REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 74 OF 2019

ZACHARY ABUSA MAGOMA.....APPELLANT

VERSUS

JULIUS ASIAGO OGENTOTO &

JANE KERUBO ASIAGO(suing as the legal representatives

of the estate of Mercy BarongoAsiago).....RESPONDENT

(Being an appeal from the judgment of Honourable S.K. Onjoro Resident Magistrate, Kisii, delivered on 17th May 2019 in the original Kisii PMCC NO 287 OF 2016)

JUDGMENT

1. The Respondents herein are the legal representatives of the estate of Mercy Barongo Asiago Musyimi('*the deceased*') who died on the 14th May 2015 following injuries sustained in a road traffic accident. The deceased was a pedestrian walking along the Kisii – Keroka road on 14th May 2015 when she was hit by the appellant's motor vehicle registration number KAD 162N. The suit before the trial court was in respect of a claim for compensation for damages under both the **Fatal Accidents Act and the Law Reform Act** in which the Respondent claimed General Damages, Special Damages in the sum of Kshs 111,000/=, Costs and Interests.

2. In his statement of defence, the appellant stated that the deceased caused and or contributed to the accident through her own negligence by failing to give way to the motor vehicle, failing to maintain any or proper look out expected of a reasonable pedestrian and walking on the road while intoxicated.

3. Asenath Teresa Sostini (Pw3) who witnessed the accident adopted her witness statement dated 31st August 2017. Pw3 testified that on the material day while in the company of the deceased and Teresa Kwamboka she heard a loud screech from the motor vehicle registration No KAD 162N, realized that the vehicle was being driven at a high speed and heading towards their direction. She began running away from the motor vehicle which was carrying electric posts whereupon the vehicle overturned and fell on the deceased and Teresa Kwamboka. The two were pulled from underneath the vehicle but she soon realized that they had died.

4. The mother of the deceased, Jane KeruboAsiago (Pw1) testified that the deceased was studying food and beverage at Gusii Institute. She also told court that she spent a total of Kshs 111,000 on funeral expenses and on costs of obtaining letters of administration in respect to the deceased's estate. PC Caleb Osodo (Pw2) testified that the brakes of the motor vehicle had failed when it hit the deceased and another victim. He produced the police abstract in respect of the fatal injury road traffic accident.

5. The appellant on its part did not call any witness and closed their case without producing any evidence to controvert the evidence of the respondent.

6. The trial court found that the respondent had proved its case against the appellant and found the appellant 100% liable for the accident. The trial magistratemade the following award in the respondent's favour:

Pain and Suffering *Kshs 20,000*

Loss of expectation of life *Kshs 150,000*

Loss of Dependency *Kshs 2,000,000*

Special Damages *Kshs 111,000*

TOTAL ***Kshs 2,281,000***

7. It is the aforesaid award that has precipitated this appeal. The appeal is solely on the quantum of damages. The appellant in his memorandum of appeal contend that the trial court applied wrong principles in assessment of damages and also failed to consider his pleadings and submissions thus making an award that was excessively high and erroneous.

8. Directions were taken on 26th September 2019, for disposal of the matter by way of written submissions. Both sides have complied with those directions by filing their respective written submissions.

9. The appellant proposed an award of Kshs 10,000 under the head, pain and suffering would suffice and relied on the case of **Gakinya Karienye v Perminus Kariuki [2015]eKLR**. While citing the decision of **Charles Masoso Barasa v Chepkoech Rotich (2013) eKLR** they proposed that an award of Kshs 80,000 for loss of expectation of life. They also argue that in any case, where a suit is brought under **the Fatal Accident Act** and **the Law Reform Act** then the court must ensure that the estate of the deceased should not benefit twice. They cited the case of **Benedeta Kimani v Changwon Cheboi (2013) Eklr** and **Kemfro v AM Lubia, Olive Lubia (1982-1988) KLR 727** in support of their position. They proposed the multiplier approach calculated the award for loss of dependency as Kshs 5000 x 12 x 30 x 1/3 = 600,000/-. On special damages they advanced that the amount proved was Kshs 96,000 and not the awarded Kshs 111,000/-.

10. The respondent in their submissions supported the trial court's award of Kshs 2,000,000 in respect of the loss of dependency. On the award of special damages it was submitted that Pw1 produced a bundle of receipts totaling to Kshs 111,281/-. They advanced that no fault can be found in the trial's court reasoning of computing quantum and the appeal therefore lacks merit.

11. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus ***Bashir Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR*** thus;

> *"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."*

12. The appellant contend that the award by the trial court was erroneous as the court awarded damages under both the **Law Reform Act** and **Fatal Accident Act** and that amounted double compensation since the deceased's dependents are the same. The Court of Appeal while sitting at Nyeri in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR** said:

> *"[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise."*

13. I now turn to the award of Kshs 2,000,000/- made under the head loss of dependency. The appellant proposed computation using the multiplier approach while the respondent supported the global sum approach adopted by the trial court. In **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** where he held that:

> *"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and 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 ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."*

14. It is with no doubt that damages are clearly payable to a parent of a deceased child irrespective of the age of the child and their pecuniary contribution because the mere presence of a child in a family is itself a valuable asset which the parents are proud of and are entitled to keep intact. (*see* ***Kenya Breweries Limited vs. Saro [1991] eKLR***). In this case Pw1 testified that the deceased was a student at Gusii institute a fact similarly reflected on the deceased's death certificate. The deceased was schedule to do her final examination.

15. Having considered the circumstances and the peculiarity of this case, the trial court cannot be faulted for applying a global sum when computing damages for loss of dependency. What this court must now consider is whether the Kshs 2,000,000/- awarded for loss of dependency was excessive. The respondent proposed a global sum of Kshs 3,000,000/-. They cited the decision of **Maingi Celina v John Mithika M'itabari suing as the administrator of the estate of Erastus Kirimi Mithika (Deceased) [2018] eKLR** where the court awarded Kshs 1,000,000/- where it was proved that the deceased at the time of death was an 18 year old who was about to be admitted to the University. The appellant on the other hand proposed an award of Kshs 256,740 before the lower court after applying the multiplier

approach. The trial court in awarding Kshs 2,000,000 held as follows;

> *"In this present case the plaintiff has proposed a global sum of Kshs 3,000,000 relying on NRB HCC NO 814 OF 2007. PETER KIBOGORO WANJOHI (suing as the Administrator of LILIAN WANGUI WANJOHI (DECEASED) VS CHRISTINE WAKUTHI MURIUKI & ANO*
>
> *I note that in the said authority the deceased was a university student studying Education course and a global sum was awarded. In the present case the deceased was a college student at Gusii Institute studying a course on food and beverage."*

16. Having considered the cases cited before the trial court and taking into account that the deceased was about to sit for her final examination before graduating, I find the Kshs 2,000,000 awarded by the trial court was excessive and the same is substituted for an award of Kshs 1,500,000/- under the head loss of dependency.

17. The trial's court award for pain and suffering of Kshs 20,000/- is reasonable and I find no reason to interfere with the award. In the case of **Sukari Industries v Clyde Machimbo Jume HB HCCA No. 68 of 2015 [2016] eKLR** the court held as follows:

> *"On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."*

18. On loss of expectation of life, I find that the sum of Kshs100,000/= would be reasonable taking into account that the deceased was 28 years old at the time of her death. In **Paul Ouma v Sarah Akinyi and Monica Achieng Were (suing as the legal representative in the Estate of Paul Otieno Were (Deceased) [2018] eKLR** the court held as follows

> *"13. On loss of expectation of life, the Trial Court awarded Kshs. 140,000/= which the Appellant urged is excessive and should be reduced to Kshs. 70,000/=. The Respondent did not agree. The Appellant has not urged why on award of Kshs. 140,000/= is excessive for loss of expectation of life for the deceased who died at the age of 26 years. The death certificate exhibit 5 produced as exhibit reveals the deceased died at the age of 29years. I have considered the authorities relied upon and evidence on record and find an award of Kshs. 100,000/= for loss of expectation of life would be proper."*

19. It is trite law that special damages must be specifically pleaded and strictly proved. The respondent claimed for special damages amounting Kshs 111,000/- however I am constrained to agree with the appellant that the respondent only proved that they were entitled to Kshs 96,000 from the receipts availed before the trial court.

20. In view of the finding I have made, the appeal partially succeeds.I hereby set aside the decision of the trial Court on quantum by substituting it with an award of Kshs 1,716,000/= to the Respondent. The award is therefore tabulated as follows:-

Pain and Suffering	*Kshs 20,000*
Loss of expectation of life	*Kshs 100,000*
Loss of Dependency	*Kshs 1,500,000*
Special Damages	*Kshs 96,000*
TOTAL	***Kshs 1,716,000***

Dated and Delivered at KISII this 3rd day of August 2020.

A. K. NDUNG'U

JUDGE