REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 67 OF 2016

KITALE INDUSTRIES LTD….....1ST DEFENDANT

HILKAM AHMED MOHAMED.....2ND DEFENDANT

VERSUS

1. ZAKAYO NYENDE

2.EMILY OLANGO (*suing as the legal representatives of*

***the estate of* VA –DECEASED)..... PLANTIFF**

***(From the judgment and decree of M.I. Shimenga ,R.M, in Butere SPM's court civil case No. 59 of 2015 delivered on 18th August, 2016*).**

J U D G M E N T

1. The respondent herein had sued the appellant in the lower court seeking for general and special damages after the 2nd respondent's 12 year old daughter was killed in a road traffic accident involving a vehicle belonging to the appellants. The claim was under the Fatal Accidents(cap 32) and under the Law Reform Act(cap 26) of the Laws of Kenya. The lower court awarded damages as follows:

Pain and suffering	Ksh. 20,000/=
Loss of expectation of life	Ksh. 80,000/=
Loss of dependency	Ksh. 820,000/=
Special damages	Ksh. 30,800/=
Total	Kshs. 950,000/=
Less 30% contribution	Kshs.285,000/=
Award	Kshs. 665,560/=

2. The appellant was dissatisfied with the award and filed this appeal on the grounds, interalia, that:

1.That the learned trial magistrate misdirected herself in ignoring the principles applicable in awarding of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.

2. That the learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondents and failed to apply precedents and the law applicable.

3. That the learned trial magistrate erred in awarding, a sum in respect of damages which was so inordinately high in the circumstances that it represents an entirely erroneous estimate vis-a-vis the respondents claim , and the award constituted a miscarriage of justice.

4. That the learned trial magistrate failed to apply herself judicially and to adequately evaluate the evidence and submissions

tendered on quantum and thereby arrived at a decision unsustainable in law.

Submissions by Advocates:-

3. The advocates for the appellant, **E.K. Owinyi & Co. Advocates**, submitted that since the deceased was a minor, it was wrong for the trial magistrate to use the multiplier approach instead of the lumpsum/global award approach method. That the trial magistrate did not give any reason as to why she preferred to use the multiplier approach method instead of the lumpsum/global award approach as was submitted by the advocates for the appellant. That the general practice is to use the global approach method in awards for minors as it is not easy to tell the future of a minor with any certainty. That due to the risks and imponderables of life that the deceased might even have died of another cause before attaining working life, only a global award is reasonable to make.

4. Further that the deceased had not earned an income that could have helped the court to determine suitable multiplicand. That there was no justification in the court adopting a multiplier of 25 for a 12 year old. That no evidence was led to show that the deceased had a bright future.

5. That the trial magistrate used a dependency ratio of one- half. That it is trite law that a two thirds ratio is usually applied where a deceased is survived by issues and where this is not the case, the correct ratio applicable is one -third except in very exceptional circumstances. That there was thereby no justification in the trial magistrate using a dependency ratio of one- half.

6. That the court ought to have subjected the award to a reduction of Kshs. 20,000/= made for pain and suffering as it was a Law Reform Act award and it was necessary to avoid double gain and double jeopardy.

7. The advocates urged the court to set aside the award and make a global sum award of Ksh 400,000/=. They relied on the following authorities:

> **-Palm Oil Transporters & Another Vs W.W.N (suing as the Legal Representative and Administrator of the estate of W (Deceased),** Machakos HCCA No. 142 of 2009 (2015)eKLR, where Nyamweya J. used the lumpsum/global approach method and upheld an award of Ksh. 400,000 in a case where the deceased child had died at the age of 13 years. The grounds were that the child had not earned any income that could guide the court in determining the multiplicand and the multiplier.
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> **-Charles Ouma Otieno & Another Vs Benard odhiambo Ogecha (Suing as Brother and legal Representative and Administrator of the estate of the late Oscar Onyango Ogecha(Deceased) , Kisii HCCA No. 50 of 2013,** where 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 adopted the lumpsum award method and awarded Ksh. 350,000/= where the child had died at the age of 14 years. The grounds were that the future of the child was uncertain and there was no knowing what he would have become had he lived his life to the full nor how much he would earn.

8. The advocates for the respondent, **Namatsi & Co. Advocates** opposed the appeal. They submitted that Kenyan courts have generally adopted two approaches in determining quantum of damages to award to estates of deceased minors as compensation for loss of expectation of life and dependency- the global sum approach on one hand and the dependency ratio/income on the other. Therefore that the trial court cannot be faulted for preferring either of the approaches as there is no rule of the thumb on the preferable approach.

9. Further that the adoption of a multiplier of 25 years, the minimum wage of Kshs. 6000/= and a dependency ration of one-half cannot be faulted. That the argument that the award of Ksh. 20,000/= for pain and suffering should also be subjected to deduction from the award is untenable as it is not income like the income for lost years and loss of dependency.

10. To buttress the point on the adoption of the awards on the dependency ratio approach , the advocates cited the following authorities:

> **-Simon Kibet Langat & Another Vs Mariam Wairimu Ngugi (suing as the Administrator of the estate of Daniel Mwiruti Ngugi(2016)eKLR** where **eKLR Mulwa J** considered urguements on both methods and said that the dependency ratio/expected working life/income method was quite in order as it is used in many decisions, though on her part the global award method was more appealing. In that case she awarded Kshs. 720,000/= for loss of dependency where the minor had died at the age of 14 years.
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> **-Transpares Kenya Limited & Another Vs S.M.M (suing as legal representative for and on behalf of the estate of E.M.M(Deceased**) **Machokos HCCA No. 203 of 2012 (2015) eKLR** where Nyemweya J endorsed both approaches in a case where the deceased had died at the age of 5 years.
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> **-Oshivji Kuvenji & Another Vs James Mohamed Ongenge(2012)eKLR** in a case where the magistrate had adopted the multiplier approach and Ngenye – Macharia J stated that neither the High Court nor the court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor. In that case the learned judge made a global award of Kshs 320,000/=. The deceased had died at the age of 6 years.
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> **-D.M.M. (Suing as the Administrator and legal representative of the estate of L.K.M Vs Stephen Johana Njue & Another, Meru HCCA NO. 21 of 2014** where the trial magistrate had awarded a global sum of Ksh 700,000/- for loss of dependency. Gikonyo J increased the award to Kshs. 1,200,000/= for a 16 year old who was doing well in school at the time of demise.
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> **-Daniel Mwangi Kimemi & 2others Vs J.G.M & Another (The personal representatives of the estate of N.K. (DCD) (2016)eKLR** where the minor had died at the age of 9. The trial magistrate adopted the multiplier method. Gikonyo J. however held that the trial magistrate did not explain why he adopted a multiplicand of Kshs 6000 and a multiplier of 25. That in his view the better judgment was to award a global figure for loss of dependency. He accordingly set aside the award for loss of dependency and

awarded a global sum of Kshs 1 million.

DETERMINATION:

11. The issue for determination in this case is whether the trial magistrate applied the wrong principles of law in assessing the damages payable to the estate of the deceased as a result of which she arrived at an inordinately high figure.

12. The circumstances under which an appellate court can disturb an award for general damages was well stated in the case of **Bashir Ahmed Butt Vs Uwais Ahmed Khan (1982-1988) KAR** 5 that :

> **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.**

13. The appeal is on the award made on loss of dependency. The advocates for the appellant submit that the most appropriate method in the circumstances of this case was the global approach method while the advocates for the respondent hold the view that it was appropriate for the trial court to use either of the methods.

14. It is clear from the authorities cited by the advocates of either side that there is no uniform method for assessing damages to be awarded to the estates of minors. Some High Court 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 h**e** said that:

> **‘‘It thus emerges that superior courts 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.’’**

14. On the other hand there are some High Court decisions which 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 quoted in **Albert Odawa Vs Gichimu Gichenji, NKU HCCA No. 15 of 2003 (2007) 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 altar of methodology , something a Court of Justice should never do.’**

15. What is not in doubt is that estates of minors are entitled to damages for loss of dependency as was stated by the Court of Appeal in **Kenya Breweries Limited Vs Saro , Civil Appeal No. 144 of 1990 (1991) eKLR** 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 years 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 parent 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 so invariably take care of their aged parents.’**

16. The estate of a deceased minor is in addition entitled to damages for pain and suffering**. In Chen Wembo ~& 2 others Vs IKK & another (Suing as the legal representative and Administrator) of the estate of CRK (Deceased) (2017) eKLR** , Meoli J. held that :

> **‘Equally, there can be no dispute that the estate of a deceased minor is entitled to damages for pain and suffering , loss of expectation of life , funeral expenses etc. under the Law Reform Act…’**

In that case the learned judge held that the trial magistrate was entitled to make the awards under the heads (multiplier approach) , but went ahead to consider whether the case was a suitable one for multiplier/multiplicand approach.

17. The evidence of the respondent was that the deceased was aged 12 years at the time of death. That she was a class 6 pupil who was hardworking in school and had expressed a desire to be a pilot.

18. The learned trial magistrate considered a multiplier of 25 years to be reasonable on the ground that the deceased was a ‘ young woman of 12 years and could have worked up to the age of 55 years. She also adopted the minimum wage of Kshs. 6000/=. She adopted a dependency ratio of one-half ‘‘because the deceased was young and didn’t have a family, though it is logical that she would have helped her parents and

family members as is common practice in most homes''. Her award on loss of dependency worked out as follows:

6000 x 12 x 25 x ½ =	-	Kshs 900,000/=
less award for loss of expectation of life	-	Kshs 80,000/=
		Kshs 820,000/=

19. In assessing loss of dependency, the age of the deceased is important. It is apparent that the learned trial magistrate fell into error by treating the deceased as a young woman instead of being a minor . She fell into error by holding that the minor would have worked upto the age of 55 years when the deceased was not working . The magistrate therefore used the wrong principles to determine the multiplier of 25.

20. The appellant produced the deceased's school report, Pex-5, that indicates that she was an average pupil. It is difficult to determine from the school report the ability of the deceased and what she would have turned out to be in life . It is a fact of life that there are some average students who have ended up doing well in life while others have not managed to do so. The decision by the trial magistrate to use the minimum wage as the multiplicand when there was no evidence on the ability of the child was erroneous and based on speculation.

21. If the deceased had lived to work ,it is impossible to expect that she would commit half of her earnings to the respondents. The trial court was therefore in error to adopt a dependency ratio of one-half. The conventional dependency ratio of 1/3 would have been more reasonable.

22. In face of the foregoing, I am of the view that it was not appropriate to employ the multiplier/ multiplicand method in this case. It was difficult to fathom what the 12 year old child would have turned out to be in life. The adoption of the multiplier method in the case was based on speculation. The learned trial magistrate used the wrong principles to arrive at the award for loss of dependency. The global approach method is , in my view the better approach where it is difficult to ascertain the multiplicand and the multiplier. I would thereby set aside the award of Kshs. 900,000/= made by the trial court on loss of dependency and make an award on the global basis method.

23. In the authorities relied on by the advocates for the appellant, global awards of Kshs. 400,000/ and Ksh 350,000/= were made respectively for the estates of 13 and 14 years olds. In the authorities cited by the advocates for the respondent, global awards ranging from Kshs. 320,000/= to Ksh. 1 million were made for estates of deceased minors who had died between the ages of 6 and 14 years.

The deceased herein was an average student in school. I make a global of award Ksh. 600,000/= for loss of dependency.

24. An award totaling to Kshs. 100,000/= was made under the Law Reform Act. The advocates for the appellant submitted that this award ought to be deducted from the award for loss of dependency as it amounts to double compensation.

25. The concept of double compensation was explained recently in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja (deceased) Vs Kiarie Shoe Stores Limited, Nyeri Civil Appeal No. 22 of 2014** where the Court of Appeal stated that :-

> '.. **this court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act , hence the issue of duplication does not arise''.**

The court re- stated what was held in **Kenfro Africa Limited t/a Meru Express Services 1976 & Another Vs Lubia & Another (1987) eKLR 30** that :

> ' 6. **An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.**
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> **7. The Law Reform Act (cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any of the rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.**
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> **8. The words 'to be taken into account' and ' to be deducted' are two different things . The words in section 4(2) of the Fatal Accidents Act are 'taken into account'. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for non – pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.**

26. The trial magistrate herein deducted the sum of Kshs. 80,000/= made for loss of expectation of life. The same was erroneous as there is no requirement in law to do so. Similarly there is no requirement for the court to deduct the award for pain and suffering. The awards made under the Law Reform Act do not amount to double compensation. I have in this case taken into account the awards made under the Law Reform Act when making the award under the Fatal Accidents Act.

27. In the foregoing the award of the trial court on loss of dependency is set aside and replaced with an award of Kshs. 600,000/=. The award is therefore computed as follows:-

1. Pain and suffering	- Ksh. 20,000/=
2. Loss of expectation of life	-Kshs. 80,000/-
3. Loss of dependency	- Kshs. 600,000/=
4. Special damages	- Kshs. 30,800/=
TOTAL	-Ksh. 730,800/=
Less 30% contribution	-Ksh. 219,240
Award	-**Kshs. 511,560**/=

Judgment is entered for the respondents to the sum of Kshs, 511,560/= with interest at court rates.

The respondents to have the costs of the appeal.

Orders accordingly.

Delivered, Dated and signed at Kakamega this 3rd day of July,2018.

J. NJAGI

JUDGE

In the presence of:

N/A……...for respondent

George..……court assistant.

Parties:

Appellant …….absent

Respondent ……..absent