



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NO 200 OF 2013**

**ERASTUS GITUMA.....1<sup>ST</sup> APPELLANT**

**JAMES MURIITHI MUMBA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MOHAMED NOOR OSMAN**

**FATUMA YAROW ADAN (*suing as the Legal*)**

***Representative of the Estate of AISHA***

**MOHAMMED NOOR (*Deceased*).....RESPONDENTS**

**(An Appeal arising out of the judgment of Hon. L. Simiyu Ag. SRM**

**delivered on 5<sup>th</sup> September 2013 in Machakos Chief Magistrate's**

**Court Civil Case No. 1088 of 2010)**

**JUDGMENT**

The Appellants were the Defendants in Civil Case No. 1088 of 2010 at Machakos Chief Magistrate's Court, while the Respondents were the Plaintiffs in the said suit. The said parties entered a consent on 1<sup>st</sup> August 2013 in the trial Court, whereby judgment on liability was entered in favour of the Respondents as against the Appellants at the ration of 85%:15%.

The trial magistrate in her judgment after hearing the evidence awarded total damages of Kshs 647,700/= to the Respondents. The Appellants subsequently moved this Court through a Memorandum of Appeal dated 4<sup>th</sup> October 2013, wherein they raised the following grounds:

1. THAT the learned magistrate erred in law and fact in awarding loss of dependency and lost years in view of the age of deceased and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards on deceased minors.
2. THAT the learned magistrate erred in law and in fact in awarding damages which were not proved in view of documentary evidence presented before the court and ended up making such a

high award as to show that the magistrate acted on a wrong principle of law

3. That the learned magistrate erred in law and fact by awarding the respondent lost years and under the Fatal Accidents Act so as to show that the award was erroneous and based on wrong principal of Law and fact.

4. THAT the learned magistrate's erred in law and in fact in failing to consider the defendant's submissions while finding on quantum and his award on damages was so high as to be entirely erroneous.

5. THAT the learned magistrate's erred in law and in fact in his assessment of general damages which were inordinately high having regard to the age of deceased, evidence and submissions made and award was made without considering the age of the minor, hence making an excessive award in view of the fact that dependency and loss of future earnings was not proved.

6. THAT the learned magistrate erred in law and in fact in awarding the plaintiff damages and failed to take into account the award on loss of dependency and loss of future earnings and ended up awarding both.

7. That the learned magistrate erred in law and in fact in failing to consider relevant authorities in assessing damages and ended up awarding damages without guidance on comparable awards.

The Appellants are praying for orders that the appeal be allowed, the judgment of the lower court be set aside and award reduced, and that the cost of this appeal be borne by the Respondents.

### **The Facts and Evidence**

The brief facts of the case in the trial Court are that the Respondents instituted the suit in the lower court by filing a Plaint dated 5th August 2010. They stated therein that at the times material to this suit, the 1st Appellant was the registered, legal or beneficial owner of motor vehicle registration number KAL 878S, an Isuzu Lorry, while the 2nd Appellant was the 1st Appellant's driver, servant and/or agent who had custody and control of the said motor vehicle.

Further, that on or about 4th day of January, 2010 at about 4.00pm Aisha Mohamed Noor (deceased) was lawfully walking along Outer Ring Road near Pipeline Stage, when she was knocked down and crashed by the Appellants' motor vehicle registration number KAL 878S Isuzu Lorry, which was being negligently driven, controlled and/or managed by the 2nd Appellant. As a result of the said accident, the deceased sustained serious injuries from which she died and lost the normal expectation of a happy and healthy life, and the estate of the deceased has suffered great loss and damage.

The Respondents gave the particulars of negligence on the part of the Appellant's driver and also relied on the doctrine of *res ipsa loquitur*. They also gave the particulars of the deceased and her dependants, and stated that at the time of her death the deceased was aged 9 years old and in good health, and lost normal expectation of a happy and prosperous life. The Respondents sought general damages under the Law Reform Act and the Fatal Accidents Act, special damages that were to be proved at the hearing, and costs of the suit.

The Appellants filed a Defence in the trial Court dated 6<sup>th</sup> December 2010, wherein they denied that the Respondents have capacity to sue for and on behalf of the estate of the late Aisha Mohamed Noor, and the claim of ownership of, or that the 2nd Appellant was driving motor vehicle registration number KAL 878S. The Appellants also denied that on or about 04/01/2010 an accident occurred involving vehicle registration number KAL 878 S along Outer Ring road thereby hitting the deceased, and also denied all the particulars of negligence attributed to them as owner, driver, servant and /or agent as alleged.

From the record of the trial court proceedings, the trial took place on 1<sup>st</sup> August 2013 when the 1<sup>st</sup> Respondent gave evidence as PW1 before the Respondents closed their case. The Appellants did not call

any witnesses during the trial.

### **The Issues and Determination**

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. The duty of this Court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

The Appellants and Respondent canvassed the present appeal by way of written submissions. Wangari Muchemi & Company Advocates for the Appellants filed submissions dated 10th December 2016, wherein it was argued that the trial court failed to take evidence into cognizance which proved that the deceased had no dependants, and her future had not clearly been mapped out to warrant an award under lost years under Fatal Accidents Act. Further, that there was neither oral testimony by the deceased's estate nor any document relied on by the trial court to arrive at the said award under this head.

In addition, that there was no indication in the whole proceedings how the award of lost years was found to be applicable, instead of the global sum as suggested by the Appellants in their submissions. The Appellants submitted the award of lost years Kshs. 600,000 was excessive and not commensurate with awards for similar claims of deceased minors.

The Respondent's Advocates, Magare Musundi & Company Advocates filed submissions dated 27th January 2017, in which it was argued that the deceased suffered a lot of pain from the accident scene, and was rushed to South C Hospital and later to the Nairobi Hospital where despite treatment, she succumbed to the injuries. Further, that the Respondents had urged the trial court to be guided by the judicial authority of **Hassan & Another vs Soma Properties Ltd, [2004] 2 KLR 608** where the court awarded a sum of Kshs . 1,000,000/=, and where the deceased died at hospital and not at the scene of accident

Reliance was also placed on the decision in **Alili vs Edward & Anor [2000] e KLR** that the court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense, and that such children in turn are expected to assist in domestic work while at school and after school on gaining employment, to make a contribution towards the maintenance of the family.

The Respondents also submitted that the principle in the case of damages awarded under both the Law Reform Act and the Fatal Accidents Act for loss of life is not of 'deduction' *per se* but one of "taking into account" and is not applicable in all cases especially this one, as no evidence has been led by the Appellants that the deceased's estate would benefit from both awards. Reliance was placed on the decision by Dulu J. in this respect in **Hassan Salat Gudow vs Mohammed Adan & 2 Others, Garissa Civil Appeal No. 10 of 2014**.

Lastly, it was submitted that the Respondent gave evidence at the hearing and produced exhibits which showed that they incurred special damages, and the Court was urged to make an award of the special damages of Kshs. 21,700/= incurred by the Respondent and proved in court as per the evidence and documents on record.

I have considered the evidence given in the trial Court and the arguments made by the parties. From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are only contesting the issue of quantum of damages. It is an established principle of law that that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see

**Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).**

It is not disputed that the deceased in the present appeal was a child, and section 4 of the Fatal Accidents Act clearly stipulate that every action brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the deceased. The dependants named in the Plaint filed in the trial Court included the Respondents who are the deceased's father and mother respectively.

In addition, the issue of payment of damages to the estate of a deceased child was long settled by the Court of Appeal in the case of **Sheikh Mushtaq vs. Nathan Mwangi Kamau Transporters & Others, [1985 – 1988] 1 KAR 217** where Nyarangi, JA recognized the fact that in African and Asian communities, an expectation by parents that their children would take care of them in their old age was normal. In **Kenya Breweries Ltd. vs. Saro, [1991] KLR 408** the Court of Appeal held 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 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.”**

In the present appeal, the trial magistrate awarded damages under the following heads;

Special damages	52,000/=
Pain and suffering	10,000/=
Loss of expectation of life	100,000/=
Lost years	<u>600,000/=</u>
Sub-Total	762,000/=
Less 15% Contribution	<u>114,300/=</u>
Net Award	<u>647,700/=</u>

On the question whether the amount of Kshs 600,000/= awarded by the trial court as damages for lost years was based on any known factors or principles of law, this Court is guided by the manner of assessment of damages for loss of dependency under the Fatal Accidents Act. The applicable method was aptly explained by Ringera J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows;

**The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually**

called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

The deceased child in the present appeal had not in this respect earned any income that would have guided the Court in determining a multiplicand and resultant multiplier, and the best the trial Court could do in the circumstances is award a global amount. I note in this regard that in the comparable judicial authority relied upon by the Appellants in the trial Court, being John Njenga Njoroge vs Alex Mureithi, Nakuru H.C.C. No 252 of 1999, a global figure of Kshs 300,000/= was awarded for lost years with respect to an accident that occurred in August 1998 when the deceased therein who was aged 17 years died. The accident herein took place on 4th January, 2010, more ten years later and the award of Kshs 600,000/= for lost years was in my view reasonable taking into account inflationary trends.

The law and practice where a claimant get awards for loss of life both under the Law Reform Act and the Fatal Accidents Act was explained by the Court of Appeal as follows in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] eKLR:

**“20. 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 under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.**

**21. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the *ratio decidendi*. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the *ratio decidendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, 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 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 the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”**

In the present appeal that the trial magistrate awarded damages for loss of life both under both the Law

Reform Act and Fatal Accidents Act and did not necessarily err in so doing , as she considered the awards together when it came to the computation of damages.

Lastly, on the submissions made by the Appellant that special damages were not awarded but were proved during the hearing, this Court notes that on the contrary, there was an award by the trial Court of special damages of Kshs 52,000/=, which was in my view erroneous. This is for the reason that as shown in the introductory sections of this judgment, the Plaintiff filed in the trial Court indicated that the Respondents were seeking special damages that were to be proved at the hearing. However, for special damages to be awarded, they must be specifically pleaded and also strictly proved. It was held as follows in **Maritim & Another –v- Anjere (1990-1994) EA 312** at 316 in this regard:

**“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”**

I therefore set aside the said award of damages in the trial court of Kshs 647,700/=, and substitute it with a total award of Kshs 603,500/= to the Respondents as against the Appellants, which has been computed as follows arising from the findings in the foregoing:

	Kshs
(a) Pain and suffering	10,000.00
(b) Loss of expectation of life	100,000.00
(c) Lost years	600,000. 00
Sub Total	710,000.00
Less 15% contribution	106,500.00
<b>Total</b>	<b><u>603,500. 00</u></b>

The Appellants shall bear 85% of the costs of the appeal.

It is so ordered.

**DATED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF MARCH 2017.**

**P. NYAMWEYA**

**JUDGE**