REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CIVIL APPEAL NO. 32 OF 2014

(Being an appeal from the Judgment of the Chief Magistrate's Court at

Naivasha Civil Case No.478 of 2013, E. Kimilu- Ag. PM)

CHEN WEMBO.....1ST APPELLANT

HANQIANGZHOU.....2ND APPELLANT

KOBAY ASHI KOJI.....3RD APPELLANT

- VERSUS -

I K K and H M M (*Suing as the legal representatives and administrators*

***of the Estate of* C R K (DECEASED).....RESPONDENTS**

J U D G M E N T

1. The undisputed background to this case is that the minor **C R K** died as a result of injuries sustained in a road traffic accident on 2/10/2011 along Maai Mahiu – Naivasha Highway when the vehicle **KBN 412K** knocked him down. His parents, who are the Respondents in this appeal being the legal representatives of his estate, sued the three Appellants herein. The said Appellants were sued in the capacities as the driver, beneficial and registered owners, respectively, of the accident vehicle.

2. The Respondents blamed the Appellants for negligence resulting in the accident. The Appellants denied liability for the accident, and pleaded negligence against the deceased minor. At the close of the trial, the learned magistrate awarded a net sum on Shs 1,563,000/= which included *interalia* a gross sum of Shs 1,680, 080/= for loss of dependency.

3. Aggrieved by the decision the Appellants filed the present appeal. The memorandum of appeal filed on 16/10/2014 contains 7 grounds of appeal as hereunder:-

> **"1. THAT the respectable Honourable Magistrate applied the principles laid down in the Fatal Accidents Act and Law Reform Act in respect of the estate of a child aged 12 years.**
>
> **2. THAT the Learned Honourable Magistrate applied a minimum wage to the estate of a child aged 12 years when no income was pleaded or exhibited.**

3. THAT the Learned Honourable Magistrate failed to use presents and practice of Courts to ward a lump sum compensation (Award) to the estate of a child aged 12 years.

4. THAT the Learned Honourable Magistrate failed to make a finding on the submissions by the defence in her judgment in particular to award a lump sum.

5. THAT the Award by the Honourable Magistrate was excessive in any event.

6. THAT the Learned Honourable Magistrate failed to subject the loss of dependency to Limitations.

7. THAT the estate has earned twice under the Law Reform and the Fatal Accidents Act."

4. The parties did not file skeleton arguments on time as directed by the court but eventually, counsel for the Appellant field written submissions and elected to rely on them on the date set for oral arguments in reply. Counsel for the Respondents made oral arguments. The main thrust of the Appellants' argument is that the trial court erred in making separate awards under the Law Reform Act and the Fatal Accidents Act. They further contend that as the deceased was 11 year old minor at death a global award was more suited to the case.

5. On this score they have relied on the decision of **Sitati J** in **Charles Ouma Otieno & Another -Vs- Bernard Odhiambo Ogecha Civil Appeal No. 50 of 2013** and **H. Young & Co. (EA) Limited & Another -Vs- James Gichana Oranji Kisii HCCA No. 207 of 2009**. Further citing **Kemfro Africa Limited t/a Meru Express Service & Ano. -Vs- A. M. Lubia & Another (1982 – 1985) 1 KLR 727)** the Appellants took issue with the lower court's double award for loss of life under the Law Reform Act and the Fatal Accidents Act. In their view this amounts to double compensation as observed by the Court of Appeal in **Hellen Waruguru Waweru –Vs- Kiarie Shoe Stores Limited (NYR) Civil Appeal No. 22 of 2015**.

6. On the actual award in respect of lost dependency, the Appellants contend that the figure of Shs 1,680,000/= was excessive for a 11 year old and had no support in the evidence tendered before the trial. Several authorities are cited for the proposition that in the case of a minor whose future and income is unknown, a global figure is more appropriate. In their view an award for lost dependency ordinarily requires hard evidence of income which is not forthcoming in the case of a minor.

7. The Appellants however proposed that a more appropriate approach was used in **Oshivji Kuvenji & Another -Vs- James Mohammed Ongenge [2012] eKLR** wherein the court relied on **Mohammed Abdi Noor Adi -Vs- Wilson Wanyeki Warita, NRB HCC No. 1525 of 2005**. In the latter case that involved a 10 year old deceased minor a multiplicand of Shs 3,000/= (applicable minimum wage) and a multiplier of 20 years was used.

8. Mr. Waigwa for the Respondents opposed the appeal. He submitted that there is no legal requirement for the court to use the global award approach in respect of claims involving minor's deceased persons. That the "heads" approach used in this case cannot be said to erroneous unless the Appellant showed that the figure arrived at was wrong. In his view the more relevant question is whether the award was fair. He defended the award and relying on the case of **Abdi Kadir Mohammed & Another –Vs- John Wakaba Mwangi [2009] eKLR** urged the court to find no merit in the appeal and to dismiss it.

9. At this stage the duty of the appellate court is as stated in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** by the Court of Appeal for Eastern Africa:-

"i) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

10. And in **Peters –Vs- Sunday Post [1958] EA 424 pg 429** the court stated:-

"It is a strong thing for an Appellate court to differ from the finding, on a question of fact, of a Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence……to determine whether the conclusion originally reached upon it should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

11. I have considered the submissions made on this appeal and the record of the trial in the lower court. It seems to me that this appeal turns on two key but related issues, namely:-

a. Whether the trial court erred and arrived at an excessive award by adopting the 'heads' approach in determining damages in respect of the deceased minor.

b. Whether the trial court erred and arrived at an excessive award by making awards both under the Law Reform Act and the Fatal Accidents Act in respect of the same claimants.

12. The impugned award of the lower court was as follow:-

"Liability: 85:15% in favour of the Plaintiff and against the defendants jointly and severally.

Pain and suffering	**-**	**Kshs 20,000/=**
Loss of expectation of life	**-**	**Kshs 80,000/=**
Loss of dependency	**-**	**Kshs 1,680,000/=**
(less 15% contributory negligence)	**-**	**Kshs 252,000/=**
	-	**Kshs 1,428,000/=**
Special damages	**-**	**Kshs 35,000/=**
Total	**-**	**Kshs 1,563,000/="**

13. Regarding the appropriateness of the 'heads' approach in determining the award of damages in respect of minor deceased persons, this is not a new question. The superior courts have repeatedly weighed in with their respective views on the heads vis-à-vis global award approach. In particular courts have different approaches in dealing with claims under the Fatal Accidents Act. Some courts are inclined to the formulae proposed by **Ringera J** (as he then was) in **Beatrice Wangui Thairu -Vs- Hon. Ezekiel**

Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR) while others prefer global awards.

14. **Ringera J** had stated:-

> **"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."**

15. This debate is not in any way surprising, primarily because, the exercise of awarding damages for lost years in respect of a minor deceased person necessarily poses a challenge to the courts, involving as it does a fair amount of speculation.

16. **Sitati J** eloquently highlighted the court's dilemma in the case of **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:**

> **"I am of the considered view that the learned trial magistrate fell into error in making awards under separate heads. As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.**
>
> **The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14 year old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved. Reliance was placed on the case of H. Young & Company EA Ltd. & another -vs- James Gichana Orangi – Kisii HCCA NO.207 of 2009. In the said case, the learned trial magistrate awarded damages totalling Kshs.323,300/= under various heads in respect of the death of the deceased who was aged 11 years at the time of death. On appeal, Musinga J (as he then was) set aside the award of Kshs.323,300/= and in lieu thereof made a lump sum award of Kshs.300,000/= subject to 25% contribution."**

In her decision, **Sitati J** made a single global award of damages under the Law Reform Act and Fatal Accidents Act.

17. While grappling with the same question in an appeal before her **Ngenye J** observed in **Oshivji Kuvenji & Another -Vs- James Mohammed Ongenge [2012] eKLR** that:

> **"In as much as the Appellants in the instant case argue that a global sum would be the best suited to the deceased aged only six (6) years at the time of her death, I have not come across an authority that has overturned a decision of the trial court on account of granting general damages based on expected earnings and tabulated on a multiplier. It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor.**

Even as early as 1986 as is in the case LUDUWA (Suing by her next friend) AND ANOTHER -VS- AYUKU & ANOTHER, (1986) KLR, 394, a Judgement of Apaloo, J – High Court, the Court considered that an award of only Ksh. 8,000/= under loss of expectation of life in the case of a minor aged only one month who had died alongside her mother. In granting the figure the court said that she lived for just a month and her prospects of a future happy life are less than her mother's. However loss of dependency was awarded for death of her mother which was tabulated based on her average earnings and a multiplier of twenty five (25) years used. Nothing was awarded for lost years or loss of dependency in respect of this minor."

Ngenye J proceeded to allow damages under the Law Reform Act for pain and suffering and loss of expectation of life. She also awarded a global sum as damages in respect of lost dependency under the Fatal Accidents Act.

18. In the case of **Abdi Kadir Mohammed & Another** the High Court (**Mugo J** as she then was), supported the 'separate heads' approach. This too was the approach adopted by **Ang'awa J** (as she then was) in the case of **David Njunge Mwangi** which the lower court appeared to rely upon in this case.

19. There is therefore no golden rule in the assessment of damages in respect of a deceased minor. The heads, global or mixed approaches have been applied in superior courts. What is beyond doubt is that irrespective of the age of a deceased child, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents - See decisions of the Court of Appeal in **Kenya Breweries Limited -Vs- Saro [1999] KLR 408** and **Sheikh Mushtaq Hassan -Vs- Nathan Mwangi Kamau Transporter & 5 Others [1986] KLR 457; [1986] eKLR**.

20. 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. I would therefore agree with Mr. Waigwa's submission that the adoption of a heads approach in the award of damages in respect of a deceased minor is not *ipso facto* evidence that the award is excessive or erroneous. Indeed the Appellants at the close of their submissions sought to persuade the court to use a multiplier approach in arriving at damages payable under the head of lost dependency.

21. It follows therefore that an award in damage could potentially be made to the same claimants under the Fatal Accidents Act and the Law Reform Act. Of course the particular sums in respect of each head are only evident when the court expressly awards under the several heads. But it does not mean that the award of a global figure as in **Charles Ouma Otieno** (supra) does not encapsulate awards under both the Acts. Similarly there can be a mixed approach which is also common, where the courts award under separate heads in respect of the Law Reform Act and a global award under the Fatal Accidents Act. Again whether or not an award is excessive does not depend on the mere fact that awards have been made under both Acts or different heads.

22. Having read the Court of Appeal decision in **Kemfro** (supra) I am unable to accept the interpretation assigned by the Appellants' counsel thereto. The counsels have argued *interalia* that:

"where a claim is made under both the Fatal Accidents Act and the Law Reform Act, and where the claimant succeeds in both, the award under the Law Reform Act must be deducted in full from the award made under the Fatal Accident Act as the deceased's estate cannot benefit twice."

23. With respect, that is not the dictum of the **Kemfro case**. The brief passage in **Hellen Waruguru** quoted on this appeal by the Appellants does not do justice to the true import of the dictum therein. I therefore find it necessary to quote in *extenso* what the Court of Appeal said in **Hellen Waruguru** on the matter.

24. The learned judges of appeal had this to say:

"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.

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 decindendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, that:-

> ***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.***
>
> ***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.***
>
> ***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.***

The deduction of the entire amounts made under the LRA in this case was erroneous and once again……."

25. In my considered view, it would be a futile exercise for a court to labour to make an award under the Law Reform Act only to completely deduct it from the award under the Fatal Accidents Act. Effectively such 'complete' deduction would nullify the benefits intended by the two Acts of Parliament for deserving claimants.

26. Evidently therefore the trial court herein was entitled to make awards under both the Law Reform Act and the Fatal Accidents Act and hence to use the heads approach. As to whether the awards were excessive, this court is guided by the decision of the Court of Appeal as restated in **Hellen Ruguru Waweru:-**

> **"As a general principle, assessment of damages lies in the discretion of the trial court and a*n appellate Court will not disturb an award of damages unless it is so 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.* The Court must be satisfied that either 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 damages. 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."**

27. In the trial before the lower Court, a consent was recorded on liability at 85:15% in favour of the Respondents. By a further consent recorded on 2/9/2014, the parties agreed to admit the following documents as **exhibits 1 – 7 respectively**, without calling any witnesses on either side:

i. Death certificate

ii. Letters of Administration

iii. Police Abstract

iv. Receipts in respect of records

v. Copy of records

vi. Two demand letters

vii. Receipts in respect of funeral expenses amounting to Shs 34,500/=

28. Thereafter, submissions were filed and judgment given. That notwithstanding, the learned magistrate in her judgment stated interalia after noting that the deceased met his death at 12 years of age:

> **"The deceased had a bright future and his estate has suffered loss and a big blow…….although the deceased life could not be ascertained it is my finding that an award of Shs 80,000/= would be reasonable for the loss life expectation…….The deceased died the same day of the accident since no evidence was adduced as to whether he was taken to hospital. He must have died on the sport or soon after the accident. The Plaintiff counsel suggested Kshs 100,000/= for pain and suffering. I shall award the conventional figure of Kshs 20,000/= for pain and suffering since the deceased had on impact or immediately after the accident."**

29. Thus far, it is plain that the trial magistrate had a dearth of material placed before her to enable a proper exercise of her discretion. It is not clear how the court bereft of evidence arrived at the conclusion, that the deceased had a bright future. The learned trial magistrate was compelled to use the limited material at her disposal in attempting to arrive at the awards above.

30. Although the awards in respect of pain and suffering are reasonable on the face of it, the constraint is further evident in the portion of the court's judgment regarding lost dependency where the learned trial magistrate observed *interalia* that:

> **"The deceased was a minor aged 12 years. It is anticipated that the deceased would have completed his education gotten employed at the age of 25years. The Plaintiff's counsel submits that the deceased would have worked up to 62 years. However due to vicissitudes and uncertainties of life I shall award a multiplier of 30 years. This court is persuaded to award the minimum age of Kshs 4,000/= against a multiplier of 30 years."** (sic)

31. First of all, the court appeared to speculate without any evidence that the deceased was pursuing education and the future prospects arising therefrom in securing employment at 25 years of age. Secondly, loss of dependency being a dependent's claim under the Fatal Accidents Act, rather than for the benefit of the deceased's estate, the amount awarded is always subject to a dependency ratio. Even where such formula is not used, the court must bear in mind that the dependents were not entitled to the full future earnings, that the deceased might have made had he lived a full life.

32. In the case of **Ephantus Mwangi & Another -Vs- Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278**, **Hancox J.A.** (as he then was) stated that:-

"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did"

33. In this case it seems that the trial court supposed that the deceased minor would have used all his income in the support of his parents. That is not practical or conceivable even where the dependent is a spouse of the deceased. Hence the calculation:

Kshs 4,000/= x 12 months x 30 years = Kshs 1,680,000/= (sic)

There is also an apparent error in the calculation as the correct total is **Shs 1,440,000/=** and not **Shs 1,680,000/**= as reflected in the judgment.

34. The uncertainties referred to by **Sitati J** in determining the future of a minor deceased, his earning prospects and hence support for parents/dependents are amply demonstrated in this case. Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables. The speculative nature of the matter renders the court's exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants.

35. In my considered view, this case was eminently unsuited to the multiplier/multiplicand approach in the assessment of damages in respect of lost dependency. The court in my considered view erred by accepting the invitation to strain the morsel of information placed before it in order to come up with an award based on the supposed future income of the deceased minor. Secondly the court failed to take into account that the award was subject to a dependency ratio as the dependents were not entitled to the full future income of the deceased minor.

36. With respect, the only solid facts laid before the court were the age and date of death of the deceased. His future could not be predicted: what he might have become had he lived to full age. Whether he would have been able to hold down a job and earn enough for himself and his family and to what extent, fall within the realm of conjecture.

37. For these reasons, I have come to the conclusion that the trial court erred in its approach, and further that the figures arrived at, especially with regard to lost dependency were the result of applying the wrong principles as to dependency and misapprehension of the scanty material before the court.

38. As stated by the Court of Appeal in **Kenya Breweries Limited -Vs- Saro, [1991] KLR 408**:-

"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."

39. The deceased was aged 12 years at death. There is no evidence that he was in school or as to the level of his abilities and therefore future prospects. The award in respect of lost dependency in my view was excessive and erroneous. I hereby set it aside and substitute therefor a global award under the Fatal Accidents Act in the sum of Shs 600,000/= bearing in mind the awards under the Law Reform Act. I

have upheld general damages for loss of expectation of life, pain and suffering whose total is Shs 100,000/=. Special damages had been agreed at Shs 35,000/=.

40. Judgment is accordingly entered in favour of Respondents against the Appellants jointly and severally with costs and interest as follows:-

General damages under Law Reform Act

- Pain and suffering - Kshs. 20,000/=
- Loss of expectation of life - Kshs. 80,000/=

General damages under Fatal Accidents Act

- Lost dependency - Kshs.600,000/=

Total **- Kshs.700,000/=**

(less 15%) - Kshs.105,000/=

Net **- Kshs.595,000/=**

- Special damages - Kshs. 35,000/=

Net Total **- Kshs.630,000/=**

Delivered and signed at Naivasha this **24th** day of **July, 2017.**

In the presence of:-

Mr. Mburu F. I. for the Appellants

N/A for Respondent

Court Assistant – Barasa

C. MEOLI

JUDGE