REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 147 OF 2013

AMBROSE KIPTANUI.....1ST APPELLANT

INDIANA INSTITUTE FOR GLOBAL HEALTH.....2ND APPELLANT

-VERSUS-

TIMONA WEKESA

(suing as the Administrator of the estate of

FAITH NAFULA WEKESA (Deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Principal Magistrate in Eldoret CMCC No. 411 of 2011 delivered on 4 July 2013 by Hon. S. Mokua, SPM)

JUDGMENT

[1] This appeal was filed by the two Appellants, **Ambrose Kiptanui** and **Indiana Institute for Global Health Ltd**, through the law firm of **M/s Nyachiro Nyagaka & Company Advocates**, from the Judgment and Decree passed by the Senior Principal Magistrate, **Hon. S. Mokua**, in **Eldoret Chief Magistrate's Civil Case No. 411 of 2011**: **Timona Wekesa Wachwenge** (suing as the Administrator of the estate of the late **Faith Nafula Wekesa** (Deceased). The Respondent's cause of action was for damages in negligence. It was his contention that, on or about **17 March 2011** at about 5.30 p.m. the 1st Appellant so negligently drove **Motor Vehicle Registration No. KAX 423S** at Edomos area along Eldoret-Webuye Road that he caused it to lose control and veer off the road, thereby causing fatal injuries to the deceased.

[2] The 2nd Appellant was impleaded as the owner of the motor vehicle aforementioned; and, in Paragraph 5 of the Plaint dated **1 July 2011**, the Respondent set out the Particulars of Negligence alleged by him against the two Appellants as hereunder:

[a] Driving without due care and/or attention at all leading to the accident and the death of the deceased;

[b] Causing the death of the deceased through reckless and dangerous driving;

[c] Failing to slow down, brake, stop or in any other manner control the vehicle to avoid losing control;

[d] Failing to abide by the Highway Code and traffic rules;

[e] Swerving left and off the road at high speed when it was not safe to do so and when there was a pedestrian path;

[f] Driving the said vehicle at an excessive speed in the circumstances and causing the accident;

[g] Hitting the deceased on the pedestrian path;

[h] Driving the said vehicle while intoxicated or when it was defective hence causing the fatal accident.

[3] Although the Appellants filed a Defence dated **28 July 2011** denying the allegations against them, the lower court record shows that a consent was entered on liability on **25 October 2012**, thereby settling the issue of liability at 80:20 per cent in favour of the Respondent.

Accordingly, what fell for determination before the lower court was the issue of quantum. The lower court then took the evidence of the Respondent and, on the basis thereof, and on the basis of the written submissions filed by learned counsel, made an award in the total sum of **Kshs. 591,440/=** made up as follows:

Pain and suffering	:	Kshs. 20,000/=
Loss of expectation of life	:	Kshs. 150,000/=
Loss of dependency	:	Kshs. 500,000/=
Special damages	:	Kshs. 9,300/=
Funeral expenses	;	Kshs. 60,000/=
Less 20% contribution	:	Kshs. 147,860/=
Total		**Kshs. 591,440/=**

[4] Thus, the lower court entered Judgment in the Respondent's favour on **2 July 2013** in the sum of **Kshs. Kshs. 591,440/=** together with interest and costs. Being dissatisfied with the decision of the trial magistrate, the Appellants filed the instant appeal, raising the following grounds:

[a] That the trial magistrate erred both in law and in fact by failing to take into account the weight of the evidence adduced before the court.

[b] That the trial magistrate erred in law and in fact by not considering the Appellants' submissions.

[c] That the trial magistrate erred in law an in fact by awarding **Kshs. 500,000/=** for loss of dependency when the deceased was a minor aged 11 years old.

[d] That the trial magistrate applied wrong principles of law in his Judgment.

[e] That the trial magistrate erred both in law and fact by awarding damages which were inordinately high in the circumstances.

[f] That the trial magistrate erred in failing to take into account the age of the deceased minor and ended up awarding a sum that had no basis.

[5] It was on account of the foregoing grounds that the Appellants prayed that the decision of the trial magistrate on quantum in **Eldoret CMCC No. 411 of 2011** be set aside and; and that a proper finding be made by this Court. They also prayed for costs and any further orders as may be fit and expedient.

[6] The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **20 June 2016**. Thus, Counsel for the Appellants filed his written submissions herein on **3 July 2017** reiterating the contention by the Appellants that the amount awarded by the lower court for loss of dependency was excessive. His argument was that, since the deceased was aged 11 years at the time of her demise, there was nothing to prove that she supported the Respondent financially or otherwise. Counsel further submitted that the Respondent failed to prove the deceased's future prospects. On that account, he urged the Court to reduce the award for loss of dependency to **Kshs. 120,000/=.** He relied on the following authorities:

[a] Oyugi Judith & Another vs. Fredrick Odhiambo Ongong & 3 Others [2014] eKLR;

[b] P I vs. Zena Roses Ltd & Another [2015] eKLR.

[7] On his part, learned Counsel for the Respondent urged the Court to find that credible evidence was placed before the lower court to demonstrate that the deceased was a Class 4 pupil at **Life Transformation Children's Centre**, and that she had a promising future. He made reference to the School Report Card (marked the **Plaintiff's Exhibit 6)** and the letter written by the director of the school, **Beatrice Wanyama**, which showed that the deceased was a very active, disciplined and reliable cheer leader with a promising future. Counsel also pointed out that the Appellants opted to call no evidence and therefore did not rebut the evidence adduced by the Respondent. In his view, the award of **Kshs. 500,000/=** for loss of dependency was moderate and ought to be upheld.

[8] On proof of dependency, it was the submission of Counsel for the Respondent that this was not a requirement. He relied on the case of **Kenya Breweries Ltd vs. Ali Kahindi Saro** [1981] KLR 408, wherein the Court of Appeal held that, within the context of the African and Asian communities, the mere presence in a family of a child of whatever age and of whatever ability is itself an assurance that the parents would be taken care of and provided for once the child became of age. Counsel also referred the Court to **Section 4(1)** of the **Fatal Accidents Act, Chapter 32** of the **Laws of Kenya,** as to the definition of a dependant and the cases of **Mohammed Abdi Noor Ali and Ibrahim Ali Abdi vs. Wilson Wanyeki & Another**, **Kemfro Africa Ltd t/a Meru Express & Another vs. A.M. Lubia and Another (No. 2)** [1985] eKLR and **Daniel Mwangi Kememi & 2 Others vs. JGM & Another** [2016] eKLR to buttress his submissions. He thus urged the Court to find that the trial magistrate did not err at all in assessing damages for loss of dependency, and dismiss the appeal.

[9] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of re-evaluating the same and coming to its own conclusions thereon, while bearing in mind that it did not have the advantage of seeing or hearing the sole witness who testified before the lower court. The holding in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** is instructive, namely:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

[10] The Respondent, who was the only witness before the lower court, testified on **23 May 2013** as **PW1.** His evidence was that the deceased, **Faith Nafula Wekesa,** was his daughter; and that she died at the age of 11 years in a road accident that happened on **17 March 2011.** He explained that the deceased was then in Class 4 at **Life Transformation Children Centre. PW1** produced several documents before the lower court, including a letter dated **5 April 2011** from the deceased's School, as exhibits.

[11] There is no dispute therefore that the deceased, an 11-year-old school girl, died on **17 March 2011** after being knocked down by the 2nd Appellant's **Motor Vehicle Registration No. KAX 423S,** Toyota Station Wagon. The Police Abstract dated **1 April 2011 (marked the Plaintiff's Exhibit 7),** shows that the accident occurred at about 5.30 p.m. along the Eldoret-Webuye Road; and there is no dispute that the deceased died as a result of the injuries she sustained. The Certificate of Death, Burial Permit, Mortuary Discharge Form all attribute the death of the deceased to the road traffic accident that she was involved in. Hence, it was on that basis that the issue of liability was settled by consent. What is in contention herein is the quantum due to the estate and dependants of the deceased; and even then, only one item is contested, namely, the **Kshs. 500,000/=** award made by the lower court for loss of dependency.

[12] The general principle is that assessment of damages is a matter of discretion; and that an appellate court will hardly disturb an award made by a subordinate court unless warranted. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR the Court of Appeal aptly restated this principle as follows:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."**

[13] Bearing the foregoing in mind, I have given due consideration to the proceedings before the lower court, namely, the pleadings, the evidence presented before the court and the submissions and authorities relied on. I have also paid attention to the Judgment of the trial court and the reasons for the decision. The key issue that emerges for my determination is whether the award for loss of dependency was tenable, granted that the deceased was a class 4 pupil with no demonstrable future prospects. The Appellants were also of the view that the Respondent was under obligation to demonstrate that they were dependent on the deceased. Accordingly, the question posed thereby is whether a claim for damages for loss of dependency can be maintained on behalf of a deceased minor.

[14] The Court of Appeal had occasion to consider the aforementioned question in the case of **Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others** [1986] eKLR and here is its collective view as expressed by **Nyarangi, JA**:

> **"...in the context of Kenya, and that is the relevant context, parents of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age suffer real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased ... are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise."**

[15] One may reason that in that case the deceased was a 17-year-old student who had completed high school and had been admitted to the University of Nairobi to study architecture; and therefore that the deceased's future appeared bright. Indeed, it was on that basis that the Court of Appeal used the comparable earnings of architects as a multiplicand. In this case, the deceased was a Class 4 pupil and it was not so clear what she would have turned out to be by way of career.

[16] In **Kenya Breweries Ltd vs. Saro [1991] eKLR,** wherein more or less similar circumstances played out, the Court of Appeal restated its position as follows:

> **"...in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen 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 year old one who has not been to school and whose abilities are yet not ascertained...But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because 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. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents...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 not evidence of pecuniary contribution...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..."

[17] In the premises, there can be no doubt that the Respondent was entitled to claim and was rightfully awarded damages under the **Fatal Accidents Act** as a dependant of the deceased. Having so found, the next issue to resolve is whether the lower court adopted the correct approach in arriving at the figure of **Kshs. 500,000/=.** Here is how the trial magistrate reasoned on the matter:

> **"The next head for consideration is that of loss of dependency. The plaintiff proposed on sum of kshs. 1,000,000. The plaintiff's counsel did lay basis for the claim of kshs. 1,000,000/=. The defence did not address the issue at all.**
>
> **The plaintiff relied on the case cited herein. The deceased therein was aged 10 years, the court awarded kshs. 720,000 which was based on 30000 with a similar multiplier of 20 years.**
>
> **The above basis was not laid in this case. I will not ignore the fact that the deceased would have grown up and after her education could be able to assist her parents she would have equally benefitted her estate. The deceased would of course have had to live with the usual uncertainties of life. Therefore in assessing damages, the court ought to arrive at a modest figure. Therefore I award under this head kshs. 500,000/=…"**

[18] It is clear from the foregoing excerpt and elsewhere in the Judgment of the lower court that it took into account the evidence and the submissions made by the parties. It is also manifest that the learned trial magistrate was guided by applicable precedent. Apparently, the trial magistrate used the global sum approach, granted the circumstances of the case he was dealing with. There was no income to speak of and therefore the multiplier approach was clearly inapplicable. I have no reason to fault him in this connection. Indeed, in **Mwanzia vs. Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another**, (as quoted by Koome J., in **Albert Odawa v Gichimu Gichenji [2007] eKLR) Hon. Ringera, J.** took the following viewpoint, which I find instructive and relevant:

> **"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 the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the 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."**

[19] As to whether the sum of **Kshs. 500,000/=** was a reasonable sum in the circumstances, the observation in **H. West & Son Ltd vs. Shephard** [1964] AC 326, is instructive, namely, that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[20] And in **Stanley Maore vs. Geoffrey Mwenda** [2004] eKLR, the Court of Appeal suggested thus:

> **"…It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

[21] Accordingly, I have looked at comparable awards and noted that:

[a] In **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,** in which the deceased minor died at the age of 12 years, an amount of **Kshs. 600,000/=** was awarded pursuant to the global sum approach.

[b] In **Fredrick Kimokoti Imbali & 2 others v AKW & another (Suing as Legal administrators of the Estate of the late AK (Deceased) [2019] eKLR,** the High Court upheld an award of **Kshs. 880,000/=** for loss of dependency in respect of a deceased 11-year-old minor.

[c] In Rosemary Onyango & another v Mohamed Jenjewa Ndoyo & another [2019] eKLR, an award of **Kshs. 1,000,000/=** by the lower court for loss of dependency was considered inordinately high and was reduced to **Kshs. 500,000/=.**

[22] In the circumstances, it cannot be said that the lower court's award of **Kshs. 500,000/=** for loss of dependency under the **Fatal Accidents Act** is excessive or in any way erroneous. And, as has been pointed out herein above, the other items comprising the lower court's award were not in dispute. Consequently, I find no merit in the appeal, which I hereby dismiss with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF MAY 2020

OLGA SEWE

JUDGE