



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 21 OF 2018

(Being an appeal from the original judgement and decree of

Hon. Khapoya, Senior Resident Magistrate, of 31st August 2017

in Kakamega CMCCC No. 352 of 2017)

CHABHADIYA ENTERPRISES LIMITED.....1ST APPELLANT

SHAJANAND HARDWARE (K) LTD.....2ND APPELLANT

VERSUS

GMB (suing as the legal administrator of the estate of NN, DECEASED).....RESPONDENT

JUDGMENT

1. The suit at the trial court, in Kakamega CMCCC No. 362 of 2014, was initiated by the respondent herein against the appellants, for general and special damages, arising from a road traffic accident on 5th March 2014, where two vehicles, belonging to the two appellants collided and as a consequence hit the deceased, a child of the respondent, who was a pedestrian along the Eldoret-Webuye Road. The respondent attributed negligence on the part of the appellants' drivers, and sought damages under both the Law Reform Act, Cap 26, Laws of Kenya, and the Fatal Accidents Act, Cap 32, Laws of Kenya.

2. The respondents filed a joint defence, in which they denied liability and accused the deceased of being the sole cause of the accident or having contributed to it.

3. At the oral hearing, only the respondent testified. She stated that her child was hit and killed by motor vehicles belonging to the appellants. She stated that the deceased was a fourteen-year-old, in Standard Five at [particulars withheld] Primary School. She stated that she incurred Kshs. 3, 100.00 to obtain the burial permit and paid Kshs. 15, 000.00 to her advocate to obtain grant of letters of administration *ad litem*. She further stated that the deceased used to assist her with house chores, which assistance she lost, and that she expected her to complete school and find formal employment. She described her as below average in school, but also said that she was performing well. She asked for compensation and costs.

4. After reviewing the evidence adduced at the trial, and other material on record, the trial court found the two appellants jointly liable, and awarded damages as follows:

- (a) Pain and suffering Kshs. 50, 000.00;
- (b) Loss of expectation of life.....Kshs. 70, 000.00;
- (c) Loss of dependencyKshs. 1, 000, 000.00; and
- (d) Special damagesKshs. 85, 000.00.

TOTAL Kshs. 1, 295, 000.00.

5. The appellants were aggrieved by the decision, and lodged this appeal. Their case, as articulated in their memorandum of appeal, dated

8th March 2018, is that the trial court awarded damages that were inordinately excessive in the circumstances, the trial court did not consider the evidence and submissions tendered by the appellants, the trial court applied the wrong principles of law and misapprehended the evidence while assessing damages, the trial court considered issues that were neither raised nor pleaded nor submitted upon by the respondent on quantum, and the court awarded double compensation to the respondent.

6. Directions were taken on 30th October 2019, for disposal of the matter by way of written submissions. Both sides have complied with those directions by filing their respective written submissions.

7. The appellants written submissions are dated 3rd December 2019. In the written submissions, the appellants have collapsed their grounds of appeal into only one ground: Whether the quantum of damages awarded by the trial court was inordinately high in the circumstances. The appellants submit that the trial court did not follow the principles laid down for award of damages for loss of dependency in the case of a minor. They submit that the trial court did not take into account the fact that the minor's income for lost years is not entirely spent on her dependants, but rather on herself. They submit that the trial court presumed that she would spent all her income on the dependants, which was not a practical possibility. The other argument is that the trial court fell into error in separating the two heads of loss of dependency and loss of expectation of life. They underscore the fact that the courts are somewhat divided on whether the two heads should be separated or not, and they have cited several decisions to support that contention. It would appear from a review of those decisions that the predominant view is in favour of the lumpsum approach.

8. On her part the respondent, submits that the amount for loss of dependency awarded by the trial court, of Kshs. 1, 000, 000.00, was proper in the given circumstances. She has cited the decision in *Daniel Mwangi Kimemi & 2 others vs. JGM & another* [2016] eKLR, also relied on by the appellants, where the court awarded Kshs. 1, 000,000.00, for loss of dependency for a nine-year-old.

9. From the decisions cited by both the appellants and the respondent, it would appear that the trial court fell into difficulties in assessing loss of dependency when it chose to apply both heads, which is not in principle wrong. The challenge with applying it in the case of minors is the challenge of imponderables, hence the preference for the lumpsum. To avoid falling into the pitfalls pointed out by the appellants, that the trial court did not factor that loss of dependency could not be 100%, for the bulk of income is not spent on the dependants, the trial court should have applied the lumpsum approach.

10. *Daniel Mwangi Kimemi & 2 others vs. JGM & another* (supra), was cited by both sides, the court imposed Kshs. 1, 000, 000.00 for loss of dependency and Kshs. 100, 000.00 for loss of expectation of life for a nine-year-old in 2016. The appellants cited *Chhabhadiya Enterprise Ltd & another vs. Gladys Mutenyo Bitali (suing as administrator and personal representative of the Estate of Linet Simiyu – (deceased))* [2018] eKLR, the court awarded Kshs. 100, 000.00 for loss of expectation of life and Kshs. 800, 000.00 for a twelve-year-old. they also cited *Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of the estate of CRK (deceased))* [2017] eKLR, the court awarded Kshs. 80, 000.00 for loss of expectation of life and Kshs. 600, 00.00 for loss of dependency. In *Surjit Singh & another vs. Richard W. Barasa* Bungoma High Court civil appeal number 78 of 2012, the court, in 2017, awarded loss of loss of expectation of life at Kshs. 800, 000.00, and Kshs. 284, 000.00 for lost years for an eleven year old.

11. Taking everything into account, I shall not interfere with the discretion as exercised by the trial court, save for loss of dependency, which I hereby reduce to Kshs. 900, 000.00. the appeal succeeds to that limited extent. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W. MUSYOKA

JUDGE