



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO 27 OF 2015**

**BENARD WICHENJE.....1<sup>ST</sup> APPELLANT**

**SAMSON MUDENYO OPARA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**AMK (suing as the administrator and**

**personal representative of the estate of**

**ASM-(DECEASED).....RESPONDENT**

*(Appeal arising from the Judgment in Bungoma Chief Magistrate's court Civil Case*

*No. 567 of 2013 delivered on 29<sup>TH</sup> April 17<sup>th</sup> day of April 2015 by HON.D.C.MUTAI – RM)*

**JUDGMENT**

By plaint dated 19/12/2013, the respondent in this appeal **AMK** (suing as the administrator and personal representative of the estate of ASM-(DECEASED) sued the Appellants BENARD WICHENJE and SAMSON MUDENYO OPARA claiming; as at paragraph 7 of the plaint at the time of his painful death the deceased was aged 17 years and a form 3 student at [*Particulars withheld*] School and was above average student hoping to be a teacher in future.

The basis of the claim was that on or about 6<sup>th</sup> December 2012 the deceased was a pillion passenger on motor cycle registration number KMCM 493 H along Kimilili-Chwele Road at Teremi area when the 1<sup>st</sup> Defendant's motor vehicle registration number KBM 346A was so negligently and without any due care and regard driven by 2<sup>nd</sup> Defendant that it lost control and caused an accident in which it knocked motor cycle registration number KMCM 493 H and as a result deceased sustained fatal injuries.

By statement of defence dated 19<sup>th</sup> February 2014 the appellants denied the claim and any liability or damages. By way of consent adopted by the court on 4<sup>th</sup> March, 2015, judgement was entered on liability for plaintiff against Respondent in the ratio of 50% 50% in favour of the Plaintiff as against the Defendants jointly and severally. The only issue therefore before the trial magistrate was assessment of damages. By judgement dated 29/4/2015 the learned magistrate assessed the damages as hereunder.

**Pain and suffering**

The deceased died on the 6/12/2012 but could not specify time. Under this head the I would award Kshs.20,000/=.

**Loss of expectation of life**

The deceased died at the age of 17 years. A student whose life was cut short at tender age. Under this head I award Kshs.120,000/=.

**Loss of dependency**

The Deceased in this case was 17 years still a minor and average student in form 3 upon assessing his performance. He would eventually finish school and support his parent as well as his personal needs. I thus find it reasonable not to go the lumpsum way but adopt a dependency ratio of 2/3 guided by the decision in Nairobi/HCCC/2409/1998. I also adopt the prevailing rate of 6999 and do also find that a multiplier of 30 years would suffice. The Plaintiff are therefore awarded under this head  $2/3 \times \text{Kshs.6999} \times 30 \times 12 = \text{Kshs.1,670,760/=}$

less 50% liability on Plaintiff leaving a total of Kshs.839,880.00 due to the Plaintiff.

### **Funeral Expenses**

The Plaintiff pleaded 79,800/= but submitted Kshs.70,000/= and no evidence was submitted and been guided by decision in Keriato/Hccc/173 of 2001.I hereby award Kshs.35,000/= as I find the amount to be reasonable.

### **Special damages**

The special damages pleaded and proved under this head was Kshs.15,000/= and thus I award Plaintiff Kshs.15,000/=.

The Appellants are aggrieved with the judgment of the Learned Trial Magistrate on quantum for general damages only and have filed five grounds of appeal against it on the following grounds;

- 1. That the learned magistrate erred in law and fact in applying the two thirds ratio in determining the issue of loss of dependency when the deceased was a minor aged only 17 and passed away without a wife or any issues.**
- 2. That the learned magistrate erred in law and fact in applying very high multiplier of 30 when the deceased died aged 17 years when evidence available and law merited a much lower multiplier**
- 3. That the Honourable Court 's award on the 2 limbs above was harsh ,biased and contrary to all the principles of law applicable and has resulted in a total miscarriage of justice.**
- 4. That the overall award of the court was in the circumstances so inordinately high and unreasonable and resulted in total miscarriage of justice.**

By consent of Counsel of both parties this appeal was to be disposed of by way of written submissions. Both parties filed their respective submissions.

Mr. Owinyi for the appellant submitted that the deceased was 17 years old and in form 3 and only dependents were his father and mother and was not making any earning at time of his death thereof one could not tell his future aspirations and dreams. Mr. Owinyi submitted that on the assessment of damages for loss of dependency the trial magistrate in applying the multiplier approach in this suit occasioned a miscarriage of justice as the court should have used a global amount for the same. Mr. Owinyi submitted that global sum of Kshs.700,000/= would have been sufficient compensation under the head.

Secondly Mr. Owinyi submitted that the learned magistrate used a multiplier approach in determining the loss of dependency of the estate of the deceased they have no problem with the multiplicand adopted however, the trial magistrate using the multiplier approach adopted a dependency ratio of 2/3 in the suit yet deceased minor had no wife or children and the counsel humbly submitted that the court erred in adopting dependency ratio of 2/3.

Mr. Owinyi submitted the deceased be a minor 17 years old and in form 3 he could have started making an earning at 25 years thereof the multiplier to be used was of an employed of 25 years old. Mr. Owinyi submitted that the multiplier approach ought to have been calculated as follows;

$$1/3 \times \text{Kshs.6,999} \times 25 \times 12 = \text{Kshs.699,900}/=.$$

Mr. Z.K. Yego for the respondent opposed the appeal. He submitted that the Plaint filed by Plaintiff (now Respondent) claimed for general and special damages and the learned magistrate held that the Respondent had proved his case on balance of probability and awarded the general damages of Kshs.1,679,760/= less contributory negligence at 50% by the Respondent and also awarded kshs.35,000/= for funeral expenses and special damages of Kshs.15,000/=.

He submitted that the learned magistrate used multiplicand award of 6999 and dependency ration of 2/3 and a multiplier of 30 years deceased being a 17 years old was sufficient because he could not be equated to a 10-13 year old kid whose career path is not well known thereof the trial magistrate application of multiplier of 30 years was reasonable in this case considering deceased was just a step away to be through with his studies.

He further submitted that the trial magistrate while making the judgement relied on facts and evidence put and proved before him and thereof submitted that the learned magistrate did not misdirect himself in finding that the Respondent had proved case against the Appellant.

In this appeal, it is noted that there was consent of liability adopted by the court on 4<sup>th</sup> March,2015 and therefore the only issue for determination in the trial court and this court is the quantum of damages awarded.

The first issue raised by appellants is on evidence on quantum counsel submitted that court erred in using multiplier approach because the deceased was a minor aged 17 years old who was still in form 3 and therefore one could not tell his future aspirations and dreams. Counsel submits that the court could have used a global amount for the same and he referred the court to the authority of **Wembo & 2 Others -Vs- I.K.K & Another (2017)**. Counsel in response submits that the action was brought under section 4 of the Fatal Accidents Act and thereof the parents of the deceased in this are deemed as dependants even if the deceased was a minor.

The principles upon which appellant court can consider in reversing the finding of an award of a lower court are well stated in **Butler Vs. Butler C.A. NO. 49/1993**. The appellant must demonstrate that the court in exercising its discretion acted on wrong principles, failed to take into consideration matters which ought to have been considered or that the award is so excessive or little as would reflect on erroneous application of

the principles of assessment of damages.

In this case although the deceased was a 17 year old and in form 3 he had prospects of getting employment after form 4 or even further education. There is evidence that he had parents who would be his dependants upon employment. The trial magistrate rightly in my view adopted the minimum wage as the multiplicand in view of the fact that the deceased could at least be engaged in some employment after his studies. This approach in my view was prudent and a correct basis for assessment of damages.

I have considered the submissions by the appellants and particularly on the issue of damages awarded there is no evidence that the trial magistrate failed or took in consideration extraneous matter or applied wrong principles on assessment of damages.

Consequently, I don't find any merit in this appeal and its hereby dismissed with costs.

**Dated and Delivered at Bungoma this 6<sup>th</sup> day of February, 2019.**

**S.N.RIECHI**

**JUDGE**