REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 18 OF 2017

MICHAEL KAMOTHO MAINA.....1ST APPELLANT

PATMATT SUPERMARKET LTD.....2ND APPELLANT

VERSUS

JMW.....RESPONDENT

(Being an appeal from the judgment of Hon G.N Opakasi RM

delivered on 26th April, 2017 in SRMCC No 59 of 2015)

JUDGMENT

Background and Appeal

1. This appeal in this matter emanates from a trial in the lower court following a fatal accident that occurred on 5th November, 2013 along Engineer- Njabini road. The accident vehicle was driven by the 1st appellant, and the respondent's six-year old son, JMM, was the victim. The trial magistrate found the 1st appellant 100% liable for the accident and awarded damages as follows:

a.	Loss of expectation of life	Kshs	100,000/=
b.	Pain and suffering	Kshs	10,000/=
c.	Loss of dependency	Kshs	1,000,000/=
d.	Special damages	Kshs	34,400/=
		Total Kshs	**1,144,400/=**

2. The appellants' appeal is against both the finding of liability and the quantum of damages awarded. The grounds of appeal impugn the judgment in its finding that: the appellants did not prove their case on balance in the lower court; the wrong principles for awarding loss of dependency, which was manifestly excessive, were adopted by the trial court; and that the trial court failed to take into account the defendants' evidence.

3. It is now trite that the following three complementary principles guide a review of the evidence on a first appeal: first, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; second, that in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and third, that it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time. See: ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal) No. 172 of 2000(CA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000 (CA); Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd (Kisumu High HCCC No. 88 of 2002).***

4. In considering a request to review an award of general damages, the following principle stated by Law J.A. in the case of ***Butt v Khan (1977) KAR 1*** applies:

> ***An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 as either inordinately high or low.***

Analysis and Determination

On liability

5. The appellants argue that PW1, the child's father, was not at the scene of accident and PW2's evidence was full of inconsistencies. PW2 testified that he was headed to Tulaga, Nyandarua, when he saw five children in a group walking along the road on the right side. Four of them began crossing the road, and the vehicle, which was driving along at high speed and marked "Patmatt", tried to avoid knocking them and swerved. In so doing it hit the fifth child who was on the side of the road, and threw the child into the bush. He ran there and saw that the child belonged to his friend, who he tried to call on phone in vain.

6. In cross examination, PW2 said there was no zebra crossing where the children were crossing the road; he reiterated that the deceased was off the road when he was knocked down; and that the vehicle had swerved to avoid the other children. The cross examination.

7. Despite the appellants' assertions of inconsistencies in PW2's evidence, his recorded examination in chief and cross-examination does not reveal any inconsistencies.

8. DW1, the appellant who drove the accident vehicle, testified that as he was driving a child suddenly appeared on the road. He tried to veer off the road but hit the child, because he saw the child when the vehicle was very near, and he couldn't brake. In cross examination, he said there was no zebra crossing, no schools, houses or shops nearby, and that the road was straight and flat; that he was driving at about 50kph in a loaded vehicle. In re-examination, he said the distance between him and the child was very short.

9. The trial court held that given that the road was straight and flat, and that there were no obstructing houses or shops nearby on the straight flat road, the driver ought to have seen the child approach the road; unless he was driving fast and not exercising due care and attention.

10. The telling evidence of PW2 was that:

> ***"I saw the child when the vehicle was very near. I tried to brake but it was too late… the child did not check the road before crossing..."***

Further, in cross examination, that:

> ***"the accident occurred on a straight road. There were no shops or houses nearby. It was just a straight flat road"***

11. The driver seems to have had time to notice that *"the child did not check the road before crossing"*; that this happened on a straight flat road without the obstruction of houses, yet he says he "*saw the child when the vehicle was very near"* to the vehicle.

12. In those circumstances, I agree with the trial magistrate that the driver must have been driving both fast and without exercising due care and attention given the conditions of the road and the obvious non-obstruction to visibility along the road, as there were no houses or shops. The driver did not state that the child came running onto the road from behind bushes or trees. He does not say why he could not have braked earlier. He can only have been inattentive not to have seen the child until the child was too close to the vehicle.

13. When the evidence of PW2 is then taken into account, the reasons for the accident become clearer. That, on a balance of probability, he was driving fast, that there were other children were on the road and he had to swerve to avoid them, hence knocking the deceased who was off the road. All in all, the trial court's finding of liability cannot be impugned, and I uphold the same.

On damages

14. I have carefully perused the appellants' submissions on damages. They challenge the award of Kshs 1,000,000/= for loss of dependency as excessive and urge that an award of not more than Kshs 500,000/= is sufficient as a conventional award. They cite the cases of **JGW & EWW v James Muriithi Muruga [2014]eKLR** where loss of dependency for the loss of a child of 15 years was awarded at Kshs 160,000/- and **Morris Gitonga v Morris Mutunga Kyaula & Anor [2017]eKLR** where an award of 500,000/- for death of a child of 15 years was not interfered with on appeal.

15. The appellants also urge that an award of a global sum might be more appropriate. Citing the case of **Oshivji Kuvenji & Another v James Mohamed Ongenge [2012]eKLR** where the deceased child was 6 years old, and Ngenye J reduced the award from 800,000/- concluding that:

> ***"…. the trial court failed to apply good principles in arriving at the sum awarded for loss of dependancy which I conclude to be inordinately too high. Given the contingencies in the economy and especially the inflationary rates, I consider a global sum of Ksh. 320,000/= as adequate award under the Fatal Accidents Act."***

16. The trial magistrate considered the arguments of both counsel; considered the case of **Mohamed Abdinoor Achi v Wilson Wanyeki Waruta & Abdirizak Mohamed , Nairobi HCCC No 1525 of 2002** where the estate of a 10 year old was awarded a multiplier of 20 years; and **Kenya Breweries Ltd v Samo (1991) [1990]eKLR** cited in **Daniel Mwangi Kimani & 2 Others v VJGM & Another[2016]eKLR** where the court awarded Kshs 1,000,000/- for death of a 9 year old. She also considered the defence's authorities proposing an award of 150,000/-.

17. The trial court also took into account the case of **Daniel Mwangi Kimemia & 2 Ors v JGM & Anor deceased [2016]eKLR** where Kshs 1,000,000/- was awarded in respect of a 9 year old deceased on the well-established principles discussed in that case that **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. There, the court (Gikonyo, J) said:**

> ***"[12] Applying the above test to this case, it is important to note that the deceased: (1)aged nine years; (2) was already attending [particulars withheld] Primary School; (3) was a bright student and was always in position one to three in her class. The deceased had expressed her desire to become a doctor upon completion of her education. But all the dreams and desires were shattered by the untimely death herein. Her parents also reasonably expected that she would finish school, enter the job market and help them. In Kenya, and particularly among the Asian and African communities, every child is a blessing to the family and is off real worth to them. That is why the law is that damages for loss of dependency are not in question; they are awardable for every child whose life is cut short by the negligence of another in a road traffic accident. Therefore, discretion is only on quantum of damages. As a matter of law, damages awardable for such child who was nine years old, already in school and doing well in her studies, 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 to be ascertained. In 1990- over 25 years ago-the judges of Appeal in the Saro case (supra) awarded a sum of Kshs. 100,000 to the deceased minor aged 6 years. With the passage of time and the attendant inflation, awards for loss of dependency in respect of deceased child have increased steadily. As a matter of common sense and good judgment, for the deceased who died at the age of nine years; was a student at [particulars withheld] primary school with excellent performance; and the fact that her parents had reasonable expectations that she would finish school, enter the job market and assist them in old age, a sum of Kshs 1,000,000 would be fair compensation under the head of damages for loss of dependency***.

18. In **Oshivji's case**, the court pointed to cases where the courts had awarded differing amounts in damages for loss of dependency and cited for example:

- **Nairobi HCCC. No. 1525 of 2002 Mohammed Abdinoor Abdi v Wilson Wanyeki Waruta And Abdifizak Mohamed**. The deceased herein was 10 years old when he met his death. The Judge awarded him a minimum wage of Ksh. 3,000/= and used a multiplier of twenty (20) years, thus arriving at a figure of Ksh. 720,000/= in a Judgement delivered on 24th February 2005; and

- Nairobi HCCC. No. 24 of 1998 **David Ngunje Mwangi v The Chairman Of Board Of Governors Of Njiiri High School** where the deceased was aged seventeen (17) years. In considering his prospective career the Judge considered his earnings at minimum wage of Ksh. 4,000/= which he would have earned for thirty (30) years given the contingencies of life; thus arriving at a figure of Ksh. 1,680,000/= being awarded for lost years.

19. The judge in **Oshivji's case** finally concluded that she was satisfied that there was a failure by the trial court to give a rationale for using the multiplier method, and stated as follows:

> ***"My concern with the judgement of the lower court is that the trial Court did not give the rationale for tabulating the loss of dependancy with a multiplier and assuming what would have been earnings of the minor. Save to say that the minor died while in Standard one, no evidence was tendered to show how he performed in school, so that it could be assumed he would have lived to be a senior government officer at adulthood. PW.1 did not tender any school performance report and so his conclusion that the deceased would become a senior government officer was without basis."***

20. In the present case, the evidence of the plaintiff was that the deceased was aged 6 years; He availed a letter from the deceased's headmaster that the child was in standard one and was of average performance; that the child had expressed he wanted to be a pilot; and that he said he wanted to help his family when he grew up. The trial magistrate decided on a global sum award of Kshs 1,000,000/-.

21. I note that the child was not stated to be an exceptionally bright student, and the question is whether the amount awarded was excessive in the circumstances. I think not. The principle in the **Bashir Ahmed Butt** case that *an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate*; and that *it must be shown that the Judge proceeded on wrong principles of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or law, remains good law.*

22. In the circumstances, nothing has been placed before me to demonstrate that the trial court proceeded on wrong principles or that the award was an erroneous estimate, or inordinately high. What is clear is that had the matter been before me, I might have given a slightly lower award, but that is not a sufficient reason to overturn the award given by the trial court in the absence of misapplication of the law or the award being inordinately high.

23. Accordingly, I find no reason to disturb the award and dismiss the appeal on quantum of damages.

24. As there was no challenge to the other aspects of the award on quantum, the award by the trial magistrate is upheld.

25. Accordingly, the appeal herein is dismissed in its entirety with costs to the respondents.

26. Orders accordingly

Administrative directions

27. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

28. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

29. Orders accordingly.

Dated and Delivered via video-conference at Nairobi this 4th Day of June, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Ms Nasimiyu for the Appellants

2. Ms Kithinji for the Defendant

3. Court Clerk - Quinter Ogutu