



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 10 OF 2017

CHHABHADIYA ENTERPRISE LTD.....1ST APPELLANT

SHAJANAND HARDWARE LTD.....2ND APPELLANT

V E R S U S

GLADYS MUTENYO BITALI (Suing as the administrator and personal representative

of the estate of LINET SIMIYU – Now (deceased).....RESPONDENT

(from the judgment and decree of F. Makoyo ,SRM , in Kakamega CMC Civil suit No. 363 of 2014 delivered on 20/1/2017).

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 trial 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 4 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 as a lawyer 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 $10,000 \times 30 \times 12 \times 1/3 = 1,200,000/=$.

Submissions

5. The appeal was on the award for loss of dependency and the award on special damages. The advocates for the appellant, **Kigen & Co. Advocates**, submitted that the award in respect of loss of dependency was excessive and erroneous. That the deceased was aged 12 years at the time of death. There was no evidence as to her abilities and future prospects. That the trial court erred in law in awarding loss of dependency based on the multiplier method instead of awarding a lumpsum/global award as a consequence of which the award is inordinately high as to amount to an erroneous estimate of the damages. The advocates relied on the following cases:-

-Chen Wembo & 2 Others Vs IKK & Another (suing as the legal representatives and administrators of the estate of CRK (deceased) (2017) eKLR where the trial magistrate had used the multiplier method in a case where the deceased had died at the age of 12 years. Meoli J set aside the award and said that there was no evidence on the abilities and future prospects of the minor. The judge thereupon made a global award of Kshs 600,000/- for loss of dependency.

-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 where the trial magistrate had used the multiplier method to make an award for loss of dependency for a 14 year old deceased. Sitati J held that the future of the deceased was uncertain as there was no knowing what he would have become had he lived his life to the full nor was there way of knowing how much he would earn. The judge set aside the award and made a global award.

6. On special damages the advocates submitted that the lower court erred in law in admitting receipts which do not bear the stamp duty stamp. That in the circumstances duty had not been paid for them. That the receipts ought not to have been admitted by the trial court. They submitted that the admission of the documents was contrary to the provisions of section 19 of the Stamp Duty Act. The advocates relied on the case of **Leonard Nyongesa Vs Derick Ngula Rights, Civil Appeal No. 168 of 2008 Mombasa** (unreported) where Kasango J held that:

“The position therefore is that a receipt for which payment of stamp duty is required under the Stamp Duty Act is admissible in evidence on condition that the person issuing the same takes it for Stamp duty assessment before the court can attach any probative value to it. In my opinion, if that is not done, the court cannot award damages based on such a receipt.”

7. The advocates proposed the final award to be as follows:

(a) General damages for Pain and suffering....Kshs. 30,000.00	
(b) Loss of expectation of life.....Kshs.100,000.00	
(c) Loss of dependency.....Kshs.600,000.00	
(d) Special damagesKshs. Nil	
Sub – totalKshs. 730,000.00	
(e) Less 20% contributionKshs. 146,000.00	
Net TotalKshs. 584,000.00	

9.The advocates for the respondents , **C.M. Mwebi & Co. Advocate**, on the other hand submitted that though the trial magistrate used the multiplier method to make an award on loss of dependency, the award of Kshs. 1,200,000/= was not excessive even if the global award method was to be used. The advocates cited the case of **Daniel Mwangi Kimemi & 2 Others Vs JGM & Another (2016) eKLR** where the lower court had used the multiplier method for a minor who had died at the age of 9 years. On appeal Gikonyo J set aside the award and made a global award of Kshs. 1,000,000/= .The advocates submitted that the award of Kshs. 1 million for a 9 year old in that case compares

relatively well with an award of Kshs. 1,200,000/= that was made for a 12 year old in this case.

10. The advocates also cited the case of **Surjit Singh & Malkiat Singh Vs Richard Barasa (Suing as the administrator of the estate of Victor Wangila(deceased) Bungoma HCCA No. 78 of 2012** where the lower court had used the multiplier method in assessing damages for the estate of a 9 year old deceased. On appeal, the High Court confirmed the award of Kshs. 720,000/= despite the multiplier principle that had been applied. The judge went further to state that she would have awarded a sum of Kshs. 800,000/=. The advocates urged the court to find that an award of Kshs. 1,200,000/= for a 12 years old is not excessive as compared to the cited authority where the deceased had died at the age of 9 years.

11. On special damages, the advocates submitted that receipts were produced to prove the same. That no objection was raised when the receipts were produced. Furthermore that in an African funeral, especially that of the Luhya community, such funeral expenses would ordinarily be incurred. Hence with or without receipts such expenses were reasonable and would ordinarily be awarded.

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

14. 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 confined to loss of dependency and the award on special damages.

Loss of dependency-

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 exemplified 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 cited 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. Some cases have been cited above where some High Court judges on appeal replaced awards made on the basis of the multiplier method with awards based on the lumpsum/global method. In **Charles Ouma Otieno & Another Vs Benard Odhiambo Ogecha** (supra) where the deceased 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/-.

21. In **Daniel Mwangi Kimemi & 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. I take the my view that the multiplier method where it involves minors is only speculative. In this appeal, the minor died at the age of 12 years. The court cannot know what the minor would have turned out to be in life. There was no basis for 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 suggested a global award of Kshs. 600,000/- while relying on the case of **Chen Wembo & 2 others Vs IKK & Another(supra)** where a lumpsum award of Kshs.600,000/= was made. The advocates for the respondents relied on the cases of **Daniel Mwangi Kimeni & 2 others Vs JGM(Supra) and Surjit Singh & Malkiat Singh Vs Richard Barasa (Supra)** where awards of Kshs. 1 million and Kshs. 720,000/- were respectively made. In this case a school report was produced that indicated that the deceased was a below average pupil and had a problem of chronic absenteeism from school. However there is no telling what she would have turned out to be in life. There are some below average students who have excelled in life. I award a global sum of Kshs. 700,000/=.

In making the award for loss of dependency under the Fatal Accidents Act, I have considered the award of Kshs. 100,000/= for loss of expectation of life made under the Law Reform Act which is not contested.

Special damages-

30. Receipts were produced to prove the sum of Kshs. 66,190/- awarded in special damages. There was no objection to the production of the supporting documents when the case proceeded in court. 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 appearancefor appellants

No appearance.....for respondent

George.....court assistant

Parties:

Appellants.....absent

Respondent.....absent

Right of appeal 14 days