



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.50 OF 2013**

**BETWEEN**

**CHARLES OUMA OTIENO ..... 1ST APPELLANT**

**MARTIN OTIENO AYUNGO ..... 2ND APPELLANT**

**T.A.J. MOTORS LIMITED**

**AND**

**BENARD ODHIAMBO OGECHA (suing as Brother and Legal**

**Representative and Administrator of the Estate of the**

**late OSCAR ONYANGO OGECHA (DECEASED) ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Kimei, SPM dated*

*17<sup>th</sup> day of April 2013 in the original Migori SPMCC No.82 of 2012)*

**JUDGMENT**

1. The only issue on this appeal is quantum of damages. The appellant is asking this court to determine the following related issues:-

a. *Whether the learned trial magistrate erred in assessing damages*

*over various headings instead of awarding lump sum;*

b. *Whether the learned trial magistrate erred in applying*

*dependency ratio of 2/3;*

c. *Whether the award of Kshs.500,000/= was excessive;*

d. *Whether the learned trial magistrate erred in assessing damages*

*under various headings instead of a lump sum award.*

1. Briefly the respondent herein commenced suit by way of a plaint dated 24<sup>th</sup> September 2012 claiming the following reliefs:-

- a. *General damages for loss of expectation of life;*
- b. *Special damages for Kshs.25425/=,*
- c. *Costs of the suit;*
- d. *Interest on (b) at court rates.*

1. The respondent's case was that the deceased herein died as a result of the

negligence on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants for an accident which occurred on or about the 11<sup>th</sup> day of June 2012 at around 4.30 p.m. or thereabouts at Lwala along Awendo-Kisii Road. The deceased was said to have been standing on the verge of the said road when the authorized driver, agent and/or servant of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants while driving motor vehicle Registration Number KBT 260 P Toyota Probox negligently drove, managed and/or controlled the same thus permitting the same to veer off the road thereby knocking down the deceased thus occasioning him to suffer severe multiple bodily injuries from which he died. The respondent set out the particulars of negligence in paragraph 6 of the plaint.

2. The appellants filed a joint statement of defence and denied the respondent's claims. The appellants also denied the particulars of negligence and averred that if any accident occurred at all, which was denied, then the same occurred due to negligence of the respondent as more particularly set out at paragraph 9 of the Statement of Defence dated 18<sup>th</sup> October 2012 and filed in court on the same day. The appellants urged the court to dismiss the respondent's suit with costs.
3. The respondent filed Reply to Defence and denied the particulars of negligence attributed to the deceased.
4. The case was heard by Hon. Mr. David Kimei. Liability was agreed by consent at 20% to 80% in favour of the respondent. After hearing submissions on quantum, the learned trial magistrate entered judgment as follows:-

- *General damages ..... Kshs.480,000/=*
- *Pain and suffering ..... Kshs.20,000/=*
- *Special damages ..... Kshs.18,675/=*

less 20% contribution bringing the net to Kshs.418,675/=. The respondent was also awarded costs and interest.

1. Being aggrieved by the whole of the said judgment, the appellants brought this appeal on grounds:-

1. *That the Learned Trial Magistrate misdirected himself in law and principle by making an award of General Damages in the sum of **Kshs.500,000/=**, which sum is excessive in the circumstance. (sic)*
2. *The Learned Trial Magistrate erred in law and principle by adopting wrong method and principle in arriving at the quantum of damages awarded to the respondent.*
3. *The Learned Trial Magistrate erred in principle by assessing damages over various heading instead of awarding lump-sum amount as by law required.(sic)*
4. *The Learned Trial Magistrate erred in law and principle by failing to subject the awarded costs to the contribution of 30%, liability apportioned to the Respondent.*
5. *The Learned Trial Magistrate erred in applying dependency ratio of 2/3 or at all.*
6. *That the Learned Trial Magistrate thereby arrived at a wrong decision by applying wrong principles.*

1. The appellants pray that the appeal be allowed and the judgment and decree of the trial magistrate dated 17<sup>th</sup> day of April 2012 be set aside in its entirety and that this Honourable Court do revisit the issue of assessment of the quantum of damages and do assess the same afresh. The appellants also pray that costs payable be subjected to contribution of 30% being the liability apportioned to the respondent. The appellants also ask the court to condemn the respondents with costs of this appeal. It is noted that the contribution on liability against the respondent was agreed at 20% and

- not 30%.
2. This appeal is before me as a first appeal and when deciding whether or not to interfere with the award of damages, the following principles apply:-
    - a) *The plaintiff should receive in money terms no more and no less than his actual loss or the principle of restitution in integrum;*
    - b) *Where the plaintiff clearly establishes his financial loss, then the court should award the full amount of such loss and as accurately as possible;*
    - c) *Measure of damages for personal injury which cannot be calculated in terms of money always remains within the discretion of the trial court.*

(For the above propositions, see **R. Kuloba's Measure of Damages for bodily**

**injuries**” Law Africa Publishing 2006 at pages 5 and 6).

3. Once the above principles are observed by the trial court, an appellate court of first instance can only interfere with the award on quantum where it is shown that the figure awarded by the trial court is based on some erroneous principle or it is so low or so excessive that it must have been based on some incorrect reasoning as to amount to an entirely erroneous estimate. On appeal on quantum of damages and remembering that the figure awarded by the trial court is always a matter for the discretion of such court, the appellate court will be slow to interfere unless, as stated herein above, the award was based on wrong principles or the amount is so low or so excessive as to present an entirely erroneous estimate.
4. In the instant case, the appellants, through their written submissions dated 17<sup>th</sup> February 2014 and filed in court on 20<sup>th</sup> February 2014 contend as follows: *“The deceased in this case was a minor, in Form Two, with a very unpredictable future. Reliance was placed on the case of Oguttu -vs- Makario 3Bs Trading Co. Ltd. - Nairobi Civil Suit No.3003 of 1984 – www.Kenya lawreports.or.ke where O’Kubasu J (as he then was) persuasively held that “in assessing damages to be awarded, the court is dealing with uncertainties and discretion. We do not know how far this child would have gone with his education. He might have made it to university had he lived. But he might also have joined other school drop outs. He might have become a very prominent leader but chances of his becoming a liability to his parents cannot be completely ignored. He might have become a successful businessman. What I am trying to say is that the court has to consider all these possibilities in an attempt to assess what assistance he might have given to his parents.”*
5. The conclusion reached by the learned trial judge was that in the case of minor victims of road traffic accidents, the court ought to award a lump sum amount and not under various heads contemplated under the Law Reform Act and Fatal Accidents Act.
6. On this issue, the Respondent's counsel submitted that there was no misdirection on the part of the trial court in making the award of Kshs.500,000/= since the award was not manifestly excessive or exorbitantly high.
7. After a careful consideration of the submissions and the relevant guiding principles on award of damages for minor victims of road traffic accidents, the issue that arises for determination here is whether the findings of the learned trial magistrate were well anchored in law. I am of the considered view that the learned trial magistrate fell into error in making awards under separate heads. As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.
8. The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14 year old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would

have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved. Reliance was placed on the case of **H. Young & Company EA Ltd. & another -vs- James Gichana Orangi – Kisii HCCA NO.207 of 2009**. In the said case, the learned trial magistrate awarded damages totalling Kshs.323,300/= under various heads in respect of the death of the deceased who was aged 11 years at the time of death. On appeal, Musinga J (as he then was) set aside the award of Kshs.323,300/= and in lieu thereof made a lump sum award of Kshs.300,000/= subject to 25% contribution.

9. The respondent's contention is that the award of Kshs.500,000/=, the dependency ratio of 2/3 and the award of Kshs.20,000/= for pain and suffering, were all within the law and should not be interfered with. The respondent also contends that since appellant's counsel had asked the trial court to make an award of Kshs.480,000/= he is now estopped by dint of the provision of **Order 2 rule 6** of the **Civil Procedure Rules** from raising a new ground of claim inconsistent with the submissions counsel made before the trial court.
10. I must point out here that courts are not bound by submissions. Courts give judgment in line with the pleadings and the law, that is why facts pleaded must always be proved by evidence. In the instant case, and in regard to all the above issues, it is clear that the trial court failed to take into account the principle for making awards for injuries/death of child victims of traffic accidents. This follows therefore that in assessing the damages, the learned trial magistrate proceeded on wrong principles and by so doing he arrived at a figure which was inordinately high as to amount to an erroneous estimate.
11. It is for the above reason that this court, as the first appellate court, has found reason to interfere with the award of general damages made by the learned trial magistrate. As the appellants have not questioned the award of proved special damages, I will not interfere with the same.
12. Accordingly I set aside the trial court's award on general damages and now enter judgment as follows:-

General damages .....	Kshs.350,000.00
Special damages .....	<u>Kshs. 18,675.00</u>
	<u>Kshs. 368,675.00</u>
Less 20% contributon .....	Kshs. 73,734.00
<b>Total</b>	<b><u>Kshs.294,941.00</u></b>

13. I enter judgment for the above amount together with costs and interest from day of judgment in the lower court.
14. The appellants shall have a quarter of the costs of this appeal.
15. Orders accordingly.

**Dated, signed and delivered in open court at Kisii this 25<sup>th</sup> day of June, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:-

Mr. J. O. Soire for O.M. Otieno (present) for Appellants

Mr. Owade (absent) for Respondent

Mr. Bibu - Court Assistant