REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 40 of 2009

OSHIVJI KUVENJI …..... 1ST APPELLANT

STEPHEN KIPLIMO KIMELI ..... 2ND APPELLANT

VERSUS

JAMES MOHAMED ONGENGE (Suing as a representative of

the estate of SAMUEL ONGENGE) …..... RESPONDENT

(Being an appeal from the Judgement of Honourable Principal Magistrate W. N. Njage in Eldoret CMCC. No. 561 of 2007 delivered on 13th March 2009)

JUDGEMENT

This appeal arises from Judgement delivered on 13th March, 2009 in Eldoret Chief Magistrate's Court Civil Case No. 561 of 2007. The Plaintiff sued as the representative of the estate of the deceased Samuel Ogenge. The Plaintiff claimed both general and special damages and costs of the suit as a result of a road accident that led to the death of the deceased.

It was averred in the plaint that the deceased was lawfully walking along Eldoret-Kitale Road when he was knocked down by the motor vehicle registration No. KAT 056 Q owned by the 1st Defendant and driven by the 2nd Defendant, now 1st and 2nd Appellants respectively. The plaintiff stated that the accident occurred due to the sole negligence of the 1st Defendant's servant (2nd Defendant).

The Plaintiff called one witness while the defence called none. Upon hearing the evidence, the learned Magistrate entered Judgment for the Plaintiff as follows:-

(a) Pain and suffering Ksh. 20,000/=

(b) Loss of expectation of life Ksh. 100,000/=

(c) Loss of dependancy Ksh. 800,000/=

(d) Special damages Ksh. 35,000/=

T O T A L **Ksh. 955,050/=**

The Appellants, being dissatisfied with the award filed this appeal arguing that the award given under the head of loss of dependancy was inordinately too high.

Grounds of Appeal are contained in the Memorandum of Appeal dated 6th April, 2009 and filed on 9th April 2009. They are as follows:-

1. The Learned trial Magistrate erred in law and fact in basing his assessment of quantum on irrelevant principles and precedents.

2. The Learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered by the Plaintiff.

3. The Learned trial Magistrate erred on all points of fact and law in as far as award of damages is concerned.

During the hearing of this appeal, the counsel for the Appellants conceded to the awards made under the different head save for that under the head for loss of dependancy granted at Ksh. 800,000/=. He argued that the learned Magistrate based his assessment on quantum on irrelevant principles of law and precedents. According to him, it was wrong to tabulate the loss of dependancy using a multiplier, as in case of a minor, it is difficult to conclude that he/she has dependants. That further the figure awarded was based on mere speculation. That in the instance of a minor, a global sum should have been awarded. He relied on one Court of Appeal decision in this regard; **HASSAN -VS. NATHAN MWANGI KAMAU TRANSPORTERS AND 4 OTHERS, MOMBASA CIVIL APPEAL NO. 123 OF 1985** and other High Court decisions, inter alia, as follows:-

(1) **BUSIA HCCA. NO. 52 OF 2001**

SALIM GOLOMALI T/A KALENJIN AUTO HARDWARD -VS- LUCAS OKOA in which Ksh. 100,000/= was awarded for loss of dependancy.

(2) M**OMBASA HCC. NO. 602 OF 1987**

SARO -VS- KENYA BREWERIES LIMITED Ksh. 100,000/= was awarded for lost years.

(3) **NAIROBI HCC. NO. 3003 OF 1984**

OGUTU -VS- MAKAIRO 3 BS TRADING CO. LIMITED in which Court awarded Ksh. 70,000/= under the Fatal Accident Act.

He proposed an award of Ksh. 150,000/= under this head.

The appeal was vehemently opposed with Counsel for the Respondent submitting that the trial court considered the proper principles in arriving at the figure awarded under the Fatal Accidents Act. According to him, Court considered that life was lost. That it applied the general principle in considering a minimum wage of Ksh. 4,000/= which in any event is below the minimum wage that an ordinary Kenyan earns. That the multiplier of 25 years and dependancy ratio of 2/3 was also reasonable and in line with principles applied in decided cases cited by the plaintiff during the hearing of the suit in the lower court.

I will cite two of the cases, I think he wanted the court to consider:-

(1) **NAIROBI HCCC. NO. 1525 OF 2002**

MOHAMMED ABDINOOR ADI -VS- WILSON WANYEKI WARUTA AND ABDIFIZAK MOHAMED. The deceased herein was 10 years old when he met his death. The Judge awarded him a minimum wage of Ksh. 3,000/= and used a multiplier of twenty (20) years, thus arriving at a figure of

Ksh. 720,000/= in a Judgement delivered on 24th February 2005.

(2) **IN NAIROBI HCCC. NO. 24 OF 1998**

DAVID NGUNJE MWANGI -VS- THE CHAIRMAN OF BOARD OF GOVERNORS OF NJIIRI HIGH SCHOOL. In the case the deceased was aged seventeen (17) years. In considering his prospective career the Judge considered his earnings at minimum wage of Ksh. 4,000/= which he would have earned for thirty (30) years given the contingencies of life; thus arriving at a figure of Ksh. 1,680,000/= being awarded for lost years.

I would like to state that this court is not bound by precedents of its parallel jurisdiction but they may persuade me to lean towards the principles applied by it. I have endevoured to cite such authorities so as to demonstrate how, in general, the High court has tended to consider the awards under the Fatal Accidents Act. It is trite from the authorities that there is no uniformity in how the courts of parallel jurisdiction have considered the said awards. In view of this, my observations and final analysis of this appeal would be as follows:-

I will consider whether the learned Magistrate applied the wrong principles in arriving at a figure of Ksh. 800,000/= for loss of dependancy and therefore awarded an inordinately too high a figure.

It is observed in courts of Superior jurisdiction that "***damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution***" as observed in **KENYA BREWERIES LTD -VS- SARO (1991) KLR, 408**, a decision of the Court of Appeal sitting in Mombasa. This followed an observation by the court that:

"In the Kenyan Society at least as regards Africans 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 parents are proud of and are entitled to keep intact."

The same was said by **Kneller, JA** in **HASSAN -VS- NATHAN MWANGI KAMAU TRANSPORTERS & 5 OTHERS (1986) KLR, 457**. He dismissed the trial Judge's remarks as outrageous and pernicious to expect children to maintain their parents as having been arrived on application of the wrong principle. To the contrary Kneller, JA had this to say:-

"The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated against as a system of genontocracy at its worst."

Having said that, what then would be the most desirable principle to apply in tabulating loss of dependancy or lost years?

In **HASSAN -VS- NATHAN MWANGI KAMAU TRANSPORTERS & 5 OTHERS (Supra)** in the Judgement of Kneller, JA and which Hancox and Nyarangi, JJA adopted, he took issue with the trial Judge adopting to tabulate expected earnings of the deceased with salary of a High Court Judge. The facts laid before the trial court were that the deceased who died aged seventeen (17) years had completed High School and had been admitted to the University of Nairobi to pursue architecture. Therefore he should have considered earnings of an architech as per evidence tendered before him. However having compared the deceased's earnings with those of a High Court Judge, he arrived at an inordinately low figure which the Court of Appeal enhanced. The Court of Appeal did not however take issue with the fact that the trial Judge had considered expected future earnings of the deceased in arriving at the figure it did.

In the case of **KENYA BREWERIES LIMITED -VS- SARO** (Supra), the total figure of Ksh. 100,000/= awarded as general damages to the deceased who died aged six (6) years was considered as sufficient. The Appellant had appealed against this award which it felt was inordinately so high. The Judges in the appeal were however of the general view that, in assessing general damages, the age of a

deceased child must be taken into account. In this regard they said:-

" ….. the age of a deceased child is a relevant factor to be taken into account so that in the case of say a thirteen (13) 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 (4) year old one who has not been at school and whose abilities are not yet ascertained. That we think is a case of common sense rather than law …."

This to me explains why in **HASSAN -VS- NATHAN MWANGI TRANSPORTERS & 5 OTHERS**, the award given in 1986 was higher than that given in Kenya Breweries Limited -Vs- Saro in 1991.

In as much as the Appellants in the instant case argue that a global sum would be the best suited to the deceased aged only six (6) years at the time of her death, I have not come across an authority that has overturned a decision of the trial court on account of granting general damages based on expected earnings and tabulated on a multiplier. It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor.

Even as early as 1986 as is in the case **LUDUWA (Suing by her next friend) AND ANOTHER -VS- AYUKU & ANOTHER, (1986) KLR, 394**, a Judgement of Apoloo, J – High Court, the Court considered that an award of only Ksh. 8,000/= under loss of expectation of life in the case of a minor aged only one month who had died alongside her mother. In granting the figure the court said that she lived for just a month and her prospects of a future happy life are less than her mother's. However loss of dependancy was awarded for death of her mother which was tabulated based on her average earnings and a multiplier of twenty five (25) years used. Nothing was awarded for lost years or loss of dependancy in respect of this minor.

I would, in the instance hold the view that the future of a minor is uncertain and it might be risky to assume what life he/she would have lived into adulthood. As such, I would award a global figure under the head of loss of dependancy.

My concern with the judgement of the lower court is that the trial Court did not give the rationale for tabulating the loss of dependancy with a multiplier and assuming what would have been earnings of the minor. Save to say that the minor died while in Standard one, no evidence was tendered to show how he performed in school, so that it could be assumed he would have lived to be a senior government officer at adulthood. PW.1 did not tender any school performance report and so his conclusion that the deceased would become a senior government officer was without basis. Our case is clearly contrasted with that of **HASSAN -VS- NATHAN MWANGI KAMAU TRANSPORTERS & 4 OTHERS**, as in the latter the minor had passed well in High School and had been admitted to pursue a degree in architecture at the University of Nairobi. Hence the tabulation of lost years using an estimate of future earnings was based on good principles.

I do therefore conclude that, the trial court failed to apply good principles in arriving at the sum awarded for loss of dependancy which I conclude to be inordinately too high. Given the contingencies in the economy and especially the inflationary rates, I consider a global sum of Ksh. 320,000/= as adequate award under the Fatal Accidents Act. Other sums under the different heads remain not interfered with as there was no opposition to them. They remain as follows:-

(a)	Pain and suffering	Ksh. 20,000/=
(b)	Loss of expectation of life	Ksh. 100,000/=
(c)	Special damages	Ksh. 35,000/=
	SUB-TOTAL	**Ksh. 155,000/=**
	Add loss of dependancy awarded	Ksh. 320,000/=
	T O T A L	**Ksh. 475,050/=**

In paying the total sum, the Appellants will take into account the sum of Ksh. 390,000/= already paid to the Respondent in partial satisfaction of the decretal sum thereof. Costs of the trial court's proceedings and this appeal are payable by the Appellants. The damages are also payable with interests at court rates.

DATED and **DELIVERED** at **ELDORET** this 21st day of November, 2012.

G. W. NGENYE - MACHARIA
JUDGE

In the presence of:

Mr. Kibichiy for the Appellants

Mr. Cheluget for the Respondent