



IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 36 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

COUNTY GOVERNMENT OF MERU....APPELLANT

AND

JAMES MWAKI & KAREN MWAKI

suing as the legal representative

of the estate of SHEELIN WANJA aka

SHELIN WANJA (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E.W Ndegwa, RM

dated 21st March 2018 at the Senior Resident Magistrates Court

at Githongo in Civil Case No. 17 of 2017)

JUDGMENT

1. It was not disputed that the deceased, a 13 year old child, sustained fatal injuries when the appellant's motor vehicle registration number KBY 388C, Toyota Hilux hit her as she was walking along the Meru-Nkubu Road on 5th November 2016. Liability was apportioned by consent of the parties in the ratio 80:20 against the appellant. The trial magistrate proceeded to award damages as follows:

Pain and suffering	Kshs. 20,000.00
Loss of Expectation of life	Kshs. 130,000.00
Loss of Dependency	Kshs. 1,200,000.00
Special Damages	Kshs. 43,250.00
Less contribution	Kshs. 278,650,00
Total Award	Kshs. 1,114,600.00

2. It is the award of damages under the heading of loss of dependency payable under the **Fatal Accidents Act** that has precipitated this appeal. Counsel for the appellant, in his submissions, reiterated the grounds of appeal set out in the memorandum of appeal dated 20th April 2018 as follows:

1. THAT the learned trial magistrate erred in law and in fact in awarding a sum of Kshs. 1,200,000/- as damages for loss of dependency where the deceased was aged 13 years with no clear academic performance.

*2. THAT the trial magistrate erred in law and in fact in wholly relying on the decision in **DMM (Suing as the Administrator and***

legal representative of the Estate of LKM) v Stephen Johana Njue and Another where the circumstances in that decision were not analogous to those in the present case and thereby arriving at a wrong decision.

3. THAT the Judgment of the trial magistrate is against the law and weight of evidence.

3. Counsel for the respondent submitted that the decision cited supported the approach taken by the trial magistrate and that there was sufficient evidence that the deceased was doing well in school and as such the award was reasonable in the circumstances.

4. The relevant part of the evidence by the deceased's father, James Mwaki (PW 1) was that, "*The girl who passed on S was a bright girl. I have a letter from St. Anne Day and Boarding dated 9/1/2018*" The letter from the school produced confirmed that the deceased was a student in the said school and at the material part stated that, "*The school had just closed for the December holidays. She was bright student and active in church.*"

5. In the judgment, the trial magistrate found that the deceased was a child aged 13 years and since no evidence had been adduced to show her school abilities held that, "*I will abandon the multiplier approach since it is impossible to ascertain the expected monthly or annual income and proceed to award a global figure.*" The trial magistrate then held that she was persuaded by the case of **David Micheni Mutugi suing as the administrator and legal representative of the estate of LKM v Stephen Johana Njue and Another MERU HCCA No. 21 of 2014 [2016] eKLR** and held that since the child was 13 years old the sum of Kshs. 1,200,000.00.

6. From the highlights of the judgment I have set out, the trial magistrate reached the conclusion that a global award was appropriate in the circumstances due to lack of evidence hence no error was committed in reaching this conclusion as contended in Ground 1 of the memorandum of appeal. The main issue is whether the sum of Kshs. 1,200,000.00 was excessive as a result of relying wholly on the decision in **DMM suing as the administrator and legal representative of the estate of LKM v Stephen Johana Njue and Another (Supra)**. The respondent relied on that case to propose the sum of Kshs. 1,500,000/- as being adequate compensation where the deceased child was 16 years old. The learned judge set aside the award for loss of dependency awarded by the trial court and held as follows:

[12]In the circumstances, the sum of Kshs. 700,000 was a product of, and was an erroneous estimate of damages. Taking all factors into account, a 16 year old in school and doing well would receive a compensation of between Kshs. 1,000,000 to 1,500,000. In my discretion, I find the sum of Kshs 1,200,000 to be adequate compensation for loss of dependency. Accordingly, I set aside the award of Kshs 700,000 awarded by the trial court for loss of dependency and in its place I award a sum of Kshs 1,200,000 for loss of dependency.

7. On the other hand, the appellant submitted that Kshs. 300,000/- was reasonable in the circumstances. It cited **P I v Zena Roses Limited and Another ELD HCCA No. 126 of 2009 [2015] eKLR** where the court awarded Kshs. 300,000/- for a child aged 6 years old and in kindergarten and the case of **Moranga Abel Nyakenyanya v Jackson Kichwen ELD HCCC No. 74 of 1996 [1991] eKLR** where the court awarded Kshs. 300,000/- where the child was 10 years old.

8. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

9. The trial magistrate relied entirely on the **DMM Case** and gave a similar award. It clear that even in that case, the learned judge was referring to the bracket of a child aged 16 years. As the child in this case was aged 13 years, the trial court erred by failing to take into account the lower age of the child particularly in light of what the Court of Appeal stated in **Kenya Breweries Limited v. Saro [1991] Mombasa Civil Appeal No. 144 of 1990 [eKLR]** that:

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 into 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.

10. The cases cited by the appellant was on the lower side and involved children of a much younger age than the deceased in this case. I find that the trial magistrate failed to consider that the deceased in this case was younger than the child in **DMM Case**. I find that the award should have been lower even taking into account the bracket suggested by the learned judge in that case. I therefore hold that a sum of **Kshs. 800,000/-** as the global award for loss of dependency would be reasonable in the circumstances.

11. I allow the appeal, set aside the award for loss of dependency and substitute the same with an award of **Kshs. 800,000/-** subject to the agreed contribution. The sum shall accrue interest at court rates from the date of judgment in the subordinate court.

12. I award the appellant costs of **Kshs. 40,000/-**.

DATED and DELIVERED at MERU this 18th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Kariuki instructed by Mithega and Kariuki Advocates for the appellant.

Mr Mwirigi instructed by Mwirigi Kaburu and Company Advocates for the respondents.