



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.249 OF 2009

BETWEEN

PETER FRANCIS MASARAAPPELLANT

AND

**ANTONE OMONDI ADEDE (suing on behalf of the Estate
of SHEILA ANYANGO OMONDI – DECEASED)RESPONDENT**

***(Being an appeal from the judgment and decree of Mrs. S.M. Shitubi Esq., SPM,
dated and delivered on the 19th November 2009 in Migori SPMCC NO.288 of 2008)***

JUDGMENT

1. Peter Francis Masara the appellant herein was sued by Antone Omondi Adede as a legal representative of the estate of Sheila Anyango Omondi (deceased) in Migori PMCC No.288 of 2008 (herein after referred to as “the Respondent”)
2. It was alleged that on the 13th November 2007 the deceased was lawfully walking off the verge of the road along Oruba-Nyabisawa road when at Oruba estate area motor vehicle registration No.KAJ 862 V was so carelessly driven by the defendant/appellant, his agent and/or servant that it lost control and violently knocked down the deceased thereby occasioning her bodily injuries. The respondent filed the suit claiming general and special damages under the Law Reform Act and Fatal Accidents Act.
3. On conclusion of the trial, the trial magistrate found the appellant liable for the accident and judgment was accordingly entered. The respondent was awarded Kshs.411,000/= in general damages, costs and interest thereon.
4. The appellant being dissatisfied by the judgment of the trial Court and the decree issued therefrom appealed on the following grounds:-
 1. *The Learned trial Magistrate erred in law and in fact when he held that the deceased, a Minor who at the time of Death was aged barely One and Half (1½) years could have earned a Minimum of Kshs.2,000/= per month which she adopted as a multiplicand and without basis and or evidence at all.*
 2. *The Learned trial Magistrate erred in fact and in law when she held without finding that the*

Respondent had proved negligence against the Appellant.

3. *The Learned trial Magistrate erred in fact and in law when she awarded to the respondent against the appellant Kshs.55,000/= as special damages a claim in respect of which no Court Filing fees had been paid at the time when the plaint was lodged.*
4. *The Learned trial Magistrate erred in law when she failed to appreciate the fact that there was material departure and discrepancies in the pleadings filed and the evidence led at the trial.*
5. *The Learned trial Magistrate erred in fact and in law when she awarded the sum of Kshs.240,000/= as damages for lost years under the Law Reform Act.*
6. *The Learned trial Magistrate erred in fact, and in law when he failed to take into account the damages she awarded under the Law Reform Act for the ones he awarded under the Fatal Accidents Act and in so doing he ended up awarding the benefits twice to the same Dependents.*

5. Both counsel for the appellant and respondent agreed to canvass the appeal by way of written submissions.

6. In their submissions, the appellant's counsel Okong'o Wandago & Co. Advocates agreed that the award for the loss of expectation of life and pain and suffering of Kshs.100,000/= and Kshs.20,000/= respectively were reasonable and reflective of the circumstances particularly where the minor deceased died one day after the accident she must have suffered a lot of pain.

7. On the issue of lost years awarded in the judgment, counsel for the appellant has relied on the case of **Hassan -vs- Nathan Mwangi Kamau Transporters & others [1986-1989] 1 EALR 137 – Court of Appeal at Mombasa Case No.123 of 1985.** The reason for citing the above authority was to bring out certain principles relating to the subtraction on the lost years principles. At page 142 of the judgment, the Court stated:- **“Then, having declared that principle to be part of the law of Kenya, Mr. Justice Aragon went on to set out various guidelines to the assessment of damages for “the lost years”-**

a. A parent cannot insure the life of his child.

b. The death of the victim of the negligence does not increase or reduce the damages for the lost years.

c. The sum to be awarded is never a conventional one but compensation for pecuniary loss.

d. it must be assessed jointly and with moderation.

e. The complaints of insurance companies at the size of such awards should be ignored.

f. Disregard remote inscrutable speculative claims.

g. Deduct the victims living expenses during the lost years for they would not form part of the estate.

h. A young child's present or future earnings in most cases would be nil.

i. An adolescent's would usually be real, assessable and small.

j. The amount will vary greatly from case to case for it depends on the facts of each case including the victims station in life.

k. Calculate the annual gross loss.

l. Apply the multiplier the estimated number of lost working years acceptable in each case.

m. Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her and

n. Living expenses include the reasonable cost of housing, heating, food, clothing, insurance, travelling, holidays, entertainment social activity and so forth.

8. The appellant's counsel has also quoted the speech of Lord Scarman in **Gammwel -vs- Wilson 1982 A.C. 27 1981 1 ALLER 578** when he said at page 78 “... *if sufficient facts are established to enable the court to avoid the facies of speculation even though not enabling it to reach mathematical certainty the court must make the best estimate it can. In civil litigation it is the balance of probability which matters ...*”

And again later on in the judgment, the learned judge said, “*subtle mathematical calculations based as they must be on events or contingencies of a life which he will not live are out of place, the judge must make the best estimate on the known facts and his prospects at the time of his death.*”

9. From the above principles and factors in mind counsel for the appellant is of the opinion that the deceased minor being one year and nine months old was so young that imagining his career prospects would have been premature and similarly there was no evidence from the respondent, PW1 on what plans he had for the minor daughter career wise.

10. Counsel therefore submits that the honourable trial court never laid basis for assessing the income at Kshs.2,000/= per month, setting the dependency at 2/3 and the multiplicand at 15 years. He argues that special damages were not specifically proved hence they should not have been awarded and that the lower court did not discount the award under Fatal Accident Act with the one under Law Reform Act.

11. He opines that the award of Kshs.120,000/= under the Law Reform Act ought to be deducted from the lost years of Kshs.240,000/= and lastly that the pleaded special damages of Kshs.45,000/= was not paid for while filing the suit.

12. On their part, the respondent through the firm of M/s Abisai & Co. Advocates submitted that the respondent was entitled to the award of lost years only that the dependency ratio ought to have been reduced to 1/3 instead of 2/3. He submits that the assessment of Kshs.2,000/= per month was a minimum basic wage which is a factor applicable in a multiplicand where no material is brought before the court to confirm proposed earning of a deceased such as in this particular case. He submits that the trial magistrate was within the legal boundaries on quantum herein.

13. This being a 1st appeal it is this court's duty to assess and re-evaluate the evidence adduced before the lower court only bearing in mind the fact that it had no opportunity of hearing the testimony of the witnesses who testified. This court must also ensure that the findings of the trial court on facts were based on evidence adduced pursuant to pleadings and the findings were based on sound principles of the law (see **Peters -vs- Sunday Post [1958] EA 424 at page 429.**)

14. Looking at the prayers sought in the appeal, the appellant wants the appeal allowed and the respondent's suit in the court below dismissed with costs and the costs of the appeal be paid to the appellant.

15. None of the grounds touch on the issue of liability. Counsel has only complained about the issue of damages. There being no contention in respect of the trial magistrate's finding on liability, I will proceed to address the issue of quantum of damages raised in the grounds of appeal.

16. With regard to damages awarded on the head of pain and suffering, the respondent testified that the accident occurred on 13th November 2006 and the deceased passed away at 2 a.m. on 14th November 2006. The honourable court awarded the respondent Kshs.100,000/= and Kshs.20,000/= for loss of expectation of life and pain and suffering respectively. Counsel for the appellant found those amounts to be reasonable and reflective of the circumstances. This court thus will not interfere with the awards under the said head.

17. On lost years, I do agree that the respondent is entitled to the award of lost years and that the

dependency ratio ought to be 1/3 instead of 2/3. The assessment of Kshs.2,000/= per month is a minimum basic wage which is a factor applicable in a multiplicand where no material is brought before the court to confirm proposed earnings of a deceased.

18. Both counsel had no issue with the multiplicand of 15 years. I therefore see no reason to disturb it. In the circumstances I uphold the same.

19. With regard to special damages, I do find that the same was proved and accordingly awarded by the trial magistrate and will therefore not interfere with the trial court's finding on the same. However, the sum of Kshs.100,000/= awarded under the Fatal Accidents Act ought to have been discounted from the award under the Law Reform Act.

20. In the premises, the appeal partially succeeds in respect of the award on lost years which is calculated as follows:-

$$2000 \times \frac{1}{3} \times 12 \times 15 = 120,000/=$$

The total award will therefore be as follows:-

Pain and suffering	KSHS.20,000/=
Loss of expectation of life	Kshs.100,000/=
Lost years	Kshs.120,000/=
Special damages	<u>Kshs.51,500/=</u>
Grand Total	<u>Kshs.291,500/=</u>
Less amount under Law Reform Act	Kshs.100,000/=
Total Due.....	<u>Kshs.191,500/=</u>

14. Having confirmed the judgment in favour of the respondents on other heads, costs and interest shall be borne by the appellant as ordered by the trial court. Each party shall however bear costs of this appeal.

Dated and delivered at Kisii this 6th day of August, 2014

R.N. SITATI

JUDGE

Mr. Momanyi Aunga for Odhiambo for Appellant

N/A Abisai & Co. for Respondent

Mr. Bibu - Court Assistant