REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 18 OF 2014

(CORAM; F.GIKONYO)

DANIEL MWANGI KIMEMI ……………….……………...1ST APPELLANT

REYNOLDS CONSTRUCTION COMPANY LIMITED......2ND APPELLANT

SBI INTERNATIONAL HOLDINGS AG LIMITED............3RD APPELLANT

Versus

J G M & S M M (the Personal Representatives of the Estate of

N K (DCD)………………..……….........…...........……...RESPONDENTS

JUDGMENT

[1] Having been aggrieved by the judgment and decree of Hon C.N Ndubi in Nkubu PMCC NO 91 of 2012 in which the honourable trial magistrate, *inter alia*, awarded the Respondent a sum of Kshs 1,530,000 as loss of dependency under the Fatal Accidents Act, the Appellants filed this appeal. The Appellants set out the following grounds of appeal in the Memorandum of Appeal dated 15th April 2015, to wit;

1. **The Learned Magistrate erred in law in adopting the wrong principles in awarding loss of dependency under the Fatal Accidents Act.**
2. **The Learned Magistrate erred in law and fact in making an award for dependency which was manifestly excessive in the circumstances.**
3. **The Learned Magistrate erred in law and fact in awarding damages well in excess of what the plaintiff had requested for.**

[2] In addition to the award on loss of dependency under the Fatal Accidents Act, the Learned Magistrate made the following awards of damages:

1. **Pain and suffering ……………...Kshs. 20,000**
2. **Loss of expectation of life…… Kshs. 100,000**
3. **Special damages………………… Kshs. 43,525**

These awards of damages were not contested in this Appeal. I will therefore, determine the contest herein which is on the sum of Kshs 1,530,000 for loss of dependency. Similarly the issue of liability is not in issue in this appeal- it was apportioned at 85:15% by consent of the parties in the lower court in favour of

the Respondent. Therefore, liability remains as such.

[3] On 9th July 2015, the court directed that this appeal shall be canvassed by way of written submissions. Parties filed their respective submissions which I shall consider.

Appellants' submissions

[4] The Appellants submitted that the trial court did not follow the principles laid down in awarding damages for loss of dependency in case of a minor. They cited the Court of Appeal case of **SHEIK MUSHTAQ HASSAN vs. NATHAN MWANGI KAMAU & 5 OTHERS (1982-88) 1 KAR** in which it was stated that in assessing damages under loss of dependency in case of a deceased minor ***"the sole issue all the time is the assessment of a fair award in the circumstances of any case" .***It was further submitted that, in accordance with the **SHEIK case (ibid)** the court should take into account the fact the deceased minor income for lost years is not entirely spent on the dependants and that much of the amount had the minor not died, would be spent on him/her. Therefore, in making an award of Kshs 1,530,000 under loss of dependency or lost years, the court adopted an income of Kshs 6,000 and a multiplicand of 25 years without giving any rationale for so doing. They urged that the trial magistrate did not show how he arrived at the figure of Kshs 6,000 as the least income of the minor. On the basis of these reasons, the Appellants urged the court to find that the Trial Magistrate erred in law in awarding Kshs 1,530,000 as loss of dependency on wrong principles and consequently, the award is inordinately so high as to amount to an erroneous estimate of damages. The Appellants' submission is that this appeal has merits and should be allowed- the award of Kshs 1,530,000 to be vacated and replaced with an award of Kshs 400,000.

Respondents' submissions

[5] The Respondents took a totally different view of the matter. According to their estimation the trial magistrate did not err at all in assessing damages for loss of dependency because there is no law prohibiting a court of law from assessing damages. Again, they stated that the award by the lower court was not manifestly high to warrant interference by this court. The Respondents further submitted that the sum of Kshs 400,000 suggested by the Appellants was plucked from the air as the same was not supported by the Appellants own authorities. They concluded, therefore, that the award of Kshs 1,530,000 was reasonable taking into account the death of the deceased. Consequently the Respondents submitted that the appeal on quantum had no merit and urged the court to dismiss it with costs to the Respondents.

DETERMINATION

[6] The issue for determination by this court is:-

> **(a) Whether the trial magistrate correctly applied the applicable principles of the law in assessing the damages payable to the estate of the deceased.**

[7] I have carefully considered this Appeal, submissions by the parties and the rival authorities. I take the following view of the matter. The applicable law in an appeal such as this was laid down in the case of **ALI vs. NYAMBU T/A SISERA STORES [1990] KLR 534** at page 538 which quoted with approval the principles laid down by the Privy Council in **NANCE vs. BRITISH COLUMBIA ELECTRIC RAILWAYS COMPANY LIMITED [1951] AC 601**at page 613 to be that:

> **"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a**

wholly erroneous estimate of the damages (<u>Flint –vs- Lovell [1935] 1KB 354</u>) approved by the House of Lords in <u>Davis –vs- Powell Duffryn Associated Collievers Ltd. [1941]AC 601.”</u>

See also the decision by the Court of Appeal in ***BASHIR AHMED BUTT vs. UWAIS AHMED KHAN*****[1982-88] KAR** *5*that;

> ***An 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 of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or law.***

[8] Did the trial magistrate fall into error of applying wrong or no principle in assessing damages for loss of dependency? In making an award of Kshs 1,530,000 for loss of dependency the Learned Magistrate stated as follows;

> ***“In arriving at the appropriate sum to be awarded this court estimates the minors least income at Kshs 6,000 and multiplies that estimate by 25 years to arrive at the following computation;***

6000x25x12=1,800,000

Less 20% contribution=1, 530, 000”

Before making the award, the learned trial magistrate stated these:-

c) Loss of dependency

> ***The Deceased was a minor whose full potential was pretty much unknown although the mother attempted to explain her dreams and ambitions. Unfortunately for her parents these shall just remain dreams. However this does not negate the fact that compensation should be awarded for her untimely demise. The court could easily have considered the minimum wage in arriving at the compensation to be awarded but that would not be a proper reflection since the minor had not attained the age of majority to entitle her to any income.***

[9] Subject to liability which was recorded on 15th January 2014 upon consent of the parties, the trail magistrate was alive to the fact that, in law compensation for the untimely death of the deceased, regardless of age, is available under loss of dependency. The trial magistrate was also acutely aware that the age of the deceased was a factor to be taken into consideration in assessing damages. That is not all. The trial magistrate was not oblivious that minimum age may act as a guide in assessing damages under loss of dependency except he was convinced that it was not appropriate measure in this case because the deceased was a minor and was not working; he was in school. The trial magistrate had correctly found that ***‘’...the deceased income could not be ascertained since she had not reached the age capable of making any income’’.*** *The trial magistrate also appreciated that the deceased was a bright student and was always in position one to three in her class. And that she had expressed her desire to become a doctor upon completion of her education. But all the dreams and desires were shattered by the untimely death herein. But ultimately and despite all the foregoing, the trial magistrate adopted a figure of Kshs. 6,000,000 as the reasonable minor’s least income. He then applied a multiplier of 25 years. This ultimate decision by the trial magistrate is what presents difficulties. One, the trial magistrate did not state the minimum wage which he said would not be proper reflection of compensation. This court does not also have the advantage of the minimum wage which the magistrate thought was not appropriate, thus, there is no basis for the seeming comparison to what the trial magistrate deemed to be minor’s least earning. Second, after finding that it was difficult to ascertain income for a child of that age, it is not clear why the trial magistrate became so beholden to applying a multiplier? On multiplier, I am content to cite what* Ringera J (as he then was) said 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."**

Clearly, in such circumstances, the court's obligation would have been to achieve ***"the assessment of a fair award in the circumstances of the case"*** for loss of dependency rather than courting an obsession to applying a multiplier to facts which are not apt **.**See **SHEIK MUSHTAQ HASSAN vs. NATHAN MWANGI KAMAU & 5 OTHERS (1982-88) 1 KAR.** Therefore**,** t*he least income adopted by the trial magistrate lacked a foot on which to stand. The multiplier was also inappropriate in this case. The trial magistrate committed yet another error by assuming that the entire income would go to the dependants. In reality and this has been adopted as a guide in law, substantial income would ordinarily go to the deceased for his subsistence and so when applying a multiplier appropriate ratio depending on the extent of dependency is taken into account- something the trial magistrate did not do. The trial magistrate deducted 20% from loss of dependency without assigning any reason for doing so or explaining what the deduction represented. Again the trial magistrate did not seek to establish the length of dependency; vicissitudes of life; the age of dependants; life expected etc. which were necessary to justify the multiplier of 25 years. None of these things was done and so the said multiplier was not based on any analysis facts of the case. Accordingly, the good judgment in this case should have been to award a reasonable global figure for loss of dependency. In the upshot, despite the fact that the trial magistrate set out the applicable law in assessment of damages, he go it all wrong in his ultimate decision. In rounding off, the trial magistrate did not apply the correct principles, thus, ended up giving an erroneous award. In law, he acted on wrong principles. I have perused the judgment and I did not see anywhere the award was subjected to liability as agreed between the parties. As such, this court hereby sets aside the assessment for loss of dependency of the sum of Kshs 1,530, 000. Given the foregoing decision, what is fair compensation in the circumstances of this case?*

[10] The Appellants proposed an award of Kshs 400,000 to be adequate for loss of dependency. They, however, did not lay the basis upon which they deem this figure to be reasonable. Their proposal in my view cannot be a fair compensation. I note also that the authorities relied upon by the Appellants, albeit persuasive, were not applicable in this case since the circumstances were different from circumstances in the instant case. As I embark on this journey of ***''the assessment of a fair award in the circumstances of the case"*** let me recite the holding *i*n the case of **KENYA BREWERIES LIMITED vs. SARO [1991] MOMBASA CIVIL APPEAL NO. 441 OF 1990 (eKLR)** where the Court of Appeal rendered itself thus:

> **"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. 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 Africans 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 parents 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. That must be why we still do not have "homes" for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a "home" while he or she is still able**

to look after them. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare". If any legal authority is required in support of our views we would quote this court's decision in *Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others* [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-

"In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religious of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is "outrageous and pernicious" is not well-founded and must be rejected. ..."

[11] Much was said by the Learned Judges in the **SARO case (supra)** further stated as follows:

"In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution. The High Court authorities which were cited to us, such as *Abdullahi v Githenye [*1974] EA 110, *Maurice Miriti v Feroze Construction Co Ltd* HCCC No ... 1979, NRB, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In *Abdullahi v Githinye,* supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded shs 8,000/- in 1974. In *Miriti v Firoze*, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Shs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the Fatal Accidents Act. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred."

[12] Applying the above test to this case, it is important to note that the deceased: (1)aged nine years; (2) was already attending [particulars withheld] Primary School; (3) *was a bright student and was always in position one to three in her class. The deceased had expressed her desire to become a doctor upon completion of her education. But all the dreams and desires were shattered by the untimely death herein. Her parents also reasonably expected that she would finish school, enter the job market and help them. In Kenya, and particularly among the Asian and African communities, every child is a blessing to the family and is off real worth to them. That is why the law is that damages for loss of dependency are not in question; they are awardable for every child whose life is cut short by the negligence of another in a road traffic accident. Therefore, discretion is only on quantum of damages. As a matter of law, damages awardable for such child who was nine* years old, already in school and doing well in her studies, 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 to be ascertained. In 1990- over 25 years ago-the judges of Appeal in **Saro case**

(supra)awarded a sum of Kshs. 100,000 to the deceased minor aged 6 years. With the passage of time and the attendant inflation, awards for loss of dependency in respect of deceased child have increased steadily. As a matter of common sense and good judgment, for the deceased who died at the age of nine years; was a student at [particulars withheld] primary school with excellent performance; and the fact that her parents had reasonable expectations that she would finish school, enter the job market and assist them in old age, a sum of Kshs 1,000,000 would be fair compensation under the head of damages for loss of dependency. Since the other sums under the different heads of damages were not contested the final assessment of damages will be as follows:

1. **Pain and suffering…………………Kshs. 20,000**
2. **Loss of expectation of life……… Kshs.100,000**
3. **Loss of dependency……………. Kshs.1,000,000**
4. **Special damages………………… …Kshs. 43,525**

TOTAL 1,163,525

Less 15% contribution............................Kshs.174,529

NET TOTAL Kshs.988,996

I enter judgment for the respondents as stated above.

[13] Costs of the lower suit and interest on this award are awarded. As for costs of Appeal, the result of my decision commends that the Appellant shall get half of the costs of appeal, for they have succeeded partially. The Appeal is disposed of in the manner expressly stated above. It is so ordered.

Dated, signed and delivered in open court at Meru this 17th day of March 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora Advocate for the respondents

No appearance for appellants

F. GIKONYO

JUDGE