



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO.23 OF 2016**

**IRERI MOSES .....APPELLANT**

**VERSUS**

**PETER MUTUGI MUTHIKE**

(Suing as the legal administrator of estate of the late

**MARY NJERI MUTHIKE (Deceased) .....RESPONDENT**

**JUDGMENT**

1. The respondent had filed a case as a legal representative of the estate of **MARY NJERI MUTHIKE** (Deceased) against the appellant seeking damages for injuries sustained as a result of a Road traffic accident on 08/09/2013 along Makutano Sagana Road. The accident involved motor vehicle KBB 918D and a pedestrian Mary Njeri Muthike who passed away. After a full trial the Court apportioned liability at 30:70% in favour of the respondent. On the issue of quantum, the court awarded the appellant damages as follows;

**a) Loss of dependency:**

The trial magistrate held that the deceased was aged 23 years and was a student at Moi University. That owing to the vicissitudes of life it could not be known how much she may have earned or which employment she should have pursued. He applied minimum wage of Kshs.18,000/=, multiplier of 20 years and ratio of 1/3.

$$18,000 \times 12 \times 20 \times 1/3 = \text{Kshs.1,440,000/=}$$

a) **Loss of expectation of life:** Kshs.100,000/=

b) **Pain and suffering:** Kshs.50,000/= since the deceased died on arrival at the hospital.

c) **Special damages:** Kshs.38,480/=.

$$\text{Kshs.1,628,480/= less 30\%} = \text{Kshs.1,139,936/=}$$

2. The appellant has appealed against the said judgment on the ground that the learned magistrate erred in awarding general damages that were too high and finding that the respondent was entitled to an award under Fatal Accidents Act as he was not a lawful dependant. That the loss suffered under the Fatal Accidents Act (loss of dependency) must be offset by the gain from the estate under the Law Reform Act (loss of expectation of life) since beneficiaries under both Act are the same.

3. The respondent opposed the appeal and filed submissions. He submits that the appellant had a duty of care to ensure the safety of other road users. He further submits that courts have adopted different approaches in awarding damages. That this has been resolved by the court of Appeal in **KENYA BREWERIES LTD VS. SARO, 1999 KLR AND SHEIKH MUSTAF HASSAN VS. NATHAN MWANGI KAMAU TRANSPORTERS & 5 OTHERS (1986) KLR 457.**

***“The court held that what is beyond doubt is that irrespective of the age of a deceased child and whether or not there is evidence of his pecuniary contribution damages are payable to his parents”***

4. That the estate of the deceased minor is entitled to damages and the approach by the court in awarding damages was not excessive or erroneous.

5. It submitted that the lower court rightfully awarded damages under the law Reform Act and under the Fatal Accidents Act. The Respondent prays that the appeal be dismissed.

6. As for the appellant it is submitted that the award of damages must be looked at with some degree of uniformity and that the best guide is to have regard to recent awards in comparable cases the appellant relies on MILLICENT ATIENO VS. OCHUONGO VS. KALOTA RICHARD [2015] eKLR AND FMM & ANOTHER VS. JOSEPH NJUGUNA KURIA & ANOTHER [2016] eKLR where the court relied on RINGERA J. IN LEONARD EKISAT & ANTOHER VS. MAJOR KIBINGEN 2005 eKLR where it was stated.

***“The principles applicable to an assessment of damages under the Fatal Accidents Act are all to clear. The court must in the first instance find out the value of annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature”***

7. I have considered the submissions.

8. The issue which arises is Quantum of damages. This is an appeal from the Magistrate’s Court and the court has to apply the principles to determine whether it is justified to disturb the Quantum of damages awarded by the trial Magistrate. The award of damages is an exercise of discretion. The appellants are challenging the award of damages by the Magistrate. The principle which governs this court in the exercise of the appellate jurisdiction is that it is the duty of the 1<sup>st</sup> appellate court to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind the trial court had an advantage as it heard the parties and give an allowance for that.

9. The appellant has not challenged the finding of the trial Magistrate on the issue of liability. I will therefore not disturb that finding.

10. On the issue of Quantum the appellant submits the damages awarded were too High and that the respondent was not entitled to an award under the Fatal Accidents. Their main contention is that the Magistrate erred in making an excessive award of Kshs.1,440,000.00 for loss of dependency in the absence of proof of such loss or dependency and further contend that the award was made to the deceased siblings who were not dependants under the Fatal Accidents Act.

11. They also contend that the multiplier approach was not appropriate as the deceased was unemployed and a student aged 23 years at the time of the accident. The minimum wage adopted was erroneously cited as 18,000/= instead of 9,780.95/10,000/= for the minimum wage of a general labourer.

12. The multiplier approach is just a method of assessing damages. It will be applied depending on the circumstances of the case. Where the facts cannot facilitate its application it must be abandoned and more practical approach has to be adopted considering factors such as age of deceased, amount of dependency per month or annually and based on the expected length of dependency where it is known without unsubstantiated speculation which will result to undue reliance of a method at the expense of doing justice.

13. The only issue raised by the appellant before the trial Magistrate was that to avoid double awards the awards under the Law Reform Act ought to be deducted from award under **Fatal Accidents Act**.

14. The High Court in Civil Appeal No.32 of 2014 also had explained the dictum of the KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES & ANOTHER VS. A. M. LUBIA & ANOTHER [1982 – 1985] 1 KLR727. In explaining it relied on C.A. NO.22 of 2015 HELLEN WARUGURU WAWERU VS. KIARIE SHOE STORES LTD (NYR) and said:

***“this court has explained the concept of double compensation in several decision and it is surprising that some courts continued to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise”***

15. The award of damages only to deduct it from the award would deny parties the benefits intended by the two Acts. The approach by the lower court to award damages under the different heads under the Law Reform Act and Fatal Accidents Act was therefore appropriate.

16. The issue of speculation which the appellants have used cannot be upheld considering that evidence which was undisputed was that the deceased was aged 23 years and was a student at Moi University. She had a definite career path. Upon finishing and it cannot be said that her future career was speculative. Based on the evidence before the trial Court, the trial Magistrate had a basis for using a multiplier the contention that a lump sum should have been considered is not supported under the law.

17. In the celebrated case of KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE GATHOGO KANINI –VS- A M LUBIA & OLIVE LUBIA [1982-88] KLR 727 the Court of Appeal held:

18. The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

19. These are the grounds which the appellant had to prove. The award of damages under the Law Reform Act was appropriate. There are various authorities which adopted the expected future earnings of the deceased from the nature of education and the age of the deceased.

#### **Loss of dependency**

The appellant stated that the multiplier approach was not appropriate since the deceased was unemployed and a student of 23 years. In addition, that the trial court applied minimum wage of Kshs.18,000/= instead of Kshs.9,780.95/10,000.00 for the minimum wage of a general labourer.

20. They applied to set aside the award of Kshs.1,440,000/= and award a global sum of Kshs.600,000/= - 700,000/=.

21. In **URSULAR MULANDI V KYALO MUTUNGA & OTHERS [2017] eKLR**

The High Court held;

**The deceased was a student aged 23 years and her parents had passed away when she was 9 years. Therefore, she had been brought up by the respondent who was her brother. The respondent in his evidence stated that the deceased was left with 2 years to complete university and had high expectation of the deceased supporting him.**

**KENYA POWER LIMITED V JAMES MATATA & 2 OTHERS (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF NYANGE MASAGA (DECEASED) [2016] eKLR**

The court in holding that there was no legal basis to have awarded damages of Loss of dependency since there was also no evidence that the deceased supported his sister stated;

**The only dependants for whose benefit a claim under Section 4(1) of the Fatal Accidents Act can be brought are a wife, husband, parent or child, a position that ASIKE- MAKHANDIA J (as he then was) articulated very well in the case of MULTIPLE HAULIERS CO LIMITED VS DAVID LUSA (Supra) and which this court entirely agreed with.**

**This court could not therefore have agreed more with the Appellant on its submissions that the Respondents and their sister were not and could not be regarded as the deceased's dependants within the meaning of the Fatal Accident Act.....**

22. On the issue of lost years, the court held;

**This court was therefore not inclined to award the Respondents' claim for lost years for the aforesaid reasons and further because they had not sought the same in their pleadings.**

23. However, in this case, the deceased's parents died when she was at age 9 years. She was brought up by the respondent until she passed away in university. The respondent took the role of a parent to the deceased and therefore the trial court was correct in awarding him loss of dependency.

**JOSHUA MUNGANIA & ANOTHER V GREGORY OMONDI ANGOYA [2018] eKLR**

The deceased was aged 23 years and was a 4th year student at Chuka University College, the court held;

**Our law reports are replete with cases where the court has extrapolated the earning of the deceased from the nature of education and expected career path (see for example RICHARD OSORO JINDIGA V ALEX THANGEI AND ANOTHER NRB HCCC No. 42 of 2007[2013] eKLR). The issue really is one of evidence and common sense as the Court of Appeal observed in KENYA BREWERIES LIMITED V SARO MSA CA CIVIL APPEAL NO. 144 of 1990 [1991] eKLR that;**

**We would respectfully 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.**

24. In the trial proceedings, the defendant computed the award as  $Kshs.18,000/= \times 12 \times 15 \times 1/3 = Kshs.1,080,000/=$ . The trial magistrate applied minimum wage and ratio as proposed by the defendant, the only difference was multiplier of 20 years.

25. In view of the above, there is no justification to interfere with the judgment. The appeal is without merits and is dismissed with costs.

**Dated at Kerugoya this 13<sup>th</sup> June 2019.**

**L. W. GITARI**

**JUDGE**