



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 89 OF 2018

HASHI HAULIERS.....1ST APPELLANT

ERICK JUMA OUMA.....2ND APPELLANT

VERSUS

JKK (*suing as the administrator to the estate of*) JK.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable C. OBULUTSA,

Chief Magistrate delivered on 17th July, 2018 in Eldoret CMCC No. 105 of 2018).

JUDGMENT

1. **HASHI HAULIERS and ERICK OUMA** (the 1st and 2nd Appellants respectively) are aggrieved by the judgment of the Chief Magistrate Eldoret in which the magistrate gave judgment in favor of **JKK** (the Respondent) in the sum of **Kshs. 960,000/-** as general damages. The parties recorded a consent on liability in the subordinate court wherein the Appellant was to shoulder **80% liability against the Respondent's 20% liability**.

2. On Quantum of Damages, the subordinate court delivered its judgement as follows:-

Pain and suffering — Kshs 50,000/-

Loss of Expectation of Life — Kshs 100,000/-

Loss of Dependency — Kshs 1,000,000/-

3. The appellants being dissatisfied with the said judgment preferred an appeal before this court on grounds that:

i. The Trial Magistrate erred in law and in fact in the manner, method, mode and or calculations applied in assessing damages under Loss of Dependency/Lost years.

ii. The Trial Magistrate erred in law and in fact in failing to take into consideration that the deceased **JK** being a minor and allegedly a student was the one depending on his parents and or guardian and therefore damages under loss of dependency could not be awarded.

iii. The Trial Magistrate erred in law and fact in awarding damages of Kshs 1,000,000 as loss of Dependency/Lost years which amount was excessive in the circumstances of the case.

iv. The Trial Magistrate erred in law and in fact in awarding Kshs 50,000 under pain, suffering before death which amount was excessive in the circumstances of this case as death was almost instantaneous.

v. The Trial Magistrate erred in law and in fact in assessing General Damages at Kshs 1,200,000 which amount was/is manifestly excessive.

vi. The Trial Magistrate erred in law and in fact in failing to consider the Appellant written submissions on the issue of Loss of Dependency or at all.

vii. The Trial Magistrate misdirected himself wholly on the law regarding Principles to be applied in computing General Damages under the Law Reform Act and under the Fatal Accidents Act.

4. The Appellant prays that:-

(a) The Appeal be allowed.

(b) Judgement of the trial court in respect of quantum be set aside.

(c) This award on damages under loss of dependency, and damages on account of pain and suffering before death be re-assessed.

(d) Costs of this appeal be awarded to the Appellant.

5. The appeal was canvassed by written submissions, but the appellant never filed their submissions, and the respondent contends that the sum awarded was reasonable, taking into account the approach in the case of **Mwala Meagongo v Kenya Posts and Telecommunication HCCA Msa 16 of 199**, and it is argued that the deceased suffered a lot of pain and suffering before his death. The award of Kshs 50,000 is sufficed as just and adequate compensation to the deceased. Further, that the award of Kshs 50,000 is far more than reasonable and urged the Honorable court to uphold the same.

6. The respondent points out that the deceased was only 18 years of age and would have expected to live longer, and considering the deceased's age and that he had high prospects of staying longer in this world, the award of Kshs 100,000 was adequate compensation under this head of damages.

7. The trial court made an award of Kshs 1,000,000 as general damages. According to the death certificate, the deceased died aged 18 years and was in superb health. That this gives a projection that the deceased had a promising future coupled with the fact that he was a student nearing completion of his high school.

8. It is contended that by reason of the untimely death, the deceased's life was shortened and his estate suffered loss and damages and the court's adoption of the award of Kshs 1,000,000 as a global award was reasonable in the circumstances. The respondent relied on the case on **NAIROBI HCCC NO. 1525 OF 2002 MOHAMMED A. ABSI & ANOR VS WILDON W. WARUTA & ANOR** the minor was aged 10 (ten) years at the time of demise and the court awarded a sum of Kshs 720,000 as damages for lost years.

9. The issue main issue for determination is whether the awards of damages by the trial court under the different heads were based on any known factors or principles of law.

10. The awards of damages for pain and suffering and for loss of expectation of life with respect to a deceased person are awarded under the **Law Reform Act** as they are not provided for under the **Fatal Accidents Act**.

11. As regards damages for pain and suffering, the principle is that this head of damages is recoverable if the deceased underwent pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life.

12. In **Rose vs Ford, (1937) AC 826** it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in **Benham vs Gambling, (1941) AC 157** it was further held that only moderate awards should be granted under this head for the following reasons:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.”

13. In **Florence Mumbua Ndo & Francis Kioko (suing as the Administrators of the Estate of the Late Alfred Safari) v Ezra Korir Kipngeno & another [2017] eKLR** the court stated that:-

“the generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/- to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death”.

14. In the present appeal PW1 on cross examination, testified that the deceased died at the scene. The generally accepted principle therefore is that very nominal damages will be awarded if the death followed immediately after the accident. The conventional figure for pain and suffering the awards range from Ksh.10,000/- see **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR**. In my view the award of Kshs 50,000/= for pain and suffering was excessive and a sum of Kshs 10,000 was appropriate.

15. The deceased in the present appeal had not earned any income that would have guided the Court in determining a multiplicand and resultant multiplier, and the best the trial Court could do in the circumstances is award a global amount.

16. *Florence Mumbua Ndoe & Francis Kioko (suing as the Administrators of the Estate of the Late Alfred Safari) v Ezra Korir Kipngeno & another (supra)* Kshs 700,000/= was awarded for loss of dependency. Taking into account inflationary trends, the award of Kshs 960,000 as a global award in the present appeal was reasonable in the circumstances.

17. In my view, the rationale and factors considered in making the award was sufficient in this cause as the award is not inordinately high taking into account the fatal injuries he sustained. There was no error in principle or evidence presented at the trial as to warrant any interference of the trial court's decision on this limb. Consequently, the appeal succeeds in part only to the extent of the award made for pain and suffering which is set aside, and substituted with the sum of Kshs. 10,000/-The rest of the appeal fails. The appellant shall bear $\frac{2}{3}$ of the costs, while the respondent shall bear $\frac{1}{3}$ of the costs of the appeal.

Delivered and dated this 29th day of October 2020 at Eldoret

H. A. OMONDI

JUDGE

Mr Matekwa holding brief for Mwinamo for respondent