



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 111 OF 2014**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT**

**VERSUS**

**SAMSON ODOYO OYOO** [*Suing as the administrator*

*in the estate of P O O [DECEASED]*.....**RESPONDENT**

**[An appeal from the Judgment and Decree of the Principal Magistrate's Court**

**(Hon. P. Wechuli RM) Nyando Civil Suit No. 220 of 2013 delivered on the 30th September 2014]**

**JUDGMENT**

1. On 8th January 2013 the deceased, a child aged 5 years old, was crossing the road at a place called Kusa along the Kendu Bay – Homa Bay Road, when a lorry Registration No. KAN 118V belonging to the Defendant knocked him and he sustained fatal injuries. His father, sued the Defendant for damages under the Law Reform Act and the Fatal Accident Act.

2. After hearing evidence from both sides the trial magistrate found the Defendant wholly liable and awarded damages as follows:-

- Liability - 100%
- Pain and suffering – 20,000/=
- Loss of expectation of life – 900,000/=

3. The appellant has appealed against both liability and the quantum of damages on the grounds set out in the Memorandum of Appeal filed on 22nd October 2014.

4. The appeal was heard by way of oral submissions. On liability Mr. Odengo, for the appellant submitted that the key witness PW2 (the mother of the deceased) did not say how the accident occurred and instead said that she heard a loud bang and saw the child lying on the ground. He submitted that she also did not say which vehicle caused the accident only stating that there was a Nissan and a lorry. He attributed the accident to the child running after his mother He blamed the mother for the accident and submitted that she left the child on the side of the road, in harms way. Mr. Odengo submitted that the driver of the appellant's vehicle swerved to try to avoid the accident as is confirmed in the judgment. He contended that liability cannot attach as the driver was not charged with respect to the accident; That there can be no liability without fault yet the child's mother did not state why she blamed the driver of the vehicle. He submitted that even in the judgment the trial magistrate did not give reasons for blaming the driver. He also submitted that the Respondent ought to have called independent witnesses.

5. On the quantum of damages he submitted that lost years cannot be awarded to a child of five years and that the trial magistrate erred in awarding 900,000/= under that head. He contended that the multiplier of 45 years applied could not be explained and if anything a global sum should have been awarded. On this he relied on the decision of Majanja J in **Dominic Owuor Dibuoro & Another V. RA & MO [2015]eKLR**.

6. Mr. Ken Omolo in opposing the appeal submitted that the Respondent proved his case on a balance of probabilities. He referred to the evidence of the Appellant's driver and submitted that the driver admitted he hit a child at Kusa Trading Center. He submitted that it is trite that for a child of 12 years and below contributory negligence cannot arise. He cited the case of **Butt V. Khan (1982-88) 1KAR**.

7. On quantum Mr. Ken Omolo, Learned Counsel for the Respondent submitted that choice of a multiplier in calculating loss of expectation is in discretion of the court and cited **Sheikh Mushtaq V. Nathan Mwangi Kamau Transporters & Others (1985-1988) 1KAR 217** which he submitted was cited in **Mombasa Maize Millers Limited V. W M suing as the representative of JAM (Deceased) [2016]eKLR** although it was cited in **Transpares Kenya Limited & Another V. SMM (Suing as Legal Representative for and on behalf of the Estate of EMM (deceased)[2015] eKLR**. He submitted the fact that income is not proved does not disentitle a party to an award of damages and in this case the trial magistrate did not err in using the minimum wage. He submitted that as was held in the **Transpares** case (Supra) lost years are recoverable in the case of a child since the child's life was shortened. He urged this court to dismiss the appeal.

8. As the first appellate court I have to reconsider and analyse the evidence before the lower court so as to arrive at my own conclusion as to whether the findings of liability and award of damages should stand. I do so bearing in mind that unlike the trial court I did not see the witnesses giving evidence.

9. The deceased in this case was only 5 years old. According to his mother (PW2) on that fateful day she picked him from school and helped him to cross the road. Once he was on the other side she went back to help the other children. She waited for a lorry and a Nissan to pass but the lorry overtook the Nissan at a high speed. It was then that she heard a bang then saw her child lying on the road. In cross-examination she stated that the accident occurred on the Homa Bay – Katito Road and that the accident occurred on the left side Homa Bay-wards. Contrary to Mr. Odengo's submission this witness described how and where the accident occurred. The driver of the motor vehicle (DW1 admitted that he hit the child at Kusa Trading Center. He however blamed the child for the accident saying that the child run across the road.

10. Whether contributory negligence can be attributed to a child of the deceased's age was discussed in **Butt Versus Khan (1982-88) 1KAR** where while observing that each case must depend on its own peculiar circumstances the Court of Appeal upheld the finding of the High Court that the child's action in crossing the road amounted to an error of judgment but did not constitute contributory negligence. The child in that case was 7 ½ years old. Here the child was 4 years old. He had been safely crossed to the other side by his mother and he certainly was too young to understand the consequences of crossing the road to follow her if indeed that is what he did. I would consider that an error of judgment but not negligence. The driver of the motor vehicle ought to have taken precautions to avoid hitting him and would have done so if he was not driving too fast. I find him wholly to blame for the accident. The fact that he was not charged with a traffic offence does not absolve him from this claim.

11. On the quantum of damages Mr. Odengo submitted that lost years cannot be awarded to a child of five years, that the multiplier of 45 years was not explained and that if anything a global award should have been made. An appellate court will only interfere with the trial court's assessment of damages if the court either took into account an irrelevant factor or left out a relevant one or if the award is so excessive as to amount to an erroneous estimate or if the assessment is not based on evidence – **Peter M. Kariuki V. Attorney General [2014]eKLR**. It is now settled that damages for lost years can be awarded to a child – see **Sheikh Mushtaq V. Nathan Mwangi Kamau Transporters & Others [1985- 1988] 1KAR 217** and **Kenya Breweries Limited V. Saro [1991]KLR 408** cited with approval by Nyamweya J in **Transpares Kenya Limited and Another V. SMM (Supra)**. It is my finding that the trial magistrate

gave no reason for using a multiplier of 45 years. Given the age of the deceased and the fact that it would not be easy to determine his prospects a global award would have been more appropriate. However even were we to go the multiplier route taken by the trial magistrate the multiplier of 45 years applied is not reasonable as it does not consider that the deceased still had to finish school before he could start working and the vagaries of life a relevant fact which must be taken into account. The award for lost years left out a relevant factor and was too high as to amount to an erroneous estimate. I would substitute it with a global award of Kshs.400,000/=. The award for pain and suffering was not challenged and I shall not interfere with it.

12. The appeal is therefore allowed to the extent that the award for lost years is reduced to Kshs.400,000/= so that the total award to the respondent is Kshs.520,000/=. The sum shall accrue interest at court rates from the date of judgment in the lower court. Each party shall bear their own costs of the appeal. It is so ordered.

**Signed, dated and delivered at Kisumu this 3rd day of August 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Omondi MM for the Appellant

Mr. Ken Omollo for the Respondent

Evon – Court Assistant