



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 186 OF 2017

NANCY GATWIRI.....1ST APPELLANT

SAMUEL KAMANDE MUGO.....2ND APPELLANT

VERSUS

PETER NJENGA KIHIKO

(Suing on his own behalf and as the administrator ad litem of the estate of

DAVID MUCHIRI NJENGA-Deceased).....RESPONDENT

(Being an appeal from the judgment and decree of Honourable A. Lorot (Mr.)

(Senior Principal Magistrate) delivered on 29th March, 2017

in CMCC NO. 3671 'B' OF 2009)

JUDGMENT

1. The respondent founded a suit against the 1st and 2nd appellants herein on his own behalf and in his capacity as the administrator ad litem of the estate of David Muchiri Njenga (*"the deceased"*) vide the plaint dated 11th June, 2009 and amended on 27th August, 2009, and sought for general damages and special damages in the sum of Kshs.81,488/ against the appellants jointly and severally as well as costs of the suit and interest on the same.
2. The 1st appellant was sued in her capacity as the driver of motor vehicle registration number KAU 094Z (*"the subject motor vehicle"*) while the 2nd appellant was sued as the registered owner of the subject motor vehicle at all material times.
3. The respondent pleaded in his plaint that on the material day which was sometime on or about the 15th of December, 2007 at about 1.00p.m he and the deceased were lawfully walking along Kinyanjui Road when they were knocked down by the subject motor vehicle being controlled/driven by the 1st appellant.
4. It was also pleaded that the deceased's death and the injuries suffered by the respondent were the result of negligence on the part of the 1st appellant, the particulars of which featured in the plaint.
5. It was further pleaded that at the time of his death, the deceased was a happy and healthy boy aged 4 years.
6. The 1st and 2nd appellants entered appearance on being served with summons and filed their statements of defence separately to deny the plaintiff's claim.
7. At the hearing of the suit, a consent on liability was recorded by the parties in the ratio of 80:20 in favour of the respondent. According to the record, the parties also entered into a consent on production of the respondent's list and bundle of documents in evidence and on the filing of written submissions with regard to the assessment of damages.

8. Upon considering the material placed before the court and the written submissions filed by the parties, the trial court entered judgment in favour of the respondent in the following manner:

a) Liability	80%:20%
b) General damages for the deceased	
(i) Pain and suffering	Kshs.20,000/
(ii) Loss of expectation of life	Kshs.100,000/
(iii) Lost years	Kshs.2,584,810.80
c) General damages for the plaintiff	Kshs.1,500,000/
Gross total	Kshs.4,204,818.80
Less 20% contribution	(Kshs.840,963.76)
Net total	Kshs.3,363,855.04
d) Special damages	Kshs.69,299/
Total	Kshs.3,433,154.04

9. Being dissatisfied with the assessment of damages, the appellant lodged this appeal against the respondent vide the memorandum of appeal dated 24th April, 2017 and put forward the following grounds of appeal:

(i) THAT the learned trial magistrate erred in law and fact in making an award for lost years that was inordinately high so as to represent an entirely erroneous estimate.

(ii) THAT the learned trial magistrate erred in law and fact by acting on wrong principles in computing damages for lost years for the deceased minor.

(iii) THAT the learned trial magistrate erred in law and fact by failing to deduct the amount awarded in loss of expectation of life from the amount awarded in lost years whereas the beneficiaries of the estate is/are the same person(s).

(iv) THAT the learned trial magistrate erred in law and fact in awarding the respondent an amount in general damages that was too high and not commensurate with the nature of injuries he sustained.

10. This court gave directions that the appeal be canvassed by written submissions. At the time of writing this judgment, the respondent had not put in his submissions despite this court extending time for him to do so.

11. The appellants filed their joint submissions on 21st November, 2019 arguing that the trial court erred in applying the minimum wage regulations in computing damages for lost years yet the deceased who was a minor had no actual or predictable income.

12. The appellants also faulted the trial court for applying a multiplicand in assessing damages under the aforesaid head since a multiplicand represents the projected number of years a person would be expected to work before retiring and in the present instance, the deceased had not joined school. In this respect, the appellants are of the view that a global approach would have better suited the circumstances of this case and suggested a global sum of Kshs.200,000/ while citing inter alia, the case of **Wesley Kipkoech Kendagor v Unistar Transporters Ltd-HCCC NO. 116 OF 2004 at KERICHO** where the court awarded a global sum of Kshs.500,000/ to the estate of a deceased who died aged 21 years with no earnings.

13. As concerns the award of Kshs.1,500,000/ made to the plaintiff on general damages for his injuries, it was the appellants' contention that the same ought to have been based on the injuries pleaded, the particulars of which do not constitute the nature of injuries listed in the medical report.

14. On that note, the appellants quoted the legal principle that parties are bound by their pleadings and should not be permitted to depart from them, as severally restated by the courts, and enunciated by the Supreme Court in the authority of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** in the following manner:

“In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them.”

15. The appellants argued that in any event, an award of Kshs.150,000/ would suffice in consideration of the fact that the injuries pleaded

were soft tissue in nature.

16. I have considered the appellants' submissions plus the various authorities cited. This being a first appeal, I am enjoined to re-evaluate the evidence placed before the trial court, keeping in mind the legal position that the award of a trial court ought only to be interfered with under the following circumstances:

a) Where an irrelevant factor was taken into account.

b) Where a relevant factor was disregarded.

c) Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

17. It is noted that the appeal lies against the award made under the heads of lost years in respect to the estate of the deceased as put forward under grounds (i), (ii) and (iii) of the appeal; and the award on general damages for pain, suffering and loss of amenities in respect to the respondent as encapsulated in ground (iv) of the appeal. I will therefore address the appeal under the two (2) separate heads.

a) General damages for lost years awarded to the estate of the deceased

18. Under this head, the respondent urged the trial court to apply a multiplicand of Kshs.9,790.95 in accordance with the minimum wages regulations 2013 and a multiplier of 22 years to be tabulated as follows:

$$9,790.95 \times 12 \times 22 = \text{Kshs.}2,584,810.80$$

19. The appellants on their part suggested a global figure of Kshs.200,000/ considering the age of the deceased and cited the case of **Wesley Kipkoech Kendagor v Unistar Transporters Ltd-HCCC NO. 116 OF 2004 at KERICHO** whose award I earlier quoted. In the end, the trial court awarded the sum proposed by the respondent.

20. Upon re-evaluating the evidence tendered before the trial court, I note that the deceased was aged about 4 years at the time of his death as indicated in the certificate of death which was tendered in evidence. It is therefore apparent that the deceased was a minor. It was not disclosed whether the deceased had enrolled in school. Nonetheless, I agree with the appellants' submission that given the age of the deceased, it would have been impossible and premature to predict his career path and the nature of his earnings in future.

21. From the foregoing, I am of the view that the learned trial magistrate fell into error in adopting the multiplier approach; instead, the learned trial magistrate ought to have made a global award which is better suited the circumstances of this case. In so finding, I am persuaded by the authority of **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** where the High Court rendered itself thus:

“The uncertainties referred to by Sitati J in determining the future of a minor deceased, his earning prospects and hence support for parents/dependents are amply demonstrated in this case. Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables... In my considered view, this case was eminently unsuited to the multiplier/multiplicand approach in the assessment of damages in respect of lost dependency.”

22. While I concur with the position taken by the appellants, I observed that they did not provide any authorities involving deceased minors whose ages were of close proximity to that of the deceased in the present instance.

23. I therefore rely on the case of **John Kinyanjui Thumbi & another v Irene Wambui Nduta & another [2018] eKLR** where the court awarded a sum of Kshs.500,000/ on appeal on damages for loss of dependency in the instance of a deceased minor aged 3 years and 6 months. I also take into account the case of **Rosemary Onyango & another v Mohamed Jenjewa Ndoyo & another [2019] eKLR** in which a similar award was made in respect to a 7-year old deceased minor.

24. In view of the foregoing, I am satisfied that the learned trial magistrate's award of Kshs.2,584,810.80 following the multiplier method not only fell on the higher side but was also based on wrong principles and hence erroneous. To my mind, an award of Kshs.500,000/ would be more suitable in line with comparable awards made in the past and taking into account the inflationary trends.

25. Before I determine the second limb of the appeal, I note that the appellants brought forth the issue of double compensation in respect to the awards on lost years and loss of expectation of life in ground (iii) of their appeal though they did not discuss this ground in their submissions.

26. The law is clear that the issue of double compensation largely becomes applicable when it comes to damages for lost years vis-à-vis those for loss of dependency where the beneficiaries are the same. In the present occasion, the respondents sought for damages for loss of expectation of life which damages are distinctly provided for under the Law Reform Act and which have no direct correlation with an award for loss of dependency or lost years. Consequently, I find that double compensation could not have arisen in the present instance.

b) General damages for pain and suffering and loss of amenities awarded to the respondent

27. As concerns this particular head of damages, the respondent on the one part suggested a sum of Kshs.3,000,000/ and cited the case of

Irene Wambugi Nthiga v Stage Coach Bush Company Ltd [2007] eKLR where a plaintiff who had sustained injuries to the right upper limb, left lower limb, right limp joint and pelvis bone and abdomen was awarded a sum of Kshs.2,500,000/ and the case of **Anthony Mwundu Maina v Samuel Gitau Njenga [2006] eKLR** in which the court awarded a sum of Kshs.1,500,000/ to a plaintiff with various fracture injuries and head injuries plus concussion with loss of consciousness for one week.

28. In contrast, the appellants suggested an award of Kshs.150,000/ while submitting that the injuries pleaded to not match the injuries indicated in the medical report. The trial court awarded the respondent a sum of Kshs.1,500,000/ under this head.

29. Going by the amended plaint, the following are the particulars of injuries pleaded in respect to the respondent:

a) Bruises above the left hip and left loin

b) Cut at the top of left shoulder

c) Bruises on the left scapula

30. According to the medical report dated 2nd February, 2012 and prepared by DR. H. O. Onyango, the respondent is said to have sustained injuries to his left and right shoulders, his right thigh and left buttock, in addition to a fracture of the distal 1/3 of the right femur for which he underwent physiotherapy and had plates and screws fixed. The medical report also indicated bruises on the left scapula, right scapula and the left buttock, further terming the injuries severe with no assessment being made on permanent incapacity. The P3 form indicated that the injuries were in the category of grievous harm.

31. It remains unclear whether the respondent was admitted in hospital and if so, the duration. Be that as it may, it is apparent that the injuries pleaded were confirmed by the medical evidence tendered before the trial court hence the learned trial magistrate acted correctly in proceeding to award damages under this head.

32. Upon studying the authorities cited by the respondent before the trial court, I find the same to involve injuries of a more serious nature in comparison to those suffered by the respondent. That being said I considered two recently decided cases involving comparable injuries: the first is the case of **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** in which the High Court on appeal substituted an award of Kshs.1,000,000/ with that of Kshs.450,000/ to a plaintiff who had suffered various lacerations, bruises, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. The second authority is **Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR** where a plaintiff with soft tissue injuries including head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb was awarded Kshs.300,000/ on general damages and which award was upheld on appeal.

33. In view of the foregoing, I am satisfied that the award made by the learned trial magistrate under this head is inordinately high and is deserving of interference. I will substitute the award of Kshs.1,500,000/ with a more reasonable award of Kshs.500,000/ taking into account comparable awards made, the passage of time and inflation trends.

34. The upshot is that the appeal succeeds to the extent of the awards made under the respective heads of **general damages for lost years and for pain and suffering** and **loss of amenities**. Consequently, the trial court's award of Kshs.2,584,810.80 under the head of **lost years made to the estate of the deceased** is hereby set aside and is substituted with an award of **Kshs.500,000/** while the award of Kshs.1,500,000/ on **general damages for pain and suffering and loss of amenities** made to the respondent is set aside and is substituted with an award of Kshs.500,000/.

35. For the avoidance of doubt, the judgment on appeal is as follows:

a) **General damages for the estate of the deceased**

(i) Pain and suffering	Kshs.20,000/
(ii) Loss of expectation of life	Kshs.100,000/
(iii) Lost years	Kshs.500,000/

b) **General damages for pain and suffering and**

loss of amenities for the respondent Kshs.500,000/

c) **Special damages** Kshs.69,299/

Gross total Kshs.1,189,299/

Less 20% contribution (Kshs.237,859.80)

Net total Kshs.951,439.20

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates

from the date of judgment until payment in full.

Parties to bear their respective costs of the appeal.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 6th day of May, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the 1st and 2nd Appellants

.....for the Respondent