



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CONSOLIDATED CIVIL APPEAL NO. 54, 55 AND 56 OF 2016

ERICK NYARANGI ONDO.....1ST APPELLANT

UNILEVER KENYA LIMITED.....2ND APPELLANT

VERSUS

JMO.....1ST RESPONDENT

JNM.....2ND RESPONDENT

AND

JM & JNM (Legal Representatives and Administrators Ad Liten of

estate of HE (Deceased).....3RD RESPONDENTS

(Being Appeals against the judgments of Hon. E. Kimilu dated respectively on 16th August 2016 in CMCC 585 of 2013, 23rd August, 2016 in CMCC 172 of 2014 and 16th August 2016 in CMCC 588 of 2013)

JUDGMENT

Background

1. The cases consolidated herein share the same material facts, but the Respondents filed three different suits in the lower court, hence three judgments. The brief facts are that the 1st Appellant was the driver of motor vehicle KAU 580Q, registered in the joint names of the 1st and 2nd Appellants. On 3rd August 2011 the 1st and 2nd Respondents together with their eleven (11) year old daughter HE, the deceased, were travelling in vehicle registration number KAX 809K.

2. Along Nakuru-Gilgil road, the aforesaid vehicles collided resulting in a fatality for the deceased, and leaving the 1st and 2nd Respondents with serious injuries. Liability was apportioned by consent in the lower court at 85:15% in favour of the Respondent/Plaintiffs in all three suits.

3. The trial magistrate made awards in favour of the respondents in each of the cases as follows:

In CMCC 585 of 2013 to the 1st Respondent

a) General damages 1,800,000.00

b) Special damages 2,154,414.00

Sub-Total 3,954,414.00

Less 15% 593,162.10

Total **3,361,251.90**

In CMCC 588 of 2013 to the 2nd Respondent

a) General damages 2,200,000.00

b) Special damages 131,246.00

Sub-Total 2,331,246.00

Less 15% 349,680.90

Total **1,981,559.10**

In CMCC 172 of 2014 to the administrators of the deceased's estate (joint third respondents herein) as follows:

a) Pain and suffering 20,000.00

b) Loss of expectation of life 100,000.00

c) Loss of dependency 1,680,000.00

d) General damages 180,310.00

Sub-Total 1,980,620.00

Less 15% 297,093.00

Total **1,683,527.00**

4. Dissatisfied with the awards, the appellants have appealed against the quantum of damages awarded in each of the cases. I deal with each of the appeals by re-evaluating the evidence availed and reconsidering the quantum awarded on each of the head of damages appealed against. As such I need not set out each ground of appeal in each of the cases herein.

5. The duty of this court as the first appellate court is to subject the whole of the evidence to fresh and detailed scrutiny. Thereafter, I must make my own conclusions noting the caution that I did not get an opportunity to hear the witnesses. This is the position noted in **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123** as follows :-

“[T]his court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the trial court is not bound to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif v. Ali Mohamed Sholan (1955) 22 EACA 270.”

Appeal No. 54 of 2016 (CMCC 585 of 2013)

6. The Plaintiff/1st Respondent in the lower court pleaded and was awarded damages for the following injuries:

1. Extensive wounds and contusion to the left leg.
2. Blunt injuries to the back.
3. Comminuted multiple fracture of the left upper and of the tibia which was fixed with a metallic plate and screws.
4. Shattered fractures of the lower end of the left tibia.
5. Fracture of the lower end of the left tibia fixed with metallic plate.
6. Loss of bone density lower tibia and foot bones.

7. Permanent incapacity of 18%

7. The lower court judgment indicates a recorded consent by which the parties admitted the medical reports of Drs. Wokabi and Madhiwala, and that special damages be assessed at Kshs 2,154,414/= subject to contribution. On perusal of the record of proceedings, the record shows at page 2 as follows:

“Court: the consent of the parties in 172 of 2014 is adopted as an order of the court.”

8. On perusal of the record of proceedings in CMCC No. 172 of 2014 the consent reached on 21st October 2014, was as follows (at page 2 thereof):

“By consent judgment on liability be and is hereby entered in the ration of 85:15 in favour of the plaintiff.....

Court: Similar orders to apply in CMCC 585 of 2013, 586 of 2013, 587 of 2013 and 588 of 2013.”

9. Further, the record of proceedings shows the following consent entered by the parties on 7th June, 2016:

“Kaburu: By consent court do assess the quantum on submissions. Medical reports by Dr. Wokabi and Madhiwala to be annexed to written submissions. Special damages Kshs 2,154,414/= subject to contribution future medical expenses catered above.

Ngeresa: I confirm the consent.

Court: Consent adopted.”

10. On general damages, the appellants/defendants disputed the “*comminuted multiple fractures left tibia*”, pleaded by the plaintiff. They argue that both medical reports and treatment notes capture only “*comminuted fracture left tibia proximal and distal part and fibula lower 1/3.*”

11. In the submissions on appeal, the Appellants’ concede that both parties agreed to have the two medical reports [Dr. Wokabi’s and Dr. Madhiwala’s] produced by consent without calling on the makers. I will therefore rely on the reports as produced.

Injuries Sustained

12. The first thing I note concerning the doctors’ reports that were admitted is that they were not those of the doctor who first examined the appellant immediately upon occurrence of the accident. The accident occurred on 3rd April, 2011. The report of Dr. Madhiwala was dated 7th April 2014, whilst that by Dr. Wokabi was dated 30th April, 2013 meaning that these were not the original doctors that initially examined and treated the 1st Respondent after the accident.

13. The full list of injuries set out in the pleadings is not replicated in any of the medical reports. The P3 form filled by the police doctor and produced in the lower court showed the injuries to be:

- injuries on the left leg, bruise on the hands.
- displaced ankle joint and comminuted fracture of proximal tibia.

These were acknowledged by the defendants/appellants in page 2 of their submissions in the lower court. A comminuted fracture one in which the fracture(s) have reduced the bones to many fragments (see Oxford Concise English Dictionary).

14. Dr. Wokabi attributed permanent disability at 18% whilst Dr. Madhiwala fixed it at 15%. That would give an average of 16.5% permanent disability. In addition Dr. Wokabi set out a prognosis and indicated future costs which will have to be borne by the 1st Respondent at Kshs 100,000/=. I take these into account. Both doctors noted the extent of injuries. Dr. Wokabi referred to the injuries on the left leg as being of compound nature, that the plaintiff suffered blood loss and a lot of pain, loss of bone density and that he was fixed with metal implants. Similarly, Dr. Madhiwala noted that plaintiff had fracture of tibia which had open reduction internal fixation, and for lower end external fixates was applied; that he was admitted on 4th August 2011, 1st October 2011, and 26th March 2013 respectively and discharged on 27th August 2011 and 4th October, 2011 respectively.

15. The trial court analysed the authorities availed in the lower court. For the defence, there were three authorities namely: **Anthony Mwangi v Martin Mururi [2008] eKLR** where, the plaintiff sustained blunt and deep cut injury to the frontal region of the head, fractures of left leg in the thigh region, fracture of both arms, deep cut in chest and tongue, and was awarded 450,000/=. In addition the case of **Richard Mungai Gichohi v Peter Ngilu Kahia & Another Nairobi HCCC No. 2654 of 1997** where the plaintiff sustained multiple injuries and was awarded Shs 180,000/= for pain suffering and loss of amenities. Finally in **Zacharia Macharia v. Cleopas Waswa [2015]** the plaintiff was awarded Shs 250,000/=.

16. The plaintiff’s authorities were also considered with awards ranging between Shs 1,300,000/= and 2,000,000/=. Two of the cases were not relevant to the type of injuries suffered by the Plaintiff here. In **Dorcas Wangithi Nderi v Samuel Kabiri Mwaura & Another [2015]**

eKLR, the plaintiff sustained compound fractures of both left and right tibia/fibula, multiple soft tissue injuries and blunt injury to the head. An award of Kshs 2,000,000/= was made. A compound fracture is one (complicated by a skin wound).

17. In the present case, an award of Shs 1,200,000/= for comminuted fracture appears to be reasonable taking into account the injuries on the left leg, bruises on the hand, and the Shs 100,000/= indicated by Dr. Wokabi for future costs.

18. I therefore reduce the general damages award to Kshs 1,200,000/= from Shs 1,800,000/=. The special damages remain as agreed by the parties' consent. The final award will therefore be:

a) General damages	1,200,000.00
b) Special damages (consented)	<u>2,154,414.00</u>
Sub-Total	3,354,414.00
Less 15%	<u>503,162.10</u>
Total	<u>2,851,251.90</u>

19. The trial court's award is therefore set aside to the extent noted herein in respect of the general damages.

20. Each party will bear their own costs in appeal number 54 of 2016.

Appeal No. 55 of 2016 (CMCC 588 of 2013)

21. The appellants have appealed against the award of Shs 1,981,551.10 made to Jackline Naswa Misiskhu, the 2nd Respondent. The trial court's decision did not specify the 2nd Respondent's injuries. However, the pleaded injuries were:

1. Blunt injuries to the head and neck.
2. Major back injury with fracture of the 1st lumbar vertebrae.
3. Major injury to the right forearm with fracture to the right radius.
4. Major chest injury with fracture of the 6th rib.
5. Injury to the left shoulder with fracture of the acromion process.
6. Soft tissue injuries to both legs.

22. In the defendant's submissions, they assert that:-

“the only injuries captured in the P3 Form and both Medical Reports are soft tissue injuries to the neck, fracture of left tip of the acromion and distal and lumbar. No further injuries are captured.”

23. However, the proceedings of the lower court show the consent of the parties for the:

“medical reports by Dr. Wokabi and Madhiwala be admitted without calling makers..... (and) special damages of Kshs 131,246/= subject to contribution.”

24. The injuries are elaborated in the medical reports. By the consent of the parties special damages cannot be subject to this appeal. I note further that the court incorrectly referred to one of the doctors' reports as being that of Dr. Madhiwala when in fact, only Dr. Wokabi and Dr. Atinga provided medical reports in this case number 588 of 2013. As neither of the parties contested the medical evidence, I shall take it that the consent in fact applied to Dr. Wokabi's and Dr. Atinga's reports. Thus, the incorrect reference to Dr. Madhiwala's report in the judgment should properly be a reference to Dr. Atinga's report which is actually on record. I so find.

25. In the memorandum of appeal at paragraph 4, the appellants impugn the award of the trial court decision for:

“arriving at a wrong and erroneous conclusion condemning the defendant to damages of Kshs 1,800,000/= on the alleged injuries which could not attract such on excessive damages.”

However, in the trial court's judgment there is no mention of damages of Kshs 1,800,000/=. What was in fact awarded was general damages of Kshs 2,200,000/=. In addition the appellant has, correctly, not challenged the award of special damages.

26. Despite the appellant's error, aforesaid, I will nevertheless re-evaluate the general damages of Shs 2,200,000/= awarded by the trial magistrate.

27. Dr. Wokabi's report of 30th April 2013 took into account Dr. Atinga's report of 18th April 2013. Dr. Atinga's report did not mention any injuries to the head and neck, but Dr. Wokabi's report did. Having carefully perused both reports all the injuries pleaded appear to have been covered overall in both of the medical reports.

28. The trial court considered the following authorities from the defendant. **Agroline Hauliers & Another v Michael Abongo Kisemba [2015] eKLR** where the appellate court awarded a lower sum of Shs 400,000/= from contused neck, chest, left hand and swollen fractures of the left patella and cut wound on right lateral forehead. In **Maurice Onyango Okul v Phoebe Odhiambo Ombori [2012] eKLR**, Kshs 5,000,000/= was awarded for blunt trauma on the neck, contused lumber region, chest contusion, contused knee, compound fracture left tibia and fracture of pelvis. In **David Kiplagat Sang v Richard Kipkoech Langat and Another HCCC No. 91 of 2004 Kericho**, the Plaintiff was awarded Shs 550,000/= for fractures of two ribs, of tibia, and of fibula, of upper tibia (tibia plate) and left acetabulum with hip dislocation, fracture of left medical malleolus, lacerated wound on the left and tenderness of the chest. This latter case was decided almost ten years before the present plaint was filed.

29. Also considered were the plaintiff's authorities, namely: **James Njua Kariuki v Mary Goretti Wakwibubi & Another [2007] eKLR** where the plaintiff was awarded Shs 3,000,000/= for multiple fractures and soft tissue injuries; and further **James Katua Peter v Simon Mutua Muasya [2008] eKLR** where the plaintiff was awarded Kshs 2,000,000/= for dislocation of left hip, joint fracture of acetabulum roof, comminuted fracture of left tibia and fibula, fracture of medial malleolus and cuts and bruises on right elbow and left parietal area of the scalp. In addition, the trial court considered the cases of **Rebecca Mumbua Musembi v Lucy Kinuya [2014] eKLR** and **Duncan Muriithi Mbiuki v Amadel Thiaine HCCC No. 79 of 2007 Meru** where 1,800,000/= and 1,500,000/= respectively were awarded for multiple injuries.

30. The multiple injuries in this case are clearly set out in the medical reports adopted by the court pursuant to the parties' consent. I am alert to the principle that the court should not be bound by the lower court's assessment. Equally however, this is counter-balanced by the principle that the court should not interfere with a lower court's award unless the same is inordinately high or low or has taken into account wrong principles or has taken an unreasonable view of the facts (See **Shabani v City Council of Nairobi [1985] KLR 516**).

31. The above is further supported by the holding position was in the Court of Appeal for Eastern Africa case of **Peters v Sunday Post Ltd [1958] EA 424** where Sir Kenneth O'Connor stated:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt -vs- Thomas (1), [1947] A.C. 484.

My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

32. In light of all the foregoing I see no basis for finding that the award was so inordinately high or low as to warrant interference by this court. Nor do I see any misapplication of legal principles. Accordingly, I will not disturb the award of the trial court. The appeal will stand dismissed.

Appeal No. 55 of 2016 (CMCC NO. 172 of 2014)

33. The 1st and 2nd Respondents lost their daughter Hope Esendi Mbaja as a result of the accident aforesaid. It is not disputed that she was 11 years old at the time of her death. As administrators of the deceased estate, in the lower court they were awarded damages of Shs 1,683,527/= in the following terms:

Pain and suffering	Ksh	20,000.00
Loss of expectation of life	Kshs	100,000.00
Loss of dependency	Kshs	1,680,000.00

Special Damages	Kshs 180,310.00
Sub-total	Kshs 1,980,620.00
Less Contribution 15%	<u>Kshs 297,093.00</u>
Total	<u>Kshs 1,683,527.00</u>

34. In the appeal, the appellant impugns the whole award as excessive. I deal now with each head of damages in the award.

Pain and Suffering

35. The appellants submit that Shs 10,000/= should have been awarded as a conventional figure in line with James Gakunya Karieny, Nancy Mugure Gakenya suing as legal representative of the estate of **David Kelvin Gakunya v Perminus Kariuki Githinji. HCCC 91 of 2014 Nairobi**. Appellants base their argument on the fact that the plaintiffs did not give evidence as to whether the deceased died instantly or later.

36. There is no general principle I am aware of or have come across under this head that propounds that the conventional award is Shs 10,000/= unless there is proof that the deceased did not die instantly. The award is always within the trial court's discretion and subject to the circumstances pertaining. In my view, the appellant's submission is not a sufficient basis for interfering with the award of Shs 20,000/= which is also well within the range normally awarded under this head.

Loss of expectation of life

37. The appellant argues that the trial court held that the deceased had a healthy and vigorous life yet no certificate of medical fitness was availed. They urge that Shs 80,000/= was sufficient guided by the case of **Chen Wembi & 2 Others v IKK & Another suing as Administrators of the estate of CKK (Deceased) 2017 eKLR**. The respondents submit that the award of Shs 100,000/= is well within the range of awards normally given under the head.

38. Nothing has been shown to me on this head that would warrant my interference with the lower court's decision, as the award made is clearly within the range normally awarded under this head.

Loss of dependency/lost years

39. The appellants impugn the trial magistrate's suggestion concerning what the deceased would have turned out to be in future as conjecture. They propose an award of Shs 300,000/= guided by the case of **MN (suing on behalf of the minor LK Deceased) v Paul Kiptoo [2016] eKLR**. This case was however not cited to the trial court.

40. The trial magistrate determined that the deceased died at 11 years of age; was a pupil in class 6 at New Light Junior Academy; that she was a bright pupil and the parents had high expectations on her. In the lower court the plaintiffs alleged that they were dependents of the deceased by customary law.

41. Exhibits 1 - 10 filed with the plaint were admitted by consent in the lower court. The document numbered 9 comprised New Light Schools Monthly Progress Card for the deceased, her class assessment report and a letter of condolences from the deceased's school. The Class Assessment Report shows that she was generally a grade A pupil and according to the teachers assessment was on an improving trajectory.

42. In the Plaint, the plaintiffs stated that the deceased had a normal expectation of life and by her death the estate suffered lost years to be assessed by the court. the trial court's assessment was as follows:

“The court shall award the minimum wage of Kshs 7,000/= against a multiplier of 30 years. The plaintiff would have used 2/3 of her salary to maintain her parents and siblings. Loss of dependency would be calculated as follows:

$$Kshs 7,000 \times 12 \times 30 \times 2/3 = 1,680,000/= ”.$$

The plaintiff had made a submission on the above and cited the Regulation of Wages minimum wage scales for 2011 for Nairobi region.

43. I have seen the Regulation of Wages 2011 scale relied upon in the trial court. It is accepted law that an award under loss of expectation of life and loss of dependency can be combined and can be awarded either by way of lump sum or by way of calculation based on a prospective salary. There is therefore no need to spend time on arguing which is the best method by which to tabulate such an award. It is also clear that damages are payable to the parents of a deceased child irrespective of the age of the child and irrespective of whether or not there is evidence of their pecuniary contribution. See **Kenya Breweries Ltd v Saro [1981] KLR 408** where the Court of Appeal sitting at Mombasa held:

“In the Kenyan society, at least as regards African and Asians, the mere presence in family of a child of whatever age and of whatever ability is itself a variable asset which the parents are proud of and are entitled to keep intact.”

44. Similarly Nyarangi JA stated in **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] eKLR** at page 10:

“In general, in Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian Communities in Kenya. This particular custom is broadly accepted, respected and practised throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others’ welfare. In the Asian community, the customs is supported by the Hindu religion whose influence on the life of the Hindu community is well nigh total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary.”

45. The trial court was persuaded that the deceased child was doing well in school and the parents anticipated that she “*would have completed her education and gotten employed.*” This is not far-fetched. I agree that the progress reports exhibited showed that the deceased was a bright child, an A/B student. Her lowest recorded total marks in class were 361 and the teacher commented on her second term assessment that she “*can get 400 marks*”. The head teacher equally commented “*good improvement*”. Here I see clear and concise evidence of the brilliance and future prospects of the deceased child.

46. I agree with Kimondo J in **DI v Zena Roses Ltd & Another** where he said:

“For the case of minors, it is my view that tabulation for damages for loss of future earnings can be gauged depending on what evidence is brought before the court.”

47. In **David Ngunje Mwangi v The Chairman Board of Governors Njiiri High School [2001] eKLR** cited in **MN (Suing on behalf of LK Deceased) v Paul Kiptoo [2016] eKLR** the court used a minimum wage multiplied by 30 years to reach an award of 1,680,000/=. This case was availed by the plaintiffs in the lower court.

48. The trial Magistrate was thus entitled to rely on the Regulation of Wages (General) Order scale for 2011, and a multiplier of 30 years, as she did, the accident having occurred in 2011. The salary of a general labourer in that scale is Shs 6,999/= in municipalities outside of Nairobi.

49. For all the foregoing reason, I am not persuaded that the award under this head was inordinately high or low, or was made using wrong principles of law. Accordingly, I will not interfere with the trial court’s award.

Disposition

50. In summary my determination on the three appeals is as follows:

a) In Civil Appeal No. 54 of 2016, the appeal is partially successful and the award on general damages is hereby set aside. An award of general damages of Shs 1,200,000/= shall substitute the trial court’s award of Shs 1,800,000/=. Special damages remain as awarded by the trial court. Costs to the appellant

The totals (Shs 1,200,000 + Special damages 2,154,414) = 3,354,414.00

Less Contribution 15% 503,162.10

Total **2,851,251.90**

b) In Civil Appeal No. 56 of 2016, the appeal is hereby dismissed with costs to the Respondent.

c) In Civil Appeal No. 55 of 2016, the appeal is hereby dismissed with costs to the Respondent.

51. Orders accordingly.

Dated and Delivered at Naivasha this 23rd Day of October, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Akango holding brief for Maroko for the Appellants
2. No representation for Kaburu for the Respondents

3. Court Clerk - Quinter Ogutu