



Gadd Construction Limited & 2 others v JEE & another (Suing as Administrator of the Estate of the Late MOE– Deceased) (Civil Appeal E022 of 2022) [2023] KEHC 20724 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E022 OF 2022
TM MATHEKA, J
JULY 13, 2023**

BETWEEN

**GADD CONSTRUCTION LIMITED 1ST APPELLANT
BRIDGEWAYS ENTERPRISES LIMITED 2ND APPELLANT
DYMETRICS KENYA LIMITED 3RD APPELLANT**

AND

**JEE 1ST RESPONDENT
JOI 2ND RESPONDENT
SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE MOE–
DECEASED**

JUDGMENT

1. It is not in dispute that on June 7, 2018 an accident occurred along Salama Nunguni road at Salama township involving the minor MOE (deceased) and the defendant/appellants’ motor vehicle registration NO. KCC 368Q.
2. According to the plaint filed on 5th December 2019 dated 31st October 2019 the plaintiff/respondents sought both special and general damages under the Fatal Accident and Law Reforms Acts, together with costs and interest.

They blamed the defendants/respondents for the accident on the alleged negligence of their driver, agent and /or employee.



3. The defendant/appellants on their part filed their defence and denied all the allegations of negligence and blamed the driver who was a pedestrian for the accident. They too set out what they considered to be the particulars of negligence on the part of the deceased.
4. The learned trial court heard the matter and vide a judgment delivered on 25th March 2022 – allowed the plaintiff's case – in the following terms:
Liability against defendants at 100%
Loss of expectation of life Kshs.150,000
Pain & Suffering Kshs.100,000
Special damages Kshs.134,050
Total Kshs.1,684,050
5. The appellants were aggrieved by the judgment and filed this appeal. They attacked the learned magistrate's judgment on the grounds that the finding of liability and the awards made were against the weight of the evidence on record before the trial court. The appellants sought to have the judgment set aside and urged this court to assess liability.
6. The appeal was canvassed by way of written submissions.
7. I have perused the record and considered the submissions. I am aware of the authorities defining the role of this court as the 1st appellate court; (see *Selle & Anor v Associated Motor Boat Co. Ltd & Anor* [1968] E.A 123) which is to re-evaluate the evidence on record and arrive at its own conclusion always keeping in mind that I have neither seen nor heard the witnesses. Further, that I am not bound by the finding of facts by the subordinate court, if it appears to me that the subordinate court failed to take into account some particular circumstances material to the case ;(see *Ephantus Mwanti & Another v Duncan Mwangi Wambugu* Court of Appeal 77 of 1982.)
8. It is also now settled as to when the appellate court can interfere with the discretionary findings of the subordinate court.
9. In the circumstances set out above I consider the issues for determination to be;
 - (1)whether the finding of liability at 100% against the appellants was warranted, and
 - (2) whether the damages as assessed were excessive and unsupported by the evidence before the court.
10. At the trial, the plaintiff called two witnesses. PW1 No. 73675 PC Henry Gatibi from Salama Traffic Base who produced the evidence of the report from the Occurrence Book and the police abstract:- that one John Buti Kimondo was on 7th June 2018 driving motor vehicle registration number KCC 363Q from Salama to Nunguni when a 14 year old girl crossed the road from the left to the right. The motor vehicle hit her and she sustained injuries. The police came and took her to hospital. Three days later the child died as evidenced by the report in OB 21/06/7/18. He said he did not visit the scene and at the time of his testimony, the matter was pending under investigation. PW2 JOI, was the mother of the minor. She testified that she never witnessed the accident and that it was not the first time the child had been sent to the shops. She blamed the driver of the lorry for the accident and stated that he ought to have seen the minor and avoided the accident.
11. The defence called the driver of the motor vehicle. He adopted his witness statement – which said that he was driving from Lukenya to Maiani Catholic Church to deliver hardcore and upon reaching



- Salama along Mombasa road, he turned left to join the main Salama-Nunguni highway. 50 meters from the highway, a pedestrian ran into the road in an attempt to cross the road. He applied brakes but the distance between the pedestrian and the lorry was too close and she was knocked down by the left side of the bumper. He blamed the pedestrian for running into the road and causing the accident.
12. On appeal it is argued for the appellant that this testimony that the minor was hit by the motor vehicle while crossing the road veered off the plaintiff's pleadings because the pleadings allege that the deceased was hit by the motor vehicle after it lost control and hit her.
 13. However upon perusal of the pleadings one will see that the plaintiff set out other particulars of negligence including that the defendant's driver was driving at high speed, without due care and attention to other road users. Similarly, the defendants/appellants had raised several particulars of negligence against the deceased including crossing the road without attention. This argument is therefore untenable.
 14. In any event the argument about pleadings was never raised before the trial court.
 15. It is contended by the respondents that before the lower court, the defendant/appellant had submitted that, on liability both parties were equally liable and urged the court to make a finding of liability at 50:50 on the ground that the deceased crossed the road suddenly making it difficult for the appellant to avoid the road traffic accident
 16. It is noteworthy that the defendant/appellant's witness who was the only eye witness to the accident was present at the scene and he testified that the child crossed the road. PW1 also testified that the report to police said the child was crossing the road; the fact of crossing the road did not change the fact that the child was a pedestrian, nor did it change the fact that the defendant/appellant's witness was unable to control the motor vehicle to avoid the accident. The child was crossing the road as a pedestrian. The defendant/appellant's driver was the one in control of the motor vehicle which he failed to do causing the road traffic accident.
 17. Ideally in a situation such as this there would be have been consideration of contributory negligence on the part of the pedestrian – however, the respondent relied on a string of authorities where courts have held that a 13 year old is a child of tender years on whom liability cannot hold see Butt vs- Khan (1978) eKLR and Kiganya Karanja Kiganya v James Nyoike Kariuki & Another (2018) eKLR.
 18. This appears to be in line with the [Children Act](#) 2022 which provides that the age of criminal liability is 12 years – at section 221 – but proceeds to state that (2) A child who commits an offence while under the age of 14 years shall be presumed not to be capable of differentiating between right and wrong, unless the court is satisfied on evidence to the contrary.
 19. In this case there is no evidence to controvert the holding in Kiganya above that;

“ there was no liability to attach on the deceased minor as the defendant did not establish the deceased being a child of tender age (13 years) knew/ought to have known that he should not have crossed the road as he did”.
 20. In the circumstances I find no reason to disturb the finding on liability.
 21. On quantum – the appellant urges the court to be guided by inter alia *Kemfro Africa Ltd t/a Meru express & Another v AM Lubia & Another* (No. 2) on whether an appellate court can disturb the award of quantum of damages by a trial court. The appellant argued that the deceased was 14 years and the global sum approach ought to have been applied. They cited *Water Recycling Ltd v Rose Wanjiru Njeru* Court of Appeal No. 35 of 2010 where the Court of Appeal found that the trial court was in



- error for awarding damages for lost years and loss of dependency with respect to an 8 year old and urged that a conventional figure like was done by the Judge in H Young & Company E.A Ltd & Another v James Gichana Kisii HCCA 207/2009 of Kshs.300,000/= to parents of an 11 year old, on the ground that there was no evidence of the minor's aspirations or how he would have performed in school : BWW a minor (deceased) v Munena Ndiwa Durman C.A [2019] eKLR where the award of dependency of Kshs.1,260,000/= was substituted with a global sum of Ksh.200,000/= for a deceased infant; Chen Wembo & 2 Others v IKK & HM [2017] eKLR - where lump sum of Kshs.1,680,000/= was reduced to 600,000/= where the minor was 12 years old. The appellants urge the court to award Kshs.300,000/=.
22. The respondent refers the court to Catholic Diocese of Kisumu v Tete [2004] 2 KLR 55 on when this court can interfere with the award of damages by the trial court. It is argued that this child was 14 years old. She died 2 days after the road traffic accident – so there was pain and suffering – that she was a joy and help to her parents hence the award of Kshs.150,000/= for loss of expectation of life was in order.
 23. The respondent cites William Juma & Another v Kenya Breweries Limited & Another [1977] eKLR where the court held that Kenya parents expect financial help from their children – children also render services in the home and the shamba – freeing parents from certain financial burdens – it is these that can be converted into money and that is why courts award a lump sum figure to compensate parents for the pecuniary loss suffered and /or expected to be suffered. The respondents cited:-Mpaka Muriuki Japheth v HMM & Anor [2021] eKLR where Ksh 1,500,000 was awarded for a 13 year old; Kenya Red Cross v IDS (Suing as the legal representative of the estate of MD (deceased) [2020] eKLR where Ksh 1,300,000 was awarded for a 13 year old. The respondent urges the court to find that the learned trial court was not in any error in the award.
 24. I have carefully considered the authorities on the awards; those cited by the appellants are 5 years and 8 years ago, those cited by the respondent are for 2 and 3 years ago hence the more current with respect to the figures quoted.
 25. The learned trial magistrate – made an award for pain and suffering, loss of expectation of life, then a sum for loss of dependency.
 26. That is the correct position. In Mpaka Muriuki Japheth v HMM & another [2021] eKLR the court relied on Kenya Breweries Limited v Saro [1991] (eKLR) where the Court of Appeal held inter alia

“In our view 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 no evidence of pecuniary contribution. The High Court authorities which were cited to us, such as Abdullahi v Githenye [1974] EA 110, Maurice Miriti v Feroze Construction Co Ltd HCCC No 1979, NRB, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In Abdullahi v Githinye, supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded Kshs 8,000/- in 1974. In Miriti v Firoze, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Kshs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject the ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the *Fatal Accidents Act*. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred.”
 27. Considering the authorities herein above the appeal only succeeds on the damages.

Liability against defendants 100%



Loss of expectation of life Kshs.100,000

Pain & Suffering Kshs.100,000

Loss of dependency Ksh 1,300,000

Total Ksh 1, 500,000

Add uncontested Special damages Kshs.134,050

Total Kshs.1,634,050

28. The judgment from the subordinate court is substituted with General damages of Ksh 1,500,000 specials of Ksh 134,000 plus costs and interest from the date of the lower court judgment.

29. Orders accordingly

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JULY 2023.

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MUMBUA T MATHEKA

JUDGE

M W Muli@Co Advocates for the appellants

Waiganjo Wachira & Company Advocates for the respondents

