



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 40 of 2014

(Arising from the judgment of the Hon Maundu (SPM) delivered on 15th October 2014 in MAUA CMCCC No. 157 of 2011)

(CORAM: F. GIKONYO J.)

FREDRICK BUNDI RUCHIA.....1ST APPELLANT

GEORGE MWENDA.....2nd APPELLANT

-VS-

SMM (suing as the legal representative of the estate of

JMM (DESEASED).....RESPONDENT

JUDGMENT

[1] This appeal emanates from the judgment in Civil suit No.157 of 2011 where the Respondent was awarded a net sum of Kshs. 1,280,000/= which included *inter alia* a gross sum of Kshs 1,200,000/= for loss of dependency. Liability was determined by consent of the parties recorded on 2nd July 2014 by the trial court at the ratio 80%:20% in favor of the plaintiff. The suit was filed following the demise of a minor as a result of a road traffic accident which occurred on 14th July 2010 at Kathie along Meru- Maua Road when Motor vehicle KAZ 191U knocked him down. His parent being the legal Representative of the estate of the minor, sued the Appellants herein their capacities as driver, beneficial owners, respectively, of the accident vehicle.

[2] The Appellant being aggrieved by the award filed this appeal and cited three (3) grounds of appeal in his Memorandum of Appeal. The said grounds were enumerated as hereunder;

a. THAT the learned Magistrate erred in law and in fact by failing to take into account the award of damages under the Law Reform Act while awarding damages Fatal Accidents Act thereby arriving at an award that is inordinately excessive.

b. THAT the learned Magistrate erred in law and in fact in awarding a sum of Kshs 1,200,000/= for lost years contrary to the provisions of Cap 405.

c. THAT the award for lost years is inordinately excessive and not supported by the Law and evidence on record.

[3] The Appellants filed their submissions on 22nd August 2008. They submitted that the award made under the Fatal Accidents Act was high and that under the two Acts i.e. The Law Reform Act and the Fatal Accidents Act they are to compensate the courts have generally held that, where the beneficiaries are the same, the award under the Law Reform Act is deductible from the award under the Fatal Accidents Act to ensure there is no case of double benefit and to this end they relied on **Edner Gesare Ogecavrs Aiko Kebiba (suing as the legal Representative of Alice Bochere Aiko- deceased)[2015] eklr.** That the multiplier adopted of 20 years was on the higher side and that the trial Court failed to consider the uncertainties of life that would have probably curtailed the life of the deceased. That the trial court therefore failed in adopting a dependency ratio and to this end he relied on the cited authorities **John Wamae&2 others vrs Jane Kituku Nziwa& Anor [2017] ekLR & Mwanzia vrs Ngalali Mutua Kenya Bus Ltd.** Lastly they submitted that in the instant case the deceased performance was not proved and the Court was not told the profession the deceased was to be engaged in. That the Court was best placed to adopt a global sum. He cited the authority **PI vrs Zeina Roses Ltd & Anor [2015] eklr & Moranga Abel Nyakanyana v Jackson Kichwen [1999] eklr** where the courts awarded a global sum of Kshs. 300,000/=.

[4] The Respondent submitted that the Appeal was defective as there was no decree issued by the trial Court and in its absence the appeal is incompetent and therefore ought to be dismissed. That the First ground of the appellants appeal had already been determined in **Hcca No. 158 Of 2011 Charles Mageto& Anor Vrs Sospeter Ndungu Kamau.** That there are considerable changes in Cap 405 showing compensation in the respect to motor vehicle accidents. That the court awards damages on a case to case basis and depending on the nature

and facts of the case before it. They relied on Sera Auma Juma vrs Bat Ltd (1978) Klr where Chesoni J. held that the dependency sum and the multiplier depend on the facts of the case and no general rule can be made as to how a dependency multiplier should be determined. He also relied on Asal vrs Muge& Anor (2001) Klr. They also relied on cited cases where the court never sought to make deductions on the multiplier i.e. Sheikh Mushtap Hassan vrs Nathan Mwangi Kamau Transporters &Five Others (1982-1988) 1 KAR 946, HCCC No. 1525 of 2002 Mohammed Abdi noor Abdi &Anor vrs Wilson Wanyeri Waniita & Anor (Nairobi),Hcca No. 133 Of 2003 Abdi Kadir Mohammed & Anor Vrs John Wakaba Mwangi,Hccc No. 2409 Of 1998 David Njunge MwangiVrs Chairman of The B.O.G. Njeri High School&H.C.CA NO. 30 of 2014 Japheth Kibiri Jonathan vrs Wilson MunyuaMaitima

ANALYSIS AND DETERMINATION

[5] This court has carefully considered the record of appeal and submissions presented. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat however that I have neither seen nor heard the witnesses. See Selle v Associated Motor Boat Company Ltd[1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1.

[6] I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the submissions by learned counsels for both parties.

[7] From the record of Appeal, this is an appeal on quantum of damages and global issue for determination is whether the trial court took into account irrelevant factors or failed to take into account relevant factors, or erred in principle of law or the award was inordinately low or excessive that it must be an erroneous estimate of damages. I need not multiply authorities which are many on this threshold. The specific strands argued are:-

a. That the learned Trial Magistrate erred in law and in fact by by failing to take into account the award of damages under the Law Reform Act while awarding damages under the Fatal Accidents Act thereby arriving at an award that is inordinately excessive.

b. That the learned Magistrate erred in law and in fact in awarding a sum of Kshs 1,200,000/= for lost years which was inordinately excessive and not supported by law and the evidence on record.

[8] Only the plaintiff testified. It was the testimony of Samuel Munakina Marete, Pw1 that he spent Kshs. 4800 in mortuary and Kshs 2,400 at the Hospital. He produced an invoice of Kshs. 4,800/= and receipt of Kshs. 2,400/= as Exh 1 & 2 respectively He also claimed to have spent Kshs. 14,000/= for the coffin and Kshs 10,000/= for transport but the same was not produced. He averred that he spend Kshs 500/= for the motor vehicle search and he produced the motor vehicle copy of records and the receipt as exhibit 3 & 4 respectively. He also produced Demand letter Exh 5 & Copy of limited Grant Exh 6. He stated that his son was aged five (5) at the time of the accident and in nursery school at Kathathene Primary School and was always top ten in his studies. That it was their expectation that he shall assist them in their old age. He blamed the driver of the motor vehicle for being reckless, careless and negligent and prayed for both general damages, special damages and costs of the suit.

[9] Both parties also filed written submissions proposing different award on quantum. The plaintiff filed its submissions on 23rd July 2014 and prayed that the Court relies on the minimum wage of Kshs. 5000/=as per gazette notice No. 196 & 197 dated 30th August 2013 and proposed a multiplier of 25 yrs. They subsequently prayed for a colossal sum of Kshs. 2,320,000/=. The defendant averred that the damages sought are not clear and that the plaintiff had abandoned the claim for damages in the Fatal accidents Act. They also averred that the damages under the Law Reform Act has not been specifically pleaded so were the special damages. They proposed a colossal sum of Kshs. 325,000/=

[10] The trial Court in its judgment awarded the plaintiff the following award;

a. Pain and Suffering Kshs. 10,000/=

b. Loss of expectation of Life Kshs. 70,000/=

c. Lost years Kshs. 1,200,000/=

less 20 % contribution Kshs. 256,000/=

Kshs. 1,024,000/=

[11] Before I delve into the substantive issues, I note that, contrary to the submissions by the Respondent I find that there was s decree issued by the trial Court on 10th April 2015 and a Certificate of osts dated 18th December 2014. Therefore the appeal is not fatal within the meaning of Order 42 Rule 2 of the Civil Procedure Act and Section 79 B of the Civil Procedure Act.

Taking into account award under the Law Reform Act

[12] The Court in Hcca No. 158 Of 2011 Charles Mageto & Anor Vrs Sospeter Ndungu Kamau already made a determination in this respect when it held;

“....there is no requirement in law to make any deduction. The only requirement is for consideration in making one award as against the other which is a matter of the discretion of the court. We find no reason to interfere with the award and reject

the ground of appeal.....”

[13] The same determination was adopted in the case 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 court held that;

25. In my considered view, it would be a futile exercise for a court to labour to make an award under the Law Reform Act only to completely deduct it from the award under the Fatal Accidents Act. Effectively such ‘complete’ deduction would nullify the benefits intended by the two Acts of Parliament for deserving claimants.

26. Evidently therefore the trial court herein was entitled to make awards under both the Law Reform Act and the Fatal Accidents Act and hence to use the heads approach.

[14] Without much ado, I reject the argument and ground of appeal in that respect.

Of award for lost years

[15] In arriving at the sum of Kshs. 1,200,000/= the Trial Magistrate held as hereunder;

The deceased who was aged five (5) years was in nursery school and that he was a bright pupil with a promising future ahead of him. I award him a minimum wage of Kshs, 5,000/=. In the case of Mohammed Abdinor Ali vrs Wilson Wanyeki Warita and Adirizak Mohammed Hccc No. 1525 of 2002 the Court adopted a multiplier of 20 years where the deceased was aged ten (10) years. In the present case the deceased was aged five (5) years old. I would adopt 20 years multiplier. The amount awarded under this heads is therefore; Kshs 5000/=×20×12= Kshs. 1,200,000/=

[16] It has been submitted that the award and multiplicand is high, the trial magistrate never considered the uncertainties of life and that the deceased performance and profession was not ascertained.

[17] The Respondent herein clearly did not provide any evidence to show that the deceased herein was a performing student. He only averred that the deceased was a school going child at nursery school and was always top ten at his school. Given the fact that child was in his second year of study the nature of his employment or what he would be when he grew up was not ascertained. At this juncture I am forced to remind that courts should not be obsessed with the use of multiplier where it is not appropriate. See what Ringera J (as he then was) stated in the case of **Kwanzia vs. Ngalali Mutua & another** that:

“The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

[18] Again dependency is a matter of evidence and not a matter which the court should take judicial notice of. On this see the case of **EPHRAIM MUTAHI MUTUNDE V RAPTURE BUS SERVICES LIMITED MOMBASA HIGH COURT CASE NO. S18 OF 2011 (2016)** eKLR Otieno J that:

“ Dependency is always a matter of evidence and not a question of any conventional standards. It behooves a party/litigant to give evidence on the extent of its dependency to the deceased.

The trial magistrate did not seek to establish the length of dependency; vicissitudes of life; the age of dependents; life expected etc. which were necessary to justify the multiplier. The said multiplier was therefore not based on any analysis of facts of the case. Accordingly, I agree with the Respondent that the good judgment in this case should have been to award a reasonable global figure for loss of dependency.

[19] In order to find a proper award in respect to loss of dependency I am guided by the following authorities

a. In Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD)) [2016] eKLR. The deceased minor was aged nine years was awarded a sum of Kshs 1,000,000/= for loss of dependency.

b. In 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 the deceased minor was aged 12 years. The court granted a global sum of Kshs. 600,000/= under the fatal accidents Act.

c. In Transpares Kenya Limited & another v S M M (Suing as Legal Representative for and on behalf of the Estate of E M M (Deceased)) [2015] Eklr the deceased minor was aged 5 years was granted a sum of Kshs. 602,400/=.

[20] I am therefore inclined to disturb the award on lost years and award a global sum of Kenya Shillings Eight Hundred thousand (Kshs. 800,000/=).

[21] The upshot therefore is that the appeal succeeds on the 2nd Ground and the judgement is now entered in favour of the Respondent against the Appellant as hereunder;

General damages under Law Reform Act

a. Pain and Suffering Kshs. 10,000/=

b. Loss of expectation of Life Kshs. 70,000/=

General damages under Fatal Accidents Act

c. Lost years Kshs. 800,000/=

Total - Kshs. 880,000/=

(less 20%) - Kshs. 176,000/=

Net - Kshs. 704,000/=

Cost of the lower court and interest goes to the Respondent. Each party shall bear costs of the appeal.

Dated, signed and delivered in open court at Meru this 5th day of February, 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Rimita for respondent

Mutuma for Kariuki for applicant

F. GIKONYO

JUDGE