REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 73 OF 2017

KARANJA EDWIN alias EDWIN GITAU KARANJA.....APPELLANTS

VERSUS

RAHAB WANJIKU NJOROGE.....RESPONDENT

(Being an appeal from the Judgment of Hon. G. Onsarigo Resident Magistrate delivered on 4/5/2017 in Kikuyu PMCC No. 237 of 2014)

J U D G M E N T

1. This appeal emanates from the judgment of **Onsarigo,** Resident Magistrate, in **Kikuyu PMCC No. 237 of 2014**. By the Plaint filed on 4/9/2014, the Plaintiff in the lower court, and now the Respondent herein, sued the Defendant now the Appellant, claiming compensation for the fatal injuries sustained by the deceased on 1st December, 2013. The Respondent sued in her capacity as the legal representative of the estate of **Erick Muthui Mwangi** the deceased. She averred that the deceased was lawfully walking along the **Wangige-Karura** road when the Appellant and /or his agent so negligently drove the Appellant's motor vehicle registration number **KBV 757P** that he caused the same to lose control and violently knock down the deceased, as a result of which the deceased sustained fatal injuries.

2. The Appellant filed his defence on 23rd September, 2014, denying any liability for the accident. In particular, the Appellant denied that the deceased was the person involved in the said accident.

3. The suit was disposed of by way of written submissions after a consent on liability was filed. Under which liability was apportioned at 85:15% in favor of the Respondent. The Trial Magistrate entered judgment for the Respondent as follows:

a) Damages under the Law Reform Act

Pain and suffering	Kshs.	20,000/ =
Loss of expectation	Kshs.	150,000/=

b) Damages under the Fatal Accidents Act

Loss of dependency		Kshs. 2,100,000/=
		Kshs. 2,270,000/=
Less contribution	Kshs.	340,500/=
Total		Kshs. 1,929,500/=

4. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present appeal based on the following grounds:-

"a) That the learned magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards on deceased of closely related age.

b)That the learned magistrate erred in law in making such a high award on loss of dependency as to show that the magistrate acted on wrong principle of law.

c) That the learned magistrate applied a monthly income that was not specifically pleaded and proved and did not have any basis and justification to award the same.

d) That the learned magistrate erred in law and fact by applying a dependency ratio of ½ and failed to take note the deceased was a minor and the only beneficiary was the mother.

e) That the learned magistrate erred in law and fact in failing to take into account the award under the Law Reform Act and the Fatal Accidents Act

f) That the whole judgment on quantum was against the weight of evidence before the court".

5 The parties agreed to canvass the appeal by way of written submissions. Through his advocate's written submissions, the Appellant submitted that the damages awarded were not commensurate with other awards in respect of deceased minors. He deponed that no evidence was tendered to warrant an award for lost years as the future prospects of the deceased could not be anticipated. It was his submission that the trial court did not appreciate the authorities tendered by the Appellant urging a global award. Counsel, appreciated that the assessment of damages is discretionary, but stated that the award of Kshs. 2,100,000/= is so inordinately high as to warrant disturbance by the appellate court.

6. The Respondent also filed her written submissions and stating that the award of general damages is an exercise of the trial court's unfettered judicial discretion and should only be interfered with if it is shown that it was exercised on the wrong principle and that the Appellant had failed to prove any error on the part of the trial court. To support this proposition, Counsel relied on a number of cases among them ***Samken Limited & Another vs Mercedes Sanchez Civil Application No. Nbi21 of 1999*** where it was held that the burden of proving improper exercise of discretion lies with the person alleging the same.

7. The court has considered the submissions made on this appeal. There was no formal hearing in the lower court, the parties having recorded a consent judgment on liability at the ratio of 85:15% in favour of the Respondent. This consent, filed on 14.4.16 does not appear to have been formally adopted as an order of the court even though subsequent proceedings suggest its adoption. The second limb of the consent was to the following effect:

"2 That the case to proceed for assessment of damages and documents to proceed without calling the maker." sic**.**

8. I presume the reference to documents is to the respective document filed by the parties under Order 11 of the Civil Procedure Rules. The parties subsequently agreed on 30.1.17 to file written submissions.

9. On this appeal, the Appellants are particularly aggrieved with the award in respect of lost dependency, asserting *inter alia*, that neither dependency was proved, nor any material as would have justified this award tendered.

10. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424; Selle and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAI I.**

11. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR** 278 stated that:

"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did." See also **Mbogo v Shah [1969] EA 93.**

12. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed as inordinately high by the Appellants while the Respondent defends the awards. The court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30.**

13. It was held in that case that:

"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages." see **also Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.**

14. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *"an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance"*.

15. The Respondent brought the claim in the lower court as a legal representative of the estate of **Erick Muthui Mwangi** who died in the accident giving rise to the claim. At paragraph 4 of the plaint she averred that the Deceased was 14 years old at death and **"was enjoying good health and leading a happy life,** and that following his demise, his estate had suffered loss and damage. Particulars pursuant to the

Fatal Accidents Act contained in the same paragraph are that the claim was brought for the benefit of the Respondent, the mother to the Deceased. The Defendant denied all the allegations of loss and damage.

16. The Respondent's documents filed on 9th September 2014 included a death certificate, and copy of the grant *ad litem* in favour of the Respondent. There is also a list of witnesses but no witness statement was attached. On her part, the Appellant filed a list of witnesses, and attached a statement by **Edwin Gitau Karanja,** the Appellant herein. No documents were filed.

17. The Appellant's complaint on this appeal that no evidence of dependency was tendered has came too late. In his own submissions in the lower court the Appellant all but admitted that the award was payable, the only question being question being quantification.

18. The Appellant had submitted that a global amount was applicable stating:

> **"There was no academic testimonials that were produced to indicate the likely career. The deceased child was not employed and no income is pleaded to guide in determining a multiplicand and resultant multiplier. We submit that a global amount is applicable... All said and done, children are an asset, and parent's expectations are shattered when they lose their lives ... For those reasons, the global approach appeals more."** sic

19. Citing two authorities **Palm Oil transporters and Another v WMN [2015] e KLR** (involving a child aged 11 years) and **Moranga Abel Nyakenyanya v Jackson Kichwen (1999) e KLR** (involving a 10 year old child) he urged an award of KShs.450,000/= on this appeal.

20. For their part, the Respondent's advocates urged a multiplier approach, asserting that the minor could have matured to become a professional, that **"at the very worst (the deceased) could be a casual labourer earning an average of KShs.10,071/= as provided basic minimum consolidate wages ... 2015."(**sic) Several authorities, including **Suluenta Kennedy Sita and Another v Jeremiah Ruto Eldoret Civil Appeal No.163 of 2011** and **Nairobi HCC No.159 of 2013 MMG Administrator of the estate of ZG v Muchemi Teresa [2015] e KLR** involving a 2 year old, were cited.

21. It is not clear from the judgment of the trial magistrate why he felt more persuaded by the authorities cited by the Respondent's advocates and therefore settling on a multiplier approach. Granted, he adopted the minimum wage over a period of 35 years (2 years less than the Respondents had urged).

22. Nonetheless, beyond the fact of the age of the Deceased, there was no evidence whether he was in school at the time of his death; and the court appeared to assume that his support to his mother would have remained constant at a ½ ratio for all his working life. This is not realistic at all as the Deceased could have married and could not have been expected to sustain a dependency of ½ of his income to his mother, whose age was unknown at the time of the trial. In my considered view, there was a dearth of evidence before the trial court that rendered the case unsuitable for the multiplier approach.

23 Indeed in the case of **Suluenta Kenedy Sita** which the trial Court relied on, the Judge had observed that:

> **"In calculating damages for loss of dependency in cases where the victim is a minor, courts have more often than not given a global figure guided by the minor's performance in school if there was evidence the minor was in school and his or her career prospects. In this case however, guided by the parties written submissions, the learned trial magistratecalculated loss of dependencyusing the other method based on expected monthly income..."**

24.There was no agreement in this case by the parties to adopt the multiplier approach. Further more, in the case of **Daniel Kuria Ng'ang'a v Nairobi City Council [2013] e KLR** a multiplier method was used but dependency set at ?. Ditto for **MMG v Muchemi Teresa**.

25. In **Kenya Breweries Ltd. v Saro [1991] e KLR** the Court of Appeal stated that in claims brought in respect of deceased minors, the age of the child and his capabilities were relevant factors. The court stated:

> **"... 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 a case of a four year old who has not been to school and whose abilities are yet to be ascertained. That, we think, is a question of common sense rather than law ... Were the damages awarded excessive as claimed in ground two of the memorandum of appeal? It is now well established that this court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where damages awarded are so inordinately high or law than an application of wrong principles must be interfered."**

26. The Court proceeded to consider awards made on this head between 1982 and 1990 before concluding that an award of KShs.100,000/= in 1990 cannot be taken to be so inordinately high that the application of a wrong principle must be inferred. The Court concluded by stating that:

> **"While we would express the view that damages on this head must be kept relatively low, we do not think that the sum awarded was wrong, taking into account the depreciation in the value of money. We probably would have awarded slightly less had we been the trial judge but that is not a reason to warrant us interfering."**

27. In **Chunibhai J. Patel and Another v PF Hayes & Others [1957] EA 748** the Court of Appeal had given the following guidelines in assessing damages under the Fatal Accidents Act:

"The court should find the age and expectation of theworking life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of widow or children (dependants).... The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."

28. I think the court has said enough to demonstrate that given the bare material placed before the court, the award of KShs.2,100,000/= does not appear to be based on evidence and/or is so high that it must be inferred that wrong principles were applied. The Court therefore feels justified to interfere. The awards in the Appellant's authorities in the lower Court and before this Court seem to be on the lower side and out of step with current awards for deceased children aged about 14 years. On the other hand the Respondent's authorities in the lower Court were given on the basis of adequate evidence, which is lacking in this case. Be that as it may, this Court is not bound by the said authorities.

29. Based on the sketchy evidence in the trial and current trends, such as discussed by **Nyamweya J** in **Palm Oil Transporters v WMN [2015] e KLR**, and after factoring inflation, I think that an award of KShs.700,000/= is reasonable for lost dependency. The appeal has therefore succeeded on this aspect.

30. This Court sets aside the award of KShs.2,100,000/= and substitutes therefor an award of KShs.700,000/=. This will be in addition to the awards made in respect of loss of expectation of life (KShs.150,000), pain and suffering (KShs.20,000/=) but subject to the agreed liability ratio. The Appellants are awarded the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 2ND DAY OF NOVEMBER 2018.

C. MEOLI

JUDGE

In the presence of:

Mr. Kinyua holding brief for Mr. Muchuru for Apellant

Mr. Ranga holding brief for Mr. Mwangi for the Respondent

Court clerk - Kevin