter of methodology, something a court of justice should never do."*

In this case, apart from pleading in the plaint that the deceased was school going, the court was not told what class she was in, which school she went to and what her performance was, to enable the court to be convinced that she was likely to go through her education get a formal job to enable her assist her parents in future. Although primary school education is free and it is expected that the child would be in school, the respondent needed to avail some more evidence to persuade the court as to what the child may have become later. Because of lack of these details, in my view, the more appropriate method to adopt in assessment of damages for loss of dependency in this case would have been the global award and indeed that is what the court did. In *Daniel Mwangi Kimemi & Others vs Representative of Estate of N.K. (deceased) respondent*, in 2016, the deceased was aged 9 years and the court made an award of Kshs.1,000,000/- as a fair compensation for loss of dependency.

In *HCC 519/2013, ZC (deceased) plaintiff vs Muchemi Teresa,* the deceased was 12 years and the court considered the fact that the deceased was academically bright, attending a reputable school and hoped to be a medical doctor but those hopes were dashed. An award of Kshs.3,600,000/- was made in 2015 though the court used the multiplier method. In my considered view, for an award made in 2017 two and three years after the awards in the decisions, I have considered above, I am of the view, that Kshs.1,000,000/- was not excessive but a fair compensation of the deceased's estate.

Damages under Law Reform Act; on the claim for pain and suffering, an award of Kshs.30,000/- was made. The appellant complains that it is excessive. Although the appellant complained that the appellant's authorities were not considered by the trial court, Counsel did not cite a single case or refer the court to any in this appeal.

In *NMG's case supra*, the court made an award of Kshs.20,00/- for pain and suffering.

In this case, the respondent suddenly fell into the hole filled with water. I believe she died instantiously but even then, she suffered pain before death.

In *Daniel Mwangi case,* the court also made an award of Kshs.20,000/-. I would find that an award of Kshs.30,000/- is not excessive in the circumstances.

As regards loss of expectation to life, the court awarded Kshs.100,000/- which the appellant again complained is too high. The deceased was aged 8 years and had a whole life ahead of her which was suddenly cut short. In *NMG's case,* an award of Kshs.150,000/- was made. In *Daniel Mwangi's case,* the court made an award of Kshs.100,000/-. Looking at the comparable awards, the award of Kshs.100,000/= for loss of expectation to life is not excessive.

The claim for special damages was disputed.

Having considered all the grounds of appeal, I find that the appellant has not demonstrated that the award made by the trial court was inordinately high as alleged nor did the court apply the wrong principles in arriving at the award. I find no merit in the appeal and it is hereby dismissed with costs to the respondent.

Signed and Dated at *NYAHURURU* this *30th* day of *June, 2020*.

.....

R.P.V. Wendoh

JUDGE

PRESENT

Mr. Nyagaka for the respondent

Eric – court assistant