



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 466 OF 2016

HARRISON MWANGI WANARUA.....APPELLANT

VERSUS

AKK (Suing as the father and Personal

Representative of the estate of the minor NK (Deceased).....RESPONDENTS

JUDGMENT

The appeal herein arises from the judgment of Hon. L. Kassan in the Chief Magistrates Civil Case no. 8465 of 2009 in which the Respondents herein sued the Appellant seeking both special and general damages, arising from a road traffic accident that occurred on the 25th day of March, 2009 along Ngong –Kiserian Road, involving motor vehicle registration number KAT 404G and NK (deceased).

In the amended plaint, amended on the 6th day of August, 2013, the Respondents alleged that, the deceased who was a minor aged 5 years was lawfully walking along the said road, near Methodist Church when the Defendant recklessly, negligently and without due care and attention drove the aforesaid motor vehicle that it hit the deceased who sustained fatal injuries.

The particulars of the Appellant's negligence and those of special damages are set out in paragraphs 5 and 6 of the amended plaint. The Respondents thus claimed damages under both the fatal accidents and the Law Reforms Acts and contended that prior to his death, the deceased was in good health, was performing well in his studies, that he was of great assistance to his family and would have continued to do so in future.

In his statement of Defence filed on 20th July, 2010, the Appellant admitted the occurrence of the accident and the fact that he was driving the aforesaid motor vehicle at the material time of the accident. He, however, denied the particulars of negligence attributed to him.

In the alternative, but without prejudice to the foregoing, he averred that the accident occurred due to the negligent manner in which the deceased conducted himself as a pedestrian. The particulars of such negligence were set out in paragraph 6 of the defence.

On 30th May, 2011, parties recorded a consent on liability at 60:40 in favour of the Respondent and therefore, the matter proceeded by way of formal proof with the respondent testifying as the only witness in support of his case. He is the father to the deceased.

It was his evidence that, on the material day, the deceased was in the company of other people when the accident occurred. He produced the documents in the list dated the 14th day of August, 2015.

Parties filed their respective submissions and in a judgment delivered on 14th June, 2016, the learned Magistrate awarded a total of Kshs. 1, 320,000 as general damages, special damages in the sum of kshs. 350,000/- less 40% liability.

The appellant being dissatisfied with that judgment has filed the appeal herein and has listed five (5) grounds of appeal in his Memorandum of Appeal dated 12th July, 2016.

The grounds of appeal are on the multiplier of 30 years, the multiplicand of kshs. 15,000, the ratio of 1/3 adopted by the learned Magistrate and the award of Kshs. 350,000 made as special damages. The appellant has also complained that the learned trial Magistrate failed to deduct the award made under the Law Reform Act.

The appeal was disposed of by way of written submissions. In his submissions the appellant contended that the finding by the learned Magistrate on the multiplicand, multiplier, and the ratio adopted of ½ were not based on evidence and that the court seems to have based its

finding on its own consideration.

On their part, the respondents urged the court to uphold the decision of the lower court maintaining that the reasoning by the learned magistrate was sound as he considered all issues pertaining to the matter.

The court has considered the grounds of appeal and the submissions filed by the parties herein. The appeal herein is on quantum of damages as the issue of liability was settled by consent as pointed out earlier in this judgment. The bone of contention is the multiplier, multiplicand and the ratio of $\frac{1}{2}$ adopted by the trial court.

It is not in dispute that the deceased herein was a minor aged 5 years at the time of the accident. In his witness statement, the respondent stated that the deceased was a very brilliant pupil with a promising future whose life was cut short as a result of the accident. This court has carefully perused the proceedings of the trial court, the documents that were produced as exhibits and the judgment by the learned Magistrate.

Though the Respondent alleges that the deceased was a brilliant pupil, no evidence was adduced to that effect. In his judgment, the learned Magistrate applied a multiplier method and took a minimum wage of kshs. 15,000 per month and even assumed that the deceased would have had a family and that the Respondent would get half of his future salary. This was not supported by any evidence on the part of the Respondent though he submitted on it. The submission before the trial court that the deceased would have followed his father's foot-steps as an engineer was merely speculative because at the age of 5 years, it is not possible to tell what the deceased would have become in future.

Infact, the learned Magistrate in his judgment observed that no one knows if the child could have been successful in life or not.

In this regard, I am persuaded by the appellant's submissions that the learned Magistrate's finding on general damages was not based on law and /or facts but was speculative.

Considering the deceased tender age at 5 years, this court concurs with the learned Judge's view in the case of Meshack Kamau (Supra) in which it was stated:

“in this case, the deceased having been a child of tender age of 5 ½ years, it is difficult to estimate with accuracy what kind of life she would have led and of what help she would have been to her father.” In the circumstances, it is difficult to identify a figure as an income or multiplier for purposes of assessment of damages. Nonetheless, whether the deceased would have been employed or not, it is fair and reasonable to assume that she would have offered some assistance, monetary or otherwise to her father as is ordinary in the African setting.

In the circumstances of this case, a global award would be appropriate, taking into account the element of inflation I would award a sum of Kshs. 100,000 to the appellant as general damages for loss of dependency”

Whereas this court appreciates that damages are clearly payable to the parents of the deceased child, irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution, the quantum therefore should depend on the age and the evidence on record such that for the court to adopt the multiplier method, there should be clear evidence of what the child would have become in his future life so as to guide the court on the multiplicand to adopt. The deceased herein having died at the age of 5 years, it was too early in life to estimate with accuracy what kind of life he would have led and what help he would have given to his father.

It is the finding of this court that the learned Magistrate applied the wrong method in awarding damages. He ought to have applied the global sum formula.

In the premises aforesaid, the award on general damages is hereby reduced to Kshs. 500,000/- being guided by the case of

Magara Vs. Onachi and another (2004)eKLR wherein a sum of Kshs. 240,000 was awarded as damages for lost years in a claim in which the deceased was aged 5 ½ years at the time of his death.

On special damages, a total of Kshs. 467,400/- was claimed in the amended plaint as itemized in paragraph 6 thereof. It is trite law that special damages have to be pleaded and proved. The court has perused the receipts that were produced as exhibits.

They make a total of kshs. 490,200/- but the amount pleaded is Kshs. 467,400/=.

The learned Magistrate awarded a total of Kshs. 350,000/- under that head. Though the appellant has urged the court to reduce that amount as there was no legal basis or justification for it, my take on it, is that, he had no basis for reducing the amount pleaded and proven but since there is no cross appeal, this court shall retain the sum of Kshs. 350,000/-.

In the end, the appeal partly succeeds to the extent shown above. The award of total of Kshs. 1, 320, 000/- made as general damages is hereby reduced to Kshs. 500,000/- while that of special damages remains at kshs. 350,000/- subject to 40% contributory negligence.

Each party shall bear its own costs of the appeal.

Dated, Signed and Delivered at Nairobi this 20th Day of June, 2019.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Applicant

.....For the Respondent