



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL APPEAL NO. 76 OF 2014.**

**FREDRICK KIMOKOTI IMBALL.....1<sup>ST</sup> APPELLANT**

**TERRITORIAL COMMANDER (SA).....2<sup>ND</sup> APPELLANT**

**KENNETH ODAH.....3<sup>RD</sup> APPELLANT**

**VERSUS.**

**AKW & ANOTHER**

**(Suing as Legal administrators of the Estate of the**

**the late AK (DECEASED).....RESPONDENT**

*[Being an Appeal from Original KIMILILI SPM Civil Case No. 64 of 2013 delivered on 6<sup>th</sup> August, 2014 by Hon. C.A. Menya (RM)]*

**JUDGMENT.**

By Plaint dated 24.10.2013 the Respondent (Plaintiff in the main suit) filed this suit seeking Judgment for general damages under the Fatal Accident Act, Law Reform Act, Special damages and costs of the suit. The claim arose from an accident involving the appellant's Motor vehicle Reg. No. KBR 221B along Chwele Kimilili road where the vehicle due to the negligence of appellant's driver knocked and injured AK who died from injuries sustained in the accident.

After full trial the trial magistrate apportioned liability at 80:20 infavour of the Respondent and on assessment of damages stated;

**In the instant case, the deceased was 11 years old. The Plaintiff submitted that he was assisting his grandmother with daily chores and herding of cattle. About the academic performance, no evidence was tendered including report forms save for the Plaintiff just stating that the deceased minor performed well in class. I would assume that the child would perhaps have grown up and perhaps would have secured a job and since the court cannot tell what he could have earned the court might as well consider the minimum wage of Kshs.6,000/= as suggested by the Plaintiff. I base my findings on the minimum wage since there was no evidence as to his academic capabilities.**

**I would also assume that basing on the current life expectancy; the deceased could have perhaps gotten a job at the age of 18 years as is the age of majority in Kenya could have least worked for 37 years to each the 55 retirement age. Not far from the 40 years suggested by the Plaintiff.**

**He dependants as listed in the Plaint include the mother, father son, daughter, dependant and dependant. Of all the dependants only 3 of them are under the age of 18 years are all self-sufficient. Looking at those under 18 years, I find that the deceased was in fact only older than KC who was 8 years old. In fact birth certificates have not been produced to confirm the respective ages of the purported dependants (Those under 18 years). I will find at the only dependants that can benefit from the estate of the deceased are his parents and grandmother if any. Since the minor did not have a great deal of dependants I would assume that he would support the subsisting ones with 1/3 of his salary.**

**I therefore calculate lost years as follows:**

$$6000 \times 37 \times 12 \times 1/3 = 880,000/=.$$

**SPECIAL DAMAGES:**

Special damages are usually the expenses incurred and should always be supported by receipts. The Plaintiff produced a bundle of receipts as exhibit 9 (a) to (f) totaling to Kshs.100,000/=. Since the Defence did not object to the same I shall proceed to award the same.

Having discussed the above hearing, the total compensation for the estate of the deceased minor would be thus:-

**PAIN AND SUFFERING 30,000/=**

**LOSS OF EXPECTATION OF LIFE 70,000/=**

**LOSS OF DEPENDENCY/LOST YEARS 880,000/=**

**980,000/=**

**Less 20% Liability 196,000/=**

**784,000/=**

**Add Special Damages 105,000/=**

**TOTAL 889,000/=**

Aggrieved by the assessment of damages the appellant filed the appeal on the following grounds;

- 1. The learned magistrate erred both in fact and law by making an award for general damages which is so inordinately high as to amount to a wholly erroneous estimate of the damage allegedly suffered by the Respondent.*
- 2. The learned magistrate erred both in fact and law by taking into account irrelevant factors and failing to take into account relevant factors and thereby arrived at an erroneous finds on quantum of damages.*
- 3. The learned magistrate erred both in fact and law by failing to apply or applying the wrong principles in assessment of damages thus awarding damages that were excessive in the circumstances.*
- 4. The Judgment on quantum of damages of the Learned magistrate is in the circumstances plainly wrong.*
- 5. The learned magistrate erred both in fact and law in reaching a wrong conclusion against the weight of evidence regarding the quantum of damages.*
- 6. The learned magistrate erred both in fact and law by failing to consider the Appellant's submissions on quantum tendered before the subordinate court.*
- 7. The learned magistrate erred both in fact and law in failing to correctly assess damages.*

By Consent this appeal was canvassed by way of written submissions. Counsel for the parties filed their respective written submissions. M/s Karuga for the appellant submitted that the main issue in this appeal is the assessment of quantum of damages as finding and a apportionment on liability is conceded. Counsel for the appellant submits that the trial magistrate erred in assessing the damages based on the 'heads' approach instead of using the Global/Lump sum approach. Counsel submits that for the deceased who was a child aged 11 years old, loss of dependancy should have been by way of Lump sum/Global approach rather that calculation of expected earnings and period of such earnings by use of Multiplicand and Multiplier. Counsel submitted that this approach in assessment was erroneous and invited this court to set it aside and order proper assessment be done. Counsel referred this court to **PI Vs Zena Roses Ltd & Another 2015 eKLR** where the Judge adopted a global sum approach. In **T.O.A. Vs. Georges Onyango Ogam & Another (2009) eKLR** the Judge also adopted a global approach. In **Oshirji Kuvenji & Another Vs. James Mohamed Ogenge (2012) eKLR** the learned Judge adopted global approach. Counsel urged this court to adopt a global approach and submitted that an award of Kshs.300,000/= would be adequate.

On special damages Counsel Submits that the Respondent only proved by production of receipts for Kshs.100,000/=. The trial Court awarded Kshs.105,000/= which is inclusive of Kshs.30,000/= for filing of an application for grant of colligenda bona ad litem which ought not to have been awarded as it related to proceedings in another file.

Mr. Muholi for the Respondent submitted that the trial Magistrate was not in error in adopting the 'Heads' approach in assessing damages. He submits that there being no error, this court cannot be invited to set aside the assessment for the reason that this court would have adopted a different approach. He submitted that superior court are not unanimous. in the approach to adopt in assessment of loss of dependency in respect to deceased minors. Counsel further submits that the awards on damages under the Law Reform Act and Fatal accidents Act is not double compensation and that the trial court was entitled to make awards under both Law Reform Act and Fatal Accidents Act. On special damages Counsel submits that bundle of receipts for Kshs.100,000/= were produced and therefore special damages awarded where proper. Counsel urged this court to find this appeal without merit and dismiss the same with costs.

From the submissions of the parties the issues which crystalize for determination by this court are;

1). Whether the 'Heads' approach adopted by the trial court was erroneous.

2). Whether the damages awarded were excessive to attract the intervention of this appellate court.

Damages awarded by the court are monetary compensation for the loss or injury sustained. Its aim is to bring the injured party to the same level he would have been before the injury. It is also to award for loss sustained and material loss suffered by the plaintiff or his estate by the wrongful act of the defendant. Where there is death, the aim is to compensate the dependants or estate of the monetary contribution the deceased was making to the dependants.

In Kuloba J in measure of damages for bodily injury Law Africa Page 5 stated;

*In suit brought in respect of bodily injuries, the dominant rule of law which constitutes the fundamental and overriding principles underlying the whole law of damages and which governs the measure of damages, is the principle of compensation which is also Latinized as the principle of restitutio in integrum. This means that an award for bodily injury is intended to be compensatory in nature; that is to say that the plaintiff should receive in money terms no more and no less than his actual loss. The basic idea in awarding damages, with the exception of exemplary damages, then, is the attempt to make good on the principle of restitutio in integrum, that which is lost in recognition of the fact that actionable harm has been inflicted with resultant loss for which the law ordains compensation as far as can be done in terms of money. Accordingly, case after case in this volume proceeds on the normal principle that the victim should, in so far as money can do it, be placed in the position he should have occupied before he sustained the injury for which he is now getting his reparation or compensation.*

Damages as early as last century has materialized the same objective. In Livingstone Vs. Rawyanda Coal Co. (1880) 5APP Case R5 at 39 Lord Blackburn defined the measure of damages as;

*“That sum of money which will put the party who has been injured or who has suffered in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.”*

**In MC Gregor on Damages 19<sup>th</sup> Edition Sweet & Maxwell (page 1590) on general method of assessment the Editor's state:**

*The Court have evolved a particular method for assessing the value of the dependency, or the amount of pecuniary benefit that the dependency could reasonably expect to have received from the deceased in the future. This amount is calculated by taking the present annual figure of the dependency, whether stemming from money or goods provided or services rendered, and multiplying it by a figure which, while based upon the number of years that the dependency might reasonably be expected to last, is discounted so as to allow for the fact that a lump sum is being given now instead periodical payments over the years. This latter figure has long been called for multiplier; the former figure has come to be referred to as the multiplicand. Further adjustments, however, may or may not have to be made to multiplicand or multiplier on account of a variety of factors, namely the probability of future increase or decrease in the annual dependency, the so-called contingencies of life, and the incidence of inflation and taxation. Moreover, the value of the dependency can include not only that part of the deceased's earnings which he would have expended annually in maintaining his dependants but also that part of his earnings which he would have saved and which would have come to his dependants by inheritance on his death; and there may also be included a sum in respect of loss attributable to the cessation of contributions which the dependants were the nominated beneficiaries. Alternative methods of dealing with these savings have appeared: either they are regarded as compromised in the figure of annual dependency to be multiplied by the multiplier or they are excluded from the figure of annual dependency and a separate, and additional, sum is calculated and awarded in respect of them.*

While courts have had no problem in assessing general damages under the Law Reform Act; the Superior courts in Kenya have not been unanimous in the approach for assessment of general damages under the Fatal Accident Act where the deceased are minors. Damages under Fatal Accident Act are claimed to for the benefit of dependants of the deceased. Dependants include; spouse, parents, children, and anybody at time of death was depending on the deceased. Superior courts have adopted the one of the two approaches – the 'Heads' approach which is done by way of mathematical calculation of the expected earnings (multiplicand) and the number of years he would have worked (multiplier) and the 'Global/Lumpsum' approach where courts give a lumpsum or global figure of what in his opinion will be adequate compensation without calculation based on expected earnings and years;

**Njagi J In Kakamega H.C.A. 10/2017 Chitabhadhiya Enterprises & Another Vs. Gladys Butali** in analyzing the two application stated:

**A review of past High Court Judgments in Kenya indicated that there is no uniform method of assessing damages for estates of minors for loss of dependency. Some High Court Judges hold the view that both approaches are proper as exemplified by the following holding of Joel Ngugi J in Kenya Power & Lighting Company Limited Vs E.K.O & Another, Kiambu HCCA No. 169 of 2016 (2018) eKLR where he said that:**

*“It thus emerges that superior court are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned trial magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other High Court decisions. The learned trial magistrate did not proceed on*

*wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand.”*

**In Transpares Kenya Limited & Another Vs S.M.M. (Suing as legal representative for and on behalf of the estate of E.M.M. (deceased), Machakos HCCA No. 203 of 2012 (2015) eKLR, Nyamweya J endorsed both approaches in a case where the deceased had died at the age of 5 years.**

On the other hand there are some High Court judges who hold the view that the multiplier approach is not suitable in all cases as was stated by Ringera J (as he then was) in **Mwanzia Vs Ngalali Mutua** and **Kenya Bus Services (Msa) Limited & Another** as cited in **Albert Odawa Vs Gichimu Gichenji, NKU HCCA No. 15 of 2003 eKLR** where he held 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 alter of methodology, something a court of justice should never do.”*

Some cases have been cited above where some High Court judges on appeal set aside awards made on the basis of the multiplier method and substituted awards based on the lumpsum/global method. In **Charles Ouma Otieno & Another Vs. Benard Odhiambo Ogecha** where the deceased had died at the age of 14 years, Sitati J held that the trial magistrate fell into error by awarding the damages under the various heads instead of awarding a lumpsum. The judge set aside the award and made a lumpsum award of Kshs.350,000/=.

In **Daniel Mwangi Kimemi & 2 Others Vs. J.G.M & Another** (supra) where the minor had died at the age of 9, Gikonyo J held that the trial magistrate did not explain why he adopted a multiplicand of Kshs.6,000/= and a multiplier of 25. The Judge considered that he child was doing well in School and awarded a global sum of Kshs.1 million.

The appellant in this appeal filed as one of the grounds of appeal that the trial magistrate erred in adopting the ‘Heads’ approach in assessing damages. As has been demonstrated above, superior courts have not been unanimous on the approach in assessment. It is not therefore true that the trial magistrate fell into error in choosing one approach over the other. My view however is that the use of Heads approach where the deceased are children of tender years is fraught with so many imponderances and uncertainties as to make an accurate mathematical calculation impossible or sensible. In my view where the deceased is so young for any evidence to be tendered as to future prospects, or career path, and it is not possible for a court to give certainty to the application of the multiplier and multiplicand, the court should adopt the lumpsum approach in assessment of general damages.

On whether the damages awarded were so high or so low as to reflect on erroneous application of the principle of assessment, I do not find the same in this appeal. The damages awarded compare well with awards in authorities cited, and giving allowance for inflation are not excessive.

In result I do not find that by adopting the ‘heads’ approach instead of lumpsum assessing general damages, the magistrate committed any error in law or principle to warrant interference with this award. I therefore find no merit in this appeal which is hereby dismissed with costs.

**Dated and Delivered at BUNGOMA this 19<sup>th</sup> day of November, 2019**

**S.N.RIECHI**

**JUDGE**