



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 27 OF 2015

(CORAM: F. GIKONYO J.)

MINI BAKERIES (NBI) LIMITED.....1ST APPELLANT

MOHAMMED BABU SAIDI.....2ND APPELLANT

Versus

ZAMZAM JOSEPHINE AKINYI AINDO(Suing as the legal representative

ad litem of estate of the late Jamalddin Ramadhan (Deceased).....RESPONDENT

(An appeal from the judgment of the Hon. Teresia Njeri Ngugi (SPM) delivered on 16th January 2015 in Milimani CMCC No. 5675 of 2012)

JUDGMENT

[1] The appellants was the Defendants in the trial court and were sued by the respondent for special damages of Kshs. 21,500/-, general damages under the Law Reform Act and Fatal Accident Act, costs of the suit and interest. On 16/1/2015 the trial court entered judgment in favour of the respondent as follows:

a) Liability 100%

b) Special damages Kshs. 26,500/-

c) Pain and suffering Kshs. 20,000/-

d) Loss of expectation life..Kshs. 100,000/-

e) Loss of dependency . Kshs. 2,000,000/-

TOTAL..... Kshs. 2,146,500/-

f) Cost and interest at court rate cost to include Kshs. 5,000/- being witness court attendance expenses.

[2] The appellant being aggrieved by the decision filed this appeal based on eleven (11) grounds which relates to two issues: **apportionment and assessment of liability and damages respectively.**

[3] The appeal was canvassed by way of written submissions. The appellant submitted that the trial magistrate failed to consider the appellants had proved that the deceased grossly contributed to the accident and to his fatal injuries considering the 2nd appellant was at an average speed of between 5 and 10 Km/hr. On the issue of award, the appellants argued that the trial court did not disclose the basis in law or in fact for making the award of Kshs. 2,000,000/- for loss of dependency. It was obliged to consider previous cases and awards in order to maintain uniformity. Hence, the appeal ought to be allowed.

[4] The respondent submitted that the evidence produced by the parties was that the appellants were solely to blame for the accident. The trial court was not wrong when it held so. On damages, the trial court held that it was difficult to identify a figure as an income on multiplier method for purposes of assessment of damages. Hence, it was urged that it was not wrong for the trial court to use a global award method to award damages as loss of dependency. Thus the appeal lacks merit and should be dismissed.

ANALYSIS AND DETERMINATION

[5] As the first appellate court, this court is to evaluate, assess and analyze the evidence on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

Issues

[6] The issues for determination are

a) Whether the respondent was liable for contributory negligence

b) Whether the trial court adopted wrong principles in the assessing the damages

[7] The first issue is whether the respondent was liable for contributory negligence. According to **PW2 Hadija Ramadhan** sister to the deceased who was with him on that material day recalled that she and him were from Madrasa. On getting to the DO road in Kayole she held his hand while walking on the pavement. She saw a supra loaf motor vehicle KBB 328T come at speed and was being driven in a zigzag manner. The rear tyres hit her brother and ran over his head and died instantly.

[8] According to **DW1 Mohammed Babu Saidi** driver of motor vehicle KBB 328T, on the material day he had finished delivering goods in Kayole Estate which was crowded with many people including children. He was driving at an average speed of 5 – 10 Km/hr. As he was driving, he passed two children who were walking on the left side of the road and after he passed them he saw a lady who rushed in front of the vehicle shouting that an accident had occurred. He stopped and found the boy lying on the left side of the vehicle.

[9] From the evidence adduced by the **PW2** the deceased was hit while they were walking on the pavement by the side of the road. She affirmed that it is not true that they were running away from dogs. The dogs were just lying down near a hand cart and they were not barking as no person had stirred them up.

[10] The standard of proof in a civil case is on a balance of probabilities. **PW2** was present at the scene of the accident. She explained what happened. As she was 13 years of age the court conducted a *voir dire* examination in which it established that she understood the duty of speaking the truth. Her evidence was coherent and not controverted.

[11] The Appellant has pleaded contributory negligence. He ought to prove it. The evidence of **DW1** was that he did not see the boy run towards or approaching the vehicle herein or landing below the back left wing of the vehicle. He said that he learnt later that the children were running away from dogs that were

under a cart; and as the boy was trying to jump a drainage trench he slid and his head landed below the vehicle. He did not see any of these events; he got this information from other people making it hearsay evidence. Such evidence is inadmissible. The information was not confirmed by any other person or independent witness. Of significance is that DW1 stated that he was driving at a crowded area with many people including children. In such circumstances, he ought to have been extremely careful and to lookout for other road users. He failed the test in law and did not discharge his duty as a driver on the road. The manner the accident happened and the injury suffered does not support his claim that he drove at a speed of 5-10km per hour and with care and attention. Consequently, I find that the accident occurred as explained by PW2 and the Appellants were 100% liable.

[12] Did the trial court adopt wrong principles in assessing the damages more specifically on loss of dependency in the sum of Kshs. 2,000,000/-? Before I examine whether this award inordinately high, I wish to commend the trial magistrate for realizing that not always should one employ a multiplier. This was recognized by Ringera J (as he then was) in the case of **Kwanzia vs. Ngalali Mutua & another** when he stated 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 altar of methodology, something a Court of Justice should never do.”

[13] Be that as it may, an appellate court will only interfere with the assessment of damages by the trial court if it is convinced that the trial magistrate acted on wrong principles of law or took into or left out of account irrelevant or relevant factors, respectively or if the award is inordinately high or low as to make it an erroneous estimate of the damages. See the case of **Butt v Khan [1981] KLR 349** where it was held per Law, JA as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

[14] The deceased was aged 5 years old at the time of his death and according to his mother PW1 he was the best in school. The Court of Appeal in the case of **Kenya Breweries Ltd v Saro [1991] eKLR** it held 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. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have “homes” for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a “home” while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase “being mindful of other people’s welfare”. If any legal authority is required in support of our views we would quote this

court's decision in *Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others* [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-

“In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful others’ welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well nigh total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge’s contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religions of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge’s view that it is “outrageous and pernicious” is not well-founded and must be rejected. ...

[15] 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. In Transpares Kenya Ltd & another v S.M.M (suing as Legal Representative) of the estate of EMM (Deceased) [2015] eKLR Kshs. 500,000/- was awarded to the estate of a 5 year old child for loss of dependency. In the case of H. K. M v Francis Mwangela Mabere [2017] eKLR Kshs.200,000/- was awarded for loss of dependency in respect of the estate of a 7 year old minor. In Chem Wembo & 2 Others v IKK & another HCCA No 32 of 2014 Kshs1,000,000 award for loss of dependency in respect of the estate of a 12 year old child was set aside on appeal and substituted with an award of Kshs. 600,000.

[16] From the foregoing I find that an award of Kshs. 2,000,000/- for loss of dependency in respect of a 5 year old child to be too high and therefore inordinately excessive.

[17] Therefore I allow the appeal be allowed and set aside the award of Kshs. 2,000,000/- made by the trial court for loss of dependency. In lieu thereof, I award a sum of Kshs. 1,000,000/- for loss of dependency. An award of Kshs. 1,000,000/- is fair compensation in this case.

[18] The other awards made on the other heads by the trial court remain undisturbed. In light of the result of the appeal, I order each party to meet its own costs of the appeal.

Signed and dated at Meru this 7th day of November, 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 13th day of November 2019

L. NJUGUNA

JUDGE