REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 203 OF 2012

TRANSPARES KENYA LIMITED.....1ST APPELLANT

RELIABLE HAULERS LIMITED.....2ND APPELLANT

VERSUS

S M M (*suing as legal representative for and on behalf of the estate of*

E M M (Deceased)..... RESPONDENT

(An Appeal arising out of the judgment of Hon. M. W. Murage CM delivered on 7th November 2012 in Machakos Chief Magistrate's Court Civil Case No. 880 of 2011)

JUDGMENT

The Appellants were the Defendants in Civil Case No. 880 of 2011 at Machakos Chief Magistrate's Court, while the Respondent was the Plaintiff in the said suit. The said parties entered a consent on 10th October 2012 whereby liability was apportioned in the ratio of 85:15 in favour of the Respondent, as a result of an accident that occurred on 19th May 2011. The parties duly filed submissions on quantum, whereupon the trial magistrate in his judgment awarded total damages of Kshs 552,415/= to the Respondent. The Appellants subsequently appealed the said judgment and moved this Court through a Memorandum of Appeal dated 26th November 2012, wherein their grounds of appeal are as follows:

1. The Learned Magistrate erred in law and in fact and considered extraneous matters in finding for the plaintiff.

2. The Learned Magistrate erred in law and in fact in failing to put into consideration the submissions by the defendants in regard to quantum.

3. The Learned Magistrate erred in law and in fact by failing to consider the authorities relied on by the defendants in their submission.

4. The Learned Magistrate erred in law and in fact in awarding the plaintiff a sum in damages which is manifestly excessive and/or inordinately high as to be unjust.

5. The Learned Magistrate erred in Law in making an award under both the Law Reform Act and the Fatal Accidents Act.

The Appellants are praying for orders that the appeal be allowed, the judgment of the lower court be set aside and/or varied accordingly, and that the Appellant be awarded costs of this Appeal.

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 23rd September 2011. The Respondent brought the suit on behalf of the estate of E M M (the Deceased). The Respondent stated that she together with the deceased's brother K M M depended on the Deceased. She further stated that at all times material to this suit, the 1st Appellant was the registered owner of motor vehicle registration number KAG 044W ZD 3607, while the 2nd Appellant was the beneficial owner and in actual possession, custody, control of motor vehicle registration number KAG 044W ZD 3607 being driven by the Appellants' driver servant and/or agent thereof.

Further, that on 19th May 2011 the deceased had lawfully crossed Mombasa – Nairobi road at Kyumbi Market, when the Appellant's driver

negligently drove, managed and/or controlled motor vehicle registration number KAG 044W ZD 3607. 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*. The Respondent also stated that the deceased sustained fatal injuries as a result of the said accident, and that the deceased who was a healthy minor aged 5 years and a nursery school going pupil would have grown to support his parent and brother. She claimed general damages for the anticipated lost dependency. The Respondent accordingly sought special damages of Ksh 14,900/=, 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 20th December 2011, wherein they denied the allegations of negligence and the particulars of injuries stated by the Respondent. The Appellants stated that in the alternative, the collision that occurred between the deceased and the 1st Appellant's motor vehicle registration number KAG 044W ZD 3607 was wholly or substantially cause by negligence on the part of the deceased, particulars of which they provided.

From the record of the trial court proceedings, the Respondent testified as PW1. She stated that the deceased was her son, and died in a road traffic accident on 19/5/2011 at Kyumbi along Nairobi-Mombasa Road, when he was going to school. She stated that she was informed that motor vehicle registration number KAG 044D hit him and that it had a trailer 2B 3637. Further, that the Deceased was in [particulars withheld] Academy and did well in school. She produced as her exhibits the police abstract, death certificate, limited grant, receipts for payment of postmortem and burial, search results on the ownership of the motor vehicle and a report card on the deceased's performance .

PW2 was Massinswa Michael Macharia, who worked at [particulars withheld] Academy, and who testified that on 19th May 2011, he was helping the school children to cross the Mombasa Road Highway, and that when they reached the centre of the road they saw a trailer ZB 3607 overtaking and signaled the vehicle to stop. It slowed down but did not stop, and knocked the child who was in front and ran him over. PW2 testified that the child died on the spot.

The Respondent in her submissions in the trial proposed damages of Kshs 20,000/= for pain and suffering and Kshs 120,000/= for loss of expectation of life, and relied on the decision in **Jane Kwamboka Mogere vs Ouru Nyamori Nyamwancha & Another, Kericho HCCC No. 33 of 2001** where the same amount of damages were awarded. On the damages for lost years, the Respondent submitted that deceased died at the age of 5 years and was in nursery school and doing well academically, and would have grown up finished his education and assisted his mother.

Taking the then minimum wage of Kshs 8,579/= as the multiplicand and a multiplier of 35 years, the Respondent proposed Kshs 3,603,180/= as damages for lost years. Reliance was also placed on the decision in **Mohammed Abdinoor Adi vs Wilson Wanyeki Warita, Nairobi HCCC No 1525 of 2002** where a deceased minor aged 5 years was awarded a sum of Kshs 720,000/= under this heading. The Respondent produced receipts for Kshs 14,900/= in proof of special damages.

The Appellants did not call any witnesses during the trial. However, in their submissions on damages they proposed an award of Kshs 10,000/= for pain and suffering, Kshs 200,000/= for loss of expectation of life, and cited the decision in **Betty Ngata vs Samuel Kinuthia Thuita (1999) eKLR** where a child of 19 years was awarded Kshs 100,000/= damages under this head. On loss of dependency, the Appellants submitted that there was no proof that the mother and brother of the deceased would have depended on him, and that his estate could not claim under this heading.

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.

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 quantum of damages should stand.

The Appellants and Respondent canvassed the present appeal by way of written submissions. The Appellants Advocates, Njeri Onyango & Company Advocates, filed submissions dated14th July 2015, wherein they argued that they have no contention with regards to the general damages award, save for the dependency provision. They submitted in this regard that the learned Magistrate gave a global sum of Kshs.500,000/= for loss of dependency out of speculation. Further, that the deceased was five years old and no evidence was shown by the Respondent to create basis on which damages could have been awarded to her. The Appellants relied on the case of **Kenya Breweries Ltd vs Saro, Civil Appeal No. 144 of 1990 (1991) eKLR** in this regard.

The Appellants further submitted that they had suggested zero compensation under this head in consideration of the uncertainties on the future dependence status of the deceased minor, and that due to the court's failure to elaborate how it had arrived at the aforesaid sum of dependence, it ought to be implied that the lower court did not give due regard to the Appellants' initial submissions. They urged this Court to find that the award by the trial Court was too excessive in the circumstances, and submitted that a sum of Kshs 200,000/= would be reasonable compensation.

Sila & Company Advocates for the Respondent filed submissions dated 5th October 2015, wherein it was argued that the sum to be awarded as damages for lost years is never a conventional one, but compensation for pecuniary loss which must be assessed justly and with moderation, and depends on the facts of each case. Further, that in Kenyan society, parents expect their children to grow up, work and render

financial support. It was their submission that the trial court did not apply any wrong principles, and that the global sum of Kshs 500,000/= awarded for lost years was reasonable in the circumstances. Reliance was placed on the decision in **Mohammed Abdinoor Adi vs Wilson Wanyeki Warita, (supra)**.

I have considered the evidence given in the lower Court and the arguments made by the parties. There is no dispute on the issue of liability, the parties having agreed to apportion liability on the basis of 85:15 as between the Appellants and Respondent. On the issue of damages, the Appellants are contesting only the award given by the trial court under the head of lost years.

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 argued that there was no evidence of dependence on the deceased to warrant the payment of the said award. 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."**

It is thus my holding for the above reasons that the Respondent is a dependant of the deceased.

On the question whether the amount awarded by the trial court Kshs.500,000/= as damages for lost years was based on speculation, it is now an accepted principle that the estate of the deceased is entitled to damages for lost years, for the income that would have been earned by the deceased, less the living expenses, assuming he had lived and worked for the period he would have been expected to be in employment. It was held In **Hassan vs Nallian Mwangi Kamau Transporters & 4 Others, [1986] KLR 457** that in the assessment of general damages for lost years, the court has to make the best estimate it can, based on the known facts and the prospects of the deceased at the time of his death.

In the present appeal the deceased child had not earned any income that would have guided the trial Court with certainty in determining an amount for lost years. However, in principle such losses for lost years are still recoverable in the case of a child, because the deceased child has been deprived by the shortening of life, and of the opportunity to use their income in the way he or she desired had he or she lived. The fact that a deceased's child's loss is not as easily determinable and will occur further into the future than an adult's, should not be a reason for saying that it is speculative. Therefore it is my view that the trial magistrate did not err in principle in awarding a global amount of Kshs 500,000/= for such damages.

The alternative to awarding a global amount in such circumstances is to then apply a more scientific basis for the assessment of damages, which is what the Appellants are seeking. The applicable method of assessment 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."**

I am in this regard persuaded by the method of calculation relied upon by the Respondent in **Mohammed Abdinoor Adi vs Wilson Wanyeki Warita, (supra)** which I find to be reasonable and applicable, taking into account that the deceased minor in the said case was 10 years, and a multiplicand of Kshs 3,000/= minimum wage per month and a multiplier of 20 years was used. In the present appeal, the minimum wage for unskilled labour in 2011 at the time of the deceased's death was Kshs 3,765/=, according to the Regulation Of Wages (Agricultural Industry) (Amendment) Order, 2011, published as Legal Notice No. 63 on 10th June 2011.

Applying the said multiplicand of Kshs.3,765/= per month and a multipler of 20 years of working life, the deceased would have reasonably earned Kshs 903,600/=. In addition, taking into account a ratio of dependency of 1/3 for his expenses, the sum that the deceased can reasonably be awarded for lost years would therefore be Kshs 602,400/=.

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 the award under loss of expectation of life was to be deducted from the grand total once an award for lost years was made, and therefore erred in this respect when it came to the computation of damages.

I therefore set aside the said award in the trial court of Kshs 552,415/=, and substitute it with a total award of Kshs 537,455/= which has been computed as follows arising from the findings in the foregoing:

(a) Pain and suffering	15,000.00	
(b) Loss of expectation of life	120,000.00	
(c) Lost years	602,400. 00	
(d) Special damages	14, 900.00	
		752,300.00
Less loss of expectation of life	120,000.00	
	632,300.00	Less 15% contribution 94,845.00
Total	**537,455. 00**	

Each party shall bear their costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 17TH DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE