REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 142 OF 2009

PALM OIL TRANSPORTERS.....1ST APPELLANT

MEHARI AUTO GARAGE.....2ND APPELLANT

VERSUS

W W N *(suing as the Legal Representative and Administrator of the estate of*

***W*-DECEASED).....RESPONDENT**

(An Appeal arising out of the judgment of Hon. B. Ochieng SRM delivered on 16th July 2009 in Makindu Principal Magistrate's Court Civil Case No. 204 of 2007)

JUDGMENT

The Appellants were the Defendants in Civil Case No. 204 of 2007 at Makindu Principal Magistrate's Court, while the Respondent was the Plaintiff in the said suit. The said parties entered a consent on 7th May 2009 whereby liability was apportioned in the ratio of 30:70 as between the Respondent herein and the Appellants. They also consented on damages for pain and suffering of Kshs 10,000/=, damages for loss of expectation of life of Kshs 100,000/= and special damages of Kshs 2,200/=. Further, that damages for loss of dependence would be subject to submissions.

The parties duly filed their submissions, whereupon the trial magistrate in his judgment assessed the damages for loss of dependency of Kshs 400,000/=. The Appellants subsequently moved this Court through a Memorandum of Appeal dated 29th May 2008, wherein its main ground of appeal is that the learned trial senior resident magistrate erred in law and in fact by making an award of Kshs. 400,000/= without any reasoning, basis in law, and thus exercising his discretion on unknown factors. The Appellants are praying for orders that the appeal be allowed with costs, and that the award of Kshs. 400,000/= be set aside and substituted with the proper award that the court deems fit and just to grant.

The Facts and Evidence

I will proceed with a summary of the facts and evidence given in the trial Court. The brief facts of the case are that the Respondent instituted a suit in the lower court by filling a Plaint dated 15th August 2007. He stated therein that at the times material to this suit, the 1st Appellant was the beneficial owner, while the 2nd Appellant was the registered owner of motor vehicle registration number KAG 423J.

Further, that on 21st September, 2006 the deceased was lawfully walking beside the Nairobi-Mombasa Road near Machinery Junction when motor vehicle registration number KAG 423J was negligently

driven, managed and/or controlled by the Appellants' authorised driver, servant and /or agent that it veered off the road and knocked down the deceased thereby causing an accident. The Respondent averred that the Appellants are vicariously liable for the negligence of their authorised driver, servant and/or agent, whom the Respondent wholly blamed for the occasion of the said accident

The Respondent gave the particulars of negligence on the part of the Appellant's driver and also relied on the doctrine of *res ipsa loqituor*. He also gave the particulars of the deceased, who he stated was at the time of her death aged 11 years and had prospects of a bright future. The Respondent claimed that through her death the deceased lost her expectation of life, and that the Respondent and the deceased's mother have lost the deceased expected support and have suffered loss and damage.

The Respondent sought special damages of Ksh 4,150/=, general damages under the Fatal Accidents Act and Law Reform Act and costs of the suit.

The Appellants filed a Defence in the trial Court dated 6th February 2009, wherein they denied that the Respondent is the personal representative of the estate of the late VW, and stated that it was the deceased who was fully or substantially to blame for the accident, and proceeded to give the particulars thereof.

From the record of the trial court proceedings, interlocutory judgment was entered against the Appellants on 10th April 2008, and the suit proceeded for formal proof hearing on 25th September 2008, when two witnesses gave evidence for the Respondent. The first witness (PW1) was the Respondent who stated the deceased was his child and was involved in a fatal road accident on 21st September 2008 along Nairobi-Mombasa Road. Further, that he was not present at the time of the accident. However, that he visited the scene of the accident and confirmed that his child had passed away, and also found the motor vehicle at the scene.

He further testified that his deceased child was 13 years old at the time of her death, and in standard six and was performing well in class. He produced various exhibits in court including the police abstract, death certificate, and the limited grant of letters of administration to file suit for the estate of the deceased.

PW2 was Nzioki Mumbi Ghembe who witnessed the accident and he stated that on 21st September 2006 he was by the roadside on the Mombasa – Nairobi Road near machinery bus stage when he saw a girl knocked down by a motor vehicle KAG 423J headed for Mombasa. He stated that the girl was attempting to cross the road and the motor vehicle swerved and ran over her.

The Respondent in his submissions in the trial court relied on the decision of **Mohammed Abdi vs Wilson Wanyeki Waritu & Another, Nairobi HCCC No. 1525 of 2002** where the Court awarded a prospective wage of Kshs 3,000/= per month and a multiplier of 20 years for a deceased minor who was aged 10 years at the time of death, and asked that the lost years for the deceased in the present case be assessed at Kshs 720,000/=.

The Appellants did not call any witnesses during the trial. However, in their submissions on damages for loss of dependency, they relied on the decision in **Mori Chacha vs Richard arap Koech, HCCC No 1863 of 2001,** where the deceased was aged 14 years and the court gave a multiplier of 7 years at an income of Kshs 3,000/= per month, and urged the court to award Kshs 176,000/=.

The Issues and Determination

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are only contesting the issue of quantum of damages, and specifically damages for loss of dependency.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor**

Boat Company Limited [1968] EA 123 and **Peters vs. Sunday Post [1958] E.A. 424.** The duty of this Court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

The Appellants and Respondent canvassed the present appeal by way of written submissions. The Appellants in submissions dated 3rd April 2013 argued that in the assessment of general damages under any of the heads in the Law Reform Act or Fatal Accident Act, the Court must be guided by either relevant already decided case law, or thought out rationale derived from the evidence present in court. Further, that the deceased minor in this case was 11 years as stipulated in the Respondent's plaint, and that there is no further description as to whether she was a school-going child or not. However, that when testifying to enable the court assess general damages, the Respondent departed from his pleadings and testified that the minor at her demise was 13 years old, in standard six and performing very well.

The Appellants further submitted that despite this departure from the Respondent's pleadings, no report cards or tests sat for by the deceased were produced in court to prove the alleged excellent performance and aid the court in the assessment of loss of dependency. It was contended that the court therefore had no basis of awarding an exorbitant sum of Kshs. 400,000/=.

It was the Appellants' submissions that if the court were to award loss of dependency on the common assumption that children once grown eventually end up helping their parents, then without any evidence worth relying on, it should have adopted the Appellant's tabulation of the loss of dependency as follows:

1/3 x 3000 x 7 x 12 = 84,000/=

Further, that this tabulation encompasses a fair minimal wage as per the labour regulations of 2007. The Appellants urged the Court to set aside the award of loss of dependency of Kshs. 400,000/= and substitute it with Kshs. 84,000/= as loss of dependency.

The Respondent on his part filed submissions dated 17th April 2013 in which he argued that the Senior Resident Magistrate rightly and justly awarded Kshs. 400,000/= for loss of dependency, and that the Appellants' claim that the award is excessive is baseless, unreasonable and untenable. He relied on the decision in **Bashir Ahmed Butt vs Uwais Ahmed Khan, [1982 -22] 1KLR** where it was held that an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate.

It was his submission that the Appellants have not established that the learned magistrate in awarding Kshs. 400,000/= did either of the above to warrant this court to interfere with the said award. Reliance was also placed on the decision in **Dr. Appolo Maina t/a Fugalima Centre vs Grace Njambi Irungu (suing as the administratix of the estate of Lucy Njeri Njambi (Deceased), HCCA No. 26 of 2013** where the court upheld the award of Kshs. 577,667 for death of a minor that was as a result of a road traffic accident.

The Appellant opined that in cases like this one, some courts proceed on a global award while others tabulate as proposed by the Appellants, however that the Appellants had not set out any basis for their tabulation, especially the multiplier, and there was no reason as to why the Appellants suggested that the dependency would have only been for 7 years.

Lastly, it was submitted by the Respondent that misstating the deceased age as 11 as opposed to 13 is not so fatal so as to justify a reduction of the award, and he asked the Court to uphold the award of Kshs. 400,000/= for loss of dependency.

I have considered the evidence given in the lower Court and the arguments made by the parties. On the issue of liability, there is no dispute from the evidence on record that an accident occurred along the Nairobi-Mombasa Road at Machinery junction 21st September 2006 involving motor vehicle registration number KAG 423J belonging to the Appellants, in which the daughter of the Respondent died. The

parties also agreed on all other heads of damages other than for loss of dependence which is in contest in this appeal.

It is an established principle of law that that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

The Appellants have disputed the age of the deceased at the time of death, However it is not disputed that the deceased was a child, and section 4 of the Fatal Accidents Act clearly stipulate that every action brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the deceased. The dependants named in this appeal are the father and mother respectively of the deceased.

In addition, the issue of payment of damages to the estate of a deceased child was long settled by the Court of Appeal in the case of **Sheikh Mushtaq vs. Nathan Mwangi Kamau Transporters & Others, [1985 – 1988] 1 KAR 217** where Nyarangi, JA recognized the fact that in African and Asian communities, an expectation by parents that their children would take care of them in their old age was normal. In **Kenya Breweries Ltd. vs. Saro, [1991] KLR 408** the Court of Appeal held that:

> "**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 in to 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 African 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 parent 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."**

On the question whether the amount of Kshs 400,000/= awarded by the trial court as damages for loss of dependency was based on any known factors or principles of law, this Court is guided by the manner of assessment of damages for loss of dependency under the Fatal Accidents Act. The applicable method was aptly explained by Ringera J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows;

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

In the present appeal the deceased child had not earned any income that would have guided this Court in determining a multiplicand and resultant multiplier, and the best the Court can do in the circumstances is award a global amount. In this respect I note that from awards given in similar cases that an award of

Kshs 400,000/= as a global award is reasonable. I refer in this regard to the decision in **Regina Wambui Njenga vs R.K. Obura & Another (2009) e KLR** where a sum of Kshs 350,000/= was awarded on 22nd May 2009 as loss of dependency to the estate of the 1st Defendant therein, who was aged 13 years at the time of death.

This finding notwithstanding, I also note that in law and practice, where a claimant get awards for loss of life both under the Law Reform Act and the Fatal Accidents Act, the former should be deducted from the latter. This principal was explained by the Court of Appeal in **Kemfro v A. M. Lubia & Another,[1982-1988] KAR 727** as follows;

> "**The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.'**

It is clear in the present appeal that the trial magistrate did not consider that he was required to deduct the award under loss of expectation of life from the grand total once an award for loss of dependency was made, and therefore erred when it came to the computation of damages.

I therefore set aside the said award in the trial court of Kshs 512,000/= less 30% contribution, and substitute it with a total award of Kshs 288,540/= which has been computed as follows arising from the findings in the foregoing:

(a) Pain and suffering	10,000.00
(b) Loss of expectation of life	100,000.00
(c) Loss of dependency	400,000. 00
(d) Special damages	2,200.00
	512,200.00
Less loss of expectation of life	100,000.00
	412,200.00
Less 30% contribution	123,660.00
Total	**288,540. 00**

Each party shall bear their costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 27TH DAY OF OCTOBER 2015.

P. NYAMWEYA

JUDGE