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)

Coram: Hon. Justice R. Nyakundi

C. B. Gor & Gor advocates for the appellant

Mercy Ngugi advocate for the respondent

JUDGMENT

This is an appeal against an award of damages of Kshs.885,385.25/= in the Judgment delivered on 30.9.2019 by **Hon. Sitati** in CMCC No. 435 of 2018.

In the present case, the Plaint filed by the respondent had alleged that on 28.2.2018 the deceased was lawfully walking along the Kilifi-Mombasa Road at Vipingo when motor vehicle registration number KCG 774C was negligently driven, managed by the authorized agent or driver. That it veered off the road and fatally hit the deceased. It went on to allege that the accident could not have occurred save for the negligence on the part of the defendant's agent, driver or servant.

The respondent also pleaded the doctrine of *res ipsa loquitor* that formed the basis of the claim under the Law Reform Miscellaneous Act and the Fatal Accidents Act. In the aforesaid Judgment of the trial Magistrate liability is apportioned at **15%:85%** between the parties.

On appeal the Learned counsel **Mr. Gor** submitted that the Learned trial Magistrate erred in assessing the various limbs of damages sought by the respondent. In this context Learned counsel contends that there was no plausible inference drawn from similar awards. In attaching this findings **Mr. Gor** relied heavily on the decided cases of Sammy **Kipkorir Kosgei v Edina Musekoye Mulanya {2017} eKLR, Abubakar Abdalla Salim v Tawfiq Bus Services Ltd {2013} eKLR, James Gakinya Kunenye & Another (Suing as legal representative of the Estate of David Kibui Gakinya v Perminus Githinji {2015} eKLR.**

The Learned counsel also said in so far as loss of expectation of life award is concerned, the evidence and exercise of discretion led to an erroneous assessment under this head. He placed reliance on the cases of **Charles Masoso Barasa v Chepkoech Rotich {2014} eKLR, Sathinder Singh Bhogal v Sathinder Kuur Behawra & 2 others {2004} eKLR.** It appears from the submissions that Learned counsel rooted for an award of Kshs.70,000/= for loss of expectation of life.

Finally, Learned counsel submitted that in so far as an award on loss of dependency, the Learned trial Magistrate erred in admitting evidence which he argued was not fortified with the existing principles and similar awards. The position of Learned counsel was to invite the Court to rely on the cited cases of **Benard Odhiambo Ogecha suing as Brother and legal representative and Administrator of the Estate of the**

deceased, Kibet Langat & Another v Miriam Wairimu Ngugi {2016} eKLR, Chei Wembo & 2 others v IKK & Another Suing as the Legal representative of CRK {2017} eKLR, Cecilia W. Mwangi v Ruth Mwangi {1977} eKLR. Under this sum of money awarded Learned counsel submitted that the amount assessed of Kshs.900,000/= was inordinately high which ought to be interfered with by an appellate Court.

Analysis and Determination

In the instant case all that this Court is asked to do is to inquire whether the Learned trial Magistrate in exercise of discretion took into account irrelevant factor or in anyway misdirected himself in applying the Law rendering the award complained of erroneous? It is not in dispute that the principles that guide the Court sitting on appeal are well settled.

On a passage in the Judgment of the Court in **Henry Hidaya Ilanga v Mauyema Manyaka {1961} 1EA 701** the Court held:

> ***"In considering this question, I apply the rule laid down by the privy council in Nance v British Columbia Electrical Railway Co. Ltd (4) {1951} AC 601 at 613 "When discussing the principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge." "The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or a jury, the appellate Court is not justified in substituting a figure of its own, for that awarded below supply, because it would have awarded a different figure if it had tried the case, in the first instance. Even if the tribunal of first instance was a judge, sitting alone before the appellate Court can properly intervene. It must be satisfied either that the Judge in assessing damages, applied a wrong principle of Law, as by taking into account some irrelevant factors or leaving out of account some relevant one or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage*** **(Flint v Lwell {1935} 1KB 354)"**

At this point it would, I think, be appropriate to quote from the speech of **Lord Sumner** in the case of **R v Nat. Bell Liquors Ltd {1922} 2 A.C. 128:**

> ***"The appellate jurisdiction also sees to it that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in doing so, it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review of appeal is confirmed….." underlined emphasis mine."***

On the principles enunciated above it has been recognized for a long time past that Courts are empowered to look into the question of awarding damages within the bounds of the various parameters in line with case specific evidence the question therefore arises whether appellate Courts can vary or set aside a Judgment of a trial Court basically if it were the Court adjudicating the matter it could have arrived at a different award altogether. For instance, in the comparative jurisprudence in **Benham v Gambling {1941} 1 ALL ER** the Court held as follows on this legal task of assessment of damages.

> ***"I am the opinion that the right conclusion is not to be reached by applying what may be called statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics. The figure is not necessary one which can be properly attributed to a given individual. In any case, the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may in some cases, be a relevant factor, for example, in extreme old age the brevity of what life may be left may be relevant – but as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put a value on the years. It would be fallacious to assume for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures all that makes a life fitful fever to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost. Asquith J appreciated this view as his Judgment shows but, I think that, ……. Legal of the large amounts awarded in some previous cases in respect of quite young children, the figure arrived at was unduly swollen by the consideration that the child might otherwise have had many years of life before it. The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics; that in the Judgment of a well of Law, but, in view of the earlier authorities, we must do our best to contribute to its solution. The Judge observed that the earlier decisions quoted to him assumed.***

> ***"That human life is, on the whole good." I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance to a positive measure of happiness, of which the victim has been deprived by the defendants negligence. If the character or habits of the individual were calculated to lead him to a future unhappiness or despondency, that would be a circumstantial justifying a smaller award. It is significant that, at any rate in one case of which we were injured, the jury refused to award any damages under this head at all. as Lord Wright said in Rose v Ford – special cases suggest themselves where the termination of a life of consistence pain and suffering cannot be regarded as inflicting injury or at any rate, as inflicting the same injury as in more normal cases. I would further lay it down that, in assisting 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 is not subjective, and the right sum to award depends on an objective estimate 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 lip, not loss of future pecuniary prospects. The main reason, I think may the appropriate figure of damages should be reduced in the case of a very young child is that there is necessary so much uncertainly about the child's future that no confident estimate of prospective happiness can be made when an individual lays relied an age to have settled prospects, having passed the risks and uncertainties of childhood, and having some degree abound to an established answer and to firmer hopes, his or her future becomes more definite, and to the extent to which good fortune may probably allow him at any rate becomes less incalculable. I***

> ***would add that, in the case of a child as in the case of an adult, I see no reason why the proper sum to be awarded should be greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or states. It remains to observe as Goddard L. J. pointed out, that stripped of technicalities. The compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth of course is that, in putting a money value on the prospective balance of happiness, in years that the deceased might have otherwise lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that, in assessing damages under this head, whether in the case of a child or an adult, very modest figure should be chosen. My noble and Learned friend Lord Roche was well advised when he pointed out in Rose v Ford the danger of this head of claim becoming unduly proportionate and leading to inflation of damages in cases which do not really justify a large award."*** **(See also Kenya Breweries v Saro {1991} KLR 408)**

It would therefore appear that the appellant's grievance against the Judgment of the trial Court is an assessment done in respect to pain and suffering and loss of expectation of life and loss of dependency. It is therefore necessary to consider the trending aspect in common when it comes to Courts dealing with awards involving minors.

In this respect it is very pertinent to cite the recent cases which abound on this branch of Law. In **Chen Wembo & 2 others v 1KK & HMM – Suing as the legal representations and administrators of the Estate of CRK (Deceased) {2014} eKLR.** The judge awarded Kshs.600,000/= for loss of dependency, Kshs.80,000/= for loss of expectation of life and pain and suffering of Kshs.20,000/= for a minor aged 12 years at death.

In **Miriti v Firoze Construction Co. Ltd HCCC No. 20 of 1979** the Court awarded Kshs.70,000/= for loss of expectation of life. In the recent past the Courts in **Daniel Mwangi Kimani & 2 others, Jam & Another {2016} eKLR** awarded Kshs.500,000/= for loss of dependency to the estate of 5 years old. In the case of **H.K.M. Mwongela Mabere {2017} eKLR** Kshs.200,000/= for loss of dependency of life.

Having considered evidence as a whole as presented by PW1, I have no hesitation in coming to the conclusion that the exercise of Learned Magistrate discretion was not fully justified in awarding damages of Kshs.900,000/= for lost years. To quote from the Judgment of the Court in **Daniel Kosgei Ngerechi v Catholic Trustee Registered Diocese of Eldoret {2013} eklr, Kiragaragora v Aya {1982 – 88} 1KAR 768** where it was held:

> ***"Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee, in assessing general damages, Courts must have presence of mind to ascertain the suit of general damages that other Courts and especially appellate Courts would ordinarily award in respect of a particular injury. A plaintiffs compensation ought to be comparable to awards by other Courts in view of the aforesaid a Court must therefore be guided by precedents."***

The same conclusion was reached in **Cookson v Knowles {1979} AC 556** where **Lord Fraser** opined:

> ***"The Court has to make the best estimates that it can having regard to the deceased's age and state of health and to his actual earnings immediately before his death, as well as to the prospects of any increases in his earnings due to promotion or other reasons. but it has always been recognized, and is clearly sensible, that when events have occurred, between the date of death, and the date of trial, which enable the Court to rely on ascertained facts rather than on mere estimates, they should be taken into account in assessing damages."***

These authorities are the ones I have derived considerable assistance in determining this appeal. It is my observation that though the Learned trial Magistrate placed reliance in the case of **S.M.K. v Josephine Nikara Mailaga {2011} eKLR**, age of the minor is not the only parameter to be applied on assessment of damages. From the record all what **(PW1)** and **(PW2)** told the Court was the fact that the deceased minor was a pupil in Standard One supported with a report form. There was no evidence that the deceased was an income earner; who contributed to the claimants well being. What Courts do is to provide for reasonable expectation of future income, in the event the minor was to live up to adulthood in order to enter the job market. The nature and extent of these awards should be kept at a moderate global sum more particularly where there is vagueness of the evidence to support a higher award. As I allow this appeal under the limb of lost years, I bear in mind the principle in **Duhancy v Electoral office of Jamaica et al EWCA No. 56 of 2001** where the Court held interalia that:

> ***"The unenviable task of the Court is to arrive at a fair money value as redress for the claimant's affliction. In effect doing what is described as measuring the immeasurable."***

The dine of authorities on this subject supports the conclusion of two tier prong approach, one school of thought qualify loss of earning under lost years workings on multiplier/multiplicand formulae whereas the second school of jurisprudence go for a lump sum method. Although there is a division the majority opinion is heavily on a balance of using a multiplier/multiplicand formulae in reference to a claimant in employment or likely to find employment of any kind had the risk of death not materialized with a view to strengthen out jurisprudence arrived this question assessment of damages of acts, minor victims of tender years with no known income or prospects of employment should be kept at moderate awards. It should be observed that whereas age is one of the relevant factors on assessment of damages for lost years the decision is more concerned with the loss of earning capacity or dependency as a result of the premature death brought about the negligent act of the defendant.

In the end, the Learned counsel for the appellant, has succeeded to convince me that the Learned trial Magistrate erred in awarding Kshs.900,000/= for lost years to warrant interference by this Court. The award is not commensurate nor consumable with the principles in the cited authorities herein above.

Accordingly, and as per the reasons stated above elsewhere in this appeal, the assessment on the claim for loss of dependency is hereby varied and substituted therefore in the sum of Kshs.600,000/=. As regards the other category of damages, I find no err in any principle and are not so excessive to demand interference by the Court.

The upshot this appeal partially succeeds in favour of the appellant to the extent so far outlined.

The appellant shall have half of the costs of this appeal. The net sum so awarded shall attract interest from the date of Judgment of the trial Court save for special damages interest be calculated from the date of filing suit.

It is so ordered.

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

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R. NYAKUNDI

JUDGE