REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 196 OF 2011

NASHON GITAU...APPELLANT

VERSUS

F W H..RESPONDENT

(Being an appeal from the Judgment of Honorable Senior Principal Magistrate A.K. Ndungu in CMCC. No. 11948 of 2005 delivered on 1st April 2011)

JUDGMENT

1. The respondent **F W H** being the representative of the estate of the deceased **N W W** sued the appellant, **Nashon Gitau** seeking compensation following a road accident which occurred on 16th November, 2004 that led to the death of the deceased.
2. It was averred in the plaint that the deceased was lawfully walking within Maji Mzuri Estate in Kasarani when she was knocked down by the motor vehicle registration No. KXZ 613 owned by the appellant. The respondent stated that the accident occurred due to the sole negligence of the appellant and/or his servant. Upon hearing the matter, the learned Magistrate entered Judgment where he awarded the respondent damages amounting to kshs 590,000/=.
3. The Appellant, being dissatisfied with the judgment filed this appeal on the following grounds:

> ***1. The Learned trial Magistrate erred in law in awarding judgment of kshs 590,000/= on general damages for injuries that don't deserve such a high award.***
>
> ***2. The Learned trial Magistrate erred in law and fact in awarding loss of dependency of kshs 4,000X12X1/2X20= 480,000/= for deceased minor whose prospects of earning are not certain and failing to consider that he ought to have given a global figure.***
>
> ***3. The learned trial magistrate erred in law and fact in failing to consider sufficiently or at all the appellant's evidence and submissions as to facts and the law placed before him.***
>
> ***4. That the learned trial Magistrate erred in law and fact in awarding the plaintiff a sum that was manifestly excessive in the circumstances.***

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the parties. In the civil appeal case of, **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

4. I have looked at the lower court record. According to the lower court proceedings, it is evident that there was no viva voce evidence adduced. The parties through their advocates entered consent on liability where they agreed to share the same at a ratio of 20:80 in favour of the respondent. There was an attempt to enter consent on the quantum, but that did not bear fruits prompting the court to enter judgment of kshs 590,000/= upon considering the submissions of the parties . It is this judgment that has led to this appeal. The matter of liability having been settled, what is left for review in this court is the matter of quantum.
5. I have also considered at the record of appeal and submissions of the parties as filed in this court and those filed in the lower court, the respondent submitted that a sum of kshs 720,000/= for lost years will be adequate. He quoted the case of : **Eanest Mwara Sikutuma vs Aziz Bin Ali Charagdini HCCC No. 510 of 1989**, where the deceased who was 11 years was awarded kshs 60,000/- for loss of expectation of life, and kshs 144,000 for lost years. The appellant on the other hand submitted that a global sum of kshs 60,000/= for lost of years would be adequate. He added that a minor who suffers fatal injuries attracts a dependency ratio of 1/3 and not 2/3 as proposed by the Hon Magistrate.
6. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. In the first, third and fourth grounds of appeal, the appellant has complained that learned magistrate failed to consider all the evidence and submissions of the parties. He further claimed that the ,magistrate erred in awarding general damages amounting to kshs 590,000/= which he claims is excessive. He proposed that a global sum should have been awarded
7. On the 2nd ground the Appellant is complaining that, the trial court erred in awarding loss of dependency of kshs 480,000/= for a deceased minor. The appellants argument on this head is that the prospects of earning are not certain. According to him, it was wrong to tabulate the loss of dependency using a multiplier as in the case of anadult. He added that the magistrate should not have calculated the lost years, but instead he should have awarded a global sum of between kshs 50,000/= - 100,000/= since there was no proof of a career path. He further argued that practice dictates that dependency ratio of a child should be ½ or 1/3 and not 2/3 which was the ratio used by the magistrate. I have perused the judgment. The Honorable Magistrate on the head of loss of dependency recognized the age of the deceased as 4 years and concluded that the deceased would have assisted her parents in the future. He noted that such assistance would be difficult to quantify. He nonetheless used multiplier of 15 years , a wage of kshs 4,000/= per month and at a ratio of 2/3 which totalled to kshs 480,000/=. (I.e 4000x12x15x2/3=480,000/=)
8. I would wish to first address the issue raised by the appellant to the effect that the deceased was a minor who had no career and therefore loss of dependency awarded should have been a global. I disagree with the appellant's argument. A child is considered a gem in our society. When a child is born, it is hoped that he will grow into adulthood and be of assistance to his parents in the future. The mere fact that the life of such child has been cut short, does not mean that the head of loss of dependency should be discarded. It should be presumed that the minor would have grown into adult hood and attained some sort of career which he would have pursued for purposes of assisting his family. This position was also considered in the Court of Appeal in the case of **Kenya Breweries Ltd v Saro [1991] eKLR**, where it was held interalia:

"...But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and

Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have "homes" for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a "home" while he or she is still able to look after them."

It therefore goes without saying that loss of dependency damages are awardable regardless of whether the deceased is a minor or not.

9. Having said that, I will consider whether the learned Magistrate applied the wrong principles in arriving at a figure of Kshs. 480,000/= for loss of dependency. The main contention is on the use of multiplier of 15 years instead of 30 years, kshs 4,000 as the multiplicand and a dependency ratio of 2/3 instead of 1/3.
10. If I was to consider the parties arguments, the most appropriate multiplier would have been 30 years given that the minor died at the age of 4 years yet she would have grown up and got some sought of employment which if the Regulation of Wages (General Amendment) Order, 2005 is anything to go by, her wages would have been considered in relation to the order. However, in my view, since the deceased child had not yet earned any income that would have guided this Court in determining a multiplicand and resultant multiplier then it is only fair that the court awards a global amount. In a similar case of **Oshivji Kuvenji & Another V James Mohamed Ongenge (Suing As A Representative Of The Estate Of Samuel Ongenge) [2012] eklr,** where the deceased was aged 7 years, the court awarded a sum of kshs 320,000/= for loss of dependency. In the case of **Regina Wambui Njenga vs R.K. Obura & Another (2009) e KLR** a sum of Kshs 350,000/= was awarded in 2009 as loss of dependency to the estate of the 1st Defendant therein, who was aged 13 years at the time of death. In the case of **Transpares Kenya Limited & another v S M M (Suing as Legal Representative) for and on behalf of the Estate of E M M (Deceased) [2015] eKLR,** where the court awarded kshs 602,400/= for lost years for a minor who suffered fatal injuries at the age of 5 years. I therefore find that an award of Kshs 500,000/= as a global award is reasonable given the contingencies in the economy and especially the inflationary rates
11. There was no contention as far as the other awards were concerned. The tabulation remains as awarded in the lower court. The sums are as follows:-

(a) Pain and suffering	Ksh. 10,000/=
(b) Loss of expectation of life	Ksh. 100,000/=
(c) loss of dependency awarded	Ksh. 500,000/=
T O T A L	**Ksh. 610,000/=**
less 20%	Kshs.122,000/=
	Kshs 488,000

12. In the end the appeal partially succeds.I hereby set aside the judgment of the trial court and is substituted with a sum of kshs 488,000/= awarded to the respondent. Costs of the suit and the appeal are awarded to the Appellants.

13. Interest on the award and costs to be paid at court rates from the date of judgement until full payment.

Dated, Signed and Delivered in open court this 12th of February, 2016

J. K. SERGON

JUDGE

In the presence of:

....for the Appellant

....for the Respondent