



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 6 OF 2013

PETER KARANJA GATHOGA

INTEX CONSTRUCTION CO. LTD.....APPELLANTS

VERSUS

EUSTACE MUTEMBEI NYAGA

SCOLASTICA MUTHONI MUTEMBEI.....RESPONDENTS

JUDGEMENT

This is an appeal from an award of damages in the sum of Kshs 1,362,440/-, made on 18th December, 2012 by the court of the Chief Magistrate in favour of the respondents arising out of a fatal road accident in which the Respondents' daughter died.

The appeal is only in respect of the quantum of damages, which the appellants complain is manifestly excessive and should be reduced. In their ground 1 of the memorandum of appeal, the appellants have stated that the trial court erred in fact and law in basing the assessment of damages awardable under the Fatal Accidents Act on the wrong and irrelevant principles and in doing so, arrived at a manifestly excessive award. In ground 2, the appellants have stated that the trial court erred in law and fact in failing to deduct the sums of money awarded under the Law Reform Act from the final award and thus amounted to double compensation of the estate of the deceased minor.

The issue of liability was settled by consent between the parties at trial with the appellants being liable in terms of 80% negligence and the remaining being left to the respondents.

This is a first appeal. And as a first appeal according to *Selle v. Associated Motor Boat Company Ltd (1968) EA 123*, I am required to reassess the evidence and arrive at my own independent conclusions while at the same time deferring to the issue of credibility because the trial court was better placed to assess the demeanour of the witnesses. Additionally, according to the Court of Appeal in *Arrow Car Ltd v Bimomo & ors (2004) 2KLR 101*, an appeal court is only entitled to interfere with the award of a trial court if that trial court proceeded on a wrong principle or misapprehended the evidence in some material respect in assessing the amount of damages. In the words of that court: “*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 wholly erroneous estimate of the damage. See Ilango v Manyoka (1961) EA 705 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd v Kavoloto (1970) EA, 414, 418, 419. This court follows the same principles.*”

In order to respond to the grounds raised in the memorandum of appeal, it is necessary to summarize the evidence of the only witness at trial. The only evidence tendered at trial was from Eustace Mutembei Nyaga (PW 1), who was the father of the 7 year old deceased child. According to him, his daughter was involved in a fatal accident on 12th September, 2011. He was informed that his daughter had died in a fatal road accident in which she had been hit by motor vehicle registration no. KBH 918Q, which was owned by the 2nd appellant. At the material time, his daughter was walking from school going home along Embu – Siakago Road near Ishiara market when the fatal road accident occurred. PW 1 further testified that the deceased was a bright child and would have studied to be a great professional. The father stated under cross-examination that her deceased daughter used to tell him that she would have wanted to be a doctor or a pilot. He also stated that the daughter was doing very well in school but he was unable to produce her performance records in school during trial. From his evidence, it seems that her daughter died on the same day of the accident.

As I have already indicated, liability is not in issue having been settled at trial by consent. The trial court awarded damages which was assessed as follows:

Pain and suffering - Kshs 10,000/-

Loss of expectation of life - Kshs 100,000/-

Special damages - Kshs 32,270/-

Loss of earnings - Kshs 1,560,780/-

Total - Kshs 1,703,050/-

Less 20% plaintiff liability - Kshs 340,610/-

Final award - Kshs 1,362,440/-

It is clear that the trial court awarded damages both under the Law Reform Act in the form of pain and suffering and loss of expectation of life. It then proceeded to award damages under the Fatal Accidents Act in the form of lost years.

A court is entitled to award damages under both the Law Reform Act and the Fatal Accidents Act. It should be borne in mind that damages are geared to compensate the estate of the deceased. It should also be borne in mind that the assessment of damages must be based on the evidence tendered at trial and precedents in the form of comparable awards in similar cases by the courts.

I have re-assessed the evidence and I have come to the conclusion that the trial court erred in law and fact in awarding damages for lost years under the Fatal Accidents Act. The reason being that no evidence was tendered to show the salary earned by either a doctor or a pilot. Furthermore, the father of the deceased did not produce records to show that her deceased child's performance was excellent. In the absence of this evidence, the trial court fell in error to award damages under the Fatal Accidents Act in the absence of evidence. In this regard, reference to the case of *Hassan v Nathan Mwangi Kamau Transporters & 4 others (1986) KLR 457*, is instructive. According to that case, evidence must be tendered to show the salary that may be earned by any professional to assist the court in assessing the damages payable under the Fatal Accidents Act.

In the circumstances, I hereby set aside the award of Kshs 1,560,780/- being the amount assessed as loss of earnings. The estate of the deceased is therefore entitled to the following damages:

Under the Law Reform Act

Pain and suffering - Kshs 10,000/-

Loss of expectation of life - Kshs 100,000/-

Special damages - Kshs 32,270/-

Total - Kshs 142,270/-

Less 20% plaintiff liability - Kshs 28,454/-

Final award - Kshs 113,816/-

In view of the foregoing, the appellant's appeal succeeds to that extent. It therefore follows that the Respondents will pay to appellants the costs of this appeal and in the trial court.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **OCTOBER, 2015**

In the presence of Mr Ithiga for respondents and Mr Abubakar holding brief for Ms Rukioya

Court clerk Mr Njue

J.M. BWONWONGA

JUDGE

14.10.15