REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 70 OF 2018

BETWEEN

BAHATI UPPER HILL ACADEMY.....1ST APPELLANT

ALLAN N. GICHOHI.....2ND APPELLANT

JOHN KARUGA NG'ANG'A.....3RD APPELLANT

AND

JAMES MONARO OBONYO suing as legal representative of

ISAAC ONTITA OBONYO (DECEASED).....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. E. A. Obina, SRM dated 31st July 2018 at the Magistrates Court at Kisii in Civil Case No. 250 of 2013*)

JUDGMENT

1. The facts leading to this appeal are that on 16th August 2012, the deceased was seated on his parked motor cycle registration number KMCJ 999U TVS Star at the Iyabe Bus Stage along the Kisii-Migori road when the driver of appellants drove motor vehicle registration number KAW 141G negligently causing it to knock down the deceased who died as a result. The issue of liability was settled in the ratio 85:15 against the appellants. The trial magistrate made the following award under the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*** and the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** following an assessment damages:

Pain and Suffering	Kshs. 50,000/-
Loss of expectation of life	Kshs. 100,000/-.
Loss of Dependency	Kshs. 1,600,000/-
Special Damages	Kshs. 33,300/-

2. The grounds of appeal, which learned counsel adopted, in his oral submissions are set out in the memorandum of appeal dated 29th August 2018. The appellant complained that the trial magistrate erred in applying a multiplicand of Kshs. 10,000/- whereas the respondent failed to put before the court any material from which the court could deduce that the deceased engage in meaningful employment. They also complained that the multiplier of 20 years awarded was erroneous and excessive and that award for pain and suffering was on the higher side given that the deceased died immediately.

3. Counsel for respondent took the view that the award was reasonable and in accordance with the evidence and authorities cited to guide the court and that the appellants had not made out a case for appellate court to intervene.

4. As this is an appeal on the issue of quantum of damages, this court is guided by the well-worn principle articulated by the Court of Appeal in ***Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another*** **(No.2) [1987)] KLR 30** that:

> *[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages*

awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.

5. I will start with the award of pain and suffering which the appellants complained was too high given that the deceased died on the spot. I do not find Kshs. 50,000/- as inordinately high to warrant interference. In this regard I will repeat what I stated in the case of ***Sukari Industries v Clyde Machimbo Jume*** **HB HCCA No. 68 of 2015 [2016] eKLR** as follows:

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.

6. Turning to the claim for loss of dependency under ***Fatal Accidents Act,*** the respondent pleaded that the deceased was aged 37 years at the time of his death and was a motor cycle rider earning approximately Kshs. 20,000/- per month and spent 2/3 of his income to maintain his family. The testimony of James Moraro Obonyo (PW 1), the deceased's younger brother, was that the deceased was a motorbike rider who used to earn Kshs. 20,000/-per month. In cross-examination he stated that he did not have any document to support the deceased's income.

7. On the issue of income, the trial magistrate accepted that the deceased was a motorcycle taxi operator. He concluded that, *"His income has not been disclosed and/or proved. I will therefore use the minimum wage figure of Kshs. 10,000."*

8. Although counsel for the appellants submitted that a lump sum approach ought to have been used since the monthly income was not proved, I note that in the written submissions before the trial court, counsel submitted on this issue as follows; *"Your honour, we therefore submit that in the absence of proof this honourable Court do adopt the minimum wage of Kshs. 5,000/- as adopted by the court in* ***David Kajogi M'mugaa v Francis Muthomi (2012) eKLR*** *(as at the time of the accident)."*

9. I therefore reject that appellants' contention that this court should adopt a lumpsum approach as it has not been shown that the trial magistrate erred in adopting the approach suggested by the parties. The only issue then is whether Kshs. 10,000/- was an appropriate measure of the minimum wage in June 2013. The minimum is wage is determined by legislation and more particularly the ***Regulation of Wages (General)(Amendment) Order, 2013*** ("the ***Order"***) which was applicable at the time. Although the ***Order*** does not provide for a motor cycle rider, based on the scales for general labourers, I do not think the award of Kshs. 10,000/- warrants interference. I have also looked at the case of ***David Kajogi M'mugaa*** **(Supra)** and I did not see any specific reference to the applicable ***Order*** in determining the minimum wage.

10. As regards the multiplier, the Court of Appeal in ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another*** **NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR** stated that, *"The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason."* The multiplier is a function of the age of the deceased, how long the dependants would rely on the deceased and other vagaries and vicissitutes of life. The deceased was 37 years old. The respondent proposed that he would have worked until he was 65 years hence a multiplier of 32 years would be appropriate. The appellants' suggested a multiplier of 15 years was reasonable. Assuming that the deceased would have worked until he was 55 years old, I cannot say a multiplier of 20 adopted by the trial magistrate was unreasonable or inordinately high.

11. For reasons I have set out, I do not find any reason to interfere with the award of damages by the trial court. The respondent shall have costs of this appeal which I assess at Kshs. 40,000/- only.

DATED and DELIVERED at KISII this 30th day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by O. M. Otieno and Company Advocates for the appellants.

Mr Soire instructed by J. O. Soire and Company Advocates for the respondent.