



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 4 OF 2019

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. T. Gesora (S.P. M) Delivered

on 11th December 2018 in Narok CMCC No. 8 of 2017)

JOSEPH MAROA WAMBURA.....APPELLANT

STELLAH CHEPKURUI RERE & RICHARD KIPKEMOI RERE

(Suing as the legal representative of the estate of

MERCY CHEPKOECH (deceased).....RESPONDENT

JUDGMENT

Impugned judgment

[1]. In its judgment, the trial court on the 11th December 2018 made the following awards: -

- a) Pain and suffering..... Kshs. 50,000/=
- b) Loss of expectation of life Kshs. 100,000/=
- c) Loss of Dependency lump sum 1,500,000/=
- d) funeral expenses (by judicial notice)

If there are expenses kshs. 50,000/=

- e) special damages = 20,500/=

Total =1,720,500/=

- f) less 20% contribution 344,100/=

Grand Total 1,376,400/=

- g) Plus cost of the suit.**

[2]. Being aggrieved by the said judgment, the appellant filed this appeal vide a memorandum of appeal dated 28th January 2019 in which he cited eight (8) grounds of appeal but all of which relate to quantum of damages.

APPELLANT'S CASE

[3]. The appellants did not call any witnesses.

[4]. The appellants submitted that the trial court erred in making separate awards under the law reform act and the fatal accidents act. He contended that the deceased was aged 13 years and was a minor at the time of death and therefore a global award was more suited in the case. He cited the case of **Beatrice Wangui Thairu Aand Hon Ezekiel Barngetuny & Another Nairobi Hcc No. 1638 Of 1988, Charles Ouma Otieno & Another Vs Benard Odhiambo Ogecha (Suing As A Brother And Legal Representative And Administrator Of The Estate Of The Late Oscar Onyango Ogecha (Deceased) [2014] EkLr.**

[5]. The Appellants submitted that the trial court made an award that was inordinately high and against the principles established in **Stanley Moore V Geoffrey Mwenda (Nyeri C.A 147/2002).** That comparable injuries should as far as possible be compensated by a comparable award keeping in mind the correct level of awards in similar cases. The deceased was 13 years old at the time of her demise. It was very uncertain as to when she would have completed school and later join the long road to tarmac in search of a job which is a hurdle hence the court should not have chosen a multiplicand as that is speculative. Therefore, according to the appellant the court should adopt a global sum award. He relied in the case of **Daniel Mwangi Kimeni & 2 Others Vs JGM & Another [2016] eKLR And David Kahuruka Gitau & another Vs Nancy Ann Wathithi & Another [2016] eKLR.** He proposed a global sum of Kshs. 600,000/=. He relied in the cases of **JKK And RK Versus Gilgil Hills Academy Limited Civil Case No. 337 Of 2009, Chen Wembo & 2 Others V I K K & Another (Suing As The Legal Representatives And Administrators Of The Estate Of C R K (Deceased) [2017 EKLR And Oyugi Judith & Another V Fredrick Odhiambo Ongonga & 3 Others [2014] eKLR** where the courts awarded Kshs 2,000,000/=, 600,000/= and 120,000/= respectively.

[6]. In conclusion the appellants urged this court to re assess the evidence and set aside the award of damages and substitute it with a global sum of Kshs. 600,000/=.

RESPONDENTS' CASE

[7]. The respondents called one witness.

[8]. The respondents submitted that the appeal herein is incomplete thus incompetent for failure to include the decree appealed from as well as several pleadings and documents which ordinarily would form part of the record of appeal. They cited order 42 rule 2 of the civil procedure rules, the cases of **Ndegwa Kamau T/A Side View Garage V Fredrick Isika Kalumbo [2016] eKLR, South Nyanza Sugar Co. Ltd V Simeona A. Opolo [2020] eKLR.**

[9]. The Respondents submitted that there was no error by the trial court in making the awards under separate headings as it did since it is the discretion of the court to make a global award or award under separate headings. They cited the case of **Daniel Mwangi Kameneni & 2 others vs JG M & another (the personal representative of the estate of N K (DCD) [2016] eKLR and MMG vs Muchela Teresia [2015] eKLR.**

[10]. The Respondents submitted that the authorities cited by the appellant are within the range of 1, 000,000/= and 2,000,000/= hence the trial magistrate was within range.

[11]. In conclusion the respondents urged this court to strike out the appeal for being incompetent with costs.

ANALYSIS AND DETERMINATION

Duty of Court

[12]. The duty of the first Appellate Court is to re-evaluate the evidence afresh and make own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

Issues for determination

[13]. The twin issue for determination is whether the trial court erred in making separate awards under the Law Reform Act and Fatal Accidents Act and whether the trial court erred and arrived at an excessive award by making the awards both under Law Reform Act and Fatal Accidents Act,

[14]. This appeal is on quantum of damages only. I will, therefore, be guided by the test adumbrated in the case of **Kemfro Africa Ltd v Lubia & another** as follows:

“...that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Claim under Law Reform and Fatal Accidents Act

[15]. This claim was founded on Law Reform Act and Fatal Accident Act. These law provides for awards being made for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years- loss of dependency.

Loss of expectation of life & pain and suffering

[16]. Other than the claim of double compensation, the appellant has not challenged the award of the Ksh.100, 000/- for loss of expectation

of life and Kshs. 50,000 for pain and suffering. The death occurred shortly after the accident thus these awards are reasonable.

Dependency

[17]. Section 4 Fatal Accidents Act provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgement shall find and direct.”

The concepts of multiplicand and multiplier

[18]. Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants. the concepts of multiplicand and multiplier; meaning, scope and application in assessment of damages for loss of dependency, was observed by Ringera J (as he then was) in the case of *Beatrice Wangui Thairu V Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 Of 1988.*

[19]. The bone of contention is on the lump sum award for loss of dependency in the sum of Kshs. 1,500,000/= by the learned trial magistrate. The choice has attracted quite an argument.

[20]. As to whether the trial court can be faulted for adopting the multiplier method in assessment of damages, I have looked at the principles as stated in a number of decisions. In *Seremo Korir & Another vs. SS (Suing as The Legal Representative of the Estate of MS, Deceased) [2019] eKLR*, the court said:

“22. In the lower court's judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased's school and that the deceased was 12 years old, a fact that was not contested. It was the appellants' submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method.

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27. In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the 'global sum', 'separate heads', or 'mixed' approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/lump sum approach”

[21]. Similar position was taken in the cases of *Charles Ouma Otieno & another vs. Benard Odhiambo Ogecha (suing as Brother and Legal Representative and Administrator of the Estate of the Late Oscar Onyango Ogecha (Deceased) [2014] eKLR, Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of the estate of CRK (Deceased) [2017] eKLR Oshivji Kuvengi & Another vs. James Mohammed Ongenge [2012] eKLR*

[22]. From the above, it should be clear, therefore, that the choice of whether to adopt a multiplier or a global award approach is entirely an issue of discretion of the court, but of course, as dictated by the circumstances of the case.

[23]. The appellate court in *Charles Makanzie Wambua vs. Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased) [2020] eKLR*, upheld a global award of Kshs 1,320,000.00 for loss of dependency. Similarly, in *Twokay Chemicals Limited vs. Patrick Makau Mutisya & another [2019] eKLR*, the appellate court upheld a global sum of Kshs. 1,500,000.00 for loss of dependency for a minor aged sixteen (16) years. In *Zachary Abusa Magoma vs. Julius Asiago Ogentoto & Jane Kerubo Asiago [2020] eKLR*, the court awarded a global sum of Kshs. 1,500,000.00 for loss of dependency. It is, therefore my considered view and decision, that a global award of Kshs. 1,500,000.00 made by the trial court in the case before me, is reasonable in the circumstances of the case.

Double compensation

[24]. Some of the issues argued by the appellant on awards under separate heads made under both Acts are reminiscent of double compensation principle. The answer was provided by the decision of the Court of Appeal that what the court is required to do is to take into account the award under Law Reform Act and not necessarily to deduct it from the award under the Fatal Accidents Act. See: -

i) Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) Vs Kiarie Shoe Stores Limited [2015] eKLR.

ii) Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v. Lubia & Another (No. 2) [1987] KLR 30

[25]. Accordingly, awards for loss of expectation of life, and pain and suffering were properly made by the trial court. Nothing justifies the deduction of these awards. The trial court properly took them into account in the summing up of the overall damages under the Law Reform Act and the Fatal Accidents Act. And no double compensation arises in this case.

Special damages

[26]. The appellant has not challenged the award on special damages, I therefore uphold the same.

Conclusion and Orders

[27]. In an upshot, I find that the appeal lacks merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 9TH DAY OF NOVEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Nyamweya for Appellant
2. Ms. Kuon for Respondents
3. Mr. Kasaso – CA