



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 80 OF 2016

(Formerly HCA No 72 Of 2014, Nakuru)

MICHAEL MATONYE MUNYAO.....1ST APPELLANT

DPL FESTIVE LIMITED.....2ND APPELLANT

VERSUS

JNK (suing as the legal administrators

of the estate of JOA).....RESPONDENT

(Being and appeal from the Judgment of Hon s Muchungi (Mrs.), R.M. delivered on 9th May, 2014 in Naivasha CMCC No 704 of 2012)

JUDGMENT

Background

1. This appeal arises out of an accident that occurred at around 1.00pm on 17th June, 2016, when the respondents' 3 ½ year old son was knocked down as he played with other children in Naivasha town. The respondent was in church at the time and rushed to hospital. She saw her son as he was taken for X-rays and was thereafter admitted. At about 2.00am her son passed away.
2. The respondent filed suit in the lower court, which found the appellant wholly liable. The court held that unless it could be shown that the child had the requisite "road sense" he could not be held liable in any way. The trial court relied on the case of **Butt v Khan (1981) KLR** where it was held that:

"A child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission"

It also relied on **James Theuri Wangare v Board of Trustees Archdiocese of Nyeri & Another (2005) eKLR** which held:

"In this case the minor plaintiff was just about the age of 3 years. He had completely no 'road sense' and appeared to have been merely running after his brother he could not appreciate that he was crossing the road and ought to be careful. This is not an appropriate case in which the minor can be held contributorily negligent."

3. Finally, the trial court cited **Tayab v Kinanu (1983) KLR115** where the High Court held that a child of 9 years old was negligent only to the extent of 10% because there was evidence that she possessed the requisite "road sense".

4. The lower court's award was as follows:

Pain and suffering - Kshs 100,000/=

Loss of expectation of life - Kshs 120,000/=

Lost years - Kshs 800,000/=

Special damages - Kshs 12,900/=

5. This appeal arises from the above judgment and decree. The grounds of appeal are:

a.) That the learned Trial Magistrate erred in Law and in fact and therefore misled herself to award an excessive amount in general damages on quantum as pertains to lost years of Kshs.800,000/= which was not commensurate to the claim and or what was proved.

b.) That the learned trial Magistrate erred in Law and in fact in her analysis of evidence and law applicable and thereby misdirected herself into making wrong conclusions and deductions as pertains general damages awardable under the head of lost years.

c.) That the learned trial Magistrate erred in Law and in fact in failing to appreciate the general principles applicable when awarding damages under the head of lost years.

d.) That the learned trial magistrate erred in law and in fact in failing to look into the totality of the evidence and pleadings placed before the court and in particular the age of the deceased.

e.) The learned trial Magistrate totally misapprehended the facts of the case leading to erroneous application of the same to law.

Analysis and Determination

6. The duty of this court as the first appellate court is to re-evaluate the evidence in the lower court and to draw its conclusions while bearing in mind that it did not itself have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**, **Peters v Sunday Post Ltd (1958) EA 424**. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another vs Duncan Mwangi Wambusu (1982 – 1988) IKAR 278**].

In their submissions, the appellants have sought to argue on the issue of liability. However, I note that the only evidence adduced in the lower court was that of the deceased's mother, and no evidence of contributory negligence was availed by the defendants. Further, the appellant relied on the Court of Appeal's formulation of guidelines on liability in respect of unaccompanied children in the case of **WK (Minor suing through next friend and Mother LK) v Ghalip Khan & Another [2011] eKLR** where it was stated:

*“In **Haji vs Marair Freight Agencies Ltd (1984) KLR 139** it was held that where it is proved by evidence that both parties are to blame and there are no means of making a reasonable distribution between them, the blame can be apportioned equally on each.....however in the absence of clear evidence of contribution to the accident the justice of the case would have been met by apportioning blame equally. We are satisfied and we find that the trial judge misdirected himself in finding that the appellant was solely to blame for the accident”*

7. I do not see how the case of **WK v Ghalip** is of any assistance to the appellant here. This being an appeal, and no evidence on contributory negligence, indeed no defence evidence at all, having been adduced, there can be no appeal on contribution. The WK case clearly demands that there must be evidence of the blameworthiness of both parties before apportionment of liability. In this case there is absolutely no defence evidence at all. In the brief case of **Interchemie EA Ltd v Nakuru Veterinary Centre Ltd [2001] eKLR**, Mbaluto J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. In this light, I have no choice but to treat this as an appeal purely against the quantum of damages awarded.

8. The law is replete with cases where minors of tender age in accident cases were dealt with in the same manner as the trial court dealt with the present case. In the case of **John Kinyanjui Thumbi & Another v Irene Wambui Nduta & Another [2018] eKLR** the High Court stated as follows regarding awards under the **Fatal Accidents Act**:

“The deceased died at the age of 3 years and 5 months. The deceased was a minor, a toddler to be precise. Damages are payable to parents. An award of KShs.1,000,000/= (One million shillings only) as a global figure would suffice.”

9. In a similar vein, the Court of Appeal has taken the view that the age of a minor was an important factor for consideration in assessing damages. This was stated in the case of **Kenya Breweries Ltd v Saro [1991] e KLR and HCCA No. 40 of 2009** where the court determined 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 into 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 a case of a four year old who has not been to school and whose abilities are yet to be ascertained. That, we think, is a question of common sense rather than law ... Were the damages awarded excessive as claimed in ground two of the memorandum of appeal? It is now well established that this court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where damages awarded are so inordinately high or low that an application of wrong principles must be interfered.”

10. In the **Kenya Breweries case**, above, the court therefore held as follows:

“Reviewing all the foregoing I have to agree with the Appellants that the award of KShs.1 million for lost dependency in this case was so inordinately high that the application of a wrong principle must be inferred. Moreover, it is difficult to tell from the rather short judgment whether the trial court took into account the award made under the Law Reform Act, while assessing damages under the Fatal Accidents Act. All in all the award of KShs.1 Million as damages for lost dependency is in the circumstances of this case indefensible. This court has reason therefore to interfere with the award, and considering the authorities cited at the trial and on this appeal, the age of the deceased herein, the award under the Law Reform Act and inflation over the years would reduce the award of damages under the Fatal Accidents Act to KShs.500,000/=. Evidently there was an error in the calculation of the total sum awarded in the judgment. The appeal is therefore allowed”

11. In the present case, the trial court awarded Kshs. 800,000/= for lost years on the basis of:

“.. the deceased age at the time of his demise and the fact that he was an asset to the mother despite his age.

12. In the **John Kinyanjui Thumbi case** the deceased was a minor aged 3 ½ years at the time of the accident in March of 2015. The lower court awarded Kshs 1,000,000/= for lost years, and the High Court (Meoli, J) reduced the award to Kshs 500,000/= on the basis that the lower courts award was inordinately high.

13. This being a very similar and the authority being very recent, I am of the considered view that there should be uniformity in awards. I would therefore reduce the award for lost years to Kshs 500,000/=, but would not disturb any of the other awards by the lower court.

Disposition

14. Accordingly, the appeal succeeds to this extent and the award for lost years shall be as follows:

Pain and suffering	- Kshs 100,000/=
Loss of expectation of life	- Kshs 120,000/=
Lost years	- Kshs 500,000/=
Special Damages	- Kshs <u>12,900/=</u>
Total	- Kshs <u>732,900/=</u>

15. Interest is awarded at court rates from the date of the lower court’s judgment.

16. Each party will bear its own costs of the appeal.

17. Orders accordingly.

Dated and Delivered at Naivasha this 28th Day of February, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No representation for the Appellants
2. Ngunjiri holding brief for Owuor for the Respondent
3. Court Clerk - Quinter Ogutu