



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 30 OF 2014

**Arising from the Judgment of Hon David Mburu (Ag PM) in Meru CMCC NO. 317 of 2012
delivered on 25th July 2014**

(CORAM: F. GIKONYO J)

JAPHETH KIBWI JONATHAN.....APPELLANT

-VS-

W M M (SUING ON BEHALF OF THE ESTATE OF

A M ALIAS A M M (DECEASED).....RESPONDENT

JUDGMENT

[1] This Appeal arises from the Judgment of Hon David Mburu (Ag PM) in Meru CMCC NO. 317 of 2012 delivered on 25th July 2014, in which the Learned Trial Magistrate awarded the Respondent a sum of Kshs 1,371,308.50/ for General and Special damages arising from a road traffic accident that occurred on 2nd April 2012, in which the Respondent's son was fatally injured. The Appellant was aggrieved by the said award and filed this appeal citing the following grounds in the Memorandum of Appeal filed in court on 25th August 2014:

- 1. THAT the Learned Trial Magistrate erred in law and in fact in failing to subject the damages for lost years to a dependency ratio thereby arriving at an award that is inordinately excessive.**
- 2. THAT the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the deceased would have spent part of his income to support his parents and other relatives and therefore apply a dependency ratio.**
- 3. THAT the Learned Trial Magistrate misapprehended the principles for award of damages thereby arriving at an award that is inordinately excessive.**
- 4. THAT the award is against the law.**

Appeal canvassed by way of written submissions

[2] On 15th September 2016, it was agreed that this appeal shall be canvassed by way of written

submissions. This Appeal is only on quantum of damages as liability was agreed between the parties to be apportioned in the ratio of 25:75 in favour of the Respondent- the consent was adopted by the Trial Court as judgment of the court.

Submissions by Appellant

[3] It was submitted for the Appellant that the circumstances under which the multiplier approach can be applied was clearly explained in the case of **M' RARAMA M' NTHIERI V LUKE KIUMBE MURITHI (2015) eKLR** and that it was therefore ridiculous for the trial court to have speculated an income for the deceased and his expected length of dependency. Further, the Appellant argued that the trial court recognized that a child grows to be depended upon by parents yet turned around to hold that there would be no dependency ratio- something that was unacceptable in law and contradictory. Consequently, the Appellant urged the court to discount the award on lost years and subject it to 1/3 ration or completely set it aside and award a global amount established by law in similar case scenario.

Respondent's submissions

[4] On the other hand it was submitted for the Respondent that in cases of minors who were not working, the courts would, in their discretion find a way of fixing a reasonable figure to compensate the parents as there was no provision in the statute on such assessment of damages. They argued that this was only a matter of practice and case law. As such, the Respondent contended that the Trial Magistrate's judgment was well reasoned, guided by authorities and that the award was reasonable.

DETERMINATION

[5] Upon careful consideration of this appeal, the submissions by the parties and the authorities relied upon by the parties, I am of this orientation. This is a first appeal, and the court should analyze and re-assess the evidence on record in order to reach upon its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify. See **SELLE V ASSOCIATED MOTOR BOAT CO. [1968] EA 123** and **KIRUGA V KIRUGA & ANOTHER [1988] KLR 348**. I will follow that path.

Quantum of damages: use of multiplier method

[6] As alluded to earlier, this Appeal is only on quantum of damages as liability was apportioned by consent of the parties at 25:75 in favour of the Respondent. PW1 W M M the only witness in this case testified inter alia that the deceased was his son and that he was aged 15 years at the time he met the untimely death in the tragic road accident herein. He stated that the deceased was in secondary school and doing well in class. He told the court that the deceased had expressed desire to become a doctor. This evidence remained unchallenged throughout the trial. But the major quarrel is the use of a multiplier method in assessing lost years in this case. Of relevance is the following excerpt from the judgment of the Learned Magistrate:

"The deceased was aged 15 years at the time of his death. He would probably have completed his education at about 24 years and worked from age 25-60 years. Taking into account the uncertainties of life, I adopt a multiplier of 30 years. Since it is not known what the deceased would have become, I will adopt the minimum wage of Kshs 4,854..."

Judicial dilemma

[7] I admit that the adoption of a multiplier and minimum wage for persons who died at school going age- in primary or secondary school- is still problematic in judicial determinations on lost years. See for instance the sentiments expressed by Msagha J in the case of **STANLEY MAINA V NAIROBI DELUXE SERVICES LIMITED NAIROBI HCCC NO.54 OF 1992** that:

"It has not always been easy to assess damages for lost years or loss of dependency where the deceased is of school going age..... It is recognized however that while the children grow up they

assist in many respects their parents and the same parents while contributing to the education of their children expect something in return in their adulthood...

See also Ringera J (as he then was) in the case of **Kwanzia Vs Ngalali Mutua & another** 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.”

Global award finding favour

[8] As a result of the above dilemma, making a global award in cases which are not straight-forward seems to find favour with courts. But the court must first determine that factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are not known or knowable thus leaving the court to engage in undue speculation. Is this the case here?

Of the multiplier and Court’s assessment of damages

[9] Each case must be determined on its own facts especially on matters of loss of dependency. In this case, the deceased was aged 15 years at the time of his death. A certificate of death was produced. The evidence of PW1 showed that the deceased was in Form 1 at Thuura Secondary school and was attaining grades ranging from B+ to C. PW1 testified that the deceased had expressed wish to become a doctor. This evidence is relevant and were it not for the untimely death, this boy had great expectation of becoming a doctor. It was, therefore, wrong for the trial magistrate to have ignored this evidence and diminished the prospects of such young person in the manner that:-

“...it is not known what the deceased would have become...”

The age was known, the potential of the deceased was knowable, dependency and the length of dependency was also knowable without much speculation. Dependency of parents upon their children was also canvassed in this case. On that subject, I am content to cite what Nyarangi JA in the case of **SHEIKH MUSTAQ HASSAN vs. NATHAN MWANGI KAMAU TRANSPORTERS AND 5 OTHERS (1982-88) KAR 946** stated at page 954 that:-

“In general, in Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their ability...”

As such, the trial magistrate correctly appreciated these facts and stated that:-

“The deceased was aged 15 years at the time of his death. He would probably have completed his education at about 24 years and worked from age 25-60 years. Taking into account the uncertainties of life, I adopt a multiplier of 30 years.”

The only lapse is that the Respondents did not call up evidence from a doctor or professional body concerned with or which could shed light on the kind of salaries doctors get. In the case of **SHEIKH MUSTAQ HASSAN (ibid)** evidence by architects really assisted the court in setting the wage. However, the trial magistrate opted for minimum wage approach which was quite in line with judicial thinking on such matters. Therefore, despite the absence of evidence of wage, it was in order for the trial magistrate to fall back to minimum wage- a matter the court may take judicial notice of. It should be noted that the whole idea in assessment of damages is to provide for a fair compensation for the loss suffered as a result of the untimely death of a person due to the negligence of another- and it must be considered in the circumstances of the case. It is therefore never a matter of mathematical precision. Therefore, the trial

magistrate correctly held that:-

‘... I will adopt the minimum wage of Kshs 4,854...’

Accordingly, I find that the trial magistrate did not err in making the award for lost years based on a multiplier method.

Of special damages

[10] The Respondent produced receipts which proved Special damages as follows:-

- a. Funeral expenses.....Kshs. 60,770
- b. Limited letters.....Kshs. 20,000
- c. Police Abstract.....Kshs. 200

Accordingly, special damages were proved at Kshs. 80,970.

Loss of expectation of life and pain and suffering

[11] There seems to be argument on the trial court’s decision to discount these two items. Whether that was erroneous or not, I will still have to assess damages on these two items and make my judgment. Accordingly, in the circumstances of the case I award:-

- 1. Pain and Suffering.....Kshs 10,000**
- 2. Loss of Expectation of life.....Kshs 100,000**

In the final analysis

[12] The upshot is that I dismiss this appeal and specifically enter judgment for the Respondent as follows:-

- 1. Loss of dependency.....(4,854 x 30 x 12).....Kshs 1,747,440**
- 2. Pain and Suffering.....Kshs 10,000**
- 3. Loss of Expectation of life.....Kshs 100,000**
- 4. Special Damages.....Kshs 80,970**
- TOTALKshs 1,938, 410**
- Less 25% contribution.....Kshs. 484,602.50**
- NET TOTAL AWARD..... Kshs 1,453,807.50**

Cost and interest

[13] I also order that the Respondent will have interest at court rates on this award from 25th July 2014. Costs of the primary suit and this Appeal are awarded to the Respondent. It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of September 2017

F. GIKO NYO

JUDGE

In the presence of:

Mr. Rimita advocate for Respondent

Mr. Mutegi advocate for Mr. Kariuki advocate for appellant

F. GIKO NYO

JUDGE