REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 37 OF 2018

DADSON MAINA MWANGI.....APPELLANT

VERSUS

SIMON NGICHIRI MWAKA & ANOR (Suing as the legal representatives

of the estate of) **GRACE WAMBUI NGICHIRI.....RESPONDENTS**

(Being an Appeal from the Judgment of Hon. P.Mutua (SPM) in the Chief Magistrate's Court at Nyeri, Civil Case No.213 of 2017, delivered on 10th July 2018)

JUDGMENT

1. The Respondents filed a suit in the lower court seeking general damages under the Law Reform Act *(LRA)* and the Fatal Accidents Act *(FAA)* on behalf of the Estate of *Grace Wambui Ngirichi* pursuant to a fatal road accident on 07/09/2015 along the Nyeri-Tetu road. They also prayed for special damages, costs of the suit and interest.

2. The Appellants filed a joint statement of defence and denied the claim. The parties recorded a consent on liability in the ratio of 80:20 in favour of the Respondents and the trial Court proceeded to assess the damages.

3. Judgment on quantum was eventually delivered as follows;

Pain & suffering…….Kshs 50,000/=

Loss of expectation of life……..Kshs 150,000/=

Loss of dependency…….....Kshs 1,213,600/=

Special damages…….....Kshs 66,000/=

Total……Kshs 1,479,600/=

Less 20%.....Ksh 295,920/=

Grand total.....**Ksh1,183,680/=**

4. Aggrieved by the award, the Appellants filed this appeal through the firm of Ngulli & Co. advocates and listed the grounds as follows:

a) ***That,*** *the learned Magistrate misdirected himself on the assessment of quantum on general damages. The same is inordinately high and not commensurate to the conventional and global awards awarded for the death of 12 year old.*

b) ***That,*** *the learned Magistrate erred in law and fact by failing to appreciate the age of the deceased in awarding loss of dependency.*

c) ***That,*** *the learned Magistrate erred in law and fact by failing to appreciate the age of the deceased in awarding loss of expectation of life.*

d) ***That,*** *the learned Magistrate erred in law and fact by failing to appreciate the global sum awarded for pain and suffering.*

e) ***That,*** *the learned Magistrate failed to give due regard to all issues raised in the Appellant's submissions.*

5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

6. With regard to pain and suffering Mr. Ngulli for the Appellant submits that the general principle is that very nominal damages will be awarded where death follows immediately after the accident. He contends that the award made was on the higher side and proposes Kshs.20,000/=. It is also his submission that Kshs.80,000/= would have been a fair award for loss of expectation of life.

7. On loss of dependency, counsel submits that the trial court should have adopted the global approach because the deceased was a minor who had no dependants and cited no income. He relies on the case of **Mwanzia –vs- Ngalali Mutua & Kenya Bus Services (Msa) Ltd & Anor** where Ringera J. expressed himself as follows;

> *"The multiplier approach is just a method of assessing damages. It is 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 amount of annual or monthly dependency and the expected length of the dependency are known 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."*

8. He submits that a global award of kshs 600,000/= was appropriate, fair and supported by case law *to wit*; **Chen Wembo & 2 Others –vs- IKK & Anor and Simon Kibet Langat –vs- Miriam Wairimu Ngugi (2016) eKLR**.

9. He also submits that, in making the award under the LRA, the trial court should have considered the fact that the dependants were the same under both regimes. He has urged the court to adopt the global approach and review the award downwards.

10. The Respondents through Wabandi Gacheru advocates submit that the trial Magistrate exercised his discretion by applying sound principles of law and taking into account relevant factors in arriving at the award.

11. On the issue of pain and suffering, he submits that an observation was made by the trial Magistrate to the effect that the deceased died on arrival at the hospital hence it was not an instant death. He relied on the case of **Alice .O. Alukwe –vs- Akamba Public Works Services Ltd & 3 Others (2013) eKLR** where the deceased died on the spot in the year 2002 and was awarded Kshs.50,000/=.

12. With regard to loss of expectation of life, he submits that the trial Magistrate considered the age of the minor which was not in dispute. He contends that failure to adopt the Appellant's proposal of Kshs.80,000/= cannot be said to be a contravention of the laid down principles for exercise of discretion.

13. On loss of dependency, counsel submits that the trial court's preference of a multiplier approach was not exercised blindly as the minor's age was taken into account and retirement age ought to have been 60 years. He also submits that the deceased's dependants were established by the chief's letter. He contends that the deceased was in class six, well behaved and an average student. In her lifetime, she could not have procured a salary less than the minimum wage of Kshs.12,131.36/=. Reliance is on the case of **Kenya Power & Lighting Co. Ltd –vs- E.K.O & Anor (2018) eKLR** where the Court held that;

> *"The only question that seems to divide courts is whether a multiplier method is appropriate to use when the deceased is a minor who had not yet started working for gain. Many cases including the Kenya breweries case and the two other cases cited to me by the Appellant have eschewed the multiplier method on account of the imprecision of finding the salary amount to use. J. Gikonyo had particularly strong words to use in the Daniel Mwangi Case in discouraging Courts from using the multiplier method in such cases. These Courts insist that to come to a fair assessment of damages, it is fairer to use global figure pegged to specific performance.*
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> *On the other hand, many courts including High court have persisted in using the multiplier method even when dealing with a minor. Example includes eKLR Transpares Kenya Ltd & Anor vs SMM (2015). It thus emerges that superior courts are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was, in my view, therefore upon the discretion of the learned trial magistrate to use multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other high court decisions. The learned magistrate did not proceed on wrong principles merely for choosing to use the multiplier method and then choosing the minimum wage as the multiplicand."*

14. Further, he submits that the trial Magistrate also exercised her discretion to reject the Appellant's submission that; the award under the LRA should have been deducted from the award under the F.A.A because the beneficiaries under both Acts were the same. He relies on the case of **Hellen Waruguru Waweru (Suing as the Legal Representatives of Peter Waweru Mwenja –vs- Kiarie Shoes Stones Ltd (2015) eKLR** to buttress this argument.

15. It is his contention that the trial Magistrate exercised his discretion properly and acted within the law. That the award is not inordinately high as there are other cases where higher amounts have been awarded.

Analysis and determination

16. It is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Another –vs- Associated Motor Boat Company Limited and Others (1968) E.A 123**.

17. Having considered the grounds of appeal, the rival submissions and entire record, the only issue for determination, in my view, is whether the quantum of damages should be disturbed.

18. As correctly submitted by the Respondents, awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In **Butt –vs Khan (1977)1KAR** it was held that;

> *"An appellate court will not disturb an award for damages unless it is 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.*

19. At the trial the parties further consented to rely on the Respondents' list of documents and to file submissions in regard to quantum. Accordingly, there were no oral testimonies.

Award under the Law Reform Act

20. With regard to pain and suffering, it was pleaded that the deceased died on the along Nyeri – Tetu road. The evidence of Pw1 was that the minor was declared dead on arrival at the Outspan Hospital. The death certificate shows the date of death as 02/05/2015 and I have noted that this date is at variance with the pleaded date of accident (07/09/2015) but after looking at the police abstract, it is evident that the latter was an error.

21. The post mortem report indicates that the body was found on 02/05/2015 at 7pm and indicates the same details as the date and time of death. Accordingly, the evidence shows that the accident happened on 02/05/2015 and the minor died on the same day, most probably on the spot. I agree with the Appellant that that the consideration to be borne in mind while awarding damages under this head is the length of time that a person suffers before succumbing to injuries.

22. Be that as it may, I find relevance in the words of Majanja J. in **Sukari Industries Limited –vs- Clyde Machimbo Juma; Homa Bay HCCA NO. 68 of 2015 [2016] eKLR** where he stated that;

> "[5*] 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."*

23. Similarly, it is my considered view that the award of Ksh.50,000/= in the instant case was not inordinately high and is in line with awards given in similar cases.

24. With regard to loss of expectation of life, precedent shows that courts usually make a conventional award of Kshs.100,000/=. My considered opinion is that the award of Kshs.150,000/= is within an acceptable range and it would not be a good reason to interfere with it merely because this court would have made a lower award.

Award under the Fatal Accidents Act

25. The deceased was a 12 year old class 6 pupil and the letter from her school indicates that she was well behaved, of good moral standards and average in academic performance. I have keenly looked at the arguments for and against the use of multiplier approach for minors and I find a lot of persuasion in the **KPLC case *(supra)***. Indeed the superior courts are split on the appropriateness of the multiplier approach in such cases and as such, the lower court cannot be faulted for choosing one over the other.

26. In **Nairobi HCCC No. 519 of 2013;MMG Suing as the legal representative of the estate of ZG –vz- Muchemi Teresa**, the Court stated as follows;

> *"15. I do not expect that the deceased at 12 years of age was too young for the expectations of his adult life to be purely speculative without hope of realization. He may not have become a doctor or some other high profile professional, but he appeared endowed with sufficient intelligence to at least attain a first general degree in college which would have enabled him to secure a reasonable job that would have probably earned him a monthly salary (less statutory deductions) of about Kshs.45,000/00. By the time he would have secured employment, he would probably be 25 years old. His and the plaintiff's expectations would have been that he would have a full working life to about 60 years of age. But the vagaries and uncertainty of life must be factored into the equation. We live in an imperfect and sometimes dangerous world full of disease, accidents, civil strife and war.*
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> *16. There is also the issue of the plaintiff's age as we are essentially considering her loss of dependency upon the deceased. Although she did not give her age when testifying, she appeared about 40 years as I recall. A multiplier of 20 years would be just and I award the same.*
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> *17. I assess the plaintiff's dependency upon the deceased would have been about one third (1/3) of his net earnings. I will therefore award Kshs.3,600,000/00 for lost years/lost dependency."*

27. Accordingly, I find no basis of interfering with the trial Magistrate's discretion of using the multiplier approach and assessing the loss of

dependency at Kshs.1,213,600/=. The minimum wage of Kshs.12,136/= was as per the existing schedule at the time of death hence proper. The multiplier of 25 years and dependency ratio of 1/3 are also reasonable in my view.

28. The award for special damages was not contested.

29. As for the deduction of the award under LRA as proposed by the Appellant, the holding of the Court of Appeal in the **Hellen Waruguru case *(supra)*** is that an estate of a deceased person can get awards under both Acts as there is no requirement to engage in a mathematical deduction. In this case, the trial magistrate opined that the deceased had a *'whole life ahead of her'* and I associate myself with his sentiments. Despite the fact that the dependants are same under both regimes, I am of the view that the award of Kshs.150,000/= is reasonable in the circumstances and should not be deducted.

30. The upshot is that the award should not be disturbed.

31. The appeal has no merit, and I hereby dismiss it with costs.

Dated and signed this 12th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge