



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCA NO. 3 OF 2018

PATRICK O. OPEYA.....APPELLANT

VERSUS

DANIEL OBIERO AGWANG (*Suing as the legal rep, adm.*)

Ad-litem of the estate of SEFIS ODHIAMBO ANYUMBA.....RESPONDENT

(Being an appeal from the Judgment made by Honourable R.M. Ndombi

Delivered and dated 4th July, 2017, in KISUMU CMCC NO. 127 of 2015]

JUDGMENT

1. The appeal arises against the quantum of compensation that was awarded by the trial court.
2. The Appellant and the Respondent had agreed on the issue of liability, at the ratio of 75%:25%.
3. The victim, **S O A**, was a child aged 15 at the time of the accident which led to his death.
4. On the material day, he was a passenger on a motor cycle Registration No. **KMCS 665L**, when the Respondent's motor vehicle Registration No. **KAS 980R** hit the motor cycle from behind.
5. The victim sustained serious injuries and was rushed to hospital. However, he succumbed to his injuries, three (3) days later.
6. The Appellant faulted the trial court for using the multiplicand of Kshs.10,000/= as the monthly income which the minor lost.
7. It is common ground that during the trial, the victim's uncle testified that he was the victim's guardian, as both parents of the victim had passed away earlier.
8. The said witness told the court that the victim was a student at Kit Mikayi Primary School. According to the witness, the victim was in Class 7.
9. However, during cross-examination, the witness said that he did not have anything to prove that **S O A** was a student at Kit Mikayi Primary School.
10. The Appellant submitted that in the absence of evidence that the minor was attending school, the trial court erred by delving into speculation.
11. I have carefully read through the judgment of the learned trial magistrate, but I did not find any speculation.
12. The Appellant has also not specified any particular statements in the judgment, which form the basis of his assertion concerning the alleged speculation.
13. I think that it is essential to always have submissions directed against specified findings, so that an appellate court can then interrogate the said findings to ascertain whether or not the criticism was properly founded.

14. When an Appellant does not give precision, that may lead to speculation by the appellate court.
15. Nonetheless, I appreciate that it is often times possible for the court to make analytical deductions, based on the findings being challenged.
16. In this instance, it appears that the criticism against the trial court is premised on the fact that the court did not award a global sum in respect to the compensation awardable to the estate of the minor.
17. I understand the Appellant to be complaining that the trial court appears to have made a presumption that the minor was not just in school, but that the minor would successfully acquire education and would thereafter secure an income earning source of livelihood.
18. If that be deemed to be speculation, then it would be safe to say that the whole process of quantifying compensation is speculative.
19. There is no guarantee that a minor who is intelligent in school will successfully complete his education.
20. He could die through an accident or through illness.
21. And even if he completed his college education, there is no certainty about getting a job that will enable him earn a regular income.
22. Whilst it is good to be optimistic and to hope that our children will not only grow into adulthood, but will thereafter be able, willing and desirous of supporting their parents, in their old age, such expectation may or may not become a reality.
23. In order to try and reduce the scope for speculation, the courts have come up with formulas for use in computation of compensation.
24. In respect to minors, I find that justice and fairness is best served when a lumpsum award is made, because there is no person who can correctly forecast how the future would actually turn out.
25. This can be contrasted with the situation of an adult who was already earning an income, and who was providing support to his parents and siblings. From the actual income, as well as the expenses incurred on behalf of the parents and siblings, the court is better placed to make a more realistic computation.
26. In this case, I have found no basis in law or in fact for using the multiplicand of Kshs.10,000/=.
27. The Respondent submitted that the trial court had the option of doing the assessment of the compensation using whatever formula or method that the said court deemed proper.
28. The Respondent then added, that if the court found that the method used was wrong, I could still treat the amount calculated and awarded, to be the global figure.
29. The Respondent ought to have told this court about the system which the trial court used, and he should then have sought to satisfy his court that the said method was used properly.
30. At no point has the Respondent sought to explain the system used or to justify its application.
31. But I can state categorically that just because a court has chosen to use a particular method for the computation of compensation, does not render such a system acceptable or justifiable.
32. Where there are established formula for computation of compensation, the court ought to utilize such formula. But if there were exceptional reasons to warrant a departure from settled formula, the court may feel free to depart from the said norm, provided that the court provides lawful and justifiable basis for the said departure.
33. I have re-evaluated the evidence on record and I have given careful consideration to the relevant guiding principles in the computation of awards for victims who are minors; and I have come to the conclusion that the sum of Kshs.700,000/= is appropriate for Loss of Dependency.
34. Accordingly, the sum awarded by the learned trial magistrate is set aside, and I now award;

a) Pain and Suffering - Kshs.30,000/=

b) Loss of Expectation of Life - Kshs.100,000/=

c) Loss of Dependency- Kshs.700,000/=

T O T A L - Kshs. 830,000/=

LESS 25% - Kshs. 207,000/=

BALANCE - Kshs. 622,500/=

35. The said sum shall attract interest at Court rates from 4th July 2017, when the trial court delivered its judgment.

36. Each party will meet his own costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU this 11TH day of SEPTEMBER 2018.

FRED A. OCHIENG

JUDGE