



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 48 OF 2015**

DANIEL MWANGI RUGANO..... APPELLANT

*V E R S U S*

JULIUS G. MACHARIA (Suing as the Legal Representative of the

Estate of HUMPHREY MAINA MACHARIA.....RESPONDENT

**J U D G M E N T**

1. The appellant was dissatisfied with the judgment of Embu SRM in CMCC No. 69 of 2011 in which the respondent sued him for damages arising from fatal injuries sustained by the deceased in a road traffic accident. The parties entered a consent judgment on liability at 70:30 ratio. The judgment was delivered on 21/07/2015 and the respondent was awarded damages all inclusive of Kshs.1,680,200/= plus costs costs of the suit.

2. The memorandum of appeal sets out four grounds which may be condensed as follows:-

*(a) That the general damages were inordinately high and not consistent with the guidelines under the Insurance (Motor Vehicle Third Party Risks) Amendment Act.*

*(b) That the multiplicand used was not based on evidence.*

*(c) That the defendant failed to consider the submissions of the appellant.*

*(d) That the magistrate ignored conventional awards in assessing damages.*

3. The appeal was disposed of by way of written submissions filed by the parties. Messrs Kairu & McCourt represented the appellant while the respondent appeared in person.

4. The appellant took issue with the multiplier approach treating it as the main ground in this appeal. He argued that no evidence was led to support the figure of Kshs.10,000/= as the deceased's income per month. The respondent's proposal of Kshs.40,000/= was just a mere speculation.

5. It was proposed that in a situation where there is no evidence on income, the court should rely on the Government Wages Guidelines as was held in the case of **OYUGI JUDITH & ANOTHER VS FREDRICK ODHIAMBO ONGONG & 3 OTHERS [2014] eKLR**. In that case, the appellant had challenged the lower court's as excessive and the damages were reduced considerably by the appeal court based on the said guidelines.

6. It was further submitted that the deceased having been a Form IV student, a global sum would have been more suitable as opposed to the multiplier approach. This argument was based on the finding of Ringera, J. in **MWANZIA VS NGALALI MUTUA & KENYA BUS SERVICES (MSA) LTD & ANOTHER**. It was held that:-

*7. The multiplier approach is just a method of assessing damages. It is not a principle of law and must be abandoned where the facts do not facilitate its application.*

8. As for pain and suffering, an award of Kshs.10,000/= proposed by him was adequate since the deceased died only a short while after the accident.

9. The appellant further argued that the loss of dependency was not proved since the parents of the deceased were not dependent on him. The evidence adduced only focused on the future of the student in that he would then support his parents.

10. As for the age of the deceased, the appellant said that the court held that the deceased was aged 16 years instead of 18 years which was supported by the evidence of PW1. The court ought to have awarded a reasonable sum for loss of dependency as opposed to KShs.1,600,000/= that was based on the multiplier.

11. The respondent opposed the appeal arguing that the judgment of the court was based on the evidence of the parties and the law. Further that the damages awarded were reasonable and not excessive as alleged by the appellant. The appellant's authorities for assessment of damages are of 1990 and 1991 which are not comparable with the facts in this case. He argued that the age of the deceased was proved by tendering evidence.

12. The respondent relied on the case of **DANIEL MWAI RUGANO VS JULIUS MACHARIA (suing as representative of the estate of Humprey Maina Macharia)** and urged the court to apply the principles set out by Nambuye J. as she then was in dealing with the assessment of damages.

13. The duty of the first appellate court was explained in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES [1976] & ANOTHER VS LUBIA & ANOTHER (No2) [1985] eKLR**. The court observed:-

*...The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*

14. The parties having entered into a consent judgment in this case, the issue of liability is not in dispute. The appellant indicated that he was satisfied with the special damages of KShs.50,200/= awarded by the learned magistrate. This leaves the court with only three issues for determination:-

(a) *Whether the general damages awarded specifically on loss of dependency were inordinately high for this court to interfere.*

(b) *Whether the assessment of the damages was based on wrong principles.*

(c) *Whether the damages for pain and suffering were excessive.*

15. The evidence on the record shows that the deceased was knocked by the defendant's motor vehicle registration number KAR 788B and was fatally injured. He died as he was being taken to the hospital. The magistrate awarded KShs.30,000/= for pain and suffering. It is the appellants' proposal that an award of KShs.10,000/= would suffice in the circumstances.

16. In the case of **DMM (Suing as Administrator and Legal Representative of the estate of LKM Vs Stephen J. Njue & Another [2016] eKLR** the deceased who died four (4) days after the accident was awarded KShs.50,000/= for pain and suffering.

17. In the case of **MUSYOKA MUTHOKA VS SILVERSTONE QUARRY LIMITED & ANOTHER [2016] eKLR**, the deceased was awarded KShs.200,000/= for pain and suffering having passed on the same day of the incident.

18. The appellant did not cite any case to support the award of KShs.10,000/= for pain and suffering. In view of the foregoing cases, I find the award of KShs.30,000/= reasonable and almost on the lower side for the deceased who died the same day. The respondent was satisfied with the figure awarded by the court. The argument of the appellant to reduce the award of KShs.10,000/= has absolutely no basis. I find no reason to disturb the award in this item.

19. For loss of dependency, the appellant said that the age of the deceased was not established. It was wrong therefore for the learned magistrate to use the age of 16 years to assess damages for loss of dependency.

20. The respondent who was the father of the deceased testified that his late son was aged 18 years at the time of his death. Although the birth certificate was not produced, the evidence from the respondent which was supported by the postmortem report is in my considered opinion sufficient to establish the age of the deceased. The magistrate was therefore guided by evidence on record as to the age of the deceased.

21. The appellant took issue with the proof of income of the deceased in that he was a student and had not started earning. The plaintiff said that the deceased was a form IV student and that he used to help him with household chores. It is therefore not in dispute that the deceased had no income at the time he met his untimely death.

22. The appellant seems to propose two options:-

(i) *That of the use of Government Wage Guidelines; and*

(ii) *Award of a global sum.*

23. A few decisions were cited by the appellant:-

In the case of **TRANSPARES KENYA LIMITED** quoted by Nyamweya J. in **KENYA BREWERIES LTD VS SARO [1991] KLR 408** the court held:-

*“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 in to 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 one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.*

24. In this case, the court observed that a student who was yet to be employed is still entitled to damages for lost years. It was further observed that the child even when still in school helps the parents in household chores, in cultivating family land, grazing, caring for his/her younger siblings among other duties. There was evidence from the respondent in this case that the deceased assisted the family in similar duties. Looking to the future, the parents expected the child, on completion of his studies to get a job and support them and especially in their old age.

25. The court in such cases has to get the best estimate possible on the prospects of the deceased based on the known facts presented before the court. In some cases, it may be difficult for the court to figure out what the child would turn out to be or what occupation he would have landed into.

26. As for the income of the deceased, the appellant argued that the proposal by the respondent of Kshs.50,000/= per month with no documents in support and no job at hand was baseless. Further that the magistrate used a multiplier of Kshs.10,000/= for income without any basis.

27. In the case of **PALM OIL TRANSPORTERS & ANOTHER VS W.W.N. [2015] eKLR** the court observed that the best thing to do in cases of children would be to award a global sum for loss of dependency. As I have indicated earlier, it not possible for a court to foresee the future of the child at the time of assessing damages. A bright child in school may not become a doctor or an engineer as expected by parents. Another may become a humble business man or an endowed one while another may become a small scale farmer or a large scale farmer. The future may present unpredictable situations resulting in variance of income.

28. In view of the foregoing, I find that the learned magistrate acted on wrong principles in assessing the damages which lend to inordinately high damages.

29. All relevant factors considered including the age of the deceased, I ward the respondent a global sum of Kshs.1,200,000/= for loss of dependency.

30. It is important to take into consideration that the global sum is payable in a lump sum. It is therefore reduced to Kshs.1,000,000/=.

31. The award of the lower court is hereby set aside and substituted with Kshs.1,000,000/=.

32. The total award is as follows:-

(a) Loss of dependency - 1,000,000/=

(b) Special damages - 50,200/=

(c) Pain and suffering - 30,000/=

1,080,200/=

Less 30% contribution 324,060/=

756,140/=

33. The sum payable to the respondent is Kshs.756,140/= plus costs and interests. This appeal is only partly successful.

34. I hereby order that each party meets their own costs of this appeal.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF APRIL, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Andade for Messrs Kairu & McCourt for the Appellant**

**Respondent in person**