REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 79 OF 2011

BOARD OF GOVERNORS

FRIENDS SCHOOL KAMUSINGA ….....1ST APPELLANT

MUTANDA WESESA TUMBO.....2ND APPELLANT

VERSUS

M N S ***(suing as administrator of the the estate of*** **I K S**

(deceased)**..... RESPONDENT**

(Being an appeal from Judgment and Decree of Hon. M.N. Gicheru, Chief Magistrate at Kitale delivered on 1st November, 2011 vide CMCC. No. 647 of 2010)

J U D G M E N T

1. This is an appeal from the decision and judgment of the Chief Magistrate at Kitale in Kitale CMCC No. 647 of 2010, in which the appellants i.e. **Board of Governors – Friends School Kamusinga and Mutanda Wekesa Tumbu**, were sued by the respondent, **M N S**, for damages, arising from a road traffic accident which occurred on the 24th July, 2010, along Kitale/Webuye road at Matunda, involving the appellant's motor vehicle Reg. No. KAA 168P Isuzu bus and the deceased, **I K S**, a pedestrian along the said road.

2. It was pleaded that at the material time, the first appellant (defendant) was the registered and/or lawful owner of the said motor vehicle Reg. No. KAA 168P isuzu bus while the second appellant (defendant) was the driver thereof. That, on the material date, the deceased was a pedestrian along the material road when the second appellant so recklessly and negligently drove, controlled and/or managed the said motor vehicle such that it violently hit and caused fatal injuries to the deceased who was at the time lawfully on the left side of the road.

3. The respondent (plaintiff)therefore prayed for damages under the Fatal Accidents Act and the Law Reform Act together with special damages and costs of the suit as well as interest. The appellants in their defence denied the claim and contended that if the accident indeed occurred, then it was solely and/or substantially contributed to by the negligence of the deceased in the manner of walking on the road without due care and attention among other factors.

4. At the trial, the respondent testified as PW2 and called two witnesses viz:- a traffic police officer, **Sgt. Peter Munene (PW1)** and a minor eye-witness, **S W (PW3)**, aged twelve (12) at the time.The appellants

did not had evidence in support of their case. However, by consent of both parties, judgment on liability was entered against the appellants at **70%** with the respondent bearing a contribution of **30%**.

5. The trial court delivered its judgment of quantum of damages and awarded the respondent a total of **Kshs.931,175/=** made up of **Kshs.20,000/=** for pain and suffering, **Kshs.100,000/=** for loss of expectation of life, **Kshs.1,200,000/=** for loss of dependency and **Kshs.10,250/=** special damages, **less 30% contributory negligence**.

6. Being dissatisfied with the award, the appellants filed the present appeal on quantum on the basis of the grounds contained in the memorandum of appeal dated 30th November,2011. The appeal was argued by way of written submissions which were filed by the appellants on the 4th May, 2015, and the respondent on the 5th May, 2015. After due consideration of the rival submissions in the light of the grounds of appeal, this court re-examined the evidence in relation to quantum with a view to arriving at its own conclusions.

7. Basically, 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 court were clearly laid down in the case of **K*emfro Africa Ltd & Meru Express Service -vs- A.M. Lubia & Another [1982-188] 1 KAR 727***.

8. Thus, the appellate court must be satisfied that either the trial court in assessing 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, ***Arrow Car Ltd -vs- Bimomo & Others [2004] 2KLR 101)***.

9. The evidence herein indicated that the deceased was at the time of his demise aged sixteen (16) years or thereabout and a primary school pupil in class four (4). He was said to have been the only child of the plaintiff and was good in academics and sports such that he could have in the future become the president of Kenya. The letter from his school (P. Exhibit 7) confirmed that he actually attended school and was in class four (4).

10. In considering that the deceased was a minor, the learned trial magistrate noted that being the only son of the family the deceased had extra responsibility to his parents and siblings and would in that regard have taken care of his parents in old age. Therefore, his death was a big loss to the parents as he would have probably led a full life and in the process be employed for at least thirty (30) years given the current civil servants retirement age of sixty (60) years.

11. The learned trial magistrate relied on the decision in the case of ***Kenya Breweries Ltd -vs- Saro [1991] KLR 408***, and awarded damages under both the Law Reform Act and the Fatal Accidents Act. In so doing, the learned trial magistrate was informed by the court's holding in the case aforementioned to wit:-

> ***"It is trite law that damages are payable, whenever liability is proved because in the Kenyan Society 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 one entitled to keep intact. Damages are clearly payable to the parents of a deceased child irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution."***

12. In ***Sheikh Mushaq -vs- M.M. Kamau Transporters & Others (1985-86)4 KCA 217***, it was observed by the court that generally in Kenya children are expected to provide for their parents when the children are in a position to do so and to the extent of their abilities and they are expected to do that by the established customs of the various African and Asian communities.

The court further observed that the application of the custom at family level is the basis of the national ethos of being mindful of others welfare. It thus confirmed that damages are awardable irrespective of the age of a child and these could extend to damages under the Fatal Accidents Act.

13. Contrary to what was herein submitted by the appellants, the learned trial magistrate did not apply wrong principles in assessment of damages under separate heads. In that regard, the awards made for pain and suffering and loss of expectation of life were lawful and reasonable. However, it is the opinion of this court that the deceased was more of a dependant of his parents. He had not reached and was not yet in a position to accord his parents any pecuniary benefit. Therefore, the multiplier approach taken by the learned trial magistrate in awarding damages under the Fatal Accidents Act for Loss of Dependency was in the circumstances not appropriate as it rendered the award under that head rather inordinately high.

14. The global approach in the assessment of damages for loss of dependency was more appropriate herein and in that regard the award for loss of dependency made by the learned trial magistrate is hereby reduced by a global award of **Kshs.600,000/=**. The award under the other heads remain intact.

15. With regard to the contention by the appellants that the trial court erred by making a double award in as much as awards were made under both the Law Reform Act and the Fatal Accidents Act, this court can only say that there was nothing unlawful about that since under Section 2(5) of the Law Reform Act, damages under the Act are in addition to those made under the Fatal accidents Act. Nonetheless, it is appreciated that it is a principle of law to avoid double benefits in favour of one claimant.

16. In conclusion, this appeal, other than on the award on loss of dependency, is unsuccessful. With the alteration made herein on loss of dependency the respondent is now entitled to a judgment in his favour for the total sum of **Kshs.730,250/=** together with costs and interest.

Each party shall bear own costs of appeal.

Ordered accordingly.

J.R. KARANJA

JUDGE

[Delivered/signed this **9th** day of **June, 2015**]