REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.63 OF 2015

CYRUS AMENYA KENANI AND

MARGARET WANJIRU IRUNGI.....APPELLANTS

VERSUS

GW (suing as the legal administrators of the Estate of the late AM (deceased).....RESPONDENT

(Being an appeal from the judgment/decree of Honourable E. Kelly, Senior Resident Magistrate,

Nakuru, delivered on 15th May 2015 in Nakuru CMCC NO 899 OF 2012)

JUDGEMENT

1. The appellants were sued by the respondent who was involved in a collision accident involving motor vehicle registration no. KBA 827 C and KBD 450 N belonging to the appellants herein on 25th December 2010 along Egerton -Njoro road. The respondent sued on behalf of her child who was a fare paying passenger in Motor vehicle registration No. KBA 827 C and who sustained fatal injuries. At the trial court Parties had consented on liability to the ratio of 85:15 in favour of the respondent against the appellants and on quantum the trial court awarded Kshs. 2,107,000 as general damages less 15% with costs and interests from the date of judgement. The suit against the 1st and 2nd respondents was withdrawn.

2. Aggrieved by the judgement of the lower court, the appellants filed this appeal against the lower courts award on quantum based on the following grounds;

(a)THAT the Learned Trial Magistrate' erred in law and in fact in the manner, method, mode and/or calculations applied in assessing damages under Loss of dependency.

(b)THAT the Learned Trial Magistrate erred in law and in fact in applying a multiplier that was excessive in the circumstances by failing to take into consideration the imponderables and/or vicissitudes of life and thereat failing to discount the multiplier appropriately.

(c)THAT the Learned Trial Magistrate erred in law and in fact in adopting a multiplicand that was excessive in the circumstances by failing to apply the minimum wage applicable at that time in lieu of a pay slip.

(d)THAT the Learned Trial Magistrate erred in law, and in fact in assessing General damages at Kshs. 1,756,650/= which amount was/is manifestly excessive.

(e)THAT the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellants written Submissions on the issue of loss of dependency or at all.

(f)THAT the Learned Trial Magistrate misdirected herself wholly on the law regarding principles to be applied in computing General damages under the Law Reform Act and under the Fatal Accidents Act.

(g)THAT the Learned Trial Magistrate erred in law and in fact in treating the deceased minor as an adult and assigning him a multiplicand without any basis.

(h)THAT the Learned Trial Magistrate erred in law and in fact in failing to take into account superior court's holding that

damages for deceased minors are quantified in lumpsum and not itemized to the uncertainties entailed in what the deceased minor could have turned out to be in future.

(i)THAT the Learned Trial Magistrate erred in law and in fact in applying speculative figures as the multiplier and the multiplicand and therefore arriving at a wholly erroneous judgement.

(j)THAT the Learned Trial Magistrate erred in law and in fact in applying a dependency ratio of 2/3 when the deceased minor had no such dependants and/or capacity.

3. The appellants prayed that the appeal be allowed, Judgement of the trial Court in respect of quantum be set aside, this Honourable Court be pleased to assess damages under loss of dependency, Costs of this appeal be awarded to the Appellants.

4. Parties were directed to canvass the appeal by way of written submissions.

Appellant's Written Submissions

5. The appellants submitted that the trial court did not take into account the appellants submissions as it erroneously indicated that the defendants did not file their submissions and yet they did. The appellants invited this court to find that indeed there was an error within the proceedings of the subordinate Court and move to remedy that error by looking at and taking into account the appellants written submissions dated 27/10/2014, then reassess the quantum/award.

6. The appellants submitted that the trial court erred in law and fact when she made a finding that the applicable multiplicand was Kshs.7000 and multiplier 38 years. The trial court ought to have awarded a global sum as damages for lost years instead of engaging in an exercise that was not only conjectural and speculative but was unsupported by any evidence oral and/or documentary. A multiplier of 38 years is excessive in the circumstances of this case.

7. They placed reliance in the case of **Rahab Micere Murage & Anor v the Attorney General & 2 others Nairobi Civil Appeal No.179 of 2003** where a multiplier of 20 years was upheld for a deceased person aged 25 years. The appellants submitted that had the issue of a multiplier been valid, then a figure not exceeding 25 years would have been reasonable.

8. The appellants also proposed a global award of Kshs. 500,000. They placed reliance in the authorities of **Nairobi HCCC No. 2343 of 1993 Marko Mwenda v Bernard Mugambi & Anor, Shiekh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1982-88] IKAR 946, Nakuru HCCC No. 339 of 1998 Betty Ngatia v Samuel Kinuthia Thuita**. The appellants prayed that the appeal be allowed, the honourable trial court's award be set aside, and this appellate court be pleased to re-assess the award payable to the respondent.

9. The deceased was a student at [Particulars Withheld] High School and it is clear from the evidence on record that the respondent being the mother of the deceased is the one who supported her son. She did not depend on her son in any manner hence there was no basis as to why the trial court employed a dependency ration of 2/3 and the court did not even explain the rationale for adopting the same. The deceased was a form 3 student at the time of the accident and it was unknown and/or unascertainable as the time the trial court delivered her judgment what area of professional training the deceased would have progressed towards and if indeed he would have qualified to practice his preferred profession.

10. The appellants submitted that the court's applied asum of Kshs. 7,000 is not founded on any legal principle, such as, a specified legal notice number which would spell out as the Government gazette minimum wage. The application of a minimum wage was not only erroneous but unfounded in fact and in law.

Respondent's submissions

11. The respondent submitted that the deceased was her only son as she was not lucky enough to get other children in her life. The deceased was 18 years, in form three and according to the records adduced in court he was a top academic performer. Evidence was led by the respondent that her deceased son wanted to be a doctor in future. It is not in dispute that the deceased future was cut short through the accident that was occasioned by the negligence of the appellants. Therefore, the trial magistrate's judgment and award based on the Law Reform Act and Fatal Accident Act, was proper and lawful.

12. The awards under the heads pain and suffering, loss of expectation of life and special damages are not in contention and subject of appeal thus they should be upheld.

13. The respondent relied on the case of **Mohammed Abdinoor Adi and Ibrahim Ali Abdi (Suing as the legal representatives of the estate of Mohammed Abdi Noor 10 Years Old(Deceased) Vs Wilson Wanyeki Waruta & Abdirizak Mohammed Nairobi Civil Suit No. 1525 OF 2002,** where Ang'awa J, awarded the deceased minor and adopted a multiplicand of Kshs. 3,000/= which was the minimum government wage then. Hence, the trial court was sober in adopting a minimum government wage of Kshs.7000/= as a multiplicand since that was the minimum government wage pursuant to the then wages order.

14. The adoption of a multiplier of 38 years by the trial court the respondent submitted was indeed proper and lawful. The current retirement age in Kenya is 60 years. The deceased was aged 18 years at the time of his death. Therefore, the trial court exercised its discretion properly and judiciously in adopting a multiplier of 38 years after having considered the vicissitudes of life and inflation rates. They urged this honourable court not to disturb that award.

15. The dependents contemplated under the Fatal Accident Act are expressly defined under section 4 (1) as follows: ***"Every action brought***

by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused". The respondent was the mother of the deceased and that fact remains unchallenged and uncontroverted.

16. The respondent implored the court to be guided by the authority of **Hassan Vs Nathan Mwangi Kamau Transporters & 4 Others (2008) Eklr (G & F) 90** in awarding under the head of lost years. The respondent further submitted that in the case of **Alice O Alukwe Vs Akamba Public Road Services Ltd & 3 Others (2013) eKLR Nakuru Hcc No. 26 Of 2005**, the court adopted a multiplicand of Kshs.10, 000/= and a multiplier of 30 years on account of the deceased who was unmarried and 24-year-old living with her parents. In addition, the court also went ahead and adopted a dependency ratio of ½. The court assessed General damages for lost years in the sum of kshs. 1,530,000/=. The respondent urged this honourable court to find that the trial court in this instant case was right in awarding general damages for lost years in the sum of kshs.2, 128, 000/=. The trial court used a dependency ratio of 2/3.

17. The court considered that the deceased minor would have probably used 2/3 of his income to support his mother having been an only child. Again, in our African culture, it is now not in dispute that children indeed support their aging parents both financially and emotionally during their lifetime. Hence, the award under the head lost years was not manifestly excessive as alleged by the appellants. Therefore, the respondent urged this honourable court to uphold the trial magistrate's judgement and find that the appellants appeal has no merit and as such should be dismissed with costs.

Issues for determination

18. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally''.

19**.** I have carefully perused the proceedings, the judgement, the record of appeal as a whole including the parties' submissions. The only issue that falls for determination is **Whether the award on quantum was excessive in the circumstances**.

20. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus case of Bashir **Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR** thus;

"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

21. It is with no doubt that damages are clearly payable to a parent of a deceased child irrespective of the age of the child and their pecuniary contribution because the mere presence of a child in a family is itself a valuable asset which the parents are proud of and are entitled to keep intact. (see **Kenya Breweries Limited vs. Saro [1991] eKLR).**

22. It was the respondents evidence that the deceased was 18 years old and in form three at the time of his death. The appellants propose a global award of Kshs. 500,000 while the respondent supports the trial court's multiplier approach. The issue is whether a global sum would have sufficed or the trial court was correct in awarding damages under both the Law Reform Act and the Fatal Accident Act. In this issue, there are instances where the Courts have awarded a global sum to a student accident victim and there are instances where awards have been made under both statutes.

23. In **NMG Vs Muchemi Teresa (2015) eKLR Nairobi HCCC No. 519 of 2013.** Justice Kimaru observed as follows at page 3 of his Judgment.

> ***"The case where the deceased was aged 12 years old was also an appeal, Nakuru HCCA No. 133/2003. The trial magistrate had awarded Kshs. 720,000/00 for loss of dependency. The High Court (Mugo, J) dismissed the appeal and increased the award for loss of dependency to Kshs. 900,000/00. In doing so the learned judge stated as follows: -***
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> ***"The deceased herein was aged 12 years old. He was a bright and confident child, as is demonstrated by the fact he would personally take interest in an Agricultural show and attend the same unaccompanied. His father testified that he was a clever and respectful boy. Clearly therefore, his future prospects can be said to have been quite good. He would probably complete his education at 22 years if he proceeded to University and probably become gainfully employed at 24 years. Being a Kenyan, he would be expected to contribute towards his parents' welfare and probably share his earnings with his siblings as well."***

24. The judge further stated as follows: -

> ***"I do not accept that the Deceased at 12 years of age was too young for the expectations of his adult life to be purely speculative without hope of realization. He may not have become a doctor or some other high profile professional; but he appeared endowed***

with sufficient intelligence to at least attain a first general degree in college which would have enabled him to secure a reasonable job that would have probably earned him a monthly salary (less statutory deductions) of about Kshs. 45,000/00. By the time he would have secured employment he would probably be 25 years old. His and the Plaintiff's expectations he would have been that he would have a full working life to about 60 years of age. But the vagaries and uncertainty of life must be factored into the equation; we live in an imperfect and sometimes dangerous world full of disease, accidents, civil strife and war:

There is also the issue of the Plaintiff's age as we are essentially considering her loss of dependency upon the Deceased. Although she did not give her age when testifying, she appeared about 40 years as I recall. A multiplier of 20 years would be just, and I award the same. Kshs. 3,600,000 was awarded for the death of a 12 years old student in that case."

25. In the instant suit the deceased was a form three student at [Particulars Withheld] High School, from the deceased's report forms that were adduced as evidence, the deceased was indeed a bright student whose future was full of expectations. I place reliance in the case of **P. I Versus Zena Roses Limited and Another (2015) eKLR** where the court stated as follows: -

"For the case of minors, it is my view that tabulation for damages for loss of future earnings and lost years can be gauged depending on what evidence is brought before the court. For instance, a good case can be argued where evidence is shown that the minor is in school, well performing and that it is hoped, based on his or her performance, would engage himself or herself in this or that occupation. That is why evidence before a trial court must not be led in a casual manner thinking that the court would make an assumption of what earnings the minor may get in future or what he would become once he grew up. It is not sufficient to just state that the minor was either in kindergarten, primary or secondary school. A good case would be argued when evidence is brought to show or persuade the court that despite the fact that the minor was in the tender years of school, it was hoped that he would have a good future when he grew up."

26. In view of the foregoing, I will take the view that the multiplier approach is the most appropriate in the circumstances herein than making a random global award which is not guided by any estimates. The respondent testified to the effect that the deceased was aspiring to become a doctor and that she depended on the deceased as her only child. I am therefore satisfied that making a global award in a case involving an 18 years old form three student is not prudent. The deceased mother expected that her child would cater for her once through with his education. Indeed, this was a dream shattered since the child was a top performer as evidenced by the records.

27. The authorities cited by the appellants are old and the awards therein cannot be compared with the amounts that are being awarded in the recent years. The trial court was guided by the authority of **MOHAMMED ABDINOOR ADI and IBRAHIM ALI ABDI (Suing as the legal representatives of the estate of MOHHAMED ABDI NOOR 10 YEARS OLD(deceased) VS WILSON WANYEKI WARUTA & ABDIRIZAK MOHAMMED NAIROBI CIVIL SUIT NO. 1525 OF 2002**, where Ang'awa J, awarded the deceased minor and adopted a multiplicand of Kshs. 3,000/= which was the minimum government wage then. I agree with the respondent that a multiplicand of Kshs. 7000 in the year 2015 was not unreasonable and hence I find no reason to disturb the same.

28. Guided by the **NMG Vs Muchemi Teresa (supra**), the deceased would have completed his education at 22 years if he proceeded to University and probably become gainfully employed at 24 years. Being a Kenyan, he would be expected to contribute towards his parents' welfare.

29. The respondent's expectations are that the deceased would have a full working life to about 60 years of age, but the vagaries and uncertainty of life must be factored into the equation for we live in an imperfect and sometimes dangerous world full of disease, accidents, civil strife and war. I note that trial court took that into consideration before adopting the said multiplicand.

30. Since the deceased would also have had a family at that age, then I will assume that the respondent's dependency upon the Deceased would have been about one-third (1/3) of his net earnings. I will therefore award Kshs. 1,064,000 for lost dependency which i find reasonable calculated as follows; Kshs 7000 x 12 x 38÷ 3 = Kshs 1,064,000.

31. The heads under pain and suffering, loss of expectation of life and special damages were not the subject of this appeal and hence they shall not be disturbed.

32. The appellants contend that the trial magistrate misdirected herself wholly on the law regarding principles to be applied in computing General damages under the Law Reform Act and under the Fatal Accidents Act. The Court of Appeal while sitting at Nyeri in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR said:**

"[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise."

33. In view of the foregoing, I find that the appeal partially succeeds. This court hereby set aside the decision of the trial Court on quantum by substituting it with an award of Kshs 1,064,000/= to the Respondent. The award is therefore tabulated as follows: -

(a)Pain and Suffering **Kshs 20,000**

(b)Loss of expectation of life **Kshs 100,000**

(c)Loss of Dependency **Kshs 1,064,000.**

(d)Special Damages **Kshs 35,000**

TOTAL **Kshs 1,219,000**

Less contribution of 15% Kshs. 182,850

TOTAL Kshs 1,036,150

34. The above sum shall attract interest at courts rates from the date of judgement at the lower court till payment in full. Each party shall bear their respective costs.

Dated signed and delivered via video link at Nakuru this 11th day of November 2021.

H. K .CHEMITEI

JUDGE