



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 5 OF 2017

BETWEEN

1. IMA HAULIERS LTD

2. BONFACE MAKOKHA.....APPELLANTS

AND

F J N.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.323 of 2014 by Hon. J. N Maragia-Resident Magistrate).

JUDGMENT

1. IMA HAULIERS LTD. and BONFACE MAKOKHA, the appellants herein, were the defendants in the Busia Chief Magistrate's Court Civil Case Number 323 of 2014. They were sued for a claim of compensation on behalf of the estate of F A N, deceased who died out of injuries she sustained in a road traffic accident.

2. The particulars of the claim were that on 30th November 2013, the deceased who was a pedestrian along Manyole – Nambale road, was fatally knocked her down by motor vehicle KTCA 333D – ZD 5535 Trailer. The motor vehicle was owned by the 1st appellant and driven by the 2nd appellant who was blamed for the accident.

3. On 11th October 2016 both parties entered a consent on liability as follows:

The defendants to shoulder 75% liability and the plaintiff to shoulder 25% liability.

4. The parties therefore having compromised the suit on liability, the learned trial magistrate was left with the task of determining the quantum of the damages payable.

5. The award of the learned trial magistrate was as follows:

a) Loss of dependency	Kshs.700, 000/=
b. Pain and suffering	Kshs. 25,000/=
Total	Kshs.725, 000/=
Less contribution	Kshs.181, 250/=
Net	Kshs.543, 750/=

6. The appellants were aggrieved by the award in the judgment which was delivered on 13th December 2016 and filed this appeal. They were represented by the firm of Muma Nyagaka & company Advocates. In the Memorandum of Appeal, the appellants set out five grounds of appeals as follows: -

a) The learned trial magistrate erred in law and in facts in making an award for general damages of Kshs.700, 000/= an amount that

was excessive.

- b) The learned trial magistrate erred in law and in facts by failing to appreciate the guiding principles in determining the quantum of damages.
- c) The learned trial magistrate erred in law and in facts in failing to consider the evidence of the appellants and their submissions.
- d) The learned trial magistrate erred in law and in fact by delivering a judgment against the weight of evidence and the law.
- e) That the judgement of the learned trial magistrate considered irrelevant issues.

7. The respondent was represented by the firm of Bogonko, Otanga & Company Advocates. He contended that the decision of the trial magistrate ought to be upheld.

8. When the matter came for directions on 24th October 2017, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.

9. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

10. Since the parties herein entered a consent on liability, the only issue for my consideration is whether the quantum of damages was excessive. In the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICES, GATHOGO KANINI vs. A.M.M LUBIA & ANOTHER (1982-88) 1 KAR 777** the Court of Appeal stated as follows:

"the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage." [Emphasis added]

11. It was argued for the appellants that the trial court did not consider the authorities cited before arriving at the award that gave rise to this appeal. During the trial, the respondent opined that an award of Kshs.1, 000, 000/= for loss of dependency was adequate compensation. The following authorities were relied upon in making the proposal:

SANYA HASSAN & ANOTHER vs. SOMA PROPERTIES LTD[2004] eKLR where an award of Kshs.1, 800, 000/= was made in respect of a minor aged 12 years and the case of **ELIUD SINDANI MAJIMBO MUTUMBAI vs. CLEOPHAS WANYONYI SIMIYU & ANOTHER, NAIROBI HCCC NO.880 OF 2002**. In this case an award of Kshs.756, 000 was made for a boy aged 9 years on account of lost years.

12. The appellants on the other hand were of the view that a global award of Kshs.200, 000/= was adequate compensation. They relied on the following authorities:

a) **DOMINIC OWUOR DIBUOR vs. JOHN OKOTH ADUNDA** at Migori **HIGH COURT CIVIL APPEAL No.43 of 2015 [2015] eKLR**. Justice D.S Manjanja reduced the trial court's award of Kshs.300,000/= to Kshs.200,000/= for a minor who was aged 12 years at the time of his death.

b) **OYUGI JUDITH & ANOTHER vs. FREDRICK ODHIAMBO ONGONG & 3 OTHERS (2014) eKLR** justice D.S. Majanja awarded a global sum to a deceased aged 18 years at ksh.120,000/=

c) **Sammy Kiprutorop & Another vs. Francis Cheruiyot Barbelio** suing as the legal rep of **Penina Jeptoo (2016) eKLR** here the deceased was 21 years old and Justice George Kanyi Kimondo although he adopted a multiplier approach he awarded the deceased a sum of ksh.383,680/=

13. These were the authorities that the learned trial magistrate had to grapple with before she arrived at her decision on the quantum of award. She however did not give an indication as to which authority she relied on and her reasons for doing so.

In the case of **OYUGI JUDITH & ANOTHER V FREDRICK ODHIAMBO ONGONG & 3 OTHERS [2014] eKLR** at paragraph 27 justice Majanja said as follows:

Fredrick Ouma was in Form 2 when he met his death. The claim pleaded was in respect of the loss to his estate under the Law Reform Act. The learned magistrate awarded a lump sum of Kshs. 800,000.00 based on Simon Mwangi Mureithi v Martin O. Shikuku & Another MSA HCCC No. 198 of 2003 (UR) where the court awarded Kshs. 720,000/- for loss of earning capacity. The plaintiff in that case was a polytechnic student in his final year. Quite unlike in this case, the future prospects of the deceased were not known nor was there any basis to speculate that he would have been an engineer. Even if he was, the plaintiff did not proffer any evidence to show the level of expected earnings or his prospects in the future. In the circumstances, a multiplier approach was wholly inappropriate as a basis for assessment of damages. A global sum to

recognise the loss to his estate would be preferred. I would therefore award the sum of Kshs. 120,000.00.

In the instant case, the deceased was aged 10 years and was in standard five at the time of her death. Other than the evidence by her father that her performance in school was impressive, nothing was produced to buttress the claim. There was therefore no basis of knowing what the future held for her. The award of Kshs.700, 000/= for loss of dependency was on the higher side. I will reduce the award on this head to Kshs.500, 000/= subject to contribution of 25% as agreed upon by the parties. Costs of the appeal to the appellants.

DELIVERED and SIGNED at BUSIA this 17th day of July, 2018

KIARIE WAWERU KIARIE

JUDGE