REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 21 OF 2014

(CORAM: F. GIKONYO)

D M M (Suing as the Administrator and Legal Representative of the Estate of L K M……....APPELLANT

Versus

STEPHEN JOHANA NJUE…………………………………………1st RESPONDENT

MICHAEL KARIUKI MUNYI……….………………………………2ND RESPONDENT

JUDGMENT

[1] This Appeal arises from the decision and judgment of Senior Resident Magistrate Chuka Hon C.K Obara in Chuka SRMCC NO.10 of 2013 in which she awarded general damages and special damages in the sum of Kshs 700,000 and Kshs 83,693, respectively. The Appellant was aggrieved by the said judgment and preferred this appeal whose grounds of appeal are set out as follows:

1. **The Learned Trial Magistrate erred in law by adopting the wrong principles in awarding loss of dependency under the Fatal Accidents Act.**
2. **The Learned Trial Magistrate erred in law and fact in finding that no evidence was adduced to show the deceased school performance, abilities and even prospects of her becoming a doctor after completion of her studies and thereby declined to award damages for loss of dependency in spite of the court having found that the deceased would have entered the job market and earn some income thereby failing to adopt a multiplier approach and award damages for loss of dependency.**
3. **The Learned Trial Magistrate erred in law and fact by failing to adopt a multiplier approach and award damages for loss of dependency in spite of the submissions by the advocates for both parties in their respective submissions having adopted the said multiplier approach.**
4. **The Learned Trial Magistrate further erred in law and fact in that she awarded a global sum of Kshs 700,000 for loss of dependency in spite of the evidence on record which is in support of a higher figure with the resultant award of a manifestly a low award of damages.**
5. **The Learned Trial Magistrate erred in law and fact in that she disregarded the judicial authorities which were tendered before the Honourable Court by the Appellants advocates which supported the award of higher figure for damages for loss of dependency.**
6. **The Learned Trial Magistrate erred in law and fact in that she failed to award part of the special damages which were specifically pleaded and proved by the Appellant.**

[2] This Appeal is essentially on quantum of damages as the issue of liability was settled by

consent of the parties in the lower court at 60:40% in favour of the Appellant. Parties filed their submissions. I shall consider those below.

[3] The Appellant argued inter alia that the Learned Trial Magistrate erred in law by adopting the wrong principles in awarding damages to the estate of the deceased. They contended that the deceased suffered very sever bodily injuries as a result of which she died four days after the accident, thus, her estate ought to have been awarded general damages for pain and suffering. Towards that end, the Respondents had even submitted for an award of Kshs 40,000 to be made. The Appellants submitted further that the deceased was 16 years at the time of her death and therefore, the global award of Kshs 700,000 made by the Trial Court as general damages was inordinately low and so it represents a wholly erroneous assessment of damages. In support of this submission, they cited the cases of **MOHAMED ABDINOOR ADI IBRAHIM V WILSON WANYEKI WARUTA & ANOTHER NAIROBI HIGH COURT CIVIL CASE NO.2409 OF 1998** and **DAVID MUKII MAREKA V RICHARD KANYAGO & OTHERS NAIROBI HIGH COURT CIVIL CASE NO.78 OF 2000** where the court awarded Kshs 795,000 and 4,440,014 for minors aged 10 and 18 years respectively. They also submitted on special damages and more specifically that the Appellant proved the sum of Kshs 128,058 as special damages by production of authentic receipts as evidence in court and, therefore, the award of Kshs 83,693 was erroneous. Consequently the Appellant urged the court to allow the appeal and award the costs to him.

[4] The Respondent opposed the appeal and submitted that the Appellant has failed to show the relevant factors that were not taken into account or facts of the case that were misapprehended by the trial court so as to call upon this honourable court to disturb the award of damages herein. The Respondent stated that in the submissions before the trial court special damages had not been claimed and that the reasons for rejecting some of the receipts were clearly given in the judgment. Thus, there are no reasons which have been advanced to fault the trial courts finding on the rejected receipts. Consequently, the Respondents urged the court to uphold the trial court’s award of special damages.

DETERMINATION

[5] Upon careful consideration of the grounds of appeal, the rival submissions by the parties and the judicial authorities cited, I can decipher that the issue for determination by this court is:-

> **(a) Whether the trial magistrate applied the wrong principles of the law in assessing damages payable to the estate of the deceased, or short of that, whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

[6] In will be guided by the law in my decision herein. The law is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account irrelevant factor or failed to take into account relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were laid down by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by our own Court of Appeal in cases without number. For further illumination on this see:

1. **Kanga V. Manyoka [1961] EA 705, 709, 7013**
2. **Lukenya Ranching and Farming Co-op. Society Ltd V. Kavoloto [1979] E. A. 414, 418, 419**
3. **Kemfro Africa t/a Meru Express & another v. A. M. Lubia & another (1982 – 88) 1 KAR 727**
4. **C. A Civil Appeal No.66 of 1982 Zablon Manga v. Morris W. Musila (unreported)**

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

I will apply the above test to the facts of this case.

Global award vs. multiplier approach

[7] The trial magistrate rejected the multiplier approach and awarded a global figure of Kshs 700,000 as general damages for loss of dependency. In arriving at that decision, the Learned Trial Magistrate rendered herself thus:

> ***"I have considered the persuasive authorities placed before me on the issue of quantum. The courts have in the said cases adopted different multiplicands and wages depending on the facts of the case. In the instant case though the plaintiff testified that her daughter was bright and had intentions of becoming a surgeon, no evidence was adduced to show her school performance, abilities and even her prospects of becoming a doctor after completion of her studies. The deceased was not yet in any form of employment. It is only hoped that she would have completed her studies and enter the job market and earn some income. It is not certain that that would have happened. Nevertheless, like any child in an African setting she was expected to assist her parents in carrying out various household and farm chores. She was a great asset to her parents. They had incurred expenses in bringing her up and invested in her education. She was big enough to run some of her errands for her parents the parents expected some financial assistance from her once she got into the job market but all that has been obliterated by death. All the benefits that would accrue to her parents and siblings are extinguished. She was in good health and definitely her parents had a lot of hope in her suffered a great loss and continue to suffer loss of her dependency…Guided by the above sentiments, I believe that since the deceased was not in any form of employment, a global sum ought to be awarded. In the case of WESLEY KIPKOECH KENDAGOR V UNISTAR TRANSPORTERS LTD HCCC NO. 116 OF 2004 at Kericho the deceased was aged 21 years old and been admitted at Eldoret polytechnic. He had not earned a living. He however used to assist his disabled mother at the farm. Justice Luka Kimaru (as he then was) in deciding the case was of the view that the estate of the deceased would be adequately compensated by being awarded a global sum of Kshs 500,000, I feel bound by the learned judge sentiments. Taking all factors in this case into account, the time lapse since the said case was decided and the inflationary trends, I believe a global sum of Kshs 700,000 for loss of dependency under the Fatal Accidents reasonable compensation."***

[8] The Learned Trial Magistrate gave her reasons for awarding a global sum of Kshs. 700,000. Doubtless, the Learned Trial Magistrate was well aware of the applicable law in cases such as this and gave a clear rendition on the law. She adumbrated the applicable principles with high wit, and came to a correct conclusion that in the circumstances, a global award was most appropriate. She resisted the unpardonable error of being beholden to multiplicand or multiplier approach when the circumstances and facts of the case are not appropriate for such approach, especially where it was difficult to ascertain income for a child of the age of 16 years and who was still in school. The trial magistrate was, therefore, right in rejecting the multiplier approach in this case. On this 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."

Accordingly, she did not proceed on a wrong principle in awarding a global figure. But short of acting on wrong principles, was the award of damages in the sum of Kshs. 700,000 so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages?

Of loss of dependency

[9] The long chain of judicial decisions entitles the appellate court to interfere with an award of damages if the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. S*ee 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); <u>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) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collievers Ltd. [1941]AC 601." [Underlining mine]

[10] As I examine the arguments by the Appellant, I am fully aware that 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. Rather it should embark to establish whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. The Appellant argued that the amount awarded is so inordinately low that it must be a wholly erroneous estimate of the damages. I will be guided by the facts and circumstances of this case. The *deceased was aged 16 years at the time of her demise. She was in school and according to her mother she was doing well. I must admit that despite her good grasp of the general principles applicable in assessment of damages, the trial magistrate fell into errors. One, she did not give much consideration to the age of the deceased and the fact that she was in school. Second, she laid preponderant emphasis on absence of actual school record of performance, thereby, reaching a wrong conclusion on extent of dependency. The error arose in this statement and which affected her decision on quantum:*

''In the instant case though the plaintiff testified that her daughter was bright and had intentions of becoming a surgeon, no evidence was adduced to show her school performance, abilities and even her prospects of becoming a doctor after completion of her studies. The deceased was not yet in any form of employment. It is only hoped that she would have completed her studies and enter the job market and earn some income. It is not certain that that would have happened''.

[11] In assessing loss of dependency, age of the deceased is important. The fact that she was in school and had prospects to finish school and assist her parents is also important. The extent of

dependency, life expected and other vicissitudes of life are also important factors. To demonstrate the significance of these factors, see 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.**

[12] In the circumstances, the sum of Kshs. 700,000 was a product of, and was an erroneous estimate of damages. Taking all factors into account, a 16 year old in school and doing well would receive a compensation of between Kshs. 1,000,000 to 1,500,000. In my discretion, I find the sum of Kshs 1,200,000 to be adequate compensation for loss of dependency. Accordingly, I set aside the award of Kshs 700,000 awarded by the trial court for loss of dependency and in its place I award a sum of Kshs 1,200,000 for loss of dependency.

Of pain and suffering

[13] With regard to ground 1 of appeal, I agree with the Appellant that the deceased died four days after the accident; thus, there was no reason why the trial magistrate did not award general damages for pain and suffering. There was no reason given for failure to award damages for pain and suffering. But I suspect the omission arises out of a misconception on the concept of double compensation under Fatal Accidents Act and Law Reform Act. For clarity, this was explained in a recent case of ***HELLEN WARUGURU WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF PETER WAWERU MENJA (DECEASED vs. KIARIE SHOE STORES LIMITED NYERI CIVIL APPEAL 22 OF 2014*** *when the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that:*

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

[14] Accordingly I will award damages for pain and suffering. The Appellant submitted that a sum of Kshs 50,000 would be adequate compensation for general damages for pain and suffering. The Respondents on the other hand submitted that a sum of Kshs 40,000 would be adequate compensation under this head of damages. For some strange reason the Learned Trial Magistrate did not determine this issue despite having been raised by both parties in their submissions. As the deceased died four days after the accident, she must have undergone immense pain and suffering before she finally succumbed to her injuries. Consequently, upon consideration of the submissions by parties and the circumstances of this case, I hereby award the Appellant a sum of Kshs 500,000 as damages for pain and suffering.

Of special damages

[14] Ground 6 of Appeal was on special damages. It was contended by the Respondents that the Appellant had not claimed special damages, thus, the claim ought not to have been awarded. Contrary to the Respondents submissions, special damages were specifically pleaded and particularized in paragraph 7 of the plaint and therefore the said submission is completely

indefensible. The Appellant in paragraph 7 of his plaint had pleaded Kshs 128,058 as special damages. The Trial court, however awarded him Kshs 83,693 as special damages having found that some of the receipts submitted by the Appellant did not add up. As a matter of law, special damages must not only be specifically pleaded but they must also be so proved. I have looked at the receipts tendered in evidence at the trial court and it is indeed true that some of the receipts did not add up and the Trial Magistrate was right in rejecting them and cannot be faulted for that. However on my own analysis of the said receipts I find and hold that the Appellant proved special damages of Kshs 111,833 as follows:

1. ***A receipt for the sum of Kshs 7,000 for forensic autopsy by Dr.Owino dated 22nd March 2011.***
2. ***Fees for obtaining Limed Grant from the firm of Kogora Ariithi dated 19th July 2012 Kshs 30,000.***
3. ***A receipt from Kenyatta National Hospital dated 23rd March 2011 for Kshs 49,815***
4. ***Receipts from Chogoria hospital dated 13th March 2011 for Kshs 1,675, 2,000, 19, 343 and 2,000 respectively***

TOTAL kshs 111,833

Accordingly, the Appellant specifically pleaded and proved Kshs 111,833 as special damages and I accordingly award him the said sum.

[15] In the final analysis, I find the Appellants appeal to be meritorious and I hereby enter judgment for the Appellant as follows:

1. ***Loss of dependency……………….Kshs 1,200,00***
2. ***Loss of expectation of life………Kshs 100,000***
3. ***Pain and suffering…………………Kshs 50,000***
4. ***Special damages…………………..Kshs 111,833***

TOTAL Kshs 1,461,833

LESS 40% CONTRIBUTION…. Kshs 584,733

NET TOTAL……………..Kshs 877,100

[16] The Appellant will also have costs of this appeal. 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 Arithi advocate for the appellant

Mr. Kiogora Mugambi advocate for Mwenda advocate for the respondents

Appellant present.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 21 OF 2014

(CORAM: F. GIKONYO)

D M M (Suing as the Administrator and Legal Representative of the Estate of L K M ……… APPELLANT

Versus

STEPHEN JOHANA NJUE………………………………………. 1st RESPONDENT

MICHAEL KARIUKI MUNYI …………………………………….2ND RESPONDENT

CORRIGENDA

In exercise of powers conferred on me under Sec. 99 of Cap 21 Laws of Kenya which permits amendment of judgments, decrees or orders in respect of clerical or arithmetical mistakes, or errors arising from any accidental slip or omission thereto, I hereby on my own motion, amend page 17 line 7 to read 50,000 as pain and suffering and not 500,000 as indicated. The error arose from an accidental slip or typing error.

Accordingly the judgment dated 17th March, 2016 shall be so amended.

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

F. GIKONYO

JUDGE