



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 18 OF 2017

JUSTUS N. NGIAVIAPPELLANT

VERSUS

FRANCIS KABERIA RUBUCHA

REBECCA KANGARIA NDAGARA [*suing as legal representatives of the estate
of Gabriel Munene Kaberia [deceased]*] RESPONDENTS

JUDGMENT

1. The respondents, *Francis Kaberia Rubucha* and *Rebecca Kangaria Ndagara* in their capacity as the legal representatives of the estate of their deceased son, the late *Gabriel Munene Kaberia* sued the respondents seeking special and general damages under both the *Law Reform Act* and the *Fatal Accidents Act* following the death of their son after being involved in a road accident. They also prayed for costs of the suit and interest.
2. In their plaint dated 31st March 2016, the respondents averred that the accident which occurred on or about 4th May 2015 was caused by the defendant, his servant or agent's negligence in driving motor vehicle registration number KBD 803N Toyota *matatu* which was allegedly owned by the appellant.
3. Upon being served with summons, the appellant filed a defence dated 9th May 2016. He denied all the allegations of negligence attributed to him or his servants or agents in the manner pleaded in the plaint and put the respondents to strict proof thereof.
4. The court record shows that on 17th January 2017 after two witnesses had fully testified in support of the respondents' case, the parties recorded a consent on liability in the ratio of 70:30 in favour of the respondents against the defendant. Parties also agreed that the issue of quantum of damages be determined by the trial court on the basis of written submissions which they duly filed.
5. In its judgment delivered on 28th March 2017, the trial court awarded the respondents a global sum of KShs.1,000,000 as damages for pain, suffering and loss of expectation of life which was subjected to the deceased's agreed contribution of 30% and special damages in the sum of KShs.87,995. The respondents were also awarded costs of the suit and interest.
6. The appellant was dissatisfied with the trial court's decision on quantum. He proffered this appeal through the memorandum of appeal filed on 28th April 2012. In the memorandum of appeal, the appellant raised four grounds which can be condensed into two main grounds. He basically complained that the learned trial magistrate erred in law in failing to consider his submissions and authorities on

conventional awards made in similar cases and thereby arrived at an erroneous award. He also asserted that the trial court erred in making an award of KShs.1,000,000 for a deceased minor who was three years old.

7. This being an appeal on quantum only, it is important to consider the principles that guide an appellate court in deciding whether or not to interfere with an award of damages made by the trial court.

8. As a general rule, an appellate court should be slow to interfere with awards made by a trial court and should only do so if it was satisfied that in making the award, the trial court either misapprehended the evidence adduced in the case or applied the wrong legal principles or that it abused its discretion. This is so because it is trite that assessment of damages is dependent on the trial court's discretion but that discretion must be exercised judiciously not whimsically or capriciously.

9. The above principles are distilled from a long line of authorities that speak to the mandate of an appellate court in determining appeals challenging quantum of damages made by lower courts. Citing two of those authorities will suffice for the purpose of determining this appeal.

In Mariga V Musila, (1984) KLR 251, the Court of Appeal expressed itself as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles.”

10. The same court in Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No. 2, [1987] KLR 30, while addressing the same subject stated :

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

11. Guided by the above principles, I will now address the gravamen of this appeal which is the appellant's complaint that the learned trial magistrate erred in awarding the respondents damages in the sum of KShs.1,000,000 for a minor who was three years old. In the appellant's view, the award was too high and was not comparable with awards made in the authorities cited before him and represented an erroneous estimate of the damage suffered.

12. Before addressing the above issue, I wish to first deal with the appellant's claim that the learned trial magistrate erred by failing to consider his submissions and the authorities cited in support thereof.

13. In his judgment, the learned trial magistrate clearly indicated that he had carefully considered the written submissions filed by both parties and the authorities cited by each party. He proceeded to note down the authorities relied upon by each of the parties though he did not specify what guidance he derived from the authorities. I however note that the learned trial magistrate adopted the global sum approach in awarding damages which was the approach taken in most of the authorities cited by the appellant. I find nothing on record to disprove the learned trial magistrate's claim that he had given due consideration to the appellant's submissions and authorities. Nothing therefore turns on that ground of appeal.

14. Turning now to the claim that the award of KShs.1,000,000 in respect of a minor aged three years was erroneous as it was inordinately high, the appellant in his submissions in the lower court proposed an award of KShs.200,000 relying on the authorities of Dominic Owuor Dibuoro & Another V R (administrator & personal representative of MO [deceased], [2015] eKLR where *Majanja J* made a

similar award in respect of a deceased aged 12 years; **Oshivji Kuvenji & Another V James Mohammed Ongenge, [2012] eKLR** where the appellate court reduced an award of KShs.800,000 to KShs.300,00 and the case of **Kenya Breweries Limited V Saro, [1991] KLR 408** in which a conventional figure of KShs.100,000 was awarded to the deceased who was 6 years old.

15. In this case, it would appear that the learned trial magistrate made a global award in respect of damages payable under both the *Law Reform Act* and the *Fatal Accidents Act*. I wish to observe at this juncture that the assessment of damages especially under the *Fatal Accidents Act* for loss of dependency where the deceased is a minor is a most challenging task and presents a serious dilemma to the court because on one hand, a life has been lost albeit of a child through the negligent acts of a defendant and on the other hand, though the parents of the child are entitled to compensation, no one including the affected parents or the court can predict how that child's life would have turned out had he lived to be an adult. Awards for loss of dependency to parents of deceased children are therefore mainly based on speculation.

16. That said, the Court of Appeal in **Kenya Breweries Limited V Saro, [supra]** gave guidance on what factors courts should consider when assessing damages in cases involving minors. The court stated as follows:

“We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken in to account so that in the case of say a thirteen 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 four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But 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.”

17. In this case, the deceased child was three years at the time of his demise. Given his tender age, his level of abilities or even his future prospects were unknown but a possibility still existed that he would have grown to become a successful man who would have supported the respondents financially or in any other way during their life time.

18. I have considered the persuasive authorities cited by the appellant in this appeal when urging me to set aside the award made by the trial court. In my view, the award proposed by the appellant in the sum of KShs.200,000 is inordinately low. I have noted that in **Chen Wembo & Others V IKK & Another (suing as the legal representatives and administrators of the estate of CRK [Deceased], [2017] eKLR**, the court in the year 2017 granted the respondents an award of KShs.600,000 for loss of dependency where their child was aged 12 years in addition to KShs.20,000 and KShs.80,000 awarded under the *Law Reform Act*. The total award to the respondents was therefore KShs.700,000.

19. I have also considered the authorities of **Fredrick Bundi Rochia & Another V SMM & HMM (suing as the legal representatives and administrators of the estate of JMM, [2019]** where in the year 2019, Gikonyo J awarded a global sum of KShs.800,000 where the deceased was five years old and the case of **Daniel Mwangi Kimemi & 2 Others V JGM & Another (suing as the legal representatives and administrators of the estate of NK [deceased], [2016] eKLR**, where an award of KShs.1,000,000 was granted to the parents of a deceased child aged 9 years.

20. Considering the above authorities and the age of the deceased, I find that the award made by the trial court was inordinately high. I will consequently set it aside and substituted it with an award of KShs.800,000.

21. In the premises, the appeal is merited and it is hereby allowed. The appellant shall now pay the

respondents a total sum of KShs.887,995 (including the award of special damages) which will be subject to the deceased's agreed contribution of 30%. The amount shall attract interest from date of judgment of the trial court until payment in full.

22. Lastly, costs follow the event and are at the discretion of the court. I grant the respondents' costs in the lower court but each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 30th day of November 2020.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondents

Ms Mwinzi: Court Assistant