



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 206 OF 2015

JACOB NDIRANGU KIMANI.....APPELLANT

VERSUS

DKM & AKM (*suing as administrators of the Estate*)

of the late MM (Deceased).....RESPONDENT

(Being an appeal against the decree and Judgment delivered by Hon. Mr T.O. Okello- Senior Principal Magistrate delivered at Kangundo PMCC No. 13 of 2014 on 2.12.2015)

JUDGEMENT

1. According to a plaint filed in the subordinate court, the deceased, MM, was a pedestrian along Kangundo Road near Njiru Bridge on 26.7.2009 when a Motor Vehicle registration number KAH 634L owned by the appellant was so negligently driven that it was allowed to hit the deceased and as a result the deceased suffered severe bodily injuries and succumbed to the injuries while undergoing treatment. The deceased's personal representatives pleaded *res ipsa loquitur* and 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. In his statement of defence, the appellant denied the accident, as well as the fact that the vehicle was being driven by him and denied that it was being driven negligently. In the alternative, the 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 appellant also pleaded that the alleged tortfeasor is not a party to the suit and further that the suit was brought outside the time prescribed by the law of limitation.

3. The parties consented on liability in the ratio of 85%:15% in favour of the Respondent and after hearing the evidence on liability, the learned Magistrate made the following award that has precipitated this appeal:

Pain and Suffering	Kshs.	50,000/-
Loss of expectation of life	Kshs.	150,000/-
Loss of Dependency	Kshs.	1,000,000/-
Special damages	Kshs.	40,160/-
Sub Total	Kshs.	1,200,000/-
Less 15% Apportioned	Kshs	180,000/-
Total	Kshs	1,020,000/-

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 18.12. 2015 and filed on 21.12.2015.

5. Counsel for the appellant challenged the excessive award under loss of dependency and the finding on quantum of damages in terms of loss of expectation of life as well as pain and suffering. He contended that the learned trial magistrate did not take into account the age factor of the deceased who was 7 years and thus ought to have awarded Kshs 20,000/- and Kshs 100,000/- for pain and suffering and loss of expectation of life respectively as was found in the case of **Kuvenji & Another v James Mohammed Ongenge (2012) eKLR**. Counsel faulted the trial magistrate for the award of lost years of Kshs 1,000,000/- since according to him, the same was awarded whilst ignoring the

precedents on decisions for lost years. Counsel proposed a global sum of Kshs 300,000/- as guided by the case of **P I v Zena Roses Ltd & Another (2015) eKLR**.

6. Counsel for the respondent submitted that the cases cited by the appellant were decided in the 80's and 90's and hence the instant accident occurred in 2009 that is 20-30 years after the decided authorities cited by the appellant and therefore the amount of general damages for pain and suffering as well as loss of expectation of life was within the range awardable and sufficient as guided by the reasoning in **Mutua Kaluku v Muthini Kiluto (2018) eKLR**. On award of damages for loss of expectation of life, it was submitted that the amount of Kshs 1,000,000/- was not awarded in error and is comparable to the injuries and influenced by the amounts of awards in previous cases where the injuries appear to have been comparable as adjusted by inflation. Learned counsel submitted that no reason has been raised to interfere with the award of the trial court and therefore the appeal ought to be dismissed and the finding of quantum by the trial court upheld.

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 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 seven years at the time of death and that his parents anticipated a bright future ahead of him.

9. In assessing the claim for lost years, the trial magistrate awarded Kshs 1,000,000/-. However no reason was given and no authorities were cited in support of the decision and this is what the appellant chose to challenge.

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 which 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.

15. The duty of the respondent was to prove that the deceased was a minor with a bright future. Hence there is no reason why the trial court could not make the award he gave taking into consideration age of the deceased. In calculating the damages for the loss of dependency, the loss to the estate is what the deceased would have been likely able 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**). I do not think the award by the trial magistrate is unreasonable, for there is no hard and fast rule not to use a dependency ratio. In the case cited by the respondents of **Mutua Kaluku v Muthini Kiluto (2018) eKLR**, the deceased was 35 years and a multiplier of 20 years was used. However, the case is not applicable to the instant facts before me. In **Kenya Wildlife Services v Geoffrey Gichuru Mwaura (2018) eKLR**, an amount of Kshs 700,000/- was awarded on appeal for a 13 years old boy for loss of dependency under the Fatal Accidents Act and in this case because the minor was aged 7 years, the amount awarded by the trial court was on the higher side. I find an award of Kshs.500,000/= to be reasonable in the circumstances.

16. The amount of Kshs 50,000/- for pain and suffering is rather high and because the deceased died whilst undergoing treatment, I find an award of kshs.20,000/= is reasonable. On loss of expectation of life, I find the sum of Kshs.100,000/= would be reasonable since the same is the conventional sums awarded by the courts.

17. Funeral expenses are in the nature of special damages and the prayer was abandoned by the respondents. The respondent prayed for a total amount of Kshs. 57,410/- and the trial magistrate awarded Kshs. 40,460/- inclusive of the abandoned amount of funeral charged. I shall substitute the amount with KShs. 28,910 which is the total of the receipts produced. I will award this sum as special damages specifically proved.

18. The appeal partially succeeds and the trial court's award of damages is substituted with the following award:-

Pain and Suffering	Kshs.	20,000.00
Loss of expectation of life	Kshs.	100,000.00
Loss of dependency	Kshs.	500,000.00
Special damages	<u>Kshs.</u>	<u>28,910.00</u>
Less 15% Contribution	Kshs.	97,336.50
Total	<u>Kshs.</u>	<u>551,573.50</u>

19. The appellant is awarded a third (1/3) of the costs of the appeal while the Respondent will have full costs in the lower court.

Orders accordingly.

Dated, signed and delivered at Machakos this 20th day of June 2019.

D.K. KEMEI

JUDGE