



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 13 OF 2019

(CORAM: F.M. GIKONYO J.)

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

Delivered on 2nd April 2019 in Narok CMCC No. 64 of 2017)

NAIROBI BOTTLERS LTD.....1ST APPELLANT

ALOISE YARA OTIENO.....2ND APPELLANT

VERSUS

MW (Suing as the legal representative of the estate of KM W).....RESPONDENT

JUDGMENT

Quantum of damages

1. The five (5) grounds cited in the Memorandum of Appeal dated 23rd April 2019 relate to quantum of damages. Liability was settled by consent of the parties recorded on 22/1/2019 at 90:10 in favour of the plaintiff.

2. The awards of damages subject of this appeal as were awarded by the trial court are: -

a. Pain and suffering..... Kshs. 30,000/=

b. Loss of expectation of life Kshs. 100,000/=

c. Dependency

$10,955 \times 12 \times 20 \times 2/3 =$ Kshs. 1,752,800/=

Total General Damages = **Kshs. 1,782,000/=**

d. Special damages = Kshs. 44,450/=

e. Funeral expenses

f. (Section 6 of the Act) = Kshs. 50,000/=

g. global figure

Kshs. 1,977,250/=

h. less 10% contribution Kshs, 199,772.50/=

Grand Total Kshs. 1,777,477.50/=

i. plus cost

3. Parties agreed to have documents admitted to the record as per list filed on 24/5/2017.

APPELLANTS' SUBMISSIONS

4. The appellants have submitted that the learned magistrate erred in the analysis of the evidence, thereby; i) making a completely unfounded holding that the respondent was entitled to an award for loss of dependency; and ii) applying a minimum wage to the estate of a child aged 3 years resulting in a high award when no income was pleaded or exhibited instead of using the present practice of court to award lump sum compensation to the estate of a child of tender years.

5. They relied in the cases of **Sheikh M Hassan V Kamau Transporters [1982-88] 1KAR946, Chen Wembo & 2 Others V. I K K & Another (Suing As The Legal Representatives And Administrators Of The Estate Of CRK (Deceased) [2017] eKLR, And Bonham Carter Vs Hyde Park Ltd (1948) 64 TLR 77**

6. The appellants submitted that a global award of Kshs 200,000 would be more than sufficient. They relied in the case of **Kenya Breweries Ltd Vs Saro, Msa HCCA NO. 144 Of 1990 [1991] eKLR and M.N. Vs Paul Kiptoo ELD HCCA 75B Of 2009**

7. The appellant also fastened a quarrel on the award of Kshs. 50,000/= as funeral expenses notwithstanding the fact that the alleged expenses were not proved specifically or at all. That the same ought to be quashed. They cited the court of appeal decision in **Kenya Bus Service Ltd V Gituma [2004] EA 91.**

8. The appellant submitted that costs should follow the event. They relied in the case of **Joseph Oduor Anode V Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 Of 2009; (2012) eKLR**

RESPONDENT'S SUBMISSIONS

9. The respondent submitted that she was dependent on the deceased and was looking forward to be supported by the deceased in her old age. Therefore, the court was correct in placing reliance on a dependency ratio of 2/3. She relied on the case of **Kenya Brewerie Ltd Vs Saro [1991] eKLR**

10. The respondent submitted that the deceased was a bright boy and the future prospects were good. The deceased's parents were hopeful that the deceased would go through school and join the labour market at the age of 24 years and worked up to the retirement age of 60 years. The deceased was in good health and nothing could have prevented him from working up to retirement age of 60 years. The deceased therefore lost 36 years of active employment. The trial court considered uncertainties of life and adopted 20 years of active employment that the deceased had lost. Therefore, the 20 years adopted by trial court was reasonable and proper and this court should uphold.

11. The respondent submitted that the trial court's reliance on the minimum wage for general worker as provided for under Regulation of Wages (General) Amendment Order, 2016 was proper. The deceased would not have earned anything less than 10,954.70/= no matter the type of work he did. she cited the case of **Abdi Kadir Mohammed & Another Vs John Wakaba Mwangi (2009) eKLR**

12. The respondent submitted that in every funeral expenses must be incurred in the preparation for the burial until the same is conducted and concluded. She pleaded Kshs. 70,000/= for funeral expenses however no receipts were produced to that effect. Therefore, the award of Kshs. 50,000/= was proper. She relied in the cases of **Mary Nekesa V George Muchichu Mwaura & Another [2015] eKLR and Premier Dairy Limited V Amarjit Singh Sago & Another [2013] eKLR.**

13. In conclusion, the respondent prayed that the appeal be dismissed with costs to the respondent as it lacks merit. She cited the case of **Kemfro Africa Limited T/A Meru Express Services & Another Versus A.M. Lubia & Another (1985) eKLR.**

ANALYSIS AND DETERMINATION

Duty of court

14. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.

15. Accordingly, I will evaluate the evidence afresh make own conclusions, except, bearing in mind that I 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.**

Quantum of damages

16. Circumstances in which the appellate court should interfere with trial court's discretion on assessment of damages were stated in the case of **Kemfro Africa Ltd v Lubia & another** , where:

“...its [trial court] 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.”

Loss of expectation of life & pain and suffering

17. No challenge was made to the award of the Ksh.100, 000/- for loss of expectation of life, and pain and suffering of Ksh.30, 000/-. I note that the death occurred shortly after the accident. I uphold these awards.

Dependency and Multiplicand

18. The bone of contention is the award for loss of dependency in the sum of Kshs. 1,752,800/= and particularly, the adoption of the multiplier method by the learned trial magistrate in making the award. The appellants argued that for such a child of very tender years, the multiplier method is inappropriate. They proposed an award of a global sum thereof. The respondent claimed the trial court was correct in adopting the multiplier method in the assessment of damages herein. How do we resolve this tension?

Multiplier or a global award approach

19. Let me tap from decided cases. 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”

20. 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 Kuvenji & Another vs. James Mohammed Ongenge [2012] eKLR*

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

22. This is also important. Further understanding of the subject: in a claim for lost years (loss of dependency), the manner of assessment of damages under the Fatal Accident’s Act was set out in *Chunibhai J Patel and Another vs PF Hayes and Others (1957) EA 748, 749* as cited in *James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR* by the Court of Appeal as follows:-

“The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the defendants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants.”

Use of multiplier

23. From the foregoing, courts are not compelled to adopt multiplier method in cases where the exercise is a grope in the dark; speculation on the important aspects of lost years or dependency. This was well stated by Ringera J (as he then was) in the case of *Kwanzia Vs Ngalali Mutua & another* that:

“The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

24. I take the view that, in most cases involving minors of tender age, the multiplier method would set the court to a journey of speculation. In this appeal, the minor died at the age of 3 years. The court cannot know what the minor would have turned out to be in life. Or the earnings to adopt.

25. I find relevant, the case 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 where the court held:

“I am of the considered view that the learned trial magistrate fell into error in making awards under separate heads. As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.

The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14 year old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved.”

26. See also the case of Oshivji Kuvenji & Another V James Mohamed Ongenge[2012] eKLR it was held:

“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 dependency.”

27. Except, I must complete the argument: however, there are exceptions where multiplier method may be appropriate in case of a minor in the circumstances stated but not limited to, in Gammel v Wilson (1981) 1 ALL ER 578 Lord Scarman at page 593 that: -

Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell’s case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim.

28. This case is not any such exception. It is a case of a young child of 3 years. In the absence of specific pointers, the lost years of earning capacity is ordinarily so distant that assessment of damages using a multiplier will be mere speculation.

29. Loss for the lost years. must be shown, on the facts established before the court, to be at least capable of being estimated. Sufficient facts must be established to enable the court to avoid the fancies of speculation. Such facts, need not be of mathematical certainty, but sufficient to enable the court make the best estimate it can in the circumstances.

30. There were no such facts before the trial court to justify use of the minimum wage at Kshs. 10,955/=; or a multiplier of 20 years for a child of such tender age. *No estimate or reasonable estimate is possible of lost years earning capacity herein.* The multiplier and the multiplicand applied were therefore speculative. *Accordingly,* the trial magistrate erred in adopting a multiplier method in assessment of damages herein.

31. In this case, therefore, a global lump sum should be awarded.

32. For reasons I have stated, I find that the trial court erred in making the award on dependency or lost years. I therefore, set aside the award made on the basis of the multiplier method. I will award a lump sum/ global sum.

The award

33. The advocates for the appellant suggested a global award of Kshs. 200,000/- while relying on the case of Kenya Breweries Ltd Vs Saro. Msa HCCA NO. 144 Of 1990 [1991] eKLR and M.N. Vs Paul Kiptoo ELD HCCA 75B of 2009 where a lump sum award of Kshs.280,000/= was made for a deceased aged 6 years.

34. The authorities cited by the appellant are old and are distinguishable from the circumstances of this case.

35. I am content to cite more recent cases. See S.M.K v Josephat Nkari Makaga Civil Appeal No. 66 of 2011 where an award of Kshs. 800,000/= was made on appeal under the head of loss of dependency in 2017 for a child aged 6 years and Civil Appeal No. 18 of 2014 Daniel Mwangi Kimemi & 2 others v JGM & SMM where a ward of Kshs.1, 530,000/= given for a 9-year-old was revised downwards on appeal to Kshs.1, 000,000/= in 2019. See also Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased) [2020] eKLR the court awarded Kshs. 900,000/= for a child aged 7 years.

36. Based on these decided case, I award a global sum of Kshs. 1,000,000/= as reasonable compensation on lost years or dependency.

Special damages

37. The appellants have not challenged the award on special damages save for funeral expenses.

38. The respondent pleaded special damages of Kshs. 114,575/=. At the hearing, she produced receipts supporting an amount of Kshs. 44,450/=. The trial court awarded the special damages proved. I uphold the award.

39. The award of Kshs. 50,000/= as funeral expenses has been objected to on the basis that it was not specifically proved. The respondent had pleaded Kshs. 70,000/= for funeral expenses.

40. In **Jacob Ayiga & Anor vs. Simion Obayo (2005) eKLR**, the court had awarded funeral expenses despite lack of proof, by way of receipts, on grounds that funeral expenses must be incurred in every case where someone died.

41. To the point is the Court of Appeal, in **Premier Diary Limited vs. Amarjit Singh Sagoo & another [2013] eKLR**, that:

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

42. In light of the foregoing jurisprudence, the award of funeral expenses in the circumstances of this case was properly made.

43. In an upshot, it is my finding that the appeal herein succeeds, in part. I hereby make the following awards and accordingly enter judgment in favour of the respondent:

i. Pain and suffering at Kshs. 30,000.00,

ii. loss of expectation of life at Kshs. 100,000.00,

iii. loss of dependency at Kshs. 1,000,000.00,

iv. special damages at Kshs. 44,450/=

v. Funeral expenses kshs. 50,000/=

vi. The grand total works out at Kshs. 1,224,450/=

vii. After contribution, 10%, is taken into account, the total award comes down to Kshs. 1,102,005/=

viii. Cost and interest on the award to the respondent.

44. Each party to bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 16TH DAY OF NOVEMBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. Kibet for Appellants

2. Oganga for Respondent

3.

Kasaso

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