



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 5 OF 2019

BETWEEN

SAMETA LODGES1ST APPELLANT

JOHN PHYLIS MOMANYI2ND APPELLANT

AND

BONIFACE METOBWA MAUTI AND

STELLA KEMUMA MAUTI suing as the legal representative

of the estate of WNM (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon N.S. Lutta, SPM at the Magistrates Court at Kisii in Civil Case No. 516 of 2016 dated 5th December 2018)

JUDGMENT

1. The appeal arises from a judgment and decree of the subordinate court apportioning liability at 80:20 against the appellants and for causing the death of the deceased on 30th May 2013. The trial court awarded Kshs. 780,500/- as damages under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and the **Fatal Accident Act (Chapter 32 of the Laws of Kenya)** made up as follows:

Loss of expectation of life	Kshs. 100,000/-
Loss of dependency	Kshs. 800,000/-
Less 20%	
Subtotal	Kshs. 720,000/-
Special damages	Kshs. 60,500/-
TOTAL	Kshs. 780,500/-

2. The appellants now appeal on the grounds set out in the memorandum of appeal dated 22nd January 2019 as follows:

1. THAT the Learned Trial Magistrate erred and misdirected himself by failing to consider the Appellant's submissions on quantum and particularly in computing damages awardable under the Fatal Accidents Act in respect of the death of a minor of tender years.

2. THAT the Learned Trial Magistrate misdirected himself and therefore erred in law in his assessment of damages awardable under the Fatal Accidents Act, and in particular for Loss of Dependency, which was manifestly excessive under the circumstances, where the Deceased was a minor of tender years

3. THAT the Learned Trial Magistrate erred in assessing damages and failed to apply principles applicable in award of damages and comparable awarded made in analogous circumstances.

3. It is evident from the grounds aforesaid that the issues in this appeal relate to the award of damages for loss of dependency under the **Fatal Accidents Act**. The jurisdiction of this court to intervene in an award of damages by the subordinate court is circumscribed by the principle that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see **Butt v Khan [1982-88]1KAR 1** and **Mariga v Musila [1982-88] 1 KAR 507**).

4. It is not in dispute that the deceased was child aged 1 ½ years old. The parties did not dispute that principle that the parents of the deceased were entitled to compensation, a principle so well stated by the Court of Appeal in **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457** where it acknowledged that in Kenya, children, regardless of their age, are expected to provide and indeed do provide for their parents whenever they are in a position to do so to the extent of their abilities. I also note that before the trial court both parties agreed that a global approach for assessing damages was most appropriate in assessing damages under the **Fatal Accidents Act**. The issue then is whether the sum of Kshs. 800,000/- awarded under this heard was reasonable compensation or was excessive and thus entitling this court to intervene in accordance with the principles in **Butt v Khan (Supra)**.

5. The respondents were of the view that Kshs. 3,000,000/- was reasonable under the circumstances. They relied on **Abdi Kador Mohammed and Another v John Wakaba Mwangi NKU HCCA No. 133 of 2003 [2009] eKLR** where the court awarded Kshs. 900,000/- for loss of dependency in 2009 where the deceased child was aged 12 years. In that case though, the court adopted a multiplier approach. In **Eliud Sindani Majimbo Matumbai v Cleophas Simiyu and Another NBI HCCC No. 880 of 2002 [2004] eKLR** the court awarded Kshs. 756,000/- for damages for lost years under the **Law Reform Act** in 2004.

6. The appellants suggested that Kshs. 200,000/- was reasonable compensation. They relied on the case of **Muneria Ndiwa Burmen v Emmanuel Wasike Wabukesa KTL HCCA No. 27 of 2015 [2016] eKLR** where the court awarded Kshs. 200,000/- in 2016 for lost years where the child was aged 1 ½ years old.

7. In determining the quantum of damages, the court takes the approach based on common sense as was stated in **Kenya Breweries Limited v. Saro MSA Civil Appeal No. 144 of 1990 [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.

8. Of course, the decisions cited by the parties are useful in guiding the court's discretion. In this case, the decisions cited by the respondent were not illustrative of the deceased's circumstances as the children in those cases were much older. The case cited by the appellant was apposite and close to the case at hand. The trial magistrate did not state or give reasons why he adopted Kshs. 800,000/- as damages for loss of dependency in light of the authorities cited to him. I therefore hold that the award was excessive and made without regard to the decisions cited by the parties thus entitling this court to intervene. As the deceased was aged 1 ½ years old and in light of the decisions cited by the parties, I find that Kshs. 250,000/- for loss of dependency is reasonable compensation and I allow the appeal to that extent. Before I conclude, I note that the trial magistrate did not subject the special damages to contribution. There is no reason why this was not done.

9. In conclusion, I allow the appeal to the extent that I set aside the award of Kshs. 800,000/- as general damages for loss of dependency and substitute it with an award of Kshs. 250,000/-. For avoidance of doubt the resulting sum including special damages shall be subjected to contribution.

10. The amount shall accrue interest at court rates from the date of judgment in the subordinate court until payment in full. The appellants shall have the costs of this appeal assessed to Kshs. 20,000/-.

DATED and DELIVERED at KISHI this 19th day of JULY 2019.

D.S. MAJANJA

JUDGE

Mr Geno instructed by Murimi, Ndumia, Mbago and Muchela Advocates for the appellants.

Mr Nyatundo instructed by Nyabena Nyakundi and Company Advocates for the respondents.