REPUBLIC OF KENYA

Court of Appeal, at Mombasa

July 25, 1991

Gachuhi,Masime JJ A & Omolo Ag JA

Civil Appeal No 144 of 1990

Kenya Breweries Ltd v Saro

(Appeal from a Judgment and decree of the High Court at Mombasa, Githinji J,

dated 21st May 1990 in HCCC No 602 of 1987)

Damages *- general damages - claim for damages under the Fatal Accidents Act (cap 32) - father claiming damages for the death of six year old child - whether father entitled to such damages in the absence of evidence of any pecuniary contribution made by the deceased child to the father or the family.*

Damages *- assessment of damages - general damages under the Fatal Accidents Act (cap 32) - father claiming damages for the death of a six year old child - principles the Court of Appeal will apply in considering whether to interfere with an award of damages by the High Court.*

The appellant who was a defendant in the Superior Court, filed an appeal against the judgment of the Superior Court contending that the deceased who was the victim of the suit accident was only six years so as to entittle him (the respondent) to claim damages under the fatal Accidents Act (cap 32), and was therefore incapable of offering any assistance to his father, the respondent.

It was further argued on behalf of the appellant that taking into account the age of the minor an award of Kshs 100,000/- was so inordinately high as to manifest error in application of principles.

Held:

1. The issue of some damages being payable 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.

2. 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.

3. It is now well established that the Court of Appeal can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred.

4. The Shs 100,000/- awarded by the judge cannot be taken to be so inordinately high that the application

of a wrong principle must be inferred.

Appeal dismissed.

Cases

1. *Barnett v Cohen* [1921] 2 KB 461

2. *Hassan v Nathan Mwangi Kamau Transporters & 4 others* [1986] KLR 457; [1982-88] 1 KAR 946

3. *Abdullahi v Githinye* [1974] EA 110

4. *Miriti v Feroze Construction Co Ltd* [1982] KLR 275

Texts

1. McGregor, H (1987) *McGregor on Damages* London: Sweet & Maxwell 15th Edn para 1593

2. Luntz, H (1983) *Assessment of Damages for Personal Injury & Death Sydney:* Butterworths 2nd Edn p419

Statutes

Fatal Accidents Act (cap 32) section 4(1)

Advocates

Mr Pandya for the Appellant.

July 25, 1991, the following Judgment of the Court was delivered.

The appellant, Kenya Breweries Limited, was the defendant in a suit instituted in the High Court by Ali Kahindi Saro, the respondent herein. The respondent's six year old son Said Ali Kahindi, the deceased, was on the 29th August 1986 hit and killed by vehicle registration No KSY 823 owned by the appellant. The vehicle, was, at the time of the accident, being driven by Philip Mutuku Nyanzi (DW 1), an employee of the appellant. The learned trial judge found that the accident was caused by the negligence of DW 1 and there is no appeal against liability. The respondent had brought the suit under and in accordance with the provisions of the Fatal Accidents Act. The learned trial judge awarded to the respondent damages in the sum of shs 100,000/- and the appellant appeals against that award.

There are only two grounds of appeal, namely:-

> 1. The learned judge erred in holding that the plaintiff/ respondent was entitled to claim damages under the Fatal Accidents Act; and
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> 2. The award of shs 100,000/- was in any event excessive and not supported by any evidence of loss.

We shall deal with ground one first. As we understood Mr Pandya for the appellant, his contention in the end was that, while damages are generally payable to claimants such as the respondent, in this particular case damages ought not to have been awarded because the respondent did not adduce any evidence to show what sort of assistance the deceased was rendering to the family. The deceased was only six years old, says Mr Pandya, and as such he was not really in a position to contribute anything meaningful to the respondent and that the respondent failed to show by evidence the basis on which damages could have been awarded to him. In support of his submissions, Mr Pandya referred us to a passage in *Mogregor on Damages,* 15th Edition, paragraph 1593 under the heading "infant children". The passage reads:-

> "The situation here is the reverse of the last (ie the last deals with "Adolescent children"). On the one hand there is no clear evidence of the desire or the ability of the child to assist the parents have all the expenses of bringing up the child ahead of them. Thus in *Barnett v Cohen t*he claim of the father, earning a good income but with poor health, for loss through the death of his four year old son was dismissed, there was no reasonable probability of pecuniary benefit, only a speculative possibility. ...

Mr Pandya also made available to us the case of *Barnett v Cohen* [1921] 2 KB 461 referred to in the quotation above, and the further cited to us the book *"Assessment of Damages for Personal Injury and Death,* 2nd Edition, by Professor Harrold Luntz, where at page 419 under the heading "children" the following passage is to be found:-

> "Although elderly parents may readily succeed in an action in respect of the death of an adult child (eg *Teher v British Commonwealth Pacific Airlines* (In Liq (1975) 74WN (N SW) 447, parents of young children are seldom able to show that they have suffered the necessary loss of pecuniary benefit. ...

It is clear to us that the burden of Mr Pandya's submissions, supported by these authorities, is that, as the deceased boy was only six years old, he could not have been in a position to make any contribution of a pecuniary nature to the family welfare and that was why the respondent was unable to prove any such contribution. Mr Pandya contends that even if damages were to be awarded, this factor had to be taken into account and this latter contention must be the basis of ground 2 in the memorandum of appeal which complains that the Shs 100,000/- awarded was in any event excessive.

We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. 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. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare". If any legal authority is required in support of our views we would quote this court's decision in *Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others* [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-

> "In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced thoroughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets

> of the great religious of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is " outrageous and pernicious" is not well-founded and must be rejected. ...

In our view 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. The High Court authorities which were cited to us, such as *Abdullahi v Githenye [*1974] EA 110, *Maurice Miriti v Feroze Construction Co Ltd* HCCC No ... 1979, NRB, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In *Abdullahi v Githinye,* supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded shs 8,000/- in 1974. In *Miriti v Firoze*, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Shs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the Fatal Accidents Act. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred.

Were the damages awarded excessive as claimed in ground two of the memorandum of appeal? It is now well established that this Court can only interfere with a trial judge's assessment of damages where is it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred. Apart from the age of the child, Mr Pandya has not shown to us any other factor which would make us think the trial judge's assessment is wrong. Shs 8,000/- was awarded for the death of a seven year old girl in 1984 (Abdullahi v Githinye); shs 70,000/- was awarded in respect of a nursery school boy in 1982 (Maurice Miriti) and in our view the Shs 100,000/- awarded by the judge in 1990 cannot be taken to be so inordinately high that the application of a wrong principle must be inferred. While we would express the view that damages on this head must be kept relatively low we do not think the sum awarded was wrong, taking into account the depreciation in the value of money. We probably would have awarded slightly less if we had been the trial judge but that is not a reason to warrant our interfering. In our view this appeal must wholly fail and we order it dismissed with costs.