REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL CASE NO. 27 OF 2015

(Being an appeal from Judgment of Senior principal Magistrate J.M. Nange'a delivered on 26/3/2015 in Kitale CMCC No. 211 of 2013)

MUNERIA NDIWA BURMEN.....APPELLANT

VERSUS

EMMANUEL WASIKE WABUKESA.....RESPONDENT

J U D G M E N T

The facts of this matter are clear and straight forward. On 11th October 2012 the appellant tractor Reg. No. KYU 931 Massey Ferguson hit and killed the respondents child one Brefo Wasike Wabukesa. The parties prior to the filing of the suit seemed to have reached an out of court settlement where the respondent was paid a sum of Kshs 150,000/- plus one cow. During the trial the same did not feature much.

In the first turn of events the respondent did file suit in court claiming damages both general and special. The appellant did file his defence denying the same. However in the cause of trial parties entered a consent on liability of 80%:20% in favour of the respondent. Thereafter the parties proceeded on the issue of quantum. In its judgment the court awarded the respondent the sum of Kshs 1,360,000/= less 20% making a total of Kshs 1,088.000. The appellant being dissatisfied with the same proceeded to file this appeal.

As suggested above, the issue of liability was well settled. The thrust of the appellant appeal is whether the court did follow the laid down principles in awarding damages and if so whether the same was excessive. Both parities have filed the strong submissions in an attempt to persuade this court. It is trite law that the court at an appeal stage as is the case herein will not normally interfere with the decision of the trial court and the principles laid down in ***Kemfro Africa Ltd Vs A.M Lubia & Another (1982-88)KAR 727*** where Kneller J.A. stated as follows;-

> ***"The principles to be observed in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor or left out of a court is a relevant one or that shot of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."***

In the instant case the court granted a sum of Kshs 10,000/- for pain and suffering and Kshs 80,000 for loss of expectation of life. In regard to lost years he adopted a multiplier of Kshs 3000 for 35 years thus granting a total sum of Kshs 1,260,000 for lost years. This has been termed by the appellant to be manifestly excessive and a wrong procedure.

On the other hand the respondent is satisfied and is of the opinion that the trial court did not error in arriving at the final decision. They relied on the case of ***Mohamed Abdinoor Abdi Vs Wilson Wanyeki Waruta & Another Civil Case No. 1525 of 2002*** , where the minor was aged 10 years. The court did a multiplication of 20 years at Kshs 3000 and arrived at a total sum of Kshs 795,000 in the year 2005.

In my view I do not think there was such a challenge by the appellant on the loss of expectation of life and pain and suffering. In fact it appears that the child died on the same day while undergoing treatment.

The age of the child was about 1 ½ years therefore an infant. Can it be said that her future by then was well grafted?

I do not think so. She had not even gone to school or nursery for that matter. It cannot therefore be said what kind of future she had. Her career was yet to be determined.

What then was the basis of the trial court applying a multiplier of 35 years? The deceased was an infant and did not therefore earned anything. Ringera J (as he then was) in ***Wangui Thairu Vs Hon. Ezekiel Bargetuny & Another Nairobi HCC No. 1638 of 1988*** observed as follows;-

> ***" The principles applicable to an assessment of damages under the Fatal Accident Act are all too clear. The court must in the first instance find out the value of the accused 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."***

Obviously there was no basis from the multiplier approach by the trial court. The infant was not in a position to earn anything but instead dependent on her parents. There was no basis in my view that led the learned magistrate arrived at a sum of Kshs 1,260,000/- under that heading.

Again Ringera J (as he then was,) in ***Mwanzia V Ngalali Mutua and Kenya Bus Service (Msa) Ltd & Another*** as quoted in ***Albert Odawa Vs Gichimu Gichenji Nakuru HCC No. 13 of 2003 (2007) eKLR*** by Justice Koome (as she then was,) stated as follows on this question of multiplier;

> ***" 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 the facts do not facilitate its application. It is plain that it is a useful practical method where factors such as the 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 it 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."***

Taking cue from the above decision its clear that the court awarded a sum of Kshs 1,360,000 under the law Reform Act. The deceased was an infant and I respectfully do not think that it was the appropriate line to take. There was no basis absolutely to take a multiplier approach as a basis for such amount.

In the premise a global sum to the estate of Kshs 200,000 would be appropriate in the circumstances under the said heading. As regards the other headings I do not find any reasons to disturb the same.

In the premises I shall allow the appeal as follows;-

(1) The judgment and decree of the lower court is hereby set aside

(2) The respondent is hereby awarded damages as hereunder;

(a) Pain and suffering Kshs 200,000

(b) Loss of expectation of life Kshs 80,000

(c) Lost years Kshs 200,000

Total Kshs 480,000

Less 20% Kshs 80,000

Grand Total Kshs 384,000

The same shall attract interest from the date of judgment in the lower court till payment in full.

Costs of this appeal in the cause.

Delivered this 31st day of October 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Munialo for Respondent

Mr Rugut holding brief for Onyinkwa for applicant

Kirong – Court Assistant