



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 59 OF 2019**

**WILFRED MARITA ONSOMU.....APPELLANT**

**VERSUS**

**JOSHUA NYAMENIA OGARI & ZIPPORAH KERUBO OGARI**

**{Suing as Legal representatives of the Estate of Shadrack Onsongo (DECEASED)}.....RESPONDENTS**

*(Being an Appeal against the Judgement of Hon. M. O. Wambani – CM Nyamira dated and delivered on the 22<sup>nd</sup> day of October 2019 in the original Nyamira Chief Magistrate Court Civil Case No. 158 of 2017)*

**JUDGEMENT**

The Memorandum of Appeal filed herein challenges the trial Magistrate's findings on liability and the quantum of damages awarded to the respondents. However, in their submissions, Counsel for the appellants have abandoned the appeal against the judgement on liability and correctly so given that liability was arrived at upon a consent by the advocates for the parties. This then leaves this court to deal with the question of the assessment of damages only.

The background of the case is that the victim (now deceased) of the motor accident giving rise to the suit before the lower court was ten years old. When the trial Magistrate assessed the damages it was under different heads as follows: -

<b>(a) Pain &amp; suffering</b>	<b>– Kshs. 40,000/=</b>
<b>(b) Loss of Expectation of life</b>	<b>– Kshs. 100,000/=</b>
<b>(c) Funeral Expenses</b>	<b>– Kshs. 100,000/=</b>
<b>(d) Lost years</b>	<b>– Kshs. 1,000,000/=</b>
<b>(e) Special Damages</b>	<b>– <u>Kshs. 20,585/=</u></b>
<b>Total</b>	<b>– <u>Kshs. 1,260,585/=</u></b>

After subjecting the award to the agreed ratio of contribution of 80%:20% the net award was Kshs. 1,008,468/=.

The gist of this appeal is that given the age of deceased the Trial Magistrate misdirected herself by awarding damages under the different heads instead of resorting to a global figure. It is also argued that the award was inordinately high. It is Counsel's submission that a global sum of Kshs. 400,000/= and special damages of Kshs. 41,500/= should have sufficed. Counsel contested the special damages awarded arguing that only Kshs. 20,000/= was proved. As for the award for funeral expenses of Kshs. 100,000/=, Counsel argued that at the hearing the respondents alluded to spending only Kshs. 60,000/= and that is all that should have been awarded. Counsel submitted that the funeral expenses should in any case not have been awarded as they were not proved. Counsel cited several cases in support of his submissions.

The appeal is vehemently opposed. Counsel for the respondents submitted that in fatal claims where the victim is a minor the court has discretion to make a lump sum award under the various heads so long as the award under the Law Reform Act is discounted from the award made under the Fatal Accidents Act as the beneficiaries are the same. Counsel submitted therefore that the trial Magistrate did not err in making awards under various heads. In regard to funeral expenses, Counsel for the respondents submitted that courts have held time and again that funeral expenses are inevitable even though one may not be able to keep receipts owing to the circumstances in a funeral where people are more concerned with giving the departed a befitting burial. Counsel contended that whereas the respondents proposed an award of Kshs. 200,000/= the trial Magistrate awarded Kshs. 100,000/= which is what she considered reasonable guided by the case of **Jane Katambu Mwanzia v Republic NBI HCCC 3177 of 1977**. Counsel for the respondents concluded by stating that this appeal has no merit

and is only intended to delay or deny the respondents from enjoying the fruits of their judgement and for that reason it should be dismissed with costs.

As it is not disputed that the deceased, the subject of the case in the court below was only ten years old at the time of the accident, the issues that call for determination are:-

**(i) Whether the trial Magistrate erred in principle in awarding damages under the various heads.**

**(ii) Whether the assessment of damages were so inordinately high as to attract interference by this court.**

**(iii) Whether the trial Magistrate erred in awarding funeral expenses when the same were not specifically pleaded and proved by way of receipts.**

On the first issue, the argument by Counsel for the appellant is that the award of damages under the various heads was erroneous. However, looking at the plaint it is evident that the respondents sought damages under the **Law Reform Act** as well as the **Fatal Accidents Act**. Damages under the **Law Reform Act** are guided by **Section 2** of the **Law Reform Act** which states: -

**“2(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:**

**Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.**

**(2) Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—**

**(a) .....**

**.....**

*(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, except that a sum in respect of funeral expenses may be included.”*

Awards made under the **Law Reform Act** would include damages for pain and suffering and funeral expenses. It is also the practice of our courts to include damages for loss of expectation of life under the **Law Reform Act**. These damages go to the estate of the deceased and this is to be distinguished from awards made under the **Fatal Accidents Act** which are strictly for the benefit of a parent, spouse or children of the deceased. **Section 4 (1) of the Fatal Accidents Act** states: -

**“(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:**

**Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”**

These are the damages the courts invariably refer to as damages for loss of dependency. **Section 2 (5) of the Law Reform Act** makes it clear that the damages awarded under the **Law Reform Act** shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the **Fatal Accidents Act**. The **Section** states: -

**“2 (1) .....**

**.....**

**(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 dependants of deceased persons by the Fatal Accidents Act (Cap. 32) 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).**

**.....”**

In the premises I am not persuaded by the submission by Counsel for the appellant that damages in respect of a ten-year-old could not be

awarded under the different heads and my finding therefore is that the trial Magistrate did not err in assessing and awarding damages under the different heads as the same fell under different statutes. In my view, it is only in regard to damages for loss of dependency that she was required to adopt the global approach as opposed to the multiplier, multiplicand and dependency ratio approach that is applicable in such cases. This is because unlike cases involving adults the future prospects of the deceased or the level of expected earnings are unknown – **see Oyugi Judith & another v Fredrick Odhiambo Ogongo & 3 others [2009] eKLR**. In her judgement the trial Magistrate made it clear that what was awarded under the **Fatal Accidents Act** was a global award.

This then brings us to issue number (ii) which is whether the awards were inordinately high. It is a well settled principle of law that an appellate court will interfere with the trial court's discretion on the assessment of damages only if it is satisfied that the trial court took into account an irrelevant factor or left out of account a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence. (**See Kemfro Africa Ltd v AM Lubia & another (1982 – 88) 1KAR**).

It is my considered view that save for funeral expenses the sums awarded are not inordinately high. The sums awarded for pain and suffering and loss of expectation of life are conventional awards and so this court shall not interfere. For loss of dependency Gikonyo J awarded a sum of Kshs. 800,000/= in the case of **Fredrick Bundi Ruchia & another v SMM (suing as the legal representative of the estate of JMM (2019) eKLR**. In so doing he was guided by the cases of **Daniel Mwangi Kimemi & 2 others v JGM & another [2016] eKLR** where Kshs. 1,000,000/= was awarded in respect of a deceased minor aged nine years; **Chen Wembo & 2 others v IKK & another (suing as the legal representatives and administrators of the estate of CRK (deceased) [2017] eKLR** where the court awarded a global sum of Kshs. 600,000/= for a deceased minor who was aged 12 years and **Transpares Kenya Limited & another v SMM (suing as Legal Representative for and on behalf of the estate of EMM (deceased) [2015] eKLR** where a sum of Kshs. 602,400/= was awarded for a deceased who was 5 years old. Given that the assessment of damages must also take consistency and passage of time into account, I am not persuaded that the sum of Kshs. 1,000,000/= is inordinately high as to warrant interference by this court. Therefore, the award under “**Lost Years**” shall not be disturbed.

The special damages of Kshs. 20,585/= were what was specifically pleaded and as they were strictly proved I shall not interfere.

I am however persuaded that the trial Magistrate misdirected herself in awarding a sum of Kshs. 100,000/= for funeral expenses. Even granted that courts have awarded funeral expenses without expecting the plaintiffs to produce receipts (**authorities on this are legend - See Jane Katumbu Mwanzia v M Mwanzui & the Attorney Genral [2001] eKLR**) it was wrong for the trial Magistrate to award Kshs. 100,000/= to a party whose evidence was that she had expended Kshs. 60,000/=. In the circumstances this court will deduct Kshs. 40,000/= from that award and reduce the same to Kshs. 60,000/=. The appeal therefore succeeds only to the extent that funeral expenses have been reduced. Accordingly, judgement for the respondents against the appellant shall now be as follows: -

**1. (i) Under the Law Reform Act**

<b>(a) Pain &amp; suffering</b>	–	<b>Kshs. 40,000/=</b>
<b>(b) Loss of expectation of life</b>	–	<b>Kshs. 100,000/=</b>
<b>(c) Funeral expenses</b>	–	<b>Kshs. 60,000/=</b>

**(ii) Under the Fatal Accidents Act**

<b>(a) Loss of dependency</b>	–	<b>Kshs. 1,000,000/=</b>
<b>(b) Special damages</b>	–	<b>Kshs. 20,585/=</b>
<b>Total</b>	–	<b>Kshs. 1,220,585/=</b>
<b>Less 20% contribution</b>	–	<b><u>Kshs. 244,117/=</u></b>
<b>Net Award</b>	–	<b><u>Kshs. 976,468/=</u></b>

2. As the appellant has succeeded only partially he shall get half the costs of this appeal. The costs of the lower court are however awarded to the respondents as is the interest with that on special damages being from the date of filing suit and those on general damages and funeral expenses from the date of judgement.

3. The net award under the **Fatal Accidents Act** shall be to the mother and father of the deceased solely so as to accord with the provisions of Section 4 (1) of the Fatal Accidents Act.

It is so ordered.

**Signed, dated and delivered at Nyamira this 25<sup>th</sup> day of June 2020.**

**E. N. MAINA**

**JUDGE**