



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL APPEAL NO 55 OF 2017

1. ROSEMARY ONYANGO
2. ROSEMARY OWOURAPPELLANTS

VERSUS

1. MOHAMED JENJEW A NDOYO
2. FATUMA UCHI MWAMBEZI (both suing on behalf of the
estate of AM (DECEASED).....RESPONDENT

(Being an appeal from the judgment and decree of the Mariakani Senior Resident Magistrate Honourable Lutta delivered in Mariakani Chief Magistrate Civil Case No 436 of 2015 on 19th July 2017)

BETWEEN

1. MOHAMED JENJEW A NDOYO
2. FATUMA UCHI MWAMBEZI (both suing on behalf of
the estate of AM (DECEASED)PLAINTIFFS

VERSUS

1. ROSEMARY ONYANGO
2. ROSEMARY OWOUR.....DEFENDANTS

JUDGMENT

1. The Appellants Rosemary Onyango and rosemary owner were the defendants in Mariakani SRM Civil Case No 436 of 2015. They had been sued by the respondents Mohamed Jenjewa Ndoyo and Fatuma Uchi Mwambezi for damages on behalf of the estate of AM (deceased) who died as a result of injuries sustained on 15th May, 2015 when the deceased was hit along Kaloleni Mazeras road by the appellants' motor vehicle registration number KBK 745K.

2. At the conclusion of the trial, the trial magistrate entered judgment in favour of the respondents as follows:

“I therefore enter judgment for the plaintiff against the defendant as follows:-

- i. Pain and suffering Ksh20,000/-**
- ii. Loss of expectation Ksh200,000**
- iii. Loss of Dependency Ksh1,000,000/-**

iv. Special damaged Ksh45,300/-

Total Ksh 1,265,300/-

The said amount shall be subjected to the agreed contribution and the plaintiff is also awarded the costs of the suit and interest.”

3. The Appellants were aggrieved by the said decision and have moved to this court with a view to setting aside or varying the judgment on the grounds that:-

“1. That the assessment of damages for loss of dependency and loss of expectation of life is in coordinately high as to represent an entirely erroneous estimate.

2. that the learned trial magistrate in assessing damages under the Law Reform Act viz loss of dependency by failing to apply the correct principles in determining the same hence arrived at an erroneous assessment or estimate of damages.

3. that the learned trial magistrate misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principles and judicial precedent and submissions by parties that he made an award under the Law Reform Act and the Fatal Accidents Act, that was inordinately high hence an erroneous estimate of damages which the deceased and his estate suffered.

4. The learned trial magistrate erred in law and in fact in failing to take into account the fact that the beneficiaries both under the Law Reform Act and the Fatal Accidents Act were the same while assessing damages under both heads.”

4. When the appeal came up for hearing on 21st January 2019 Mr Jengo for the appellants abandoned the 4th ground of the memorandum of appeal and indicated to the court that the appellants would limit their appeal to the assessment of damages for loss of dependency.

5. The advocates for the parties highlighted the written submissions they had filed. Counsel for the appellants submitted that the trial court was wrong in adopting a multiplier approach in assessing damages and ended up with an award for loss of dependency that was inordinately high.

6. It was further submitted for the appellants that the trial court erred in principle in adopting a multiplier approach in a case where the deceased child was very young. According to the appellants, the deceased had barely started nursery school and the evidence of the only witness when testified did not disclose the capacity of the child nor his prospects in life or what the child would be if he had grown up to maturity.

7. It was the appellants' case that the trial magistrate ought to have given a global award for loss of dependency other than adopting a multiplier approach. Counsel urged this court to be guided by the decisions in **Kenya Breweries Ltd v Soro [1995] eKLR and Nairobi HCCC No 12012 of 1992 Kinyozi Kitungi v Simon Okoth Obor & Another**. Replying on the decision in **Sheikh Mustaq Hassan v Nathan Kamau Transporters & 5 Others [1986] EKL**R counsel for the appellants submitted that the award for an older child should be higher than that of a younger child.

8. The appellants concluded their submissions by urging this court to set aside the award of Kshs1,000,000 for loss of dependency and substitute the same with an award of between Ksh200,000/- and Ksh300,000/.

9. The decisions in **Oshirji Kaverji & another v James Mohamed Ongenge, HCCCA No 40 of 2009, Chem Wembo & 2 Others v IKK & another HCCA No 32 of 2014** and **HKM v Francis Mwangi Nabere [2017] eKLR** were cited as supporting the proposed award.

10. Opposing the appeal, counsel for the respondents, Njoroge Mwangi started by stating that the appeal lacked merit and should be dismissed with costs. It was the respondents' case that for the appellate court to upset an award by the trial court, it must be satisfied that the trial magistrate in assessing damages took into account an irrelevant factor or left out a relevant factor or the amount awarded was inordinately lower so inordinately high that it must be wholly erroneous estimate of the damage or the court applied the wrong principles.

11. Counsel for the respondents cited the decisions of **Kemto Africa Ltd t/a “Meru Express Services (1976)” & another v Aziei Kamu Miduka Lubia & another [1985] eKLR; and Catholic Diocese of Kisumu v Tete [2004] eKLR** as establishing the said principles.

12. Counsel for the respondents further submitted that there is no universal formula for assessment of damages on loss of dependency in respect of a deceased minor as courts have used the global sum approach or the multiplier/multiplicand approach interchangeably overtime. According to counsel, the choice of the approach to be adopted is therefore entirely at the discretion of the trial court and the trial court in respect of this appeal cannot be faulted for choosing the multiplier/multiplicand approach in the absence of settled procedure or law limiting the trial court exclusively to the global approach. The decision of Meoli, J in **Chem Wembo & 2 Others v IKK & another [297]eKLR** is cited in support of this assertion.

13. In conclusion, counsel for the respondents submitted that the appellants had failed to prove that the learned trial magistrate misdirected himself, took into account factors he ought not to have, failed to take into account factors he ought to have taken into account, applied the wrong principles of law, or the award was inordinately high.

14. Counsel for the respondents urged this court to dismiss the appeal pointing to the decision in Daniel Mwangi Kimeni & 2 Others v JGM

& another [2016] eKLR where an award of Kshs1,000,000/- for loss of dependency was awarded in respect of the estate of a child who was 9 years old at the time of death.

15. This being a first appeal, the principles that will guide this court are those established in *Seller Associated Motor Board Co.* [1968] EA as quoted by the court of appeal with approval in the case of *Association for the physically Disabled of Kenya v Kenya Union of domestic Hotels Educational and Allied Workers Union & Another* [2018] eKLR; civil Appeal No 116 of 2016 (Mombasa) as follows:

Para 10 (physically disabled case)

“Another stereotype that people with physical disabilities face is that they are depressed because of their condition. People think that because they are stuck in a wheel chair or they need a Seeing Eye dogs to walk down the street that their lives aren’t as full as a “normal” person’s. However many disabled people live life to the fullest, and possibly better than people without disabilities. For example, wheel chair basketball is a popular sport for many people to become active in the wheel chair community.”

16. The only issue for the determination of this court in this appeal is whether the trial magistrate applied the correct principles in making the award for loss of dependency to the estate of the deceased minor.

17. In *Chen Wembo* (supra) Meoli, J did indeed observe that:-

“there is therefore no golden rule in assessment of damages in respect of a deceased minor. The heads, global or mixed approaches have been applied in superior courts.....

I would therefore agree with Mr Waigwa’s submissions that the adoption of the heads approach in the award of damages in respect of a deceased minor is not *ipso facto* evidence that the award is excessive or erroneous.”

18. Even after stating so, the learned Judge went ahead and adopted the global award approach observing that:-

34. 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. The speculative nature of the matter renders the court’s exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants.

35. In my considered view, this case was eminently unsuited to the multiplier/multiplicand approach in the assessment of damages in respect of lost dependency. The court in my considered view erred by accepting the invitation to strain the morsel of information placed before it in order to come up with an award based on the supposed future income of the deceased minor. Secondly the court failed to take into account that the award was subject to a dependency ratio as the dependents were not entitled to the full future income of the deceased minor.

19. The route of the global award taken by the learned Judge is indeed the best approach when it comes to determining the amount of damages to be awarded for case of dependency in respect of the estate of a deceased minor.

20. Counsel for the appellants correctly submitted that the trial court in making the award for loss of dependency, ought not to have relied on decisions in respect of minors whose ages was at great variance with that of the deceased minor herein. This wisdom was conveyed by the court of appeal in *Kenya Breweries Ltd v Saro* [1991]KLR 408 when it stated that:

“we would respectively agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded 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 not ascertained. That, we think is a question of common sense rather than law.”

21. The question therefore is whether the award was inordinately high thus inviting interference with the same by this court. As agreed by both sides the principles applicable are those stated by the court of Appeal in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another* (No.2) [1985] eKLR as follows:

“this Court will not interfere with the question of damages awarded by the trial court unless it is satisfied that the award was based on some wrong principle or is to manifestly excess or inadequate that a wrong principle may be inferred”.

22. The awards for loss of dependency for estates of minors have been rising steadily since 1991 when the court of Appeal upheld an award of Kshs1,000,000 on this lead in the case of *Kenya Breweries Ltd v Saro* [1991]KLR 408 in respect of the estate of a minor who died aged 6 years.

23. Recent awards range between Kshs200,000/- and Ksh1,000,000 irrespective of the age of the deceased minor. In the *Board of Governors Friends School Kamusinga & another v M. N S* issuing as administrator of the estate of I.K S (deceased) [2015]eKLR Kshs6,000,000 was awarded in respect of the estate of a deceased minor.

24. In **Daniel Mwangi Kimani & 2 others v JGM & another** (the personal representatives of the estate of NK (DCD) [2016] eKLR Ksh1,000,000 was awarded for loss of dependency in respect of the estate of a 9 year child.

25. In **Transpares Kenya Ltd & another v S.M.M** (suing as Legal Representative) of the estate of EMM (Deceased)[2015] eKLR Kshs500,000 was awarded to the estate of a 5 years old child for loss of dependency.

26. In the case of **H. K. M v Francis Mwangela Mabere [2017] eKLR**, Kshs200,000 was awarded for loss of dependency in respect of the estate of a 7 year old minor. In *Chen Wenbo* (supra) as award of Kshs1,000,000 for loss of dependency in respect to the estate of a 12 years old child was set aside on appeal and substituted with an award of Kshs600,000.

27. As regards the case before this court, the evidence that was adduced by the 1st respondent who testified as PW1 is that the deceased child was 7 years 8 months old in good health. Further that he was in good health and performing well in school and had ambitious of becoming a lawyer.

28. In my view, a child of tender age like two deceased could not be capable of articulating his desires and there was no guarantee that his dreams of joining a given profession would be fulfilled. Guided by the decisions I have cited above, an award of Kshs1,000,000 for loss of dependency was inordinately high in respect of the estate of the deceased. An award of Ksh500,000 which I hereby make was ideal in the circumstances of the case.

29. The appeal is therefore allowed and the award of Kshs1,000,000 made by the trial court to the estate of the deceased in regard to loss of dependency is set aside and substituted with the sum of Ksh500,000. The awards made on the other heads by the trial could remain undisturbed.

30. As regards costs, I find that the appellants have succeeded in their appeal. the appropriate order on costs in respect of this appeal is to order each party to meet own costs of the appeal. it is so ordered.

Dated and Signed at Nairobi this 8th day of April 2019

W. Korir

Judge of the High Court

Dated, Delivered and Signed at Malindi this 9th day of May, 2019

R Nyakundi

Judge of the High Court