



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL APPEAL NO. 65 OF 2017**

**FRANCIS NDUNGU WAMBUI.....1<sup>ST</sup> APPELLANT**

**DANIEL IRUNGU WAMBUI.....2<sup>ND</sup> APPELLANT**

**ISAAC MUTHERERO.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**JULIUS MUCHIRI MURIUKI (Suing as the Legal**

**representatives and administrators of the Estate of the late Lewis Kimanzi)...RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This is an appeal from CMCC No. 256 of 2016 in which the respondent instituted a suit for general damages against the appellants for fatal injuries sustained to the deceased in a motor vehicle accident. The issue of liability was settled in favour of the respondent against the appellants at the ratio of 75:25, the court proceeded to award the respondent Kshs. 30,000/= for pain and suffering, Kshs. 300,000/= for loss of expectation of life, Kshs. 1,540,000/= for loss of dependency and Kshs. 1,520/= for special damages amounting to a total award of Kshs. 1,871,520/= less 25% leaving a balance of Kshs. 1,403,640 as general damages plus special damages of Kshs. 1,520/=.

2. The appellants were dissatisfied with the trial court's judgment and lodged this appeal based on eleven grounds that can may be summarised as follows: -

a) That the learned magistrate erred in fact and in law for he awarded excessive damages for quantum.

3. The parties disposed of the appeal by way of written submissions.

**B. Appellant's Submissions**

4. It was submitted that in the absence of any evidence that the deceased died long after the accident, the respondent should have been awarded a sum of Kshs. 10,000/= for pain and suffering under the Law Reform Act. The appellants relied on the case of **Nairobi HCCC No 91 of 2014 James Gakinya (Suing as the Legal Representative of the Estate of David Kelvin Gakinya (Deceased) v Perminus Kariuki Githinji** where the High Court awarded Kshs. 10,000/= where the Plaintiff did not provide the time of death of the deceased.

5. On loss of expectation, it was submitted that the trial magistrate erred by stating that the deceased led a healthy and vigorous life in the absence of a certificate of medical fitness and as such proposed a sum of Kshs. 80,000/=. Reliance was placed in the case of **Chen Wembo & 2 Others v I K K & Anor (Suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR** where the court awarded a sum of Kshs. 80,000/= for loss of expectation.

6. For loss of dependency it was submitted that the trial magistrate erred in using the multiplicand approach as the trial magistrate did not seek to establish the length of dependency; vicissitudes of life, the age of dependents; life expected which were necessary to justify the multiplier as was held in the case of **Fredrick Bundi Ruchia & Another v S M M Suing as the legal representatives of the estate of J M M [2019] eKLR.**

7. The appellants proposed a global award of Kshs. 300,000/= whilst relying on the case of **M N (suing on behalf of a minor, L K,**

**Deceased) v Paul Kiptoo [2016] eKLR** where the High Court reduced the global award under Loss of Dependency from Kshs. 400,000/= to Kshs. 280,000/=.

8. The appellants also submit that the multiplier of Kshs. 11,000/= as salary adopted by the trial court should be disallowed as it is speculative. Further it is submitted that the special damages pleaded in the plaint should not be allowed as they were speculative.

### **C. Respondent's Submission**

9. It was submitted that the award of Kshs. 30,000/= for pain and suffering was fair as the deceased died moments after the accident while relying on the case of **J.N.K. (Suing as the legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors... Boys High School [2018] eKLR** where the court awarded Kshs. 50,000/= for pain and suffering where the deceased died shortly after the accident.

10. It was further submitted that the award for loss of expectation of life was just and fair as the deceased was a minor of 7 years old who had just started school. They relied on the case of **Kericho HCCA No. 48 of 2014; Vincent Kipkorir Tanui (Suing as the Administrator and/or Personal Representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co. Ltd & Another** where the court awarded Kshs. 200,000/= for loss of expectation of life in 2014.

11. It was submitted that the trial court followed the law when arriving on Kshs. 1,500,000/= for loss of dependency. On the multiplier of 35 years used reliance was laid on the case of **Abdi Kadir Mohammed & Anor v John Wakaba Mwangi [2009] eKLR** where the deceased was 12 years old and the court used a multiplier 31 years where the deceased was 12 years. On the multiplicand of Kshs. 11,000/= adopted by court it was submitted that the use of minimum wage adopted was proper as was held in the case of **Transpares Kenya Limited & Anor v SMM (Suing as Legal Representative for and on behalf of the Estate of EMM (Deceased) [2015] eKLR**.

12. On special damages it was submitted that the respondent produced the necessary receipts to support his claim.

### **D. Analysis & Determination**

13. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Anor. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

14. I have carefully perused the proceedings, the judgement appealed against as well as the Record of Appeal, the grounds thereof and the parties' submissions. A consent was recorded on liability and is not an issue in his appeal. As such, the only issue for determination in my view is whether the trial magistrate awarded excessive damages for quantum.

15. It is important to note that the deceased was aged seven (7) years at the time of the accident.

16. The deceased in the instant case died on the spot. The trial court made an award of Kshs. 30,000/= for pain and suffering. The advocate for the appellant contends that the award was inordinately high when considered that the deceased died on the spot and that an award of Kshs. 10,000/= could have been sufficient compensation.

17. As regards damages awarded under the Law Reform Act, the principle is that damages for pain are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period between the accident and his death. In addition, a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.

18. In **Josephine Kiragu v Vyas Hauliers Ltd [2017] eKLR** where the deceased had died instantly, the court held that an award of Kshs. 10,000/= for pain and suffering was on the lower side and increased it to Kshs. 30,000/=.

19. In the case of **Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] eKLR** where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering, Majanja J. held that:

*“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000/= to Kshs 100,000/= over the last 20 years hence I cannot say that that the sum of Kshs 50,000/= awarded under this head is unreasonable.”*

20. In the case of **Simon Bogonko v Alfred Mongare Mecha & Another (Suing as the Legal Representatives of the Estate of Akama Mong'are (Deceased) [2019] eKLR** and **Omanga Fish Limited v CKB & JM (Suing as the Legal Representatives of the Estate of JMM (Deceased) [2019] eKLR** the court. reduced awards of Kshs. 100,000/= to Kshs 20,000/= for pain and suffering where the deceased in the cases had died on the spot.

21. In my considered view, the award of Kshs. 30,000/= for pain and suffering was not manifestly excessive as there are comparable

decisions to support it. The award is reasonable and will not be disturbed.

22. The trial court awarded Kshs. 300,000/= for loss of expectation of life. The appellants contends that the figure is excessive and that an amount of Kshs. 80,000/= would have been sufficient compensation.

23. In **Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** the Court observed that: -

*“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/= while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”*

24. In the case of **Moses Akumba & Another v Hellen Karisa Thoya (2017) eKLR** Chitembwe J. held that an award of Kshs. 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. In the cases of **Patrick Kariuki Muiruri & 3 Others v Attorney General [2018] eKLR** Serгон J. made an award of Kshs. 200,000/= under this heading. In **Vincent Kipkorir Tanui (Suing as the Administrator and/or Personal Representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co. Ltd & Another [2018] eKLR** an award of Kshs. 200,000/= was made.

25. That this court may have made a different award if it had tried the matter itself is not a ground for setting aside the award. It is therefore my considered view that the award of Kshs. 300,000/= for loss of expectation of life was excessive. The award is hereby set aside and substituted with one of Kshs. 200,000/=.

26. Regarding the appropriateness of the ‘heads’ approach in determining the award of damages in respect of minor deceased persons, this is not a new question. The superior courts have repeatedly weighed in with their respective views on the heads vis-à-vis global award approach. In particular courts have different approaches in dealing with claims under the Fatal Accidents Act. Some courts are inclined to the formulae proposed by **Ringera J** (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** while others prefer global awards. 5,000/=.

27. I am in agreement with the holding of the court in the case of **Chen Wembo & 2 Others(supra)** where it was held, “*that no golden rule in the assessment of damages in respect of a deceased minor. The heads, global or mixed approaches have been applied in superior courts. 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/dependents - See decisions of the Court of Appeal in Kenya Breweries Limited v Saro [1999] KLR 408 and Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporter & 5 Others [1986] KLR 457; [1986] eKLR.*”

28. I do note that in his judgement proceeded to determine the award to the respondent without any evidence as to age the deceased would have lived the age of gaining gainful employment as well as the minimum wage. In essence the trial magistrate arrived at his award by speculating on the deceased’s future.

29. In my considered view, this case was eminently unsuited to the multiplier/multiplicand approach in the assessment of damages in respect of loss of dependency. The trial 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.

30. For these reasons, I have come to the conclusion that the trial court erred in its approach, and further that the figures arrived at, especially with regard to lost dependency were as a result of applying the wrong principles as to dependency and misapprehension of the scanty material before the court. It is my considered view that the global approach would be the better approach in calculating loss of dependency under the Fatal Accidents Act.

31. In the case of **Chen Wembo(supra)** where a lump sum award of Kshs. 600,000/= was made, the deceased was 12 years old. In the cases of **Daniel Mwangi Kimemi & 2 Others v JGM & Another (2016) eKLR** and **Surjit Singh & Malkiat Singh Vs Richard Barasa (Suing as the administrator of the estate of Victor Wangila(deceased) Bungoma HCCA No. 78 of 2012** where awards of Kshs. 1 million and Kshs. 720,000/= were respectively made for deceased children who were 9 years old.

32. In **Chhabhadiya Enterprise Ltd & another v Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu – Now (Deceased) [2018] eKLR** the deceased child was 12 years old and the court awarded a global sum of Kshs. 700,000/=.

33. Considering that the deceased was 7 years old in the instant case, I award a global sum of Kshs. 900,000/= for loss of dependency.

34. On special damages, I note that receipts of Kshs. 5,500/= were produced. However, the respondent is only entitled to the sum of Kshs. 1,520/= which he pleaded in the plaint. The award on special damages is therefore reduced to Kshs. 1,520/=.

35. The appeal therefore succeeds to the extent that the award of expectation for life and for loss of dependency are reduced to Kshs. 200,000/= and 900,000/= respectively. The total special damages payable is Kshs. 1,520/= making the total award Kshs. 1,101,520/= less 25% Kshs. 275,380/= leaving a balance of Kshs. 826,140/=.

36. The upshot of the above is that the trial court’s judgement is set aside and replaced with an award of **Kshs. 826,140/=**.

37. The appeal is therefore partly successful.

38. Each party will meet their own costs of this appeal.

39. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthama for Respondent**

**Ms. Kiai for Omagwa for the Appellants**