



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 48 OF 2015

JAMES MUCHERU NGARACHU.....APPELLANT

VERSUS

JGK (suing as the legal representative of MWG, Deceased).....RESPONDENT

[Being an appeal from the original judgment of P. T. Nditika, Senior Principal

Magistrate, in Kandara SPMCC No. 94 of 2014 delivered on 8th May 2014]

JUDGMENT

1. This appeal is on *quantum of damages* only.
2. None of the disputants challenged the findings on *liability*.
3. MWG (hereafter *the deceased*) was only *seven years* old when she died in road traffic accident on 8th April 2013. The class one pupil was run down by the appellant's vehicle registration number KBK 056L.
4. Her father, the respondent, brought a suit against the appellant claiming general and special damages. In a *statement of defence* dated 3rd May 2014, the respondent denied the claim *in toto*.
5. However, the respondent did not lead any evidence to rebut the allegations of *negligence*. The learned trial magistrate *correctly* found that negligence was proved on a balance of probabilities at 100%.
6. The learned trial magistrate awarded the estate Kshs 600,000 as *general damages*; Kshs 30,000 for *loss of expectation of life*; Kshs 40,000 for *pain and suffering*; and, Kshs 30,000 for *lost years*.
7. The appellants have challenged the *heads of damages* through a *memorandum of appeal* dated 3rd June 2015. There are *seven* grounds of appeal. They can be condensed into *one*: That the learned trial magistrate applied wrong principles in assessing the damages.
8. Learned counsel relied on the submissions filed on 18th February 2018. He submitted that that a *global award* would have been more appropriate. Secondly, that the award for loss of expectation of life should have been *discounted* against the award made under the **Fatal Accidents Act**; and, thirdly, that the trial court disregarded the provisions of the **Insurance (Motor Vehicle Third Party Risks) (Amendment) Act 2013**. He submitted that under that Act, compensation for the minor should be 15% of the sum of Kshs 3,000,000 translating to Kshs 450,000.
9. The appeal is contested by the respondent. The respondent relied on submissions filed on 11th September 2017. The respondent contends that the provisions of the **Insurance (Motor Vehicle Third Party Risks) (Amendment) Act 2013** relied on by the appellant are void; and, that the lower court applied the correct formula to assess damages. I was implored to dismiss the appeal.
10. On 14th May 2019, I heard brief arguments from learned counsel for all the parties.
11. This is a first appeal to the High Court. It is an appeal on both *facts* and the *law*. I have *re-evaluated* the evidence and reached independent conclusions. I am cognizant that I neither saw nor heard the witnesses. **Peters v Sunday Post Limited** [1958] E.A 424, **Selle v Associated Motor Boat Company Ltd** [1968] E.A 123.

12. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. **Butt v Khan** [1982-88] KAR 1, **Arkay Industries Ltd v Amani** [1990] KLR 309.

13. The learned trial magistrate obviously mixed up the *heads of damages* under the **Law Reform Act** and the **Fatal Accidents Act**. He also failed to *discount* the award for *loss of expectation of life* against the award under the **Fatal Accidents Act**. See generally **Kemfro v Lubia** [1982-88] KAR 727. I am thus entitled to interfere with the quantum of damages.

14. It is common ground that the deceased was aged about 7 years at the time of the accident. She was in *class one*. There was insufficient evidence on her academic performance. She had just started that journey. It would thus be a matter of conjecture to say what she would have turned out to be. Nevertheless, her parents had *reasonable expectations* of future support irrespective of the age of the child. See **Sheikh Mushaq v Nathan Mwangi Kamau Transporters & 5 others** [1985 – 1986] 4 KCA 217, **Kenya Breweries Limited v Saro** [1991] KLR 408.

15. Some courts faced with similar situations have used the *minimum wage* and a reasonable multiplier. Taking into account inflation and recent awards, I think, in the circumstances of this case, that a *global sum* of Kshs 450,000 is more appropriate and just.

16. My attention has been drawn to the decision of Onguto J in **Law Society of Kenya v AG & 3 others**, Nairobi Pet. 148 of 2014 [2016] eKLR delivered on 5th April 2016. The court *declared* sections 1A, 1B, 3 (b) and 10 of the **Insurance (Motor Vehicle Third Party Risks) (Amendment) Act 2013 unconstitutional**. In particular, the court *annulled* section 6 and the Schedule it sought to introduce to the Act. The submissions by the learned counsel for the *appellant* on that element are thus *misleading*.

17. The deceased died soon after the accident. I will not disturb the award of Kshs 40,000 for *pain and suffering*. I will not also interfere with the award of Kshs 30,000 for *loss of expectation of life* save to say that the amount should be discounted from the award under the **Fatal Accidents Act**. With respect to the learned trial magistrate, the award of Kshs 30,000 for *lost years* was *subsumed* in what the learned trial magistrate titled *general damages* of Kshs 600,000.

18. Special damages *must* be *specifically* pleaded; and, *strictly* proved. **Kampala City Council v Nakaye** [1972] E.A 446. I concur with the learned trial magistrate that the respondent *proved* the sum of Kshs 43,300.

19. Lastly, the respondent was entitled to costs and interest in the lower court.

20. The upshot is that the appeal *partially* succeeds. I make the following orders-

- i) The judgment and decree of the lower court are *set aside*.
- ii) Liability is entered in favour of the respondent against the appellant at 100%.
- iii) General damages under the **Fatal Accidents Act** are assessed at Kshs 450,000.
- iv) Damages for pain and suffering are assessed at Kshs 40,000.
- v) Loss of expectation of life is assessed at Kshs 30,000. The sum is hereby discounted against the sum awarded in iii) above under the **Fatal Accidents Act**.
- vi) Special damages are awarded in the sum of Kshs 43,300.

21. That is to say that the appellant shall now pay to the respondent damages in the sum of Kshs 533,300. I also grant the respondent *interest* on that sum at court rates from the date of the original decree till full payment.

22. Lastly, *costs* follow the event and are at the *discretion* of the court. I grant the appellant costs in the *lower court*. However, each party shall bear its *own* costs in the *appeal*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 28th day of May 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.