



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 141 OF 2016

CWW (Suing as personal representative of the estate of PWK.....**APPELLANT**

=VERSUS=

MARK KAHENYA.....**1ST RESPONDENT**

NORMAN WANJAU KIRUTU.....**2ND RESPONDENT**

(Being an Appeal from the Judgment of the Honourable P.O. Ooko, Principal Magistrate

delivered on the 7.11.2016 at Mavoko in Civil Suit 638 of 2013)

BETWEEN

CWW(Suing as personal representative of the estate of PWK.....**PLAINTIFF**

=VERSUS=

MARK KAHENYA.....**1ST DEFENDANT**

NORMAN WANJAU KIRUTU.....**2ND DEFENDANT**

JUDGEMENT

1. Vide pleadings in the trial court as amended, the appellant sued as the legal representative of the Estate of the deceased minor who was said to have died from a road traffic accident that occurred on the 29th day of May, 2012 where the deceased was a pedestrian along Nairobi-Mombasa Highway and was hit by m/v. reg. No. KAY 257X. The appellant pleaded negligence and res ipsa loquitor and further claimed that the deceased's family suffered special damages. It was pleaded that the death of the deceased caused the appellant pain and suffering and sought damages for loss of expectation of life. The appellant also sought special damages, general damages under the Fatal Accidents Act and the Law Reform Act and costs of the suit plus interest.

2. In his defence, the 2nd respondent denied negligence, denied the applicability of res ipsa loquitor and pleaded that the accident was wholly caused and or contributed to by the negligence of the appellant.

3. The matter proceeded for hearing where Pc Rider Ibrahim Kemboi testified as Pw1. He testified on behalf of the base commander Athi River Traffic Base and sought to produce the abstract in respect of PW who had been involved in an accident on 29.5.2012 having been hit by vehicle reg. No. KAY 257X. It was his testimony that according to the report the deceased was hit on the service lane as he was crossing the road going to school. The abstract was produced and marked as Pexh1.

4. Pw2, the appellant testified that the deceased was her son who was aged 17 years at the time of his death. She testified that the deceased's body was taken to Machakos funeral home where she paid Kshs 8,400/- for the preservation of his body. She testified that a post mortem was conducted on the deceased and she tendered the report as well as the report forms of the deceased.

5. The appellant's case was closed and DW1 was the 2nd respondent who testified that on the material date he was driving the subject vehicle when the deceased entered the road abruptly and in the process he was hit. That was the close of the respondents' case.

6. Vide judgement delivered by the trial court on the 7th day of November 2016, the court found the 2nd respondent 100% liable and the 1st respondent vicariously liable for the actions of the 2nd respondent. The learned magistrate awarded the respondent total damages of **Kshs.638,900.00** being **Kshs. 30,000.00** for pain and suffering, **Kshs. 100,000.00** for loss of expectation and a global sum of **Kshs. 500,000.00** for loss of dependency and **Kshs. 8,900.00** for special damages. The Appellant was dissatisfied with the award on quantum and has preferred this appeal vide a Memorandum of Appeal dated 7th December 2016 and filed in court on even date. It was counsel's position that the quantum under the Fatal Accidents Act i.e dependency was inadequate hence he sought that the award on general damages under the Fatal Accidents Act that was given by the trial court be increased. The Respondent did not file a cross appeal.

7. The appeal was canvassed vide written submissions and learned counsel took no issue with the **KShs. 100,000.00** awarded for loss of expectation of life and **KShs. 30,000.00** awarded for pain and suffering. However, the appellant argued that the award made under the Fatal Accidents Act be set aside and substituted with an award of Kshs 2,236,000 using the minimum wage of Kshs 13,000/- as at the time of death multiplied by 43 years being the difference to retirement and 1/3 ratio. Counsel placed reliance on the decision in **David Ngunje Mwangi v Chairman of the Board of Governors of Njiri High School [2001] eKLR**.

8. In reply to the submissions made by counsel for the appellants' learned counsel for the respondent in submissions filed on 3.2.2020 framed two issues for consideration, *to wit*; **Whether the failure to include a certified copy of the decree in the record of appeal was fatal to the appeal** and **Whether the court should interfere with the trial court's award of general damages under the Fatal Accidents Act**.

9. According to counsel, the appeal was admitted on 21.11.2019 however a certified copy of the decree of the trial court was not included. In placing reliance on Order 42 Rule 13(4) of the Civil Procedure Rules as well as the case of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo (2016) eKLR**, **Chege v Suleiman (1988) KLR** and **Salama Beach Hotel Ltd & 4 Others v Kenyariri Associates Advocates & 4 Others (2016) eKLR**, the failure to include a certified copy of the decree was fatal to the appeal and hence the same was incompetent and ought to be struck out. On the 2nd issue, learned counsel agreed with the findings of the trial court and placed reliance on the cases of **Kengen Limited & Another v Hane Nesunga Khala (suing as the personal representative and administrator of the Estate of Alex Wekesa Nyongesa (deceased) (2017) eKLR** and **Leonard Kaunganyi v David Mati (2018) eKLR** where a global sum of Kshs 500,000/- was awarded.

10. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court had the advantage of seeing and hearing the parties and hence I have to give an allowance for that reach and to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

11. Having considered the rival pleadings in the trial court, the evidence therein, the memorandum of appeal and the respective submissions of counsel, the issues for determination are whether the appeal is incompetent for failure to include a certified copy of the decree and whether a case has been made for disturbing the award of the trial court.

12. As regards the 1st issue, courts have spoken to the same, for instance in **Mukenya Ndunda vs Crater Automobiles Limited [2015] eKLR** the Court emphasized that;

“The power to strike out an appeal or a notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”

13. In the cited case by the respondent's counsel of **Salama Beach Hotel Limited & 3 others v Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates Civil Application 48 of 2015 (2016) eKLR**, it is noted upon scrutiny of the citation given by counsel that the same dismissed the appeal for failure to include a certified copy of the order appealed from in terms of Rule 87(1) (h) of the Court of Appeal rules that is couched in mandatory terms. In the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR**, it was observed by the Court of Appeal that “As regards the alleged lack of a certified copy of the ruling in the record of appeal, we do not think there is any substance in the complaint. What rule 87(1) requires to be certified is the decree or order, not the judgment or ruling appealed from. There is a certified copy of the order on page 96 of the record of appeal. The application to strike out the appeal has no merit and is hereby dismissed with costs to the appellant.” I also note that the mentioned Order 42 Rule 13(4) of the Civil Procedure Rules provided that the record of appeal ought to contain “(f) *the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.*” This means that firstly the decree or order need not be certified as contradistinguished from the Court of Appeal rules and secondly that either judgement, order or decree can serve and not the order or decree only. A perusal of the record indicates that there is the judgement of the trial court on the record of appeal meaning the challenge posed by the respondent collapses and I find that the appeal is not incompetent for failing to include a certified copy of the decree or order.

14. On the 2nd issue, the law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. In **Phillips vs The London South Western Point Way Company (1879 -80) 5. Q.B.D. 78**, James L. J. said on page 85:

“The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which generally speaking is considered to be within their exclusive province, that is to say the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less. Still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject to the supervision of a Court of first instance and if necessary of a Court of Appeal in this way that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for consideration by another jury.”

15. The appellant's gravamen is that the award was too low and that the trial court could have used the multiplier approach instead of the global sum award. It is undisputed that the deceased died as a result of the accident and that he was aged 17 years when he met his unfortunate death. By virtue of the respondent failing to challenge the evidence of Pw2, it becomes obvious that it is undisputable that as per the report card of the deceased, he was not a bright student who had no good grades but had a bright and promising future. Did the court consider the wrong principles in award of damages and did the court apply the wrong principles of damages under the Fatal Accidents Act?

16. The damages for death as a cause of action are pain and suffering, loss of expectation of life and loss of dependency. It is trite principle of law that in determining the amount to award in cases of loss or injury as a result of negligence of another, the fundamental principle of law to be followed was enunciated by Lord Blackburn in **Livingstone v Rawyards Coal Co. (1880) 5 App. Cas. 25 at 39**. As being " ...that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting his compensation or reparation.

17. However, it should be noted that it is not easy to maintain consistency and achieve fairness to both the victim and the defendant at the same time without well-defined reference parameters unless the court awards damages on the basis of comparable awards in cases of similar nature. Lord Diplock in **Wright v British Railway Board (1938) AC.1173, 1177**, stated that; ... "Non-economic loss...is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigation should be even handed instead of depending on idiosyncrasies of the assessor, whether judge or jury, the figure must be basically a conventional figure derived from experience and from awards in comparable cases." Be that as it may, this is a clarion call to the rules committee to set guidelines on conventional awards to be awarded by Kenyan courts just like the House of Lords has been setting guidelines on the conventional sums to be awarded by courts in the England and Wales, (**See Cramwell v Wilson [1982] A.C. 27**).

18. In light of the lack of guidelines, this court will not lose sight of the fact that even though money can compensate to an extent, it cannot create an experience to be the same as it were before the event giving rise to the action. Lord Morris in **West v Sheppard [1964] AC 326** stated;

"All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation."

19. Inflation is also a factor to be considered to ensure that the wrongdoer does not gain an advantage over the victim.

20. Having considered the submissions of respective counsel the issue is whether to adopt the multiplier approach or the global award approach when the deceased is a minor who had not yet started working for gain. In the case of **Bobmil Industries Ltd & Another v Kennedy Indakwa Eshiteni (2010) eKLR** where the deceased was a minor and the court adopted a global sum of Kshs 1,200,000/=. With regard to the multiplier approach, courts have considered how much the deceased would have earned upon completion of education, how many years he/she would have supported the parents and the siblings and for how many years. In the case of **Kenya Power & Lighting Company Ltd v E K O & Another [2018] eKLR**, Justice Joel Ngugi found no fault in the lower court adopting the multiplier of Kshs 10,000/= as a minimum wage for the deceased. Counsel's argument was that the deceased would probably become gainfully employed at 24 years till the retirement age of 60 years as was the reasoning in the case of **Abdi Kadir Mohammed & Another v John Wakaba Mwangi (2009) eKLR**, where the court considered a multiplier approach in awarding loss of dependency where a minor was 12 years. In the present case the victim was aged 17 years old just about to be an adult. A majority of the young people in this country engage in several jobs and income generating activities and each day they bring food on their family's tables.

21. I am constrained not to use the global approach as a *carte blanche* to escape from reasoned analysis of the evidence. From the evidence on record, it is possible on a balance of probabilities to elicit the inconvenience, the loss that the appellant suffered as a result of the death of the deceased and it would occasion injustice if this court were to use the global approach in awarding damages in the instant case. This being my finding, I shall use the multiplier approach to assess damages and proceed to analyze the award for loss of dependency.

22. The evidence of Pw2 is to the effect that she had high hopes in the deceased. Having associated my reasoning in line with the multiplier approach, the damages would be by multiplicand and the result reduced by 1/3 because as at the deceased's death he was not married and the same multiplied by the expected number of years that the deceased would have lived had he not been a victim of wrongful death and multiplied by 12 months.

23. The deceased was aged about 17 years old when he met his death. The life expectancy as per statistics given by the World Bank is 66.7 years. The retirement age in Kenya for all civil servants is 60 years. The multiplicand would be the expected monthly earnings of a skilled worker/ professional and assuming that the deceased finished his degree when aged 24, the ability to secure employment in Kenya would be at about the age of 28 years. (**See Formal employment (Kenya's demographic trends, millions - Source: World Bank & Kenya National Bureau of Statistics)**). I shall take the retirement age that would be 60 years meaning that the working life of the deceased would be 27 years on average. In the professional field, the average earnings of the deceased as per the minimum wage in 2013 as per the time of death was Kshs 9,780/- in Nairobi (**See THE REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2013**). The calculation for loss of dependency is thus; $27 \times \frac{1}{3} \times 9,780 \times 12 = \text{Kshs } 1,056,240/-$.

24. **By way of comparison, in Chen Wembo & 2 Others Vs IKK & Another (suing as the legal representatives and administrators of the estate of CRK (deceased) (2017) eKLR** a global award of Kshs 600,000/- was made for a deceased aged 12 years meaning in the instant case an award of between **Kshs. 900,000/- to Kshs. 1,000,000/-** would be commensurate in the instant case as the deceased died at the age of 17 years. Such an age is a borderline to adulthood and it is proper to suppose that he was about to start eking a living for himself.

25. The respondent did not file a cross appeal and that their learned counsel only submitted on the quantum of general damages and did not raise any issue on the liability. As the parties have concentrated only on the general damages under the Fatal Accidents Act I find that the other heads of damages and liability shall remain undisturbed.

26. The upshot is that the appeal succeeds. The lower court's global award of **Kshs 500,000/-** as damages for loss on dependency is hereby set aside substituted with an award of **Kshs 1,056,240/-**. The rest of the amounts awarded remain undisturbed. The appellant is awarded the

costs in this appeal and in the lower court.

It is so ordered.

Dated and delivered at Machakos this 8th day of May, 2020.

D. K. Kemei

Judge