



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 6 OF 2018

KENYA WILDLIFE SERVICES.....APPELLANT

VERSUS

GEOFFREY GICHUR MWAURA

(Suing as the legal representative of the estate of

Joshua Kamau Gichuru (Deceased).....RESPONDENT

Being an appeal from the judgment of the Chief Magistrate court

at Kajiado in a judgment delivered on 16th October, 2017

by Hon M. Chesang (RM)

JUDGMENT

Kenya Wildlife Services appeals to this court against the judgment of the Resident Magistrate's court dated 16th October, 2017 in which that court awarded damages as follows:

- (a) Pain and suffering Kshs. 150,000**
- (b) Loss of expectation of life Kshs. 150,000**
- (c) Loss dependency Kshs. 1,182,800.**

Liability had been disposed off by way of consent at 70% 30% in favour of the respondent. The appellant appeal against the award and set out in its memorandum of appeal four grounds of appeal. These basically were, that the learned trial Magistrate award was manifestly high and excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent. That in arriving at the award the learned trial magistrate relied on the wrong principles of law and thereby occasioning a miscarriage of justice upon the appellant. That the learned magistrate erred in law and fact in according general damages under loss of dependency at Kshs 1,182,800 using salary multiplicand when the same was not proved by evidence that the deceased being a minor aged 13 years the pain and suffering award was extremely high noting that the deceased died on the spot.

The appellant therefore in this appeal asks this court to re-evaluate the judgment and do re-assess the damages payable to the respondent on each head of the claim.

This is in line with the principles set out in ***Selle v Associated Motor Boat Company 1968 EA 123 at page 126*** where ***Clement De Lestang, VP of the East African Court of Appeal*** held as follows:

“An appeal to this court from trial by the High Court read Magistrate Court is by way a retrial and the principles upon which this court acts in such appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judges' findings in fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially, to extricate the evidence or if the impression based on the demeanor of a witness is inconsistent with

the evidence in the case generally”

It is also trite law that the award of damages by the trial court is discretionary and the appellate court can only interfere with any of the award if it is inordinately high or low and or if an irrelevant matter or factor was taken into account when arriving at a decision. The said principles are well settled in the case of **Kemfro African Ltd v T/A Lubia & Another No. 2 1987 KLR 30, Bahir Ahmed Butt v Khan 1982 -88 1 KAR page 5**. These principles will form the basis of the decision of this appeal.

The genealogy of the case before the trial court

The legal representative of the estate of the deceased Minor Godfrey Gichuru Mwaura filed a plaint on 30th December, 2014 against the appellant Kenya Wildlife Services seeking damages in tort. It was alleged in the plaint that on or about 30th January, 2012 the deceased minor Joshua Kamau Gichuru was lawfully cycling along Loitoktok Emali Road when the appellant/defendants’ Motor Vehicle registration No. KBE 669G was negligently driven that it colluded with the minor and fatally occasioned bodily harm.

The particulars of negligence are as pleaded in the plaint. As a result of negligence the respondent sought award of damages arising for the said accident. The appellant filed the requisite defence to the claim. From the record the mode of disposal was by way of submissions and reference to case law.

In the first instance consent in liability was reached and assessed at 70% 30%.

On the issue of damages each legal counsel approached the case by filing their stated point by way of written submissions. The trial Magistrate considered both counsels submissions and arrived at a judgment dated 16th October, 2017. That is the impugned judgment before this appellate court in so far as award of quantum is concerned.

Submissions by the appellant counsel.

Ms. Kamunya for the appellant in her written submissions invited this court to find that the approach taken to assess damages by the trial magistrate was wrong. Learned counsel referred to various heads on the award to persuade this court to find that they were wrong in both law and fact. Learned counsel placed reliance on the decisions in the cases of **Wembo & 2 others v. TKK 2017 eKLR** and urged this court set aside the award by submitting it with the following:-

- **Pain and suffering Kshs 20,000**
- **Loss of expectation of life 100,000**
- **Loss of dependency ,Kshs 60,000**

Learned counsel contended that the award under Fatal Accidents Act was so inordinately high because wrong principles of law were applied to reach the decision. The bone of contention by the learned counsel was the fact of lack of evidence that could have swayed the trial court to invoke multiplier and multiplicand factors.

Further learned counsel submitted that the deceased by the time of his death was in school and her prospect of earning income unknown. Learned counsel significantly invited the court to the judgment were the trial magistrate relied on the proposition that the minor was to have graduated as an engineer without cogent evidence.

Accordingly, learned counsel submitted that the ratio of 1/3 multiplicand and multiplier of 20 years was erroneous that occasioned the miscarriage of justice.

In nutshell learned counsel argued and submitted that the appeal be allowed and proper assessment be done.

Submissions by the respondent Counsel

Ms. Kamau, on behalf of the respondent vehemently opposed the appeal on the strength of the principles in **Bashir Butt v Khan** on exercise of discretion of an appellate court in disturbing the decision of the lower court. For her part learned counsel contended that the approach taken by the learned magistrate was on a projection of the life of the deceased minor. In this respect learned counsel relied on the case of **Abdi Kader Mohamed & Another v John Wakaba Mwangi 2009 eKLR, Palor Oil Transporters & Another v WVN 2015 eKLR, KPL v ESSO & MWK Kiambu HCCA 169 of 2016, Wangai Thairu v H. Ezekiel Barngetuny and Another HCCC 1638 of 1988.**

The essence of the learned counsel submissions is that the appeal lacks merit for this court to disturb the award that therefore bring us to the question on whether there was an erroneous or application of wrong principles on the issue of the award of damages.

I have considered the record, the ground upon these appeal has been lodged and submissions by both counsels.

I will first deal with the award on loss of dependency under the Fatal Accidents Act there is a long line of averments which have set out the applicable principles. I would in this appeal just refer to sample of some of the authorities

In the case of **Wangai Thairu v Hon Burngetuny & Another supra** – the court on this powers stated as follows:

“The principles applicable to an assessment of damages under the Fatal Accidents Act are too clear the court must in the first instance find out the value of the 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 purchase.

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 dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration 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”

In the cases of *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku court of appeal sitting at Nyeri in civil appeal no. 35 of 2014 eKLR* pronounced itself as follows:

“The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason”

From the record of the trial court the learned trial magistrate approach was on the basis of a multiplier and multiplicand approach. In reference to the decision in the case of *Kwanzia v Ngalah Rubia and another Ringera J.* as he then was read as follows

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. Can and must be abandoned where facts do not facilitate its application. It is plain that it is useful and practical method where factors such as age of the deceased, the amount or 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”

What amounts to proof on the above factors depends on the circumstances and character of each particular case. This is the position taken and articulated in the case of *Charles Ouma & Another v. Bennard Odhiambo Ogeche 2014 eKLR* where the court held:

“I am of the considered view that the learned trial Magistrate fell into error in making awards under separate heads. As it were the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full nor how much he would earn, nor was there any way knowing whether or not he would be able to support his brother, the respondent herein”

The answer on the first issue is that the trial court fell in error in assessing damages under various heads instead of awarding a lump sum. The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 13 year old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once (deceased) got a job. Further the dependency ratio adopted by the trial court was not proved.

In the present case I will apply the above principles. As cited from the one set the case before trial court had no evidence availed by the respondent to prove disputed facts. In order to discharge the burden of proof on a balance of the burden of proof at all material times in this claim rested with the plaintiff/respondent. The appellant/defendant to the bears no burden at all to prove anything to the claim.

From the record the deceased was involved in a road traffic accident at a young age of 13 years. He was still in school and not yet still at a level of choosing a career capable of steering him to any meaningful employment.

It is not clear how the learned magistrate arrived at a conclusion that the deceased minor would have become an engineer later in life. In any event there was no academic report form from the school on what he achieved to gauge his performance and likelihood of a prospective career. The learned magistrate relied on the minimum wage of 14, 785 per month to determine the multiplicand on loss of dependency and a retirement age of 60 years. The learned trial magistrate doing the best adopted a multiplier of 20 years to come up with an award of **Kshs 1,182.800.**

What the judgment failed to do is to give reasons on how the multiplier of 20 years was applicable in the instant case.

I also take judicial notice that the minimum wage in Kenya is based on the region and occupation of various categories of workers. For this reason the trial court ought to be availed cogent evidence by the plaintiff on the prospective nature of work anticipated the deceased would have undertaken on attaining the age of maturity to come up with the minimum wage under the Employment Act.

Going to the constitution the evidence presented at the trial court none of this issue was attend for by the respondent.

From the extract of the record as perused and evaluated by this court the trial magistrate analyzed and considered the evidence without taking into account the provisions of Section 107(1) of the Evidence Act. As a result judgment was entered for the respondent in error and misapprehension of the law.

Therefore on a balance and weighing the evidence as presented at the trial court I hold the view that the approach taken by the learned magistrate went against the well-established legal principles on assessment of damages. When applying the multiplicand and the multiplier formulae the case of *Wangai Thairu v Hon Burngetuny & Another supra* laid down the guiding principles in which judicial discretion is exercised in awarding damages in fatal accident claims. Notwithstanding that legal position the learned trial magistrate went outside the

scope and formulated a test in making a finding which occasioned an error in law and fact in calculating loss of dependency.

In my view the trial court exceeded the bounds of our legal authority by failing to appreciate the questions of law implicit in her decision. The matter in issue was decided in circumstances where there was an error of law and facts.

In my judgment I consider the multiplier of 20 years, a minimum wage of 14, 785 per month and multiplicand of 1/3 ratio of dependency would not meet the ends of justice in this case as the magistrate made the parties to believe.

I therefore review the judgment of the trial court pursuant to the principles in the case of **Peter M. Kariuki v A.G. 2017 eKLR, Kemfro Africa Ltd v Lubia 1987 KLR, Butt v Khan (supra)**. The impugned award is hereby set aside.

I believe the best approach with respect to the case before the trial court was to apply the doctrine of a global sum. On my part the award of **Kshs1,182,800** was inordinately high in the view of the circumstances of this case. I hereby set it aside award and apply the global sum principle and do assess a sum of **Kshs 700,000** for loss dependency under the Fatal Accident Act. On pain and suffering the deceased died the same day, there was no evidence of life and expectance before his last breath. I find that award of **Kshs. 150,000** as being excessive and do substitute it with **Kshs, 20,000**.

Thirdly, on loss of expectation of life the trial Magistrate opined as follows, the child was vibrant with no known discipline problems. He was doing well in school and hoped to become an engineer. He had no physical disabilities I will therefore award **Kshs. 150,000**.

I have carefully read and evaluated the record none of that evidential material alluded to was placed before the court by any of the parties. In my findings the learned trial magistrate misdirected herself in law and fact in that she took into consideration extraneous matters which were not before her during the trial. In deciding cases the courts are mandated to do so on the basis of evidence and nothing else.

My considered view is that the decision on loss of expectation of life is erroneous and ought to be set aside. In the foregoing I substitute it with an award of conventional sum of Kshs. 100,000.

Accordingly, this appeal is allowed in the following reviewed terms:

- (1) Loss of dependency Kshs. 700,000.**
- (2) Pain and suffering 20,000.**
- (3) Loss of expectation of life Kshs.100,000.**
- (4) Specials Kshs 30,500.**

Total 850, 300.

Less 30% of liability apportionment.

Costs of the appeal to the appellant.

Dated, delivered and signed in open court on 4th day of May, 2018.

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R. NYAKUNDI

JUDGE

In the presence of

Mr. Kamau for the respondent

Mr. Wanyoike for Ms Kenya for the appellant