REPUBLIC OF KENY A

IN THE HIGHCOURT

AT KAKAMEGA

CIVIL APPEAL NO. 9 OF 2017

CHABHADIYA ENTERPRISES LTD.....1ST APPELLANT

SHAJANAND HARDWARE (K) LTD.....2ND APPELLANT

V E R S U S

SARAH ALUSA MWACHI (Suing as the legal Administrator

and Personal Representative of the Estate of late

FAIZA MUSA – (Deceased) -.....RESPONDENT

(from the judgment and decree of F.Makoyo – SRM, in Kakamega

C.M.C Civil Suit No. 35 of 2014 dated 12/1/2017)

J U D G E M E N T

1. The respondent herein had sued the appellants at the lower court seeking for special damages and damages under the Fatal Accidents Act and the Law Reform Act after the respondent's daughter was killed in a road traffic accident involving the appellants' motor vehicle. Parties entered consent on liability in the ratio of 80:20 in favour of the respondent. The trail magistrate proceeded to assess the damages and entered judgment for the respondent as follows:

Loss of expectation of life – Kshs. 100,000/=

Loss of dependency - Kshs. 1,200,000/=

Pain and suffering - kshs. 30,000/=

Special damages - Kshs. 66,190/=

Kshs. 1,396,190/=

Less 20% contribution Kshs. 279,238/=

Total Kshs. 1,116,952/=

2. The appellants were aggrieved by the judgment and filed this appeal on the grounds that:

1. That the learned trial magistrate erred in law and in fact in failing to consider the evidence and submissions made on behalf of the appellants in arriving at his decision.

2. That the learned trial magistrate erred in law and in fact in awarding damages which were inordinately excessive in the circumstances.

3. That the learned trial magistrate erred in law and fact in applying the wrong principles of law and/or misapprehending the evidence while assessing damages.

4. That the learned trial magistrate erred in law and in fact in considering issues that were neither raised, pleaded nor submitted upon by the respondent.

5. That the learned trial magistrate erred in law and in fact in awarding double compensation to the respondent contrary to law.

Background

3. The respondent was the mother to the deceased. She testified in court that at the time that the deceased met her death she was a 12 year old class 5 pupil at Chimoi Primary School. That the deceased used to help her with household duties. That she had expected that she would take a career in magistracy and help her. That her expectation went up in smoke due to the untimely death. She sought for compensation.

Judgment of the trial magistrate

4. The trial magistrate considered that the deceased met a violent death and awarded Kshs.30,000/= for pain and suffering. He also awarded a conventional sum of Kshs.100,000/= for loss of expectation of life. On loss of dependency the magistrate conceded that the award for lost years for minors is far distant and speculative. However that courts do assess damages for lost years in cases of minors depending on the facts and circumstances of the case as held in **Hassan Vs Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 467.** He considered that the deceased would not have earned less than the minimum wage that he placed at Kshs.10,000/=. He adopted a dependency ratio of 1/3 and a multiplier of 30 years. His award came to

10,000 x 30 x 12 x 1/3 = 1,200,000/=.

Submissions

5. The advocates for the appellants, **Kigen and Co. Advocates**, submitted that the learned trial magistrate awarded damages which were inordinately excessive in the circumstances of the case. That the magistrate disregarded their written submissions.

Though the advocates indicated in their written submissions that they had filed some authorities, there were none in the court file. The court will thereby rely on the appellants' authorities made in the lower court.

6. The advocates had submitted in the lower court that the deceased had died immediately after the accident. They had urged the court to award Kshs.5000/= for pain and suffering. On this they relied on the case of **Lucy M. Njeri Vs Fredrick Mbuthia & Another (2006) eKLR** where Angawa J (as she then was) had awarded Kshs. 5000/= for pain and suffering.

7. The advocates submitted that an award for loss of expectation of life is not awardable where there is an award on loss of dependency as this amounts to double compensation.

8. The advocates submitted that the deceased had died at the age of 12 years. She did not have any dependants and was not in employment. That in claims for loss of dependency, courts normally take into account the age of the dependants and that of the deceased to determine the multiplier to be applied and the deceased's income upon which the multiplicand is determined. Since these could not be determined in the case, the better approach was to make a global award. They had urged the court to award a global figure of Kshs. 70,000/=. For this proposition they had relied on the cases of **Meshack Kamau Vs Edward Kinyanjui Gathandi & Another (2006) eKLR**,**Lucy M. Njeri Vs Fredrick Mbuthia & Another (2006) eKLR and Grace Wairimu Mwangi Vs Joseph Mwangi Gitundu, Machakos , HCC No. 162 of 1994.** In the latter case of **Grace Wairimu Mwangi Vs Joseph Mwangi Gitundu** a global sum of Kshs. 70,000/= was made for the estate of a minor for loss of dependency. In the case of **Meshack Kamau Vs Edward Kinyanjui Gathandi & anothe**r,Okwengu J (as she then was) awarded Kshs. 100,000/= in the year 2008 for loss of dependency for a minor who had died as the age of 5 ½ years.

9. On special damages, the advocates submitted that the same must be specifically pleaded and proved through production of receipts. That in this case no receipts were produced to prove the pleaded sum of Kshs. 85,100/=.

10. The advocates for the respondent, **C.M. Mwebi Advocate,** submitted in this appeal that the appellants' submissions indicate that they are only disputing the award under the loss of dependency and not the awards on loss of expectation of life and pain and suffering. That in any event the awards on loss of expectation of life and pain and suffering were reasonable.

11. The advocates submitted that the trial magistrate was right in making an award of Kshs. 1,200,000/= for loss of dependency based on the multiplier method. They submitted that even if the court were to apply the lumpsum/global method, the award of Kshs. 1,200,000/= is not excessive. They cited the cases of **Daniel Mwangi Kimemi & 2 others Vs JGM & Another (2016) eKLR** and **Surjit Sing & Malkiat Singh Vs Richard Barasa (suing as the administrator of Victor Wangila, deceased, Bunguma HCCA no. 78 of 2012** . In the former, the deceased had died at the age of 9. He was doing well in school. Gikonyo J made a global award of Kshs. 1,000,000/=. The advocates submitted that in this case the deceased died at the age of 12. That an award of Ksh. 1,200,000/= made by the trial magistrate despite the principle of law applied was not excessive for a 12 year old deceased.

12. In the latter case the deceased had died at the age of 9 years. The lower court had used the multiplier method and awarded Kshs. 720,000/= for loss of dependency. On appeal Ali- Aroni J confirmed the award despite the principle applied and went further to state that she would have awarded a global sum of Kshs. 800,000/= . The advocates urged the court to find that the award of Kshs. 1,200,000/= for a 12 year old was not excessive.

Duty of first appellate court

13. An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It 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- See **Bashir Ahmed Butt Vs Uwais Ahmed Khan (1982-88) KAR 5**.

Analysis and Determination

The claim for the respondent was under both the Fatal Accidents Act (cap 32 Laws of Kenya) and the Law Reform Act (cap 26 Laws of Kenya).The appeal was on the entire award and was not confined to the loss of dependency as urgued by the advocates for the respondent.

15. The trial court made an award of Ksh.30, 000/= for pain and suffering. The evidence was that the deceased had died in hospital on the same day of the accident. The appellant did not show that the award of Kshs. 30,000/= was excessive. The authority relied on to make an award of kshs. 5000/= was outdated.

16. The trial magistrate made an award of Kshs. 1,200,000/= for loss of dependency using the multiplier method. The advocates for the appellants submitted that this was a wrong approach and that the magistrate should have adopted the global/ lumpsum method.

17. A review of past High Court judgments indicates that there is no uniform method of assessing damages for estates of minors for loss of dependency. Some High Court judges hold the view that both approaches are proper as exemplied by the following holding of Joel Ngugi J **in Kenya Power & Lighting Company Limited Vs E.K.O & Another, Kiambu HCCA No. 169 of 2016(2018) eKLR** where he said that:

> ***''It thus emerges that superior courts are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned trial magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other High Court decisions. The learned trial magistrate did not proceed on wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand.''***

18. In Transpares Kenya Limited & Another Vs S.M.M (**Suing as legal representative for and on behalf of the estate of E.M.M (deceased**), Machakos HCCA No. 203 of 2012 (2015) eKLR,Nyamweya J endorsed both approaches in a case where the deceased had died at the age of 5 years.

19. On the other hand there are some High Court judges who hold the view that the multiplier approach is not suitable in all cases as was stated by Ringera J (as he then was) in **Mwanzia Vs Ngalali Mutua and Kenya Bus Services (Msa) Limited & another** as quoted in **Albert Odawa Vs Gichimu Gichenji, NKU HCCA No. 15 of 2003 (2007) eKLR** where he held that:

> ***'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 the 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.'***

20. Examples of cases where High Court judges on appeal replaced awards made on the basis of the multiplier method with awards based on the lumpsum/global method are such cases as in **Charles Ouma Otieno & Another Vs Benard Odhiambo Ogecha** (**suing brother and legal representative and administrator of the estate of the late Oscar Onyango Ogecha(deceased), Kisii HCCA No. 50 of 2013** where the minor had died at the age of 14 years. Sitati J held that the trial magistrate fell into error by awarding the damages under the various heads instead of awarding a lumpsum. The judge set aside the award and made a lumpsum award of Kshs. 350,000/- on the grounds that the future of the child was uncertain and there was no knowing what he would have become had he lived his life to the full nor how much he would earn.

21.In **Daniel Mwangi Kimeni & 2 others Vs J.G. M & Another** (supra) where the minor had died at the age of 9, Gikonyo J held that the trial magistrate did not explain why he adopted a multiplicand of Kshs. 6000/- and a multiplier of 25. The judge considered that the child was doing well in school and awarded a global sum of Kshs. 1 million.

22. It is my view that the multiplier method where it involves minors is only speculative. In this appeal, case the minor died at the age of 12 years. The court cannot know what she would have turned out to be in life. There was no basis in the trial magistrate holding that the deceased would not have earned anything less than the minimum wage of 10,000/=. The magistrate did not even refer to the gazette notice that sets the minimum wage at Kshs. 10,000/ =. Though he adopted a multiplier of 30 years he did not consider the age of the dependant(the mother to the deceased) so as to determine the proper multiplier. The multiplier and the multiplicand were therefore speculative. The multiplier method was therefore not the most appropriate in assessing the damages for loss of dependency in this case. The global lumpsum method was the better approach in the circumstances of the case. I will therefore set aside the award made on the basis of the multiplier method in favour of an award based on the lumpsum/ global method.

23. The advocates for the appellant had suggested a global award of Kshs. 100,000/-.The authority they relied on was delivered in 1990's which is more than 20 years ago. It certainly cannot be a good guide.

24. The advocate for the respondent have in this appeal cited more recent authorities where global awards of Kshs. 720,000/- and Kshs. 1,000,000/= were made for loss of dependency in respect to estates of minors. I have in addition considered the award in the case of **Chen Wembo & 2 others Vs IKK & Another (suing as the legal representative of the estate of CRK (deceased) (2017) eKLR,** where Meoli J

made a lumpsum award of Kshs.600,000/= to the estate of a deceased who had died at the age of 12. In this case a school report was produced that indicated that the deceased was an average student. There are some average students who end up excelling in their careers of choice. I award the estate of the deceased a global sum of Kshs. 700,000/=.

25. An award of Kshs. 100,000/= was made for loss of expectation of life. The advocates for the appellant submitted that this is not awardable where there is an award for loss of dependency as it amounts to double compensation.

26. The estate of a deceased minor is entitled to damages for loss of expectation of life under the Law Reform Act. In **Chen Wembo & 2 others vs IKK & Another** (**Suing as the legal representative and administrator of the estate of CRK** (deceased) (2017) eKLR Meoli J held that :-

> ***" Equally , there can be no dispute that the estate of a deceased minor is entitled to damages for pain and suffering , loss of expectation of life, funeral expenses etc under the Law Reform Act… "***

The award for loss of expectation of life was properly awarded.

27. The concept of double compensation was explained recently in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja (deceased) Vs Kiarie Shoe Stores Limited ,Nyeri Civil Appeal No. 22 of 2014** where the Court of Appeal stated that :-

> ***'.. this court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act , hence the issue of duplication does not arise''.***

28.The court re- stated what was held in **Kemfro Africa Limited t/a Meru Express Services 1976 & Another Vs Lubia & Another (1987) eKLR 30** that :

> *' 6.* ***An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.***
>
> ***7. The Law Reform Act (cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any of the rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.***
>
> ***8. The words 'to be taken into account' and ' to be deducted' are two different things . The words in section 4(2) of the Fatal Accidents Act are 'taken into account'. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for non – pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.***

29. In making the award for loss of dependency under the Fatal Accidents Act, I have considered the award for loss of expectation of life made under the Law Reform Act.

30. Receipts were produced to prove the sum of Kshs. 66,190/- awarded in special damages. The award on special damages is thereby upheld.

In the foregoing the appeal succeeds to the extent that the award for loss of dependency is reduced to Kshs. 700,000/=. As the appeal has partly succeeded, each party to bear its own costs.

Delivered, dated and signed in open court at Kakamega this 18th day of October, 2018.

J. NJAGI

JUDGE

In the presence of:

No appearance.....for appellants

No appearance.....for respondent

George.....court assistant

Parties:

Appellants...absent

Respondent...absent

Right of appeal 14 days