



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL APPEAL NO. 66 OF 2011**  
**S M K .....APPELLANT**  
**VS**  
**JOSPAT NKARI MAKAGA.....RESPONDENT**

**JUDGMENT**

By an amended plaint dated 9<sup>th</sup> July 2010 the Appellant herein sued the Respondent in Meru Chief Magistrates court seeking special damages, General Damages under Fatal Accidents Act and law Reform Act as well as costs of the suit.

The cause of action arose when the appellants 6 years old child was knocked by Motor vehicle Registration KAK 067 W Toyota Corolla on 32<sup>st</sup> May 2008 along Thimangiri - Meru road Kirunga. When the 2<sup>nd</sup> Respondent who was the employee/servant of 1<sup>st</sup> Respondent carelessly, negligently and/or recklessly managed the said motor vehicle and caused the child fatal injuries.

In the judgment in the Magistrates court it was found the Defendant/Respondents were 100% liable for the accident but declined to make an award under the Fatal Accidents Act for reasons that parents cannot be said to have lost any dependency as the 6 year old minor had no income and was in the contrary dependant on the parents.

The Trial Magistrate however awarded Kshs. 5000/= for pain and suffering, Kshs 70,000/= for loss of expectation of life and Kshs 10,000 as proven special damages.

The Trial Magistrate referred to the authorities of Ali Elmi Stanley & Another vs Mohammed Bakari & Another where Lady Angawa made no award under Fatal Accidents Act for similar reasons. The authority of Mwalili Vs Edward & Another (2000) KR 204 where deceased was presumed to be 16 years but had no income was also relied upon by the Trial Magistrate herein.

The Appellant being dissatisfied by the determination of the magistrates court filed this appeal on the grounds that:

- The learned Magistrate erred in law and fact in finding that no loss of earning had been shown after refusing to be guided by the principles on the subject.
- That the Learned Principal Magistrate erred in law and fact in failing to appreciate the evidence adduced on the subject in relation to damages and lost years.
- That the learned Principal Magistrate erred in law and fact in failing to appreciate the evidence adduced on the subject in relations to damages and lost years.
- That the learned Principal Magistrate erred in law and fact in that she failed to take into

- consideration the judicial authorities cited by plaintiff and other case law and written law.
- That the learned Principal Magistrate misdirected herself in the assessment of quantum on general damages.

The issue here is whether the appellants were entitled to damages for loss of dependency under the Fatal Accidents Act for the deaths of a 6 years old child.

In determining this appeal the applicable principles are well laid down in the authority of **Ali vs Nyambu T/A - Sisera Stores [1990]eKLR 534 at pg 538** which quoted with approval the holding of the privy council in **Nance vs British Columbia Electric Railways Co. Ltd [1951] Ac 601 at page 613** thus

**“The principles which apply under this head are not in doubt.....the appellate court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case in the first instance.**

**Even if the tribunal of 1<sup>st</sup> instance was a judge sitting alone, there before the appellate court can properly intervene, it must be satisfied either that the judge in assessing the damages, applied a wrong principle of the law (as by taking into account irrelevant factors or leaving out of account some relevant one) or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.**

See also the decision by Court of Appeal in **Bashir Ahmed Butt vs Uwais Ahmed Khan [1982-88] KLR** where it was held:-

**“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/she misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.**

The trial magistrate declined to make any award under the heading of loss of Dependency for reasons that applicant could not have depended on a 6 year old child who did not have income. Was it erroneous for the magistrate to make such a finding.

I do know that this was legally a wrong approach to the principle in determining damages for loss of dependency. The parents of the minor had expectations of their child. The child though not capable of earning an income had dreams which upon the untimely and painful death were shattered. The parents of the child suffered emotional pains and loss. The 6 years old child was a companion to the parents. A 6 year old child is capable of being send on small errands here and there around the home and it is common in some Kenyan communities to find that such a 6 year old depending on their gender is capable of taking care of sheep, goats and calf; they are capable of washing dishes, fetching water and even firewood.

I do not think that compensation can only be made where one is capable of earning monetary income. Whatever little the minor in a family did added value to the common good of the members of her/his family. This was as much as the court is unable to ascertain income due to the minor, a court of justice should never sacrifice justice at the altar of methodology by finding that the death of a minor cannot be compensated because they were not capable of earning. This was the holding of Ringera J in **Kwanzia vs Ng'andu Mutua & Anor.**

Where it is possible to ascertain damages using the multiplier and multirad methods then it is well and good otherwise every case/loss should be assessed on its own merits and circumstances as it is merely a practise convenient for such assessment and not a law.

The court of Appeal authority of **Kenya Breweries Ltd vs Saro [1991] Mombasa Civil Appeal No. 441 of 1990** which was cited with approval by **Justice Gikonyo** in the case of **Daniel Mwangi Kimani and 2 others versus Jacklin Gikunda Mbaya & Another High Court at Meru Civil Appeal No. 18 of 2014** has clearly laid basis for compensating for loss of minors irrespective of whether there is no-7 evidence of

monetary contribution. Earlier in the case of **Abdullahi Vs Githinge [1974] EA 100**, the deceased girl was 7 years old and Kneller J (as he was then) awarded Kshs 8,000/= for loss of dependency; in **Maurice Muriti vs Feroze Construction co. Ltd [1979]** the deceased was a nursery school boy and Nyarangi J (as he was then) awarded a total of Kshs. 70,000 in 1982.

The child in this case from the evidence adduced in the magistrates court was 6 years old and was going to school and was in standard 1. The father said he was intelligent and apart from performing duties in school would even take care of sheep. He said the deceased was an only child. The child must have had dreams and the parents also reasonably and humanly expected he would grow up, finish school and support them in the future and particularly during their old age.

It therefore goes without saying that where a child whose life is cut short by the negligence of another the parents must be awarded damages for loss. Considering the authorities cited above, considering passage of time and attendant inflation award for loss of dependency in respect of deceased child herein at a global figure of at Kshs 800,000/=. The other awards made at the magistrate remain uncontested and therefore judgment is entered for the appellant as follows;

1. Loss of Dependency Kshs 800,000.
2. Pain and suffering Kshs. 5,000
3. Loss of expectation of Life – Kshs 70,000/=.

Cost of the suit in lower court to Plaintiff. Cost of appeal to the appellant. Interest on the decretal sum is also awarded from date of appeal until payment is full.

**Judgment Signed, Delivered and Dated this 15<sup>th</sup> June Day of 2017**

**HON. A.ONG'INJO**

**JUDGE**

In the presence of:

C/A: Penina

Mr. Kithinji Advocate

M/S Mithega Kariuki & Co. Advocate for Respondents.

**HON. A.ONG'INJO**

**JUDGE**