



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 16 OF 2019

MAKUENI COURTS LTD.....1ST APPELLANT

MUSYIMI NZAU.....2ND APPELLANT

-VERSUS-

FELISTUS KANINI NDUNDA (*Suing as the legal representatives*)

of the estate of **ERIC MUTUKU.....RESPONDENT**

(Being an Appeal from the Judgment of Hon. E. Muiru (SRM) in the Senior Resident Magistrate's Court at Kilungu, Civil Case No.104 of 2018, delivered on 21st February 2019)

JUDGMENT

1. The Respondent filed a suit in the lower court seeking general damages under the Law Reform Act (*LRA*) and the Fatal Accidents Act (*FAA*) on behalf of the Estate of *Eric Mutuku* pursuant to a fatal road accident on 02/08/2017 along the Emali-Wote road. They also prayed for special damages, costs of the suit and interest.

2. The Appellants filed a joint statement of defence denying the claim. The parties recorded a consent on liability in the ratio of 80:20 in favour of the Respondent and the trial court proceeded to assess the damages.

3. Judgment on quantum (*before contribution*) was eventually delivered as follows;

Pain & suffering.....Kshs.50,000/=

Loss of expectation of life.....Kshs.100,000/=

Loss of dependency.....Kshs.2,500,000/=

Special damages.....Kshs.1,380/=

Funeral expenses.....Kshs.50,000/=

4. Aggrieved by the award, the Appellants filed this appeal through the firm of Mulwa and Mulwa & company advocates and listed three grounds as follows;

a) **That**, the learned Magistrate erred in law and fact in awarding Kshs.2,500,000/= as loss of dependency which figure is unreasonably excessive in the circumstances.

b) **That**, the learned Magistrate erred in law and fact in failing to consider in totality the submissions filed on behalf of the Appellants and the legal authorities submitted by the defence in support thereof thus arriving at a wrong decision.

c) **That**, the learned Magistrate erred in law and fact when she relied on the Respondent's/Plaintiff's submissions thus arriving at the wrong conclusion.

5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

6. With regard to loss of dependency, the Appellants support the global figure approach used by the trial Magistrate and rely on **Mwanzia – vs- Ngalali Mutua & Kenya Bus Services (Msa) Ltd & Anor** where Ringera J. (*as he then was*) expressed himself as follows;

“The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the 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.”

7. They submit that relevant authorities were quoted by the trial Magistrate but without giving any reason, she proceeded to award KShs.2,500,000/=. They contend that the authorities cited by the Court had awards ranging from KShs.70,000/= to KShs.1,000,000/=.

8. They urge this Court to consider the following authorities;

a) **Multiple Hauliers (EA) Ltd & Anor –vs- William Abiero Ogeda & 2 others (2016) eKLR** where the court awarded a global figure of KShs.300,000/= for a deceased who died aged 21 years.

b) **Karanja Edwin –vs- Rahab Wanjiku Njoroge (2018) eKLR** in which an award of KShs.700,000/= was made under global approach.

c) **Namwel Agwera Onsasa –vs- John Otieno Obonyo (2015) eKLR** in which the award of KShs.500,000/= for loss of dependency was upheld.

9. They submit that an award of KShs.300,000/= is reasonable in the circumstances.

10. The Respondent through Webale B & associates submits that based on the evidence and case law relied upon, the trial court should have awarded KShs.4,500,000/= as loss of dependency.

11. It is her submission that during the hearing of the case, she produced and relied on the deceased’s end term report books and a letter from the deceased’s head teacher indicating his abilities. She submits that the documents were never challenged and they showed that the deceased topped his class at end of term examinations on several occasions. She contends that the Appellants cannot re urge their case before this court when they failed to challenge the evidence presented before the trial court.

12. She submits that from the judgment, it is evident that the cases cited by the Appellants were considered and the one of **Albert Odawa – vs- Gichimu Gichenji (2007) eKLR** was relied on in arriving at the methodology of tabulating loss of dependency.

13. Her authority in the trial court was **Nairobi HCCC No. 519 of 2013; MMG Suing as the legal representative of the estate of ZG –vz- Muchemi Teresa**, which she contends was more comparable as the deceased therein was a minor of the same age and was awarded KShs 3,600,000/= for loss of dependency.

14. It is also her submission that a cursory look at the judgment will show that the trial court found more favor in the Appellant’s submissions as opposed to her submissions. According to her, it appears that the Appellants wanted the trial Magistrate to regurgitate their submissions for them to be satisfied.

15. She prays for dismissal of the appeal and enhancement of the award for loss of dependency to KShs.4,500,000/=.

Analysis and determination

16. This is a first appeal and it is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach it’s own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123**.

17. Having considered the grounds of appeal, the rival submissions and entire record, the only issue for determination, in my view, is whether the quantum of damages should be disturbed.

18. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In **Butt –vs Khan (1977)1KAR** it was held that;

“An appellate court will not disturb an award for damages unless it is 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.

19. From the judgment, it is evident that the Appellants’ submissions were considered. In fact, the trial Magistrate agreed with them that it would be speculative to use the multiplier approach which had been proposed by the Respondent. She even relied on the **Albert Odawa case (supra)** which had been cited by the Appellant. Their complaint about non consideration of their submissions and authorities is therefore misplaced.

20. The award for loss of dependency is the only one in dispute. The deceased's mother, **Pw1**, adopted her witness statement in which she stated that at the time of his death, the deceased was a young 12-year-old energetic boy of good health who was attending Kathuma primary school and had a high expectation in life. She also adopted her list of documents which included a death certificate, end term report forms and a letter from the head teacher as PEXB 5, 9 and 10 respectively.

21. The Appellants also complained that the trial Magistrate quoted authorities with low awards but gave a high award without giving reasons. In order to put things into perspective, the following extract from the judgment is relevant;

“Further, in the High Court at Meru Civil Appeal No. 18 of 2014 Daniel Mwangi Kimemi & 2 Others –vs- JGM & SMM, the court upheld the reasoning in Kenya Breweries Limited vs Saro (1991) Mombasa Civil Appeal No. 441 of 1990 (eKLR) where the Court held that, “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....in our view, damages are clearly payable to the parents of the deceased child irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution. In Abdullahi vs Githenye (1974) EA 110, the deceased girl was aged 7 years old and the court awarded Kshs.8,000/= in 1974, Maurice Miriti vs Feroze Construction Co. Ltd HCCC No....1979, Nrb (unreported), the deceased boy was in nursery school and the court awarded Kshs.70,000 in 1982. In the Saro case, the deceased minor was aged 6 years and the court awarded Kshs.100,000/= in 1990. In the matter appeal at Meru above stated, the court awarded Kshs.1,000,000/= to the deceased minor aged 9 years old in 2016. The court further held that damages for loss of dependency are not in question. They are awardable for every child whose life is cut short by the negligence of another in a road traffic accident.

In the case of Kenya Breweries Limited vs Saro (1991) Mombasa Civil Appeal No. 441 of 1990 (eKLR) the court held that....” in assessment of damages to be awarded in this sort of action, the age of the deceased is a relevant factor to be taken into account so that in the case of a 13-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 4-year-old, one who has not been to school and whose abilities are not yet ascertained. That we think is a question of common sense rather than law”

22. It is evident that the trial Magistrate indicated the years when the awards were made and in my view, it would be unreasonable to expect an award made in 1982 to remain the same in 2019. Indicating the year was sufficient reason to deviate from the awards.

23. I have also looked at the **MMG Case (supra)** where the Court stated as follows;

“15. I do not expect that the deceased at 12 years of age was too young for the expectations of his adult life to be purely speculative without hope of realization. He may not have become a doctor or some other high profile professional, but he appeared endowed with sufficient intelligence to at least attain a first general degree in college which would have enabled him to secure a reasonable job that would have probably earned him a monthly salary

(less statutory deductions) of about Kshs.45,000/00. By the time he would have secured employment, he would probably be 25 years old. His and the Plaintiff's expectations would have been that he would have a full working life to about 60 years of age. But the vagaries and uncertainty of life must be factored into the equation. We live in an imperfect and sometimes dangerous world full of disease, accidents, civil strife and war.

16. There is also the issue of the Plaintiff's age as we are essentially considering her loss of dependency upon the deceased. Although she did not give her age when testifying, she appeared about 40 years as I recall. A multiplier of 20 years would be just and I award the same.

17. I assess the Plaintiff's dependency upon the deceased would have been about one third (1/3) of his net earnings. I will therefore award Kshs.3,600,000/00 for lost years/lost dependency.”

24. Apart from the cases cited by the parties, I have looked at awards for loss of dependency in other cases as follows;

a) In **Chhabhadiya Enterprise Ltd & another –vs- Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu [2018] eKLR**, an award of Kshs.1,200,000/= for a 12 year old deceased was reduced to Kshs.700,000/=. A school report indicated that the deceased was a below average pupil and had a problem of chronic absenteeism from school.

b) In **Palm Oil Transporters & another –vs- W W N [2015] eKLR**, the appellate court upheld an award of Kshs.400,000/= for the estate of a 13 year old deceased.

c) 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** an award of Ksh 700,000/- was increased to Kshs. 1,200,000/= for a 16-year-old who was doing well in school at the time of demise.

d) In **Kitale Industries Ltd & another v Zakayo Nyende & another [2018] eKLR**, an award of Kshs.900,000/= was reduced to Kshs.600,000/= for the estate of a 12 year old deceased who was an average student in school.

25. In the instant case, P.Exh 9 is a report card for only one term which shows that the deceased scored 341 marks out of 500 and was position one. In his letter, the headteacher stated that the deceased was well disciplined and performed excellently in most of the subjects. In making the award, the trial Magistrate stated as follows;

“...this Court opines that in light of the age of the deceased minor herein and the deceased having been doing well in school by the time of his death and doing the best in the circumstances does hereby award Kshs.2,500,000/= which I find reasonable.”

26. In my view however, a report card for one term may not have been sufficient to make a conclusion on his performance in light of the fact that he was in class six and had been evaluated severally. The letter by the head teacher (EXB 10) puts weight to the report card (PBX 9). However, the trends from the above cases which were determined recently suggest that the award of Kshs.2,500,000/= for loss of dependency was on the higher side. Accordingly, it is my considered view that the award should be reduced to Kshs.1,800,000/=.

27. The award should therefore work out as follows;

Pain & suffering.....	Kshs .50,000/=
Loss of expectation of life.....	Kshs.100,000/=
Loss of dependency.....	Kshs.1,800,000/=
Special damages.....	Kshs.1,380/=
Funeral expenses.....	Kshs.50,000/=
Total.....	Kshs 2,001,380/=
Less 20%.....	Kshs <u>400,276/=</u>
Net award.....	Kshs 1,601,104/=

28. I set aside the judgment by the lower court and enter a judgment in favour of the Respondent in the sum of Kshs.1,601,104/=(**One million, six hundred and one thousand, one hundred and four shillings only**) with costs and interest.

29. The Appellants will get half the costs of the appeal.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong’udi

Judge