REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 106 OF 2018

FRANCIS ODHIAMBO NYUNJA.....1ST APPELLANT

NOLLAND ENGINEERING &CONSTRUCTION CO LTD.....2ND APPELLANT

NAFAS WORLD AUTO LTD.....3RD APPELLANT

VERSUS

JOSEPHINE MALALA OWINYI

(Suing as the legal administrator of the estate

of Kevin Osore Rapando (deceased).....RESPONDENT

JUDGMENT

1. The appeal herein arises for the judgment and decree, in Mumias PMCCC No. 111 of 2016, in which the court made an award in the following terms: liability at 90:10 in favour of the respondent as against the appellant, pain and suffering at Kshs. 100,000.00, loss of expectation of life at Kshs. 100,000.00, loss of dependency at Kshs. 2,119,864.00, special damages at Kshs. 105,130.00, income from volleyball at Kshs 200,000.00; making a total of Kshs 2,624,994.00, which, after contribution, comes down to Kshs. 2,362,494.00.

2. The appellants were dissatisfied with the award of general damages, and filed the instant appeal. The memorandum of appeal raises nine grounds, all challenging the award of damages made by the trial court.

3. Directions were given on 25th February 2020, that the appeal would be canvassed by way of written submissions. There was compliance, for both sides filed written submissions, which I have perused through and noted the arguments made by each side.

4. In their submissions, the appellants contend that the trial court erred in awarding loss of dependency and applied wrong principles in the assessment of damages, in terms of 1/3 dependency the ratio adopted, the multiplier of 41 and the multiplicand of 12,926.00. They further challenge the award of income from volleyball as having no legal basis and proof, and that of pain and suffering, and special damages as being manifestly excessive. The respondent opposes that appeal and submits that the award was proper and prays that the appeal be dismissed.

5. The issues for determination, which have emerged from the pleadings and written submissions, are whether the trial court acted on wrong principles in making the award of damages, and, if the above is answered to the affirmative, which sum would be sufficient compensation in the circumstances

6. The Court of Appeal, in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR, set out the parameters within which an appellate court will interfere with an award of general damages, when it stated:

> *"An appellate court will not disturb an award for general 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 he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..."*

7. Similar sentiments were expressed in *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* CA 142/2003 (UR), by the same court, when it said:

> *"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 Manga vs. Musila [1984] KLR 257).”

8. The same was reiterated in *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, where the Court of Appeal said:

> *“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.”*

9. See also *Kemfro Africa Limited t/a Meru Express Service vs. AM Lubia and Olive Lubia* (1982 –88) 1 KAR 727, *Ilango vs. Manyoka* [1961] E.A. 705, *Lukenya Ranching and Farming Co-Operatives Society Ltd vs. Kavoloto* [1970] EA 414**,** *Gicheru vs. Morton and Another* (2005) 2 KLR 333, and Major *General Peter M. Kariuki vs. Attorney General* Civil Appeal No. 79 of 2012.

10. The foregoing decisions set out the law and the guiding principles, which I am bound to apply the determination of this appeal.

11. In *Power Lighting Comp. Ltd & Another vs. Zakayo Saitoti Naingola & Another* [2008] eKLR, the court said:

> *“On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages (1) Damages should not be inordinately too high or too low; (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and a such they should be commensurate to the injuries suffered; (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts; (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment … This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others*
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> - *The award is inordinately too high or too low.*
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> - *It is based on cursory principles. The principles applied by the lower court in the assessment was that of taking a narrative of the injuries by the witnesses*
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> - *Calling for proof of the same by visual observation if pointed out and medical records.”*

12. On damages for pain and suffering, the court, in *Acceler Global Logistics vs. Gladys Nasambu Waswa & another* [2020] eKLR, observed:

> ***“****It is settled law that the personal representative of a deceased person can recover damages that the deceased could have recovered had he survived and which were a liability on the wrong doer at the date of death. This was enunciated in the celebrated decision of Lord Green in Rose vs. Ford. [26]*
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> *37. It is not in dispute that the deceased sustained serious injuries and that the deceased died on the spot. This raises a fundamental question of what each unit of pain and suffering is worth. This question has in my view been authoritatively discussed in an article in the International Review of Law and Economics [27] entitled "Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards" by W. Kip Viscussi who argues that: -*
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> > *"Pain and suffering is generally recognized as being legitimate component of compensation but one for which we have no accepted procedure of measurement ... Pain and suffering is by no means a negligible component of awards ... The general implication is that pain and suffering awards are not entirely random or capricious."*
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> *38. The position laid down in Rose vs. Ford [28] is that where the period of suffering is short, only nominal damages are awarded. That was in 1935 and 500 pounds was awarded for a two days suffering. I am persuaded that the amount of Ksh. 50,000/= awarded under the said head is not in my view excessive nor has it been shown to be erroneous or unreasonable.”*

13. In *Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay* HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

> *“[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.”*

14. In *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, the court observed:

> *"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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."*

15. See also *West Kenya Sugar Co. Limited vs. Philip Sumba Julaya (suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR.

16. The evidence, led by PW2, was that the deceased was hit by the truck, at about 6.00 PM, and that he was rushed to hospital and unfortunately passed on at 10.00 PM. PW2 testified that the deceased was in a pathetic state, and that he went into shock before he died. I am persuaded, in the circumstances, that the damages of Kshs. 100,000.00, awarded under this head, are suitable, and, therefore, the award ought not to be disturbed.

17. On damages for loss of dependency, the appellants submit that, owing to the age of the deceased, and the fact that he had not yet attained the age of employment, the court ought to have awarded a global sum for lost years. This takes us to questions around the appropriate multipliers and multiplicands to employ in the circumstances, or whether the trial court ought to have to have gone that way at all.

18. As to whether the trial court can be faulted for adopting the multiplier method in assessment of damages, I have looked at the principles as stated in a number of decisions. In *Seremo Korir & Another vs. SS (Suing as The Legal Representative of the Estate of MS, Deceased)* [2019] eKLR, the court said:

> *"22. In the lower court's judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased's school and that the deceased was 12 years old, a fact that was not contested. It was the appellants' submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method.*
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> *23 …*
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> *24 …*
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> *25 …*
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> *26 …*
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> *27. In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the 'global sum', 'separate heads', or 'mixed' approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/lump sum approach"*

19. In *Charles Ouma Otieno & another vs. Benard Odhiambo Ogecha (suing as Brother and Legal Representative and Administrator of the Estate of the Late Oscar Onyango Ogecha (Deceased)* [2014] eKLR, the court stated:

> *"I am of the considered view that the learned trial magistrate fell into error in making awards under separate heads. As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.*
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> *The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14-year-old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved. Reliance was placed on the case of H. Young & Company EA Ltd. & another vs. James Gichana Orangi – Kisii HCCA NO.207 of 2009. In the said case, the learned trial magistrate awarded damages totalling Kshs. 323,300/= under various heads in respect of the death of the deceased who was aged 11 years at the time of death. On appeal, Musinga J (as he then was) set aside the award of Kshs. 323,300/= and in lieu thereof made a lump sum award of Kshs. 300,000/= subject to 25% contribution."*

20. In *Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of the estate of CRK (Deceased)* [2017] eKLR**,** it was said:

> *"This debate is not in any way surprising, primarily because, the exercise of awarding damages for lost years in respect of a minor deceased person necessarily poses a challenge to the courts, involving as it does a fair amount of speculation … The uncertainties … in determining the future of a minor deceased, his earning prospects and hence support for parents/dependents are amply demonstrated in this case. Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables… In my considered view, this case was eminently unsuited to the multiplier/multiplicand approach in the assessment of damages in respect of lost dependency."*

21. While grappling with the same question, in an appeal, the court, in *Oshivji Kuvenji & Another vs. James Mohammed Ongenge* [2012] eKLR, said:

> *"In as much as the Appellants in the instant case argue that a global sum would be the best suited to the deceased aged only six (6) years at the time of her death, I have not come across an authority that has overturned a decision of the trial court on account of granting general damages based on expected earnings and tabulated on a multiplier. 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.*
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> *Even as early as 1986 as is in the Case Luduwa (Suing by her next friend) And Another vs. Ayuku & Another, (1986) KLR, 394, a Judgment of Apaloo, J – High Court, the Court considered that an award of only Ksh. 8,000/= under loss of expectation of life in the case of a minor aged only one month who had died alongside her mother. In granting the figure the court said that she lived for just a month and her prospects of a future happy life are less than her mother's. However, loss of dependency was awarded for death of her mother which was tabulated based on her average earnings and a multiplier of twenty-five (25) years used. Nothing was awarded for lost years or loss of dependency in respect of this minor … There is therefore 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/dependents - See decisions of the Court of Appeal in Kenya Breweries Limited vs. Saro [1999] KLR 408 and Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporter & 5 Others [1986] KLR 457; [1986] eKLR.*
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> *Equally, 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. I would therefore agree with Mr. Waigwa's submission that the adoption of a heads approach in the award of damages in respect of a deceased minor is not ipso facto evidence that the award is excessive or erroneous. Indeed, the Appellants at the close of their submissions sought to persuade the court to use a multiplier approach in arriving at damages payable under the head of lost dependency.*
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> *The deceased was aged 12 years at death. There is no evidence that he was in school or as to the level of his abilities and therefore future prospects. The award in respect of lost dependency in my view was excessive and erroneous. I hereby set it aside and substitute therefor a global award under the Fatal Accidents Act in the sum of Shs 600,000/= bearing in mind the awards under the Law Reform Act. I have upheld general damages for loss of expectation of life, pain and suffering whose total is Shs 100,000/=. Special damages had been agreed at Shs 35,000/=."*

22. From the above, it should be clear, therefore, that the choice of whether to adopt a multiplier or a global award approach is entirely an issue of discretion depending on the circumstances of the case.

23. In the instant suit, evidence was led that the deceased was aged seventeen (17) years, at the time of the alleged accident, and was in Form 3 in high school. No evidence was led as to his future prospects and ambitions. The court cannot, therefore, tell what the minor would have turned out to be in life. There was no basis, therefore, for the trial court holding that the deceased would not have earned anything less than the minimum wage of Kshs. 12,926.00. The trial court did not even refer to the *Kenya Gazette* Notice that set the minimum wage at Kshs. 12, 926.00. Though, the trial court adopted a multiplier of 41 years, it did not consider the age of the dependant, that is the mother to the deceased, so as to determine the proper multiplier. The multiplier and the multiplicand were, therefore, speculative. The multiplier method was, no doubt, not the most appropriate in assessing damages for loss of dependency in this case. The global lump sum method would have been the better approach in the circumstances of the case. The award made by the trial court ought to be set aside, and substituted with an award based on the lump sum or global method.

24. The appellate court in *Charles Makanzie Wambua vs. Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased)* [2020] eKLR, upheld a global award of Kshs 1,320 ,000.00 for loss of dependency Similarly, in *Twokay Chemicals Limited vs. Patrick Makau Mutisya & another* [2019] eKLR**,** the appellate court upheld a global sum of Kshs. 1,500,000.00 for loss of dependency for a minor aged sixteen (16) years. In *Zachary Abusa Magoma vs. Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020] eKLR**,** the court awarded a global sum of Kshs. 1,500,000.00 for loss of dependency. It is, therefore my view, therefore, that a global award of Kshs. 1,500,000.00, would be sufficient compensation in the circumstances.

25. With regard to the payment to compensate for the loss of what the deceased used to get paid for playing volleyball, I find that the same was not substantiated, and, in my view, it cannot be sustained.

26. On special damages, the respondent had pleaded special damages of Ksh 105,130.00. At the hearing, she produced receipts supporting an amount of Kshs. 68,650.00. The trial court, in awarding Kshs. 105,130.00, relied on *Jacob Ayiga & Anor vs. Simion Obayo* (2005) eKLR, where the court had awarded funeral expenses despite lack of proof, by way of receipts, on grounds that funeral expenses must be incurred in every case where someone died.

27. The Court of Appeal, in *Premier Diary Limited vs. Amarjit Singh Sagoo & another* [2013] eKLR, said as follows on the issue:

> *"We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."*

28. Similarly, the Court of Appeal, in *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited* [2016] eKLR, said:

> *"We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved … We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class."*

29. In *JNK (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School* [2018] eKLR, said:

> *"In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased."*

30. In the instant suit, the respondent pleaded funeral expenses of Kshs. 80,000.00, part of which were proved. I am persuaded that the trial court properly made the award on special damages.

31. In an upshot, it is my finding that the appeal herein succeeds, in part, and that the same is hereby allowed, and damages are hereby assessed and awarded as follows: pain and suffering at Kshs. 100,000.00, loss of expectation of life at Kshs. 100,000.00, loss of dependency at Kshs. 1,500.000.00, special damages at Kshs. 105,130.00 and zero for income from volleyball. The grand total works out at Kshs. 1,805, 130.00 After contribution, 10%, is taken into account, the total award comes down to Kshs. 1,624,617.00. Each party to bear their own costs of the appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December 2020.

W MUSYOKA

JUDGE