



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL NO. 167 OF 2015**

**MASKATI BONIFACE..... 1<sup>ST</sup> APPELLANT**

**MUASYA MUNYITHYA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MMM (suing as the mother and Personal Representative**

**of the Estate of MSM (DECEASED).....RESPONDENT**

***(Being an appeal arising out of the Decree emanating from the Judgment of Hon. M.A.O. Opanga- Principal Magistrate delivered at Kithimani PMCC No. 140 of 2013 on 2.10.2015)***

**JUDGEMENT**

1. According to the plaint filed in the subordinate court, the deceased, MSM, was a pedestrian off the road along Kanyonyo- Embu Road at Kaewa Market on 11<sup>th</sup> October, 2011 when a Motor Vehicle registration number KBJ 636V owned by the 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> appellant veered off the road and hit the deceased and as a result the deceased suffered fatal injuries. The deceased's personal representative claimed damages under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*.

2. The 1<sup>st</sup> appellant didn't file a defence. In their statement of defence, the 2<sup>nd</sup> appellant denied the accident, the fact that the vehicle was being driven negligently. In the alternative, the 2<sup>nd</sup> appellant pleaded that the deceased was negligent as he solely or substantially contributed to the accident by failing to take care of his own safety. The 2<sup>nd</sup> appellant also attributed negligence to the deceased's mother for sending him on errands on the busy road.

3. The parties consented on liability at 80:20 and after hearing the evidence on liability, the learned Magistrate made the following award that has precipitated this appeal:

Pain and Suffering	Kshs.	0/-
Loss of expectation of life	Kshs.	0/-
Loss of Dependency	Kshs.	1,500,000/-
Special damages	Kshs.	18,900/-
<b>Sub Total</b>	<b>Kshs.</b>	<b>1,518,900/-</b>
<b>Less 20% Apportioned</b>	<b>Kshs</b>	<b><u>303,780/-</u></b>
<b>Total</b>		<b><u>Kshs 1,215,120/-</u></b>

4. This appeal is against the finding on quantum. The contents of the appellant's appeal are set out in the memorandum of appeal dated 2<sup>nd</sup> November, 2015.

5. Counsel for the appellant challenged the quantum of damages on the ground that the award of damages was inordinately high. He contended that the learned trial magistrate made a determination that had no basis in law and the authority that was relied upon related to a deceased who was aged 32 years whereas in the instant case, the deceased was a minor aged about 6 years. Counsel faulted the trial magistrate for the manner of assessment of lost years for there was no evidence on record that the deceased was in school as there was no evidence on record upon which the trial magistrate could have based the manner of assessment of loss of dependency. Counsel also contended that the determination was not commensurate to the evidence adduced.

6. Counsel for the respondent submitted that the respondent was entitled to the award and gave reasons why the appeal should be dismissed. First, that it is evident that the deceased was a child as per the birth certificate that was produced as an exhibit. Secondly, the work description of the deceased was not ascertained and therefore the court used the scale for unskilled workers of Kshs 6,415 according to the Regulation of Wages Order, 2017. The counsel submitted that the award was reasonable and no grounds were raised to interfere with the award of the trial court and therefore the appeal ought to be dismissed.

7. The general principle upon which this Court, as an appellate court, will interfere with an award of damages is if it is inordinately high or low as to represent an entirely erroneous estimate. It was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

*“An appellate court will not disturb an award of damages unless it is so inordinately high or low and 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 ....”*

8. According to the evidence on record, the deceased was aged six years at the time of death and that his parent anticipated a bright future ahead of him.

9. In assessing the claim for lost years, the trial magistrate held that she would use a pragmatic approach to give a global sum of damages and relied on the case of **Bobmill Industries Limited & Another v Kennedy Indakwa Eshiteni (2010) eKLR** that cited the case of **Pius Muinde Ndosi v The Headmaster, Machakos Girls High School and 2 Others, Machakos HCCC 458 of 1998**.

10. In resolving this appeal on the issue of quantum, it is necessary to determine the nature of the respondent's claim. From the plaint, the respondent made claims both under the **Fatal Accidents Act** and the **Law Reform Act** while the trial magistrate only made awards under the **Law Reform Act**. Both claims are distinct. The **Fatal Accidents Act** was meant to cure a deficiency in the common law where the cause of action did not provide for dependants of a deceased person. **Section 4(1)** of the **Fatal Accidents Act** now provides as follows;

*Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ..... be brought by and in the name of the executor or administrator of the person deceased.....*

11. The **Law Reform Act** was intended to ensure that causes of action survive the death of the deceased hence **section 2(1)** thereof provides as follows;

*“2(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate: .....”*

12. The two statutes exist side by side and are not mutually exclusive and **section 2(5)** of the **Law Reform Act** provides as follows:

*“2(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).”*

13. The only limitation in awarding damages under both Acts is that the court should avoid double compensation or duplication of the award as the claim on behalf of the estate of the deceased is, *“in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act”*. I shall now proceed to consider whether the trial magistrate erred in making the award.

14. The approach in assessing damages for loss of dependency is to take the income the deceased would have earned assuming that he lived and worked upto the age of retirement if the deceased was not a minor. On the other hand if the deceased is a minor then a pragmatic approach is to award a global sum on that head of damages.

15. The duty of the respondent was to prove that the deceased was a minor with a bright future who would turn around to be of great help to his parents later on. However the case relied upon by the trial court had to do with a deceased aged 16 years whose prospects in life were apparent unlike the present case of the Respondent in which the deceased was still a toddler and one could not gauge what he would have become later in life.

16. The trial magistrate awarded a global sum of Kshs 1,500,000/- for loss of dependency which in my considered view was manifestly high in the circumstances bearing in mind that the deceased was still a minor as compared to the age of the deceased in the case relied upon by the court. In calculating the damages for the loss of dependency, the loss to the estate is what the deceased would have been likely to have managed to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve (see **Hassan v Nallia Mwangi Kamau Transporters & 4 Others (1986) KLR 457**). The trial magistrate's manner of awarding a global sum cannot be faulted in the circumstances since the deceased was then a minor child at the

time of death. The only issue is on the aspect of the quantum of damages awarded which the appellant strongly objected to.

17. Similarly because the subject minor was about 6 years old, and one cannot predict with certainty what the child will be later in life, whether he will marry, what career path he will take thus the global sum in line with comparable awards by given by the courts will suffice. In the case of **Transpares Kenya Limited & Another v SMM (Suing as Legal Representatives for and on behalf of the Estate of E MM (Deceased) (2015) eKLR**, the court observed that the trial court's award of Kshs 500,000/- for loss of dependency of a child of 5 years was reasonable for a child's loss is not easily determinable. The trial court's award was enhanced to Kshs 602,400/-.

18. In the case of **Chen Wembo & 2 Others v IKK & Another (Suing as the Legal Representatives of the Estate of CRK (Decesed) (2017) eKLR**, a 12 year old child was awarded Kshs 700,000/- down from Kshs 1,680,000/- for loss of dependency in light of the fact that the child was school-going and used to help the parents with chores at home.

19. In the instant case, the child was aged 6 years at the time of death and was not going to school and in light of the difficulty in assessing the award for loss of dependency, I shall award a global amount of Kshs 700,000/- being guided by the case of **Transpares Kenya Limited & Another v SMM (Suing as Legal Representatives for and on behalf of the Estate of EMM (Deceased) (2015) eKLR** and taking into account inflation for the matter was decided in 2015.

20. Funeral expenses are in the nature of special damages and the law is that they must be pleaded and proved to the required standard. The respondent prayed for a total amount of Kshs. 18,600/- and the trial magistrate awarded Kshs. 18,900/- presumably for cost of the funeral expenses and the search. I think in this case the amount is sufficient.

21. In the result the appeal partly succeeds. The award of the trial court on loss of dependency is set aside and substituted with an award of Kshs 700,000/ as follows;

Pain and Suffering	Kshs.	0/-
Loss of expectation of life	Kshs.	0/-
Loss of Dependency	Kshs.	700,000/-
Special damages	Kshs.	18,900/-
<b>Sub Total</b>	<b>Kshs.</b>	<b>718,900/-</b>
<b>Less 20% Apportioned</b>	<b><u>Kshs</u></b>	<b><u>143,780/-</u></b>
<b>Total</b>	<b><u>Kshs</u></b>	<b><u>575,120/-</u></b>

22. As the appeal has partly succeeded, the appellant shall have half the costs of the appeal while the respondent shall have full costs in the lower court.

It is so ordered.

Signed, dated and delivered at **Machakos** this **30<sup>th</sup>** day of **May**, 2019.

**D.K. KEMEI**

**JUDGE**