REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 132 OF 2016

TWOKAY CHEMICALS LIMITED.....APPELLANT

=VERSUS=

PATRICK MAKAU MUTISYA

JONATHAN KIOKO MUMAMA

(Suing as the legal Representatives

of the Estate of MUENI MAKAU (DECEASED).....RESPONDENTS

(Being an Appeal from the Judgment of the Chief magistrate at Machakos Hon. L. Mbugua delivered on 2nd November, 2017 in Machakos CMCC No. 1111 of 2013)

BETWEEN

PATRICK MAKAU MUTISYA

JONATHAN KIOKO MUMAMA

(Suing as the legal Representatives

of the Estate of MUENI MAKAU (DECEASED).....PLAINTIFFS

VERSUS

TWOKAY CHEMICALS LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 19th November, 2013, the Respondents herein instituted a suit on behalf of the estate of **Mueni Makau** (deceased) against the Appellant herein claiming Special Damages in the sum of Kshs 37,700/- General Damages, Costs and interests.

2. The Respondent's suit was premised on the fact that on or about 17th November, 2012, the deceased was lawfully and carefully walking off the road along Machakos-Wote Road when at Muumandu Area the Appellant's Motor Vehicle Registration No. KBH 716S was so negligently and/or recklessly managed and/or controlled by the Appellant's authorised driver, servant and/or agent that the same was caused to violently hit the deceased thereby occasioning fatal injuries. The particulars of the negligence, particulars pursuant to statute and special damages were pleaded.

3. According to the judgement appealed from on 28th June, 2016 a consent on liability was signed between the parties which consent was adopted by the court on 5th October, 2016 hence settling the issue of liability at 20:80 in favour of the Respondent paving way for the determination of the quantum of damages.

4. According to the plaintiffs, on 17th November, 2012, PW1, **Patrick Makau Mutisya**, the deceased's father, who was the only witness for the plaintiff received a call that the deceased had gotten involve in an accident and was taken to Machakos level 5 Hospital for treatment. At around 11.00 (sic) he was informed that the deceased was getting worse and later at around 2.00 am, he was informed that the deceased had died. It was his evidence that the deceased was alive for 6 hours. It was his evidence that the deceased was 16 years old and was in form 1 at Mumandu Secondary School and used to perform well. In his view the deceased could have been an accountant since he was in position 8 out of 56 pupils as per the last report form. As the deceased's mother was also deceased. PW1 was his only parent and the deceased used to help him a lot at home. The deceased also used to assist his uncle, Jonathan mana.

5. PW1 testified that they incurred expenses during the deceased's funeral and produced receipts for the sum of Kshs 32,000/=. It was his evidence that the deceased had been healthy and fine before the accident. After the death of the deceased, PW1 obtained grant of letters of administration ad litem.

6. The defence did not adduce any evidence.

7. In her judgement the learned trial magistrate took into account the fact that the deceased being only 16 years, though bright in school, it was not possible to ascertain what his life would have been. Accordingly, she awarded a global figure under lost years of Kshs 1,500,000.00. She also awarded Kshs 100,000.00 under loss of expectation of life, Kshs 30,000.00 for pain and suffering and special damages in the sum of Kshs 33,000.00 and discounted the same as per the consent on liability hence the total award was Kshs 1,330.400.00 with costs and interests.

8. Aggrieved by the said award, the Appellant lodged this appeal citing only one ground viz: That the learned trial magistrate erred in law and fact when she awarded the plaintiff's the sum of Ksh. 1,500,000/= as general damages for loss of dependency which award was manifestly excessive in the circumstances of the case.

9. It was submitted by the appellant that since the deceased was a student in Form 2 aged 16 years at the time of her demise and his future being uncertain, there is no knowing what she would have become had she lived her life to the full nor how much she would earn. Stating what a profession she would engage in and how much she would earn once employment would be pure speculation. In such cases, the courts award a global sum. According to the appellant, they proposed a lump sum of Kshs. 600,000.00 as sufficient compensation for Loss of Dependency to the estate of the deceased considering that she was a minor with no dependants. This submission was based on **Kenya Wildlife Services vs. Geoffrey Gichuru Mwaura (Kajiado HCCA 6/2018)** where the deceased who was aged 13 years at the time of his death was awarded a global sum of Kshs. 700,000.00 under this head in 2018 while taking into account the inflationary rate of our economy.

10. The appellant therefore submitted that the learned trial magistrate did not consider the submissions by the appellant when awarding general damages on Loss of Dependency which were excessive in the circumstances of the case. She did not give the reasons why she awarded the said amount to the plaintiffs but only agreed with the plaintiffs' proposal for general damages for Loss of Dependency and awarded the same. In the appellant's view, had its submissions been considered, a different conclusion would have been arrived at. This court was therefore called upon to consider the appellant's submissions and find in favour of the Appellant and allow the appeal.

11. On behalf of the Respondent, it was submitted that the trial court used the correct principles in awarding the correct figure thereto of Kshs. 1,500,000/= as loss of dependency. The deceased herein was only 16 years old. She was a clever girl and had bright future prospects where she would have probably completed her education and thereafter be gainfully employed. PW 1 at the trial court testified that he had quite high expectations of the deceased and expected her to help him. He further testified that since the demise of her mother, she played a huge role in supporting the plaintiff therein and her uncle/guardian in terms of helping in house chores during the holidays. It is with reference to this that it was submitted that the deceased's salary would have been used to support her father, guardian and her own family. According to the Respondent, he had computed the award which he thought would be best fit as Loss of Dependency which was a sum of Kshs. 3,051,656.40/=. However, the court declined to use the computation and instead decided to give a global figure for loss of dependency being a sum of Kshs. 1,500,000/=.

12. It was the Respondent's view that the award is justified because the deceased was still a minor having attained the age of 16 years old and being a minor, had not attained the age of majority to entitle her to any income. Accordingly, it was not *practical for the court to assess the damages for loss of dependency using the multiplier approach. In this respect the Respondent relied on the decision of* ***Ringera, J*** *in* ***Kwanzia vs. Ngalali Mutua & Ano*** *as considered by the court in the case of* ***DMM (Suing as the Administrator and Legal Representative of The Estate of LKM vs. Stephen Johana Njue & Another [2016] eKLR*** *where the judge stated as follows:*

> ***"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."***

13. It was submitted that the question which this court is therefore left to answer is whether the sum of Kshs. 1,500,000/= for loss of dependency was excessive in the circumstances. The Respondent relied on **Kenya Breweries Limited vs. Saro [1991] Mombasa Civil Appeal No. 441 Of 1990 (eKLR)** considered by the court in the case of **DMM (Suing as the Administrator and Legal Representative of The Estate of LKM vs. Stephen Johana Njue & Another** (supra) where the court of appeal stated as follows:

> **"We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old who has not been in school and whose abilities are yet to be ascertained. That we think is a question of common sense rather than law."**

14. As to whether this court should disturb the award of damages under the head of loss of dependency the Respondent relied on **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5** and submitted that the appellant herein has not demonstrated to this court whether the trial court proceeded and applied wrong principle or misapprehended the evidence adduced during trial. The appellant only stated that the sum of Kshs. 1,500,000/= is excessive and the court ought to award a sum of Kshs. 600,000/=. The Respondent insisted that the awarded sum of Kshs. 1,500,000/= for loss of dependency is not excessive as the same is a global sum awarded by courts where it is not possible to use the multiplier approach. Further to this as already stated by the court above, the sum of Kshs. 700,000/= was quite low for a 16 year old who had a bright future ahead of him. The Respondent therefore prayed that the said sum of Kshs. 1,500,000/= for loss of dependency to remain undisturbed.

15. He therefore prayed that the appeal be dismissed with costs.

Determinations

16. In this appeal, the appellant is only challenging the quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

17. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

18. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

19. The principles which ought to guide a court in awarding damages for lost years were set out succinctly by the Court of Appeal in as:

> **(1). Parents cannot insure the life of their children;**
>
> **(2). The death of a victim of negligence does not increase or reduce the award for lost years;**
>
> **(3). The sum to be awarded is never a conventional one but compensation for pecuniary loss;**
>
> **(4). It must be assessed justly with moderation;**
>
> **(5). Complaints of insurance companies at the awards should be ignored;**
>
> **(6). Disregard remote inscrutable speculative claims;**
>
> **(7). Deduct the victim's living expenses during the "lost years" for that would not be part of the estate;**
>
> **(8). A young child's present or future earning would be nil;**
>
> **(9). An adolescent's would real, assessable and small;**
>
> **(10). The amount would vary from case to case as it depends on the facts of each case including the victim's station in life;**
>
> **(11). Calculate the annual gross loss;**
>
> **(12). Apply the multiplier (the estimate number of the lost years accepted as reasonable in each case;**

(13). Deduct the victim's probable living expenses of reasonably satisfying enjoyable life for him or her; and

(14). Living expenses reasonable costs of housing, heating, food, clothing, insurance, travelling, holiday, social and so forth.

20. In this case in making the award, the learned trial magistrate relied on ***DMM (Suing as the Administrator and Legal Representative of The Estate of LKM vs. Stephen Johana Njue & Another [2016] eKLR*** in which the court expressed itself as hereunder:

> ***"In the circumstances, the sum of Kshs. 700,000/= was a product of, and was an erroneous estimate of damages. Taking all factors into account, a 16 year old in school and doing well would receive a compensation of between Kshs. 1,000,000/= to Kshs. 1,500,000/=. In my discretion, I find the sum of Kshs. 1,200,000/= to be adequate compensation for loss of dependency. Accordingly, I set aside the award of Kshs. 700,000/= awarded by the trial court for loss of dependency and in its place I award the sum of Kshs. 1,200,000/= for loss of dependency."***

21. In my view, I am inclined to agree with Gikonyo, J's opinion in ***DMM (Suing as the Administrator and Legal Representative of The Estate of LKM vs. Stephen Johana Njue & Another*** (supra). Confronted with two decisions of the High Court, the learned trial magistrate was entitled to choose which decision to rely on. She cannot be faulted for relying on one and not the other.

22. I am not convinced that an award of Kshs 1,500,000.00 for a bright girl of 16 years was manifestly excessive.

23. In the premises I find no merit in this appeal which I hereby dismiss with costs.

24. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of July, 2019

G V ODUNGA

JUDGE

Delivered the presence of: