

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 115 OF 2017

WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

TOM AVEDI MISIGO.....1ST RESPONDENT

JUDITH AVEDI KAGAI.....2ND RESPONDENT

(An appeal arising from the judgment and decree of the Hon. E Malesi, Senior

Resident Magistrate (SRM), in Kakamega PMCCC No. 439 of 2015 of 22nd August 2017)

JUDGMENT

1. The suit at the trial court was initiated by the respondents herein against the appellant for general and special damages arising from a motor traffic accident involving their late son and a motor vehicle owned and controlled by the appellant. They sought general and special damages. The appellant entered appearance and filed defence, essentially comprising of denials and an averment that the deceased caused or contributed to the occurrence of the accident the subject of the suit.

2. The matter proceeded to full trial. One of the respondents, the mother of the deceased, testified. They called an eyewitness, Benson Zubedi, with whom the deceased was looking after cattle just beside the road. He testified that the deceased died when he attempted to pull a loose hanging cane from the appellant's tractor which was being driven on the road. The appellant called only one witness, the driver of the accident tractor, Ayub Tera, he confirmed that the deceased was among children who boarded the trailer of his tractor, loaded with cane and began to pull cane therefrom. He was informed that the deceased fell from the trailer and he stopped the tractor. He testified that he was charged with a traffic offence but was acquitted. In the end the court ruled, on liability, that the appellant's driver bore the larger responsibility for the accident and assessed liability as 40:60 against the appellant. On damages, the court awarded Kshs. 10, 000.00, for pain and suffering, Kshs. 200, 000.00 for loss of expectation of life, Kshs. 960, 000.00 for loss of dependency and Kshs. 585.00 special damages, making a total of Kshs. 1, 170, 585.00.

3. The appellant was aggrieved by the award of damages and lodged this appeal, principally against the quantum. Its grouse is that the multiplicand applied was wrong, the deceased was a minor whose future could not be predicted and the court ought to have awarded a global figure.

4. It would appear to me that the only point that the appellant wants me to consider is on the assessment of damages for loss of dependency. It is submitted that the deceased was a primary school pupil in standard 5, and it was too early to speculate as to what he might have become in future. It is suggested that the court should have considered a global amount. It is argued further that loss of dependency was a claim under the Fatal Accidents Act, Cap 32, Laws of Kenya, consequently the same should have been subjected to a dependency ratio. Several authorities were cited to support these submissions.

5. The record before me does not have a document in the form of written submissions by the respondents, and therefore I have no idea whatsoever what their position on the appeal is, and in particular on the arguments articulated by the appellant in its written submissions.

6. I agree with court in *Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of eth estate of CRK (Deceased))* [2017] eKLR, that there is no golden rule in the assessment of damages in respect of a deceased minor. There is no uniform principle on how damages for a deceased minor are to be tabulated. The courts have adopted different approaches to the matter. Some award damages under the separate heads of pain and suffering and loss of dependency, others adopt the award of a global sum approach, while others adopt a more mixed approach. However, I am persuaded by and agree with the decisions in *Charles Ouma Otieno & another vs. Benard Odhiambo Ogecha (suing as brother and legal representative and administrator of the estate of the late Oscar Onyango Ogecha (deceased))* [2014] eKLR, *Kenya Wildlife Services vs. Geoffrey Gichur Mwaura* [2018] eKLR and *Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of eth estate of CRK (Deceased))*, that where the minor is fairly young and in the early stages of his education cycle, and there is unclear evidence on his future prospects, what is variously referred to as the uncertainties or imponderables or vicissitudes of life, it would be more prudent to adopt the global sum award approach.

7. In the end I find that sum awarded for loss of dependency was inordinately high, and I would award a global sum of Kshs. 700, 000.00. That appears to me to be the only issue raised by the appellant in its written submissions. As a consequence of the above, the appeal succeeds to the extent that the award of Kshs. 960, 000.00 for loss of dependency is set aside, and substituted with an award of Kshs. 700, 000.00. The rest of the awards remain undisturbed. Each party shall bear their own costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF OCTOBER, 2019

W. MUSYOKA

JUDGE