REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 76 OF 2019

AZAN ENTERPRISES LTD.....APPELLANT

VERSUS

ZUHURA SYONGIT ROBERT (Legal representative of the Estate of

ABUBAKAR ABDALLA MWANGI (DECEASED).....RESPONDENT

(Being an appeal from the Judgment by the Learned Resident Magistrate Hon. S. D. Sitati

in Civil Suit No. 435 of 2018 in the Senior Principal Magistrate Court at Kilifi

delivered on the 30th September 2019)

JUDGMENT

The appeal before me is against the award of damages by the trial Court in the sum of Kshs.900,000/= for pain and suffering subject to contributory negligence of 15%. The Judgment was delivered on 30th September 2019.

Aggrieved by the Judgment, the appellant filed a memorandum of appeal on the 7th of October 2019. His appeal is mainly on the trial Court's award on quantum. The grounds of appeal are that:

1). The Learned trial Magistrate erred in failing to adequately consider all the evidence before him and the written submissions filed by counsel for the applicant.

2). The Learned trial Magistrate erred in fact and in Law in failing to consider conventional awards in cases of similar nature thereby awarding exorbitant and inordinately high damages without regard to the laid down principles and without giving any legal basis for the sums awarded under the various heads.

3). The Learned trial Magistrate erred in Law and in fact in assessing the claim for loss of dependency/loss of life and awarding Kshs.900,000/= without giving any adequate reason or reasons for doing so.

4). The Learned trial Magistrate erred in Law awarding to the plaintiff the mother of the deceased Abubakar Abdalla Mwangi aged 6 at the time of his death the sum of Kshs.900,000/= for loss of dependency since the said sum is inordinately high considering similar awards in respect of minors aged 6 years.

5). The Learned trial Magistrate erred in Law and in fact in awarding damages under the Law Reform Act as well as under the Fatal Accidents Act against the well laid down principles of Law requiring the deduction of damages awarded under the Law Reform Act from the total award.

6). The Learned trial Magistrate erred in not deducting the sum of Kshs.100,000/= by him to the plaintiff for loss of expectation of life from the figure of Kshs.900,000/= awarded by him to the plaintiff for loss of dependency/lost life.

7). The Learned trial Magistrate erred in making awards under the various heads by failing to take into account that the general damages awarded to the plaintiff would be invested to earn interest. If the Learned trial Magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the plaintiff under each head.

8). The Learned trial Magistrate erred in Law in failing:

(i). To appreciate the significance of the various factors that emerged from the evidence of the plaintiff's witnesses.

(ii). To consider or properly consider all the evidence before him and or

(iii).To make any or any proper findings on the aspect of quantum of damages on the evidence before him.

9). The Learned Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the defendant/applicant

The appellants in their grounds of appeal fault the trial Magistrate and state that the award is excessive, that the trial Court failed to consider their submissions and appreciate principles applicable in assessment of damages and thus arrived at an erroneous award. This Court has been urged to set aside and/or review the said award. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions.

Brief facts of the Case

The respondent commenced this suit vide the plaint dated 30th November 2018 and filed on the 11th December 2018 where she sought for Judgment against the defendant under the Fatal Accidents Act and the Law Reform Act for general damages and special damages of Kshs.2,725/=. The suit is brought on behalf on the estate of the deceased, a minor aged 6 years old, who died on 28th February 2018 when motor vehicle Registration No. KCG 774C belonging to the defendant hit him at Vipingo area along Kilifi-Mombasa. The defendant filed his defence and deniability.

During trial parties recorded consent on liability in the ratio of 85:15 in favor of the plaintiffs and the Court proceeded to asses' quantum. Judgment was delivered by the trial Court on 30th September 2019 awarding the plaintiff. Total damages of Kshs.885,381.25/=, being Kshs.1,625.00/= on special damages, Kshs.40,000.00/= for pain and suffering, Kshs.100,000.00/= for loss of expectation of life, Kshs.900,000.00 for loss of dependency under both the Law Reform Act and the Fatal Accidents Act.

The Learned Magistrate assessed general damages as follows:

a). Pain and Suffering	**Kshs. 40,000.00**
b). Loss of expectation of life	**Kshs. 100,000.00**
c). Loss of dependency	**Kshs. 900,000.00**
d). Special damages	**Kshs. 1,625.00**
TOTAL	**Kshs.1,041,625.00**
Less % of liability	**Kshs. 156,243.75**
Total	**Kshs. 885,381.25**

This being the first appeal, I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified **(See Selle & Another v Associated Motor Boat Company Ltd & Others {1968} EA 123)**. The parties filed written submissions.

The Appellant's Submissions

The appellant's submission is on the basis of the assessment of the quantum of damages. It was the appellant's submission that under the Law Reform Act, Chapter 26 Laws of Kenya, the trial Court awarded Kshs.100,000.00/= for loss of expectation of life and Kshs.50,000.00/= for pain and suffering and same is not contested.

However, the appellants' submits that the same should be deducted from the full award of general damages since the beneficiaries under the Fatal Accidents Act and the Law Reform Act would ordinarily be the same hence this would amount to double compensation.

They cited the cases of; **Nance v British Columbia Electric Railway Co. Ltd (4) {1951} A. C. 601. Henry Ilanga v Manyema Manyoka {1961} EA 705 (CAD). Cecilia W. Mwangi & Another v Ruth Mwangi {1977} eKLR, Tayab v Kananu (1982-88) 1 KAR 90, Sammy Kipkori Kosgei v Edina Musikoye Mulinya & Another {2017} eKLR, Shabani v City Council of Nairobi {1985} KLR 516.**

Pain and Suffering

On this the appellant submitted that the generally accepted principle is that very nominal damages are awarded under this head if the death followed immediately after the accident and awards range from Kshs.10,000.00/= to Kshs.100,000.00/=. It was their submission that the deceased died a few hours after the accident and such the sum of Kshs.20,000.00 would be adequate compensation under this head.

They relied on the case of **Abubakar Abdalla Salim v Tawfiq Bus Services & TSS Bus Service {2013} eKLR**

> **"where the Court awarded Kshs.20,000.00 under this head for a deceased child aged nine (9) years who was travelling in a motor vehicle that plunged into a river and the deceased died as a result of drowning."**

They also cited the cases of **James Gakinya Karienye & Another (Suing as the Legal representative of the Estate of David Kelvin Gakinya (Deceased) v Perminus Kariuki Githinji {2015} eKLR**

> **"where the Court awarded Kshs.10,000.00 for pain and suffering 'being a convectional figure for the death that occurred immediately after the accident, under the Law Reform Act."**

Loss of expectation of life

They submitted that as the deceased was alleged to be 9 years old at the time of death, a pupil, Kshs.100,000.00 would suffice as reasonable compensation under this head. They relied on the case of **Charles Masoso Barasa & Another v Chepkoech Rotich & Another {2014} eKLR** as well as **Satwidner Singh Bhogal v Satwinder Kaur Benawr & 2 others {2004} eKLR** where the deceased was a young girl with bright future was awarded Kshs.70,000.00 as general damages for the loss of expectation of life.

Loss of Dependency

Under this head it was the appellant's submission that the Learned Magistrate failed to give any adequate reason how he arrived at the sum of Kshs.900,000.00 as fair and reasonable compensation for the award of general damages for loss of dependency. They reiterated that the sum of Kshs.375,000.00 would suffice as compensation under this head.

They relied on the cases of:

> **1. Benard Odhiambo Ogecha (Suing as the Legal representative and Administrator of the Estate of the late Oscar Onyango Ogecha {2014} KLR** where the Court substituted an award of Kshs.500,000.00 for an award of Kshs.350,000.00, where the deceased was aged 14 years.
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> **2. Chhabhadiya Entreprise Ltd & Another v Gladys Mutenyo Bitali (Suing as the Legal the Administrator and Personal Representative of the Estate of the late Linet Simiyu) {2018} eKLR** where the Court substituted and award of Kshs.1,200,000.00 for an award of Kshs.700,000.00, where the deceased was a class 4 pupil.
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> *3.* **Kibet Langat & Another v Miriam Wairimu Ngugi** *(Suing as the Administrator of the Estate of the Daniel Mwiritu Ngugi) {2016} eKLR* where the Court upheld the award of Kshs.720,000.00, where the deceased was a minor aged 14 years.
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> **4. Chen Wembo & 2 others v I.K.K. & Another (Suing as the Legal Representatives and Administrators of the Estate of C.R.K. (Deceased) {2017} eKLR** where the Court substituted and award of Kshs.1,680,000.00 for an award of Kshs.600,000.00, where the deceased was aged 12 years.

It was also their submission that this Court be guided by the Court's decision in the case of **Cecilia W. Mwangi & Another v Ruth Mwangi {1977} eKLR** where the Court cited with approval the case of **Lim Pho Cho v Camden and Islington Area Health Authority {1979} 1 ALL ER 332**

The Respondent's Submission

The respondent opposed the appellant's appeal and submitted on grounds 1, 2, 3 and 4 together, grounds 5 and 6 together, ground 7 on its own and grounds 8 and 9 together. Regarding grounds 1, 2, 3 and 4 the respondent submitted that the Learned Magistrate did not err in fact or in Law in awarding a sum of Kshs.900,000/= under loss of dependency/lost years and Kshs.40,000/= for pain and suffering. She relied on the authorities in the cases of **S.M.K. v Josephat Nkari Makaga Civil Appeal No. 66 of 2011** where an award of Kshs.800,000/= was given on appeal under the head of loss of dependency in 2017 for a child aged 6 years and **Civil Appeal No. 18 of 2014 Daniel Mwangi Kimemi & 2 others v J.G.M & S.M.M** where an award of Kshs.1,530,000/= given for a 9 year old was revised downwards on appeal to Kshs.1,000,000/= in 2019. They further, submitted that the award was not excessive and cited **Civil Appeal No. 65 of 2017 Francis Ndung'u Wambui & 2 Others v Julius Muchiri Muriuki.**

On grounds 5 and 6 they submitted that the appellant did not invite the trial Court to make any deductions and as such the Court cannot be faulted for that as it was not raised at all at Trial. They further stated that there was no Law requiring Mathematical deductions and relied on the authority in **Eston Mwirigi Ndege & Anor v Damaris Kariari Civil Appeal No. 73 of 2017.**

On ground 7 of the appeal they submitted that there was no law that provided that Courts should take into account the fact that the general damages in fatal cases involving minors will be invested in an interest earning account when making their awards.

On grounds 8 and 9 of the appeal it was the respondent's submission that the principles upon which an appeal Court can interfere with the

award of damages was settled in the case of **Butler v Butler CA 49 of 1993** and that the appellant had not demonstrated that the trial Magistrate took into consideration matters he ought not to have taken into consideration in making the award. They submitted that the appellant had not challenged the trial Court's decision on liability and thus cannot challenge the decision where it does not suit and accept it where it suits.

Finally, they submitted that the trial Court did not disregard the appellants nor the respondent's submissions which is evidenced by the fact that the Learned Magistrate did not award Kshs.1,000,000.00/= for loss of dependency and Kshs.50,000/= for pain and suffering as submitted by the respondent but awarded Kshs.900,000/= and Kshs.40,000/= respectively.

Finally, the respondent submitted that no evidence or legal principle has been placed before the Court by the appellant to fault the Judgment of the trial Court and urged this Court to find that the appeal lacked merit and to dismiss the same with costs to the respondents.

Analysis and Determination

First off, the respondents have raised a procedural issue in terms of Section 79 (G) of the Civil Procedure Act. The Learned Counsel for the respondent humbly submits that the Memorandum of Appeal dated 22nd January 2020 and filed in the High Court at Malindi on the same day has been filed out of time without any leave of the Court and should consequently be dismissed with costs. Nevertheless, the evidence on record preponderates heavily against the respondents' position. As accurately pointed by the Learned counsel for the appellant, Order 50 Rule 4 of the Civil Procedure Code Act addresses the issue as regards when the Court's time does not run. It envisaged therein that:

> **"Except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the Thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act."**

I note that the impugned Judgment herein was entered on the 17th December, 2019 which amounts to three days before time stopped running. The record shows that the appeal herein was filed on the 22nd January, 2020, which counts up to eight days after the time resumed running excluding Saturdays and Sundays. In that regard, the appeal was filed within the 30 days' time frame. Consequently, the respondents' case on this limb failed.

Turning to the question of whether the appeal ought to be stuck out for the failure by the appellant to apply for a certified copy of the decree appealed against and failure to file the said decree as part of the record of appeal. The Learned counsel for the respondents' contention is that the degree is an integral part of an appeal and without it, the appeal itself doesn't exist. Both counsels placed reliance in Order 42 (13)(4) (f) which provides that:

> **"Before allowing the appeal to go for hearing the Judge shall be satisfied that the following documents are on the Court record and that such of them as are not in the possession of either party have been served on that party, that is to say:-**
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> **(a). the memorandum of appeal;**
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> **(b). the pleadings;**
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> **(c). the notes of the trial magistrate made at the hearing;**
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> **(d). the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
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> **(e). all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
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> **(f). the Judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**
>
> **Provided that –**
>
> **(i). a translation into English shall be provided of any document, not in that language;**
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> **(ii). the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

The Learned counsel for the respondents' further relied on the case of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo {2016} eKLR** in which the Learned Judge held that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate Court; without the decree or order appealed from there is, in effect, no appeal. The Court further propounded that there was no evidence that the appellants had applied for the decree appealed against. The Learned Judge went on to find it was a mandatory requirement, procedural provisions and the omission of the decree in the record of appeal fatal.

Conversely, appellant holds the view that the same doesn't make it mandatory to attach both the Judgment and the decree hence the respondents' contention ought not to hold water. The Learned counsel for the appellant has sort refugee in the case of **Nyota Tissue Products v Charles Wanga Wanga & 4 others {2020}** which I am also inclined to agree with. The Learned Judge while declining an

invitation to struck out a matter which bore similar circumstances as the case at hand, held that:

> **"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the *"judgment, order or decree appealed from"* and does <u>not</u> make it mandatory to attach the Judgment and the decree. The Record of Appeal herein attached the Judgment of the trial Court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."**

I share similar sentiments with the Learned Judge in the foregoing authority cited by the counsel for the appellant. To my mind, the use of the conjunction **"or"** suggest that litigants are not mandatorily obliged to attach both the Judgment and the decree. Further, it is my view that a decree for purposes of an appeal being an extract of the decision appealed against, it would not be said to be an improper procedure when a litigant attaches the Judgment appealed against and omits to do the same with the decree of the Court. I have also looked into the definition of a **"Decree"** as provided in terms of Section 2 of the Civil Procedure Act, Cap 21, Laws of Kenya, it is defined as under:

> **"decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91 but does not include – (a) any adjudication from which an appeal lies as an appeal from an order; or (b). any order of dismissal for default: provided that, for the purposes of appeal, "decree" includes Judgment, and a Judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such Judgment may not have been drawn up or may not be capable of being drawn up."**

The proviso of the foregoing piece of Law seems to suggest that in the event that there have been hiccups in acquiring a certified or formal decree or in the absence of the same due to its non-existence, the Judgment singly suffices since it encapsulates all the contents of a decree. Thus, in my view supports the viewpoint that Order 42 Rule 13 (f) of the Civil Procedure Rules does not make it mandatory to attach the Judgment and decree.

I take it that it would be contrary to the spirit and the later of the Constitution of Kenya 2020, to strike out the appeal in these circumstances. Article 159 (2) (d) provides for the principle of substantive justice without prioritizing procedural technalities. I, therefore, decline to grant the respondents' the order that the appeal be struck out for having omitted to include the decree in the record of appeal and hold that the Judgment appealed against alone as attached by the appellant fulfils the purpose of the decree in question.

The discretionary jurisdiction of the first appellate Court being judicial is to be exercised on the basis of evidence and sound legal principles. **(See the case of Shah, Paul v E. A. Cargo Handling Services Ltd {1974} EA 75).**

I stand by the Court of Appeal for **East Africa in Peters v Sunday Post Limited {1958} EA 424 where Sir Kenneth O'Connor** stated as follows:-

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1) {1947} A. C. 484. "My, Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of Law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of Law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."**

The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> **(i). First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
>
> **(ii). In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and**
>
> **(iii). It is not open to the first appellate court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.**

These three principles are well settled and are derived from various binding and persuasive authorities including: **Mary Wanjiku Gachigi v Ruth Muthoni Kamau {Civil Appeal No. 172 of 2000} Tunoi, Bosire and Owuor JJA, Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another {Civil Appeal No. 345 of 2000} O'Kubasu, Githinji and Waki JJA, Virani T/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd {Kisumu HCCC No. 88 of 2002}.**

With this in mind, I have analyzed the evidence as this Court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination by this Court in my view:

> **a). Whether the trial Court acted on wrong principles of Law in making the award of general damages under the different heads; and**
>
> **b). If (a) above is answered to the affirmative, which sum would be sufficient compensation.**

a). Whether the trial Court acted on wrong principles of Law in making the award of general damages under the different heads

In dealing with an appeal on quantum I stand guided by the decision of the **Court of Appeal in Bashir Ahmed Butt v Uwais Ahmed Khan {1982-88} KAR 5** where the Court held that;

> **"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 the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

In the case of **Savanna Saw Mills Ltd v George Mwale Mudomo {2005} eKLR** the Court stated as follows:

> **"It is the law that the assessment of damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court simply because it would have awarded a different figure if it had tried the case at the first instance…"**

Further, in the case of **Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142 of 2003** the Court of Appeal held that:

> **"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate Court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate Court would award but whether the lower Court acted on the wrong principles." (See Mariga v Musila {1984} KLR 257)**

Furthermore, in the case of **Gitobu Imanyara & 2 others v Attorney General {2016} eKLR**, the Court of Appeal held that:-

> **"…. It is firmly established that this Court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of Law, or that the amount awarded was so extremely high or so very low as to make it, in the Judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie {1941} 1 ALL ER 297."**

In the case of **Gicheru v Morton & Another {2005} 2 KLR 333** the Court stated:

> **"In order to justify reversing the trial Judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the Judge acted upon some wrong principle of Law, or that the amount awarded was so extremely high or so very small as to make it, in the Judgment of the Court, an entirely erroneous estimate of the damage to which the appellate was entitled."**

The foregoing sets out of the Law and the guiding principles which I am bound to apply in the determination of this appeal. I shall set out to determine this question under the three different headings proposed by the applicant which also form part of his grounds of appeal;

> **(a). Pain and suffering**
>
> **(b). Loss of dependency**
>
> **(c). Loss of expectation of life**

Pain and Suffering

In the case of **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another {2017} eKLR** the Court stated that:

> **"As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are**

recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death…. 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."

It is evident in this case according to the deceased's Death Certificate that the minor passed on at the hospital and that he suffered hemorrhagic shock, a ruptured liver and right leg as well as a traumatic head injury. As such it is clear that the minor passed on soon after the accident after enduring a lot of pain. It is generally accepted principle is that very nominal damages are awarded under this head if the death followed immediately after the accident and awards range from Kshs.10,000.00/= to Kshs.100,000.00/= **(See Nyamweya J in Hyder Nthenya Musili & Another v China Wu Yi Limited & Another {2017} eKLR)** with higher damages being awarded if the pain was prolonged before death.

Under this heading the Learned Magistrate awarded Kshs.40,000.00/= subject to the plaintiff's ratio of contributory negligence. I am inclined to agree with the Learned Magistrate on this and find no basis on the appellant's contention that an award of Kshs.20,000.00/= would have sufficed in similar cases.

Further, it must be noted that the range is from Kshs.10,000.00/= to Kshs.100,000.00/= Ibid under this heading meaning that the Court preserves the discretion to award and in my opinion the award by the trial Court was based on the circumstances of the case as the minor agonized for a few hours before he passed on.

Consequently, I uphold the Judgment of the trial Court under this heading and award the same Kshs.40,000.00/= subject to the respondent's ratio of contributory negligence of 15%.

Loss of dependency and loss of expectation of life

In **Rose v 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 v Gambling, {1941} AC 157** it was 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 this 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 loss of future pecuniary prospects."

The deceased in this case from the evidence adduced in the trial Court was a 6 year old minor with a promising future and as such the respondent is entitled to compensation under this head. This exercise of awarding damages for lost years in respect of a minor deceased person always poses a challenge to the Courts as it involves a fair amount of speculation by the Court's **(See Chen Wembo & 2 others v IKK & Another (suing as the legal representatives and administrators of the estate of CRK (Deceased) {2017} eKLR para 15)**. In the case in **Oshivji Kuvenji & Another v James Mohammed Ongenge {2012} eKLR, Ngenye J** observed in that:

"It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor."

However, I stand guided by the principle that there no golden rule in the assessment of damages in respect of a deceased minor. The heads, global or mixed approaches have been applied in superior Courts. what is beyond doubt is that irrespective of the age of a deceased child, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependants. **(See Kenya Breweries Limited v Saro {1999} KLR 408 & Sheikh Mushtaq Hassan v Nassan Mwangi Kamau Transporter & 5 others {1986} KLR 457 {1986} eKLR).**

For this I rely on the Court's decision in the case of **Kenya Breweries Ltd v Saro {1981} eKLR 408,** where the Court held that:

"the age of a child must be considered in assessment of damages."

The appellant submitted that Kshs.100,000.00 would suffice as reasonable compensation under this head and argued that the Learned Magistrate erred in Law and in fact in awarding damages under the Law Reform Act as well as under the Fatal Accidents Act against the well laid down principle of Law requiring the deduction of damages awarded under the Law Reform Act from the total award.

On this, I find no basis to the appellant's submission that the Learned Magistrate ought to have deducted the damages awarded under the Law Reform Act from the total award and I rely on the authority in the case of **Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v NIA (minor suing through her next friend IAIS) & 3 Others {2018} eKLR** where the Court stated that:

"there is no requirement that the award made for loss of expectation of life has to be deducted from the award made for

loss of dependency. All what the Court has to do is to take into consideration the award made for loss of expectation of life when making awards for loss of dependency."

I see no reason as to why the trial Court should deduct the damages for loss of expectation of life from the award under the loss of dependency heading. The only limitation in awarding damages under both Acts is that the Court should avoid double compensation or duplication of the award as the claim on behalf of the estate of the deceased is, ***"in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act."*** For this assertion, I rely on the authority in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited {2015} eKLR** where the Court of Appeal held that:

> **"19. Finally on the third issue, Learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two Courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law."**
>
> **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 there are only awarded under the Law Reform Act, hence the issues of duplication does not arise.**
>
> **25. The words 'to be taken account' and 'to deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in Law or otherwise for him to engage in a mathematical deduction."**

In view of the above there is no legal requirement for the Court to deduct the amount awarded under the Law Reform Act from the award made under the Fatal Accidents Act. The argument by the advocates for the appellant on the issue does not stand.

As such I see no need to vary the sums as awarded by the Learned Magistrate as the same is not considered since the appellant's submission is only focused on the idea that the same should be deducted. That the words used in Section 4 (2) of the Fatal Accidents Act are ***'taken into account"*** should be in my opinion taken to mean that the same ought to be taken into account and not necessarily deducted. **(Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & Another {2019} eKLR).**

The duty of the respondent was to prove that the deceased was a minor with a bright future. Hence there is no reason why the trial Court could not make the award he gave taking into consideration age of the deceased. In calculating the damages for the loss of dependency, the loss to the estate is what the deceased would have been likely able to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. **(See Hassan v Nallia Mwangi Kamau Transporters & 4 others {1986} KLR 457).**

I do not think the award by the trial Magistrate is unreasonable, for there is no hard and fast rule not to use a dependency ratio. It is sufficient if the Judgment of the trial Court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in Law or otherwise for the Court to engage in a mathematical deduction.

It is thus my opinion that it has not been shown that the trial Court used the wrong principles in making the awards for pain and suffering, loss of dependency and loss of expectation of life. The fact that this Court may have made a different award if it had tried the matter itself is not a ground for setting aside the award.

b). Which sum would be sufficient compensation?

Having looked at all eh evidence before me it is clear that trial Court made reference to several other decided cases before arriving at its assessment of damages. The Court also took inflation into account. I find that the authorities relied upon by both counsels were considered and the Learned Magistrate expressed himself on the same by stating that in his opinion the cases relied upon by the defendants were older authorities. I am inclined to agree with him on this. In the case of **Gammell v Wilson {1981} 1 ALL ER, 578** the Court stated that:

> **"…. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, in either in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr. Picket, will have no difficulty. But in all cases, it is a matter of evidence and a reasonable estimate based on it."**

There can be no dispute that the estate of a deceased minor is entitled to damages for pain and suffering, loss of expectation of life, funeral expenses etc, under the Law Reform Act. The issue in this case is whether a global sum would have sufficed or the trial Court was correct in awarding damages under both the Law Reform Act and the Fatal Accident Act. In this issue, there are instances where the Courts have

awarded a global sum to a minor accident victim and there are instances where awards have been made under both statutes. Further, this exercise of awarding damages for lost years in respect of a minor deceased person necessarily poses a challenge to Courts, involving as it does a fair amount of speculation. The award of damages in respect of a deceased minor is not *ipso facto* evidence that the award is excessive or erroneous **(See Kenfro Africa Ltd T/a Meru Express Services 1976 & Another v Lubia & Another (No. 2) {1987} KLR 30).**

It is therefore, my considered view that the total award of Kshs.885,381.25/= the circumstances of this case was not excessive.

Determination

Having considered the evidence adduced before the trial Court and the authorities contained in the submissions filed by respective counsels, I am of the view in the circumstances surrounding the award, there is no error of fact or Law or misapprehension of the applicable principles by the Learned trial Magistrate to interfere with the award.

When I scrutinize and evaluate the record, I am satisfied that the Learned trial Magistrate correctly exercised his judicial discretion and applied his mind to the principles on the award with regard to general damages for pain and suffering, loss of expectation of life and loss of dependency. I further quote and rely on the Court of Appeal's assertion in the case **Kenya Breweries Limited v Saro {1991} KLR 408:-**

> **"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 African 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 parent 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."**

I think as a whole that there are no grounds for this Court to differ with the Judgment of the trial Court. As regards the claim on general damages the trial Court Judgment remains intact and is hereby affirmed. The respondent will have the cost of the suit and of this appeal together with interest and the total sum awarded.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Gor advocate for the appellant

2. Mercy Ngugi advocate for the respondent