



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 122 OF 2014**  
**KWAMBOKA GRACE .....APPELLANT**  
**VERSUS**  
**MARY KEMUMA MOSE .....RESPONDENT**

*(Appeal from the Judgment of Hon. J.M. Njoroge, CM delivered at Kisii in Civil Suit No. 90 of 2013)*

**JUDGMENT**

1. The appellant, **Kwamboka Grace**, was the defendant in Kisii CMCC No. 90 of 2013, in which **Mary Kemuma Mose**, suing as the legal representative of the estate of O O M (deceased) was the plaintiff.

The claim against the appellant was for damages resulting from a road traffic accident which occurred on the 14<sup>th</sup> January 2012, along the Oyugis-Kisii road near Riverside area within Mosochi in which the deceased as a lawful pedestrian was violently knocked down and occasioned fatal injuries by motor vehicle RegNo. **KBP 383V** belonging to the appellant.

2. The respondent, in the Complaint dated 4<sup>th</sup> February 2013, pleaded that the appellant's said motor vehicle was at the material time being driven, managed and/or controlled so negligently such that it knocked down and injured the deceased who was a minor aged five (5) years, in good health and leading a healthy and vigorous life.

3. It was further pleaded by the respondent that the deceased was survived by his parents and four siblings and that his loss occasioned loss and damage to his estate.

The respondent therefore prayed for special damages as well as general damages under the Law Reform Act and the Fatal Accidents Act together with costs of the suit and interest.

4. In a statement of defence filed on 5<sup>th</sup> July 2013, the appellant denied the occurrence of the accident and the allegations of negligence made against herself by the respondent and contended that if the accident indeed occurred, then it was occasioned by the negligence of the deceased and the respondent in failing to give due regard to the minor deceased.

The appellant invoked the doctrines of "res-ipsa-loquitur" and "volenti non fit injuria" and prayed for the dismissal of the respondent's case.

5. The pleadings brought forth the question of liability and that of damages as the main issues for determination by the trial court. However, by consent of both parties, judgment on liability was entered in the ratio of 80:20% in favour of the plaintiff (respondent) against the defendant (appellant). This

appeal is therefore on quantum of damages only.

6. The appellant thus contends that the award of damages made by the trial court was excessive as it was not based on concrete evidence, was wrong and erroneous and was not based on established principles.

At the trial, evidence was led by the respondent only. She testified that the deceased was her son aged 4½ years at the material time. That, he was a pupil at Nyamondo Primary School. He attended the baby class while in good health and active. He was a bright child in school and aspired to be a pilot. He thus had a great future.

7. The respondent further testified that she and her entire family expected that the deceased would assist his parents during their old age. That, expenses incurred during the burial of the deceased included Kshs. 10,000/= for the casket (coffin) and Kshs. 20,000/= for other funeral expenses. In addition, there were other expenses for the police abstract, death certificate, letters of administration, copy of KRA records, etc.

8. The respondent claimed both special and general damages against the appellant.

The trial court considered the evidence and awarded the respondent a sum of Kshs. 15,000/= for pain and suffering, Kshs. 100,000/= for loss of expectation of life and Kshs. 720,000/= for loss of dependency based on a multiplicand of Kshs. 6000/=, a multiplier of 30 years and dependency ratio of 1/3<sup>rd</sup>. Special damages were set at Kshs. 30,000/=.

Judgment was entered for the respondent against the appellant for the total sum of Kshs. 865,000/= less 20% contributory negligence i.e Kshs. 692,000/= together with costs and interest.

9. The appellant was aggrieved by the award and in particular the award on loss of dependency. She therefore preferred the present appeal on the basis of the grounds in the memorandum of appeal dated 27<sup>th</sup> October 2014, filed by the firm of **Mose, Mose & Millimo Advocates**.

Learned counsel, **Mr. Lazarus Mose**, appeared for the appellant at the hearing of the appeal while the learned counsel, **Mr. Dennis Nyatundo**, appeared for the respondent.

10. The appeal was canvassed by way of written submissions which were duly filed by both sides and which have been duly considered by this court in the light of the grounds of appeal and those in opposition thereto.

The duty of this court was to reconsider the evidence adduced at the trial and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Selle Vs. Associated Motor Boat Co. Ltd (1968)EA 123**).

11. In that regard, the evidence by the respondent has duly been considered hereinabove. It was not in dispute that the deceased was a child aged about four (4) years at the time of death. His school report was not produced to show that he was a bright pupil with a promising future. Most importantly, he was a child fully dependant on his parents and not vice-verse.

12. However, his estate was entitled to general damages under the Law Reform Act for loss of life expectation and for pain and suffering. The estate was also entitled to proven special damages. Damages for loss of dependency would be under the fatal accidents Act to cater for dependants (if any) who may not necessarily be beneficiaries of the estate.

13. In **Kemfro Africa Ltd t/a Meru Express Service & Another Vs. A.m Lubia & Another (1982 – 1988)1 KAR 727**, the court stated that:-

*“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 that 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 of the damage”.***

(see also, **Ilanga Vs. Manyoka (1961)EA 705**).

14. In this court’s opinion the award by the trial court under the Law Reform Act i.e for loss of life expectation (Ksh. 100,000/=) and for pain and suffering (Ksh. 15,000/=) was reasonable and adequate such that it does not call for interference by this court. Indeed, the appellant raises no issue with that award as well as that made in respect of special damages.

15. The bone of contention is the award of Ksh. 720,000/= made by the trial court for loss of dependency.

The appellant rightly argued that the deceased was a dependant of his parents for all his needs. She (appellant) was therefore of the view that the trial court should have applied the global sum formulae in awarding damages for loss of dependency rather than the multiplier approach which resulted in the award being excessive.

16. The Fatal Accidents Act provides a cause of action by the dependants of a deceased person and when damages are assessed under the Act, it is a hard matter of cash money leaving no room for what may be called sentimental damage, bereavement or pain and suffering. The measure of damages is the pecuniary loss which has been suffered and is likely to be suffered by each dependant.

17. Such loss would be nil with regard to a child who is wholly dependant on his parents. The parents may however, be compensated under the Law Reform Act for lost years but this was not pleaded herein. Basically, general damages for lost years are awarded to the estate of a deceased person under the Law Reform Act to compensate the estate for the loss of income it would have benefitted from if the deceased had lived (see, **Benham Vs. Gambling (1941)AC 157** and **Gammell Vs. Wilson (1982)AC 27**).

18. The principles laid down in the Gammell case (supra) were applied in the Kenyan case of **Sheikh Mustaq Hassan Vs. Nathan Mwangi Kamau Transporters & Others MSA HCCC No. 743 of 1981**.

In the case of **Attan Mubarak Vs. Mulji Velji Coast Co. Ltd MSA HCCC No. 973 of 1984**, the court stated that:-

***“In our society, the courts have taken perhaps a more realistic attitude that parents expect financial help from their children when they grow up. In our society, the children generally, even after they get married continue to give financial support to their parents”.***

19. In that case, the court awarded a global sum of Kshs. 100,000/= under the Fatal Accidents Act in respect of a child who was aged ten (10) years and a class 3 pupil at a Primary School.

In **Marko Mwenda Vs. Bernard Mugambi & Another NBI HCCC No. 2343 of 1993**, the court stated that the multiplier approach in assessment of damages under the Fatal Accidents Act is just a method of assessing damages and not a principle of law or a dogma. It can, and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without due speculation.

20. The court further stated that where the factors aforementioned are not known or unknowable, it would be to sacrifice justice on the alter of methodology to insist on the multiplier approach, something a court of justice should never do.

This court fully agrees with that learned proposal as it is obvious that the facts herein did not facilitate the application of the multiplier approach in the assessment of damages for loss of dependency. The multiplicand could simply not be ascertained.

Therefore, the award for loss of dependency made herein by the trial court on the basis of the multiplier approach was erroneous.

**21.** The global sum approach was the most suitable in the circumstances of this case. In that regard, this court would award damages in the sum of Kshs. 300,000/= for loss of dependency as suggested by the appellant both at the trial and this appeal. It is to that extent that this appeal succeeds.

Ultimately, the award of Kshs. 720,000/= made by the trial court for loss of dependency is hereby set aside and substituted for the sum of Kshs. 300,000/= under the head.

**22.** The awards made by the trial court for loss of expectation of life and for pain and suffering including the award respecting special damages are otherwise sustained by this court.

Judgment is thus entered for the respondent against the appellant for total sum of Kshs. 445,000/= less 20% contributory negligence i.e Kshs. 356,000/= together with costs and interest.

The appellant shall have the costs of the appeal.

Ordered accordingly.

**[Delivered and signed this 9<sup>th</sup> day of March 2017].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Moracha holding brief for Mr. Mose L.

for appellant

Mr. Nyatundo for respondent

Mohe/Dorothy CC