



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 22 OF 2017**

**SIMON BOGONKO.....APPELLANT**

**-VRS-**

**ALFRED MONGARE MECHA & JANEPHER NYABOKE MONG'ARE**

**(Suing as the Legal Representatives of the Estate of AKAMA MONG'ARE (Deceased)...RESPONDENTS**

**[Being an Appeal from the Judgement and Decree of Hon. E. K. Nyutu – PM dated and delivered on the 25<sup>th</sup> day of July 2017 in the original Nyamira Principal Magistrate's Court Civil Suit No. 2 of 2016]**

**JUDGEMENT**

This is an appeal on the quantum of damages awarded to the respondent following a motor accident involving Ruth Akama Mong'are (deceased) and the appellant's motor vehicle. Liability was by the consent of the parties settled in the ratio 75:25% in favour of the plaintiff against the defendant.

The appeal is premised on the following grounds: -

- “1. That the award of General damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance.**
- 2. That the Learned trial Magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.**
- 3. The Learned Trial Magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.**
- 4. The Learned trial Magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability.”**

By the appeal, this court is urged to set aside, vary or quash the judgement and decree of the lower court and further that this court vary the award to a reasonable amount commensurate to the injuries sustained by the respondent.

The appeal which is vehemently opposed was canvassed by way of written submissions. According to the advocate for the appellant, the sum of Kshs. 800,000/= awarded for loss of dependancy was inordinately high given firstly, that the deceased was only six years old at the time of her death and secondly, because the sums awarded in similar cases range between Kshs. 300,000/= and Kshs. 400,000/=. Counsel submitted that no iota of evidence was adduced to demonstrate the performance of the deceased both in school and in life and what her expected future would have been. Counsel also submitted that it is impossible to predict what a child of six years would be in future. He cited several cases to support his submissions.

He further faulted the trial magistrate for awarding a sum of Kshs. 100,000/= for pain and suffering and contended that a sum of Kshs. 20,000/= should suffice. Finally, he urged this court to subject the interest and costs of this case to 25% contribution.

For the respondent, it was submitted that there was no miscarriage of justice in the sum awarded. Counsel for the respondent submitted that similar injuries should attract similar awards and stated that recently awards ranging from Kshs. 600,000/= to Kshs. 1,000,000/= have been made in cases where the deceased are minors. He urged this court to find that the award in this case is not excessive. Counsel cited two cases to support this submission and urged this court to dismiss the appeal with costs to the respondents.

I have carefully considered the submissions by counsel. As correctly submitted by counsel for the respondents, it is trite that this court can only interfere with the lower court's award if it is evident that the court took into account an irrelevant factor or left out a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence – **Kemfro Africa Ltd Vs. AM Lubia & Another (No. 2) 1987 [KLR] 30**. It is my finding that the award in this case is neither manifestly excessive nor based on a wrong application of the law. The courts are also enjoined to take factors such as inflation into account. The authorities cited by counsel to support his submission are more than a year old and the trial magistrate was correct in taking the passage of time into consideration and making provision for it. I am not therefore persuaded that there are good reasons to disturb the award for loss of dependancy and that ground of appeal fails.

For pain and suffering, I am satisfied that the deceased having died on the spot, the sum of Kshs. 100,000/= was excessive and that is reduced to Kshs. 20,000/=.

As for subjecting the interest and costs to 25% contribution, my finding is that whatever decree will be issued will already have taken care of that as the interest and costs will be assessed on the net award (i.e. award after contribution) but not on the gross award. That ground of appeal is therefore misconceived and is dismissed. Accordingly, the appeal succeeds only in respect of the award for pain and suffering which this court has reduced to Kshs. 20,000/=. The judgement of the lower court is otherwise affirmed. The appellant shall bear the costs of the appeal. It is so ordered.

**Signed, dated and delivered in Nyamira this 7<sup>th</sup> day of February, 2019.**

**E. N. MAINA**

**JUDGE**