



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 129 OF 2009

E.A. GROWERS LIMITED..... APPELLANT

VERSUS

CHARLES NGANGA NGUGI.....RESPONDENT

(Being an appeal against the judgement and decree of the Hon. J.K. Ng’eno in Nyeri Chief Magistrates’ Court Civil Case No. 875 of 2003 delivered on 11th November, 2008).

JUDGMENT

On 26th June, 2002 motor vehicles registration numbers **KAG 187C (Toyota), KAN 719 A (Toyota) and KAL 201Q (Mitsubishi)** were involved in a road traffic accident along Sagana-Karatina road in Nyeri County. Virginia Njeri Ng’ang’a (deceased) who was a pedestrian on the same road was caught up in the accident as a result of which she sustained fatal injuries from which she succumbed and died on the same day.

The respondent, who described himself as the administrator of the estate of the deceased sued the owners of the three vehicles involved in the accident for special and general damages, costs of the suit and interest accruing thereof at court rates; among the defendants sued was the appellant. The respondent’s case was simply that the defendants or their respective agents or servants were negligent in managing or controlling their vehicles and thus causing the accident from which the deceased sustained injuries and subsequently died. He held them liable and solely to blame for the accident.

The record shows that liability was agreed between the parties at the ratio of 25% against the plaintiff, 10% against the first defendant and 65% against the appellant which was the third defendant in the suit at the subordinate court. Parties also agreed to file written submissions on quantum of damages recoverable. The suit was inevitably determined without taking any evidence.

In his judgment, the learned magistrate made the award in favour of the respondent in the following manner:-

1. Loss of expectation of life**Kshs. 100,000/=**
2. Loss of years.....**Kshs. 200,000/=**
3. Pain and Suffering.....**Kshs. 20,000/=**
4. Special damages.....**Kshs. 25,080/=**

Total award

(Subject to contribution).....Kshs. 345,080/=

The plaintiff was also awarded costs and interest to be paid by the defendants in proportion to their agreed ratio of liability for the accident.

The appellant was dissatisfied with the decision of the learned magistrate and has therefore appealed to this court citing four grounds upon which this decision should be set aside. These grounds, as I understand them, are as follows:-

1. The learned magistrate erred in law and in fact in awarding Kshs. 345, 080 as general damages without considering that the deceased was a minor aged seven;
2. The learned magistrate erred in law and in fact in failing to consider set precedents in award of general damages in similar circumstances;
3. The learned magistrate erred in law and in fact in awarding Kshs. 200,000/= for lost years and Kshs. 100,000/= for loss of expectation of life without stating the basis upon which these awards were made.
4. The learned magistrate erred in law and in fact in holding that the plaintiff was dependent on the deceased.

The appellant now wants this court to review downwards the award on general damages; it has also sought for the costs of the suit and the appeal.

Just like in the trial court, parties agreed to have the appeal disposed of by way of written submissions. I have had the opportunity to consider these submissions and have come to the conclusion that the dispute in this appeal is whether the learned magistrate should have awarded damages for lost years and damages for loss of expectation of life. Related to this issue is the question whether the awards made were excessive or inordinately high in the circumstances.

Generally, claimants in fatal accident claims would ordinarily sue for damages under the **Law Reform Act (cap 26)** and the **Fatal Accidents Act (cap 32)**; **section 2 (1)** of the former Act follows **section 1** of the **England's Law Reform Miscellaneous Provisions Act 1934** that abolished the old rule *action personalis moritur cum persona* and provides for survival of causes of action in tort for the benefit of the victim's estate. It says:-

2.(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

On the other hand, under **section 4 (1)** of the **Fatal Accidents Act**, proceedings may be brought for the benefit of the deceased's dependants to recover the loss caused to them by the death of their breadwinner. This provision of the law states as follows:-

4.(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares

as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint and every such action shall be commenced within three years after the death of the deceased person.

Damages under the heads of **loss of earnings, pain and suffering** and **loss of expectation of life** are usually grouped under the **Law Reform Act**. The only head of damage under the **Fatal Accidents Act** is the **loss of dependency** though its assessment will invariably involve reference to the loss of earnings for the years the deceased would have worked (the lost years).

By awarding damages under the heads of loss of expectation of life, lost years (which is referred in the learned magistrate's judgment as 'loss of years') and pain and suffering the learned magistrate appears to have restricted his award of general damages under the **Law Reform Act** only.

Having brought the suit against the appellant and its co-defendants in his capacity as the administrator of the deceased's estate, there shouldn't be any dispute as to whether the respondent was entitled to an award under all or any of the heads of damage accruing from the **Law Reform Act** which would, of course, include such damages as loss of expectation of life, lost years and pain and suffering. It has been noted that the learned magistrate made the awards under these heads and the only issue in contention is whether these awards were inordinately high as alleged by the appellant.

Lost years:

As far as the award under the head of lost years is concerned counsel for the appellant correctly submitted that general damages for lost years are awarded to the estate of a deceased person so as to compensate the estate for the loss in income it would have benefited from the deceased had he lived. It was the learned counsel's contention that since the deceased was only a primary school going minor, there was no ground for awarding the estate the sum of Kshs. 200,000/= under this head. Counsel urged that at that age, it was clearly impossible to tell what the deceased's income would have been had she lived, at least up to the retirement age; it was his view that considering the age of the deceased and also taking into account the uncertainties and imponderables associated with life, any award under this head would merely be speculative. Counsel cited the English case of **Gammel versus Wilson & Others (1981) 1All ER 578** that was cited with approval in the Court of Appeal decision in **Sheikh Mushtaq Hassan versus Nathan Mwangi Kamau Transporters & 4 Others (1986) KLR 457** for the submission that an award under this head can only be based on the probable estimate of ones income which, in his view, was wanting in the case against the appellant.

I have read the decision in **Sheikh Mushtaq Hassan versus Nathan Mwangi Kamau Transporters & 4 Others (ibid)**; it is recognised as the first case in any court in Kenya where an award for lost years was made when the victim died before instituting a suit. (See the Judgment of Kneller JA at page 466). It is also in this case that the English decisions in **Picket versus British Rail Engineering Ltd (1980) AC 136** and later **Gammel versus Wilson (1981) 1 ALL ER 578** were first applied; in these decisions the House of Lords held that a living plaintiff was entitled to damages for lost years and that these damages are recoverable by and for the benefit of the estate of a victim who dies before the action is instituted.

As to how the damages under this head are to be assessed, the Court of Appeal upheld Lord Scarman's speech in the **Gammel versus Wilson case** where he said (at page 593) that:-

The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammel's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least

capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it.

The question that may be asked is, how young must one be deemed a 'young child' as to be denied an award under this head? Secondly, are the exceptions that the learned judge referred to exhaustive? As far as I understand the learned judge's speech, there are no hard and fast rules on the minimum age below which one will be considered a 'young child' for purposes of assessment of damages under the head of lost years. I understand this to have informed the learned judge's caution that in all cases where this issue arises, it must be a matter of evidence meaning that each case will depend on its peculiar facts. The same goes with the exceptions to the rule that where a child is so young that no estimate is possible no award should be made; the list of these exceptions will also depend on evidence and thus the facts of each particular case.

When this question arose in **Sheikh Mushtaq Hassan's case**, one of the considerations the learned judges of the Court of Appeal put forth in assessing the award recoverable for a Kenyan child of either Asian or African descent is that in Kenya children, regardless of their age, are expected to provide and indeed do provide for their parents whenever they are in a position to do so to the extent of their abilities. The Court held that the children are expected to do that by the established customs of the various African and Asian Communities in Kenya and that such customs are not repugnant to justice and morality. The court castigated the trial judge (Aragon J) for his contemptuous remarks about these customs which he had described in his judgment as "both an outrageous and pernicious doctrine" to which he would not subscribe. Indeed the learned judges of the Court of Appeal allowed the appeal and upped the award made on lost years because in their view, that award was influenced by misapprehension by the learned judge of the trial court of the application of the African and Asian customs.

And in **Picket versus British Rail Engineering Ltd (ibid)**, the House of Lords addressed this issue of lost years in respect of children victims; the Court (Lord Salmon) said:-

Damages for the loss of earnings during the "lost years" should be assessed justly and with moderation. There can be no question of these damages being fixed at any conventional figure because damages for pecuniary loss, unlike damages for pain and suffering can be naturally measured in money. The amount awarded will depend upon the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimum sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate; if he has been in employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial. The amount will, of course, vary, sometimes greatly, according to the particular facts of the case under consideration.

Going back to the appellant's question, the consistent answer that emerges from the decisions in the cases I have cited hereinbefore appears to be that damages under the head of lost years are recoverable in respect of a young child including one who, as in this case, is a minor of seven years old. While damages

for lost years in such a case may be speculative, they are not non-existent; they are available and awards will ordinarily be made in deserving cases.

On the question of whether the award made under this head was inordinately high, it is necessary to go back to the trial court's decision for an answer. The learned magistrate established as a fact that the deceased was aged seven and that she was in class two. Based on his findings and the decisions which were cited to guide him the learned magistrate arrived at the figure of Kshs. 200,000/=.

As far as I can see, there is no indication that the learned magistrate acted on the wrong principle of law; neither is there any evidence that he misapprehended the facts. In these circumstances, there is no basis to interfere with the award under this head. In coming to this conclusion, I rely on Lord Scarman's speech in the *Picket versus British Rail Engineering Ltd case* where he said of this issue that:-

It is not the function of an appellate court to substitute its opinion for that of the trial judge.

The learned judge then adopted the principle stated by Lord Wright in **Davies versus Powell Duffryn Associated Collieries Ltd** where he stated (at page 617)that:-

In effect the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere on the ground of excess or insufficiency.

Loss of expectation of life:

For the same reasons that I wouldn't disturb the award made under the head of lost years, I find that there is no basis for interfering with the award made in compensation for loss of expectation of life. The learned magistrate made an award of the sum of **Kshs 100,000/=** under this head; while the appellant's counsel acknowledged in the trial court that this sum is usually a conventional sum, he never proposed any alternative sum upon which the court could work from. The trial record consists of several decisions cited by the first defendant but which, apparently, the learned magistrate did not make reference to in respect of damages under this head; for instance there is the case of **HCCA No. 52 of 2001, Salim Golamali T/A Kalenjin Auto Hardware versus Lucas Nyongesa** where **Kshs. 120,000/=** was awarded as general damages for loss of expectation of life and in **Civil Appeal No. 144 of 1990 Kenya Breweries versus Ali Kahindi Saro** where an award of **Kshs 100,000/=** was made under this head. On his part counsel for the respondent cited **High Court Civil Appeal No. 15 of 2003, Albert Odawa versus Gichimu Gichenji** where the sum of **Kshs 100,000/=** was awarded as compensation for loss of expectation of life and **Nakuru High Court Civil Case No. 437 of 1996, Jackson Magata Kuritu versus Cheruiyot Keter** where the sum of **Kshs. 150,000/=** was awarded under the same head. It is therefore clear that though the learned magistrate never made reference to any of these decisions, he was not far off the mark in awarding the sum of **Kshs 100,000/=** as general damages and in the absence of any proposal to the contrary from the appellant I find that there is no basis for the allegation that the sum awarded for loss of expectation of life was excessive in the circumstances.

Pain and Suffering:

The last head of damage contested in this appeal is the award on pain and suffering; counsel for the respondent urged that the deceased died on the same day as the date of the accident and it is possible that she died on the spot, after the accident. Citing the decision in **Nakuru High Court Civil Case No. 437 of 1996 Jackson Magata Kuritu versus Cheruiyot Keter** where the deceased died instantly but was still awarded the sum of **Kshs 10,000/=** for pain and suffering, counsel proposed the sum of **Kshs 10,000/=** as adequate compensation under this head.

Amongst the documents that were admitted in evidence at the trial were receipts indicting that the deceased was examined at Consolata for the head injuries she sustained in the accident; the receipts show

that payments were made for a CT head scan. It is possible from this evidence that although the deceased died on the same day of the accident, she may not have died instantaneously and if that is the case she must have endured pain and suffering before she finally succumbed to her injuries. If that possibility is taken into account, that the deceased may have died hours after the accident, I would consider an award of Kshs 10,000/= as a reasonable compensation for pain and suffering.

Accordingly, subject to contribution, the final award would be as follows:-

General Damages under the Law Reform Act:

(a) Loss of expectation of life	Kshs. 100,000.00
(b) Lost years	Kshs. 200,000.00
(c) Pain and suffering	Kshs. 10,000.00
(d) Special Damages	<u>Kshs. 25,080.00</u>
Total	<u>Kshs. 335,080.00</u>

The respondent shall also have interest at court rates from the date of judgment of the subordinate court.

Except for the adjustment of the award on pain and suffering, the appellant's appeal is dismissed. Parties will bear their own costs in this appeal but costs in the trial court will be paid as ordered by that court. It is so ordered.

Dated, signed and delivered in open court at Nyeri this 13th day of March, 2015

Ngaah Jairus

JUDGE