



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA

HCCA NO. 31 OF 2016

MORRIS GITONGA (Suing as the Legal

Representative of the estate of B M).....APPLICANT

- VERSUS -

MORRIS MUTUNGA KYAULA.....1ST RESPONDENT

MURITHI RINGERA.....2ND RESPONDENT

(An Appeal from the Judgment of Hon. A.G. Kibiru - Senior

Principal Magistrate in Chuka CM.CC No. 96 of 2011

delivered on 20/7/2016)

J U D G M E N T

1. **MORRIS GITONGA**, a legal representative of the estate of the late **B M** is the appellant herein who has brought this appeal against the decision of **Hon. A.G. KIBIRU Senior Principal Magistrate in Chuka SPM's Court Civil Case No. 96 of 2011**. In that case the appellant had sued the respondents herein for tort of negligence which saw one **B M** (the deceased) die as a result of injuries suffered due to a road traffic accident. The 1st respondent herein was blamed for negligence being the driver of the motor vehicle registration No. KBB 730K owned by the 2nd respondent and the court below found them 100% liable for the accident.

2. On quantum the lower court made the following:-

i. Pain and suffering	Kshs.25,000/-
ii. Loss of expectation of life	Kshs.100,000/-
iii. Loss of dependency	Kshs.400,000/-
iv. Special damages	<u>Kshs.37,110/-</u>

Total **Kshs.562,110/-**

Less award under Law Reform Act Kshs.100,000/-

Total awarded Kshs.462,110/-

3. The appellant felt aggrieved by the lower court's decision on quantum and preferred this appeal raising the following grounds namely:-

i. That the learned magistrate erred in law in awarding excessively low damages for pain and suffering.

ii. That the learned magistrate erred in law and fact in failing to appreciate the current trends in awarding damages for loss of expectation of life.

iii. That the learned magistrate erred in law and fact in awarding an extremely low amount for loss of dependency contrary to the dictates of the law.

4. This appeal was canvassed through written submissions by both the counsels of the appellant and the respondents' counsel. The appellant on his part has submitted that the learned magistrate failed to appreciate the authorities he had cited on the awards made under:-

i. Pain and suffering

ii. Loss of expectation of life and

iii. Loss of dependency.

In particular, the appellant has cited the case in Nbi HCC No.519 of 2013 (Z.G -VS- MUCHEMI TERESA) where an award for loss of expectation of life was assessed at Kshs.150,000/- while Kshs.3,600,000/- for lost years and/or loss of dependency was given. The appellant has further relied on the decision in BUNGOMA HCCA. NO.68 OF 2013 (GILBERT WANJIRA TWAMBA -VS- MASHRUO) where the court made an award of Kshs.120,000/- for pain and suffering and Kshs.1,715,960/- for loss of dependency.

5. The appellant submitted that every child is special to his/her parents and that it is the expectation of every parent that the child would grow up and offer them support in their old age and urged this court to use a multiplier of between 25 and 40 years and adopt the minimum wage of Kshs.9503.65 which was applicable in the year 2011 when the deceased met his demise.

6. On the other hand the respondents have opposed this appeal insisting that the lower court's award was in their view generous. The respondents have submitted that the evidence tendered by the appellant at the trial was casual and that the learned trial magistrate was in order to give the award he did and relied on the decision of J.G.W & E.W.W -VS- JAMES MURIITHI MURUGA [2014] eKLR to buttress their submissions. In that case the court was called upon to set aside an award of Kshs.100,000/- made by the lower court in respect to loss of dependency of a child aged 15 years. Hon. Judge Wakiaga then sitting in Nyeri found no basis to do so after considering decisions in the cases of JACKSON MAGATA KURITU -VS- CHARLES CHERUIYOT KETER (NKU HCCC NO.437 OF 1995), STANLEY MAINA -VS- NAIROBI DELUXE SERVICES LTD (NBI HCCC NO.54 OF 1992) and the case of ELIUD MWALE LEWA & ANOR -VS- PAKA TOWERS LTD & ANOR MOMBASA HCCA NO.89 OF 2009.

7. The respondents have submitted that the appellants did not adduce any evidence to show the kind of pain the deceased went through or any evidence on life expectancy. The respondents have contended that the lower court used its discretion in making the award it did and that this court as an appellate court should not interfere unless it is shown that the court took into account an irrelevant fact or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that assessment was not based on evidence. The respondents have submitted that amount awarded to the

appellant in the different heading was in their view excessive. For pain and suffering the respondents pointed out a decision in the case of **ELIJAH OLE KOOL -VS- GEORGE IKONYA THUO [2001] eKLR** where they contended that the court awarded 20,000/- for pain and suffering in a situation where the deceased died six months after the accident.

8. The respondents have further submitted that damages by way of multiplier is not cast in store and that a court has power to award global damages depending on the circumstances and cited the decision in the case of **RISHI HAWLERS LTD -VS- JOSIAH BOUNDI ONYANCHA [2015] eKLR** to support their contention. In that case the court observed that a multiplier approach is a method of assessing damages but it is not a principle of law of a dogma and that it can only be used where circumstances allow especially where the amount of annual or monthly dependency and expected length of dependency have been established.

9. The respondents have also faulted the appellant for raising the issue of minimum wage on appeal when he had not raised the same at the trial.

10. I have considered this appeal and the submissions made by counsels of both the appellant and the respondents. There is no contest in this appeal in so far as liability is concerned. The respondents were found 100% liable and the same was not contested. The only issue contested in this appeal is the quantum awarded by the trial court under the 3 headings namely:-

- i. Pain and suffering
- ii. Expectation of life and
- iii. Loss of dependency

11. **Pain and suffering**

The claim fails under Law Reform Act (Cap 26 Laws of Kenya). The appellant at the trial adduced scant evidence on how the deceased was injured, how he was taken to hospital and how he eventually succumbed to injuries sustained during the accident. He simply stated that the accident occurred on 9/5/2011 after which the deceased was taken to Chogoria hospital and later to Kenyatta Hospital where he died while undergoing treatment the following day at 2pm. That was all. The trial court took into consideration the fact that the deceased died a day after the accident and therefore the possibility that he underwent a lot of suffering before his death. The trial court considered the principles applied in assessing damages under this head and I find that he cited the decision in the case of **D.K. -VS- JOHN MURIITHI WAHOME & ANOR [2014] eKLR** where the court held:- *"What is considered under this head is the nature of injuries and how long it took before the victim succumbed to the said injuries"*.

In view of the above consideration, I find that the trial court properly directed itself in making the award he gave under pain and suffering. The learned trial magistrate took into account a relevant factor in assessing damages under that head and I find no basis to interfere with the said award of Kshs.40,000/-. I have considered the authorities cited by both counsels and the decisions in the following cases.

- i. ***SILAS MUGENDI NGURU -VS- NAIROBI WOMEN'S HOSPITAL [2014] eKLR.***
- ii. ***ANN WANGARE MWOMBE & 2 OTHERS -VS- PETER MUKIRI GATERI [2014] eKLR.***

This court is satisfied in view of the above that the award given under pain and suffering by the lower court is within acceptable parameters that have been applied in similar cases and I find no basis to interfere with the said award.

12. The claim of loss of expectation of life also falls under Law Reform Act. The deceased in this case was aged 15 years at the time of the accident and the trial court awarded Kshs.100,000/- under this head. The authorities cited by the appellant in this appeal show that the courts awarded Kshs100,000/- and

150,000/- respectively while in the respondent's cited case of **ELIJAH OLE KOOL -VS- GEORGE IKONYA THUO [2001] eKLR** the court awarded a sum of Kshs.80,000/- under the said head. I do find that the appellant cannot fault the learned trial magistrate for awarding Kshs.100,000/- for loss of expectation of life. I have considered a decision by **Hon. Justice Margaret Mungai** in the case of **ANN WANGARI MWOMBE & 2 OTHERS - VS- PETER MUKIRI GATERI [2014] eKLR** where she also made an award of Kshs.100,000/- under pain and suffering in similar circumstances. In the premises, I find no basis to interfere with the award made by the learned trial magistrate under this heading.

13. The claim on loss of dependency under Fatal Accidents Act is a grey area especially where it involves a child aged 15 years who is still a dependant himself/herself. Although I am minded to assume that being in Africa, great expectations are held on the future of the children due to the fact that they would in turn take care of their parents in old age. However at times the expectations are met at times as we all know the expectations are not realized. Courts have in the past taken into consideration the character and prospects of a child by the evidence touching on school performance to make general assumptions of the future prospects of that particular child. Where evidence is led to demonstrate the future prospects that the child had, courts have learned towards using multiplier to assess the lost years. It is in this context that decisions in the following cases should be viewed;

i. MMG -VS- MUCHEMI TERESA (NBI HCCC NO. 519 OF 2013)

ii. ABDI KADIR MOHAMMED -VS- JOHN WAITHAKA MWANGI [2009] eKLR.

iii. ALICE O. OLUKWE -VS- AKAMBA PUBLIC ROAD SERVICES LTD & 3 OTHERS [2013] eKLR.

iv. DAVID NGUNJE MWANGI -VS- CHAIRMAN B.O.G. NJIIRI HIGH SCHOOL [2001]eKLR.

In the above cited cases, courts were able to determine on a balance of probability the would be future prospects of the deceased persons or children.

14. On the other hand in situations where courts have found themselves in difficulty in determining the future prospects of deceased minors, the tilt has been to award a global figure and I find that the learned magistrate well captured this when citing the decision in the case of **KENYA BREWERIES LTD -VS- SARO [1981] eKLR** where the following observations were made;

" In the Kenyan Society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and whatever ability, is itself a valuable asset which the parents are proud of and are entitled to keep intact."

15. I have re-evaluated the evidence tendered at the trial in this appeal and on the basis of the same I am inclined to go with the latter school of thought which the learned trial magistrate adopted for the following reasons:-

a. A claim on loss of dependency or lost years under Fatal accidents Act must be pleaded and particularized. Under section 8 of the Act, the dependants of the deceased, their ages and relationship should be given. For example in this case the appellant being a parent or the father should have given out details about his age and that of the wife to enable the court know the number of years or multiplicand to be used to assess lost years or loss of dependency.

b. Secondly, the appellant should have adduced evidence to show the school where the deceased minor attended and his performances to help the trial court gauge the future prospects of the minor.

The trial court clearly pointed out in his Judgment that evidence in that regard was lacking and hence the basis for resorting to a making a global award of Kshs 400,000/- for lost years or loss of dependency. The

appellant has submitted that a multiplier of between 25 and 40 years should have been adopted using a minimum wage of 2011 (9503.65) to assess loss of dependency but he has not laid basis for such a claim and laid none at the trial. This court finds no legal basis for the same and so the award made by the learned magistrate shall remain.

In the premises this court having found no merit in this appeal, the same is dismissed with costs.

Dated and delivered at Chuka this 16th day of March, 2017.

R. K. LIMO

JUDGE

16/3/2017

Judgment signed, dated and delivered in the open court in the presence of I.C. Mugo holding brief for Mbogo for the appellant and in the absence of the respondents.

R. K. LIMO

JUDGE

16/3/2017