

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL APPEAL NO. E004 OF 2022**

**(CORAM: CHARLES KARIUKI – J)**

**VITAL ANIMAL HEALTH .....1<sup>ST</sup> APPELLANT**

**THINK PINK HYGIENE LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PETER LONGISA RORAT**

**(Suing as the Administrator on behalf of**

**the Estate of**

**ISAAK MEMUSI (Deceased) .....RESPONDENT**

**JUDGMENT**

1. The appeal arises from a verdict of the trial court on the matter of an accident in which a child of 4 years was killed by a motor vehicle and inflicted fatal injuries on the liability.

2. The driver of the motor vehicle was held 90% and victim 10% liable, and a quantum of Kshs. 1,500,000.00 was awarded as loss of expectation of life, and special damages of ksh 249,280.00, for a total of ksh1,749,280.00 which total did not factor in 10% apportionment plus costs. Being aggrieved by the aforesaid verdict, the Appellant appealed with nine grounds of appeal, which in his submissions reduced to 3 issues, namely: -

***I. Whether the burden of proof on liability was discharged.***

***II. Measure of assessment of dependency/lost years.***

***III. Whether special damages were proved to the required standards.***

3. The parties were directed to submit their appeal via written submissions.

**4. Appellant Submissions**

5. ***Did the Respondent discharge the burden of proof as required by law to render the Appellants liable?***
6. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled in *Khambi & Another v. Mahithi & Another [1968] EA 70* where it was held that:- a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.
7. The Respondent testified as PW 1, where he adopted his witness statement. He stated that he received a call from the neighbors that his son, a minor aged four years, had been knocked down by a motor vehicle and was rushed to the hospital. When he arrived at the hospital, he found out that his son had succumbed due to the injuries sustained. He stated that he did not witness the accident, and neither did he call any eyewitness to testify as to how the accident occurred. **Section 107(1) of the Evidence Act liability is dependent on the existence of facts which he asserts must prove that those facts exist.**
8. There was no eyewitness at the hearing who actually testified to how the accident occurred, and the same remains in dispute. The Respondent failed to prove that the Appellants' driver actually did act negligently and, as a result, knocked down the deceased. The case of *Hussein Omar Farah V. Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR*. In a minor being held to be contributively negligent, each case is to be determined on its own merits.
9. ***What are the measures for the assessment of loss of dependency/lost years?***
10. The lower court adopted a global approach to award damages under this head and awarded the Respondent Kshs. 1,500,000.00. The award in this case was inordinately

high, and the large sum was awarded without adequate justification. This contention is informed by the fact that the lower court's award reflects that the principles applicable in the award of damages were not adhered to. **First**, the principle of compensation (*restitution in integrum*) requires that a Plaintiff receive no more and no less than his actual loss, such that compensation is fair to both the Plaintiff and the Defendant.

11. The deceased was a minor aged 4 years, and age is one of the key factors to be considered in awarding damages under this head. This was stated in the case of **Kenya Breweries Limited Vs. Saro [1991] Mombasa Civil Appeal No. 441 of 1990 (eKLR)** 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 is a question of common sense rather than a matter of law.

12. In the case of *Wycliffe Momanyi V. Daniel Absolom Otwoma & Another [2022] eKLR*. Aburili J, on appeal, upheld an award of Khs. 700,000.00 made in respect of a deceased minor aged 10 years. In *Mwaniki & Another V. RMN & JWM (Suing as the representative of the Estate of MNM – Deceased (Civil Appeal 89 of 2015) [2022] KEHC 11143 (KLR) (10 August 2022) (Judgment)*. Wakiaga J awarded a sum of Kshs. 600,000.00 in respect of a deceased minor aged 4 years old.

### **13. Respondent's Submissions**

***14. Whether the Learned Trial Magistrate erred in law and fact in finding the Appellants 100% liable.***

15. The Appellant claims that the deceased ought to have been blamed for the accident and that liability ought to have been apportioned 50:50. There is no evidence that the Appellant has brought to this Honourable Court to show that the deceased, who was 4

years old at the time of the accident, had a role to play. There is no way they have shown and proved that a 4-year-old would consciously cause an accident.

16. Relying on the case of **BUTT Vs. Khan (1981) KLR**. It is submitted that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that they should not do the act or make the omission. The test, as stated in **GOUGH VS. THORNE (1966) 1 WLR 1387 (referred to in the BUTT vs. KHAN decision)**, was whether the child was of such age as to be expected to take precautions for his or her own safety, and finding contributory negligence can only be made if blame could be attached to the child. See also *EWO (Suing as the next friend of a minor COW) V. Chairman Board of Governors Agoro Yombe Secondary School (2018) KEHC 125 (KLR) (Supra)*,

17. *Whether the Learned Trial Magistrate erred in the assessment of loss of Dependency/lost years.*

18. The law on the circumstances under which an appellate court would interfere with an award of damages is settled. An appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have erroneous estimate of the damage. Reliance made on *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another V. Lubia & Another (No. 2) [1985] KECA 137 (KLR)*. In

19. The trial court used the correct approach in making the award. The deceased was a minor who had not yet attained the age to earn income, necessitating the court's application of the global sum approach.

20. In the case of *Daniel Mwangi Kimemi & 2 Others V. J G M & Another (the personal representatives of the Estate of N K (DCD) [2016] KEHC 6171 (KLR)*, which was also relied upon by the lower court judge. The court in this matter awarded the sum of Kshs 1,000,000.00 for loss of dependency to a six-year-old.
21. In the case of *Erastus V. NK (Suing as the legal representative and Administrator of the Estate of the late BJK – (Deceased) Civil Appeal E003 of 2021) [2022] KEHC 14893 (KLR) (3 November 2022) (Judgment)*, the court awarded Kshs. 1,000,000.00 to a minor who died at the age of 7 years. We therefore state that the trial court did not err in awarding a sum of Kshs. 1,500,000.00 for loss of dependency after factoring in the inflation rate.
22. ***Whether the Learned Trial Magistrate erred and misdirected himself in awarding special damages which were not strictly proved.***
23. The case of *Mercy Muriuki & Another V. Samuel Mwangi Nduati & Another (Suing as the legal administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR)* cited *Maritim & Another V. Anjere (1990 – 1994) EA 312 at 316* in this regard:

***"It is now trite law that special damages must not only be pleaded but must also be specifically proved, and those damages awarded as special damages, but which were not pleaded in the plaint must be disallowed."***

24. The Respondent pleaded with the sum of Kshs. 249,289.00 as special damages and produced receipts as proof in support of the same.

## 25. ISSUES ANALYSIS AND DETERMINATION

26. A first appellate court in a civil case has a duty to rehear the case on both the facts and the law, review the trial court's record, and determine whether the lower court applied the law correctly and whether its findings of fact were justifiable. It must address all

issues, give reasons for its findings, and may affirm, reverse, or modify the lower court's decision or even remand the case for further proceedings.

27. Key Duties and Aspects of a First Appeal: Unlike a second appeal, a first appeal allows the court to re-examine both factual and legal issues. The court reviews the entire record from the lower court, including pleadings, evidence, and arguments. The appellate court examines whether the trial judge properly considered the evidence and made reasonable findings. It determines if the lower court correctly applied the relevant laws to the facts. In the case of

28. **Selle vs. Associated Motorboat Co. [1968] EA 123** states that: "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial, and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself, and draw its own conclusions. However, 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, the court is not necessarily bound 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 circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

- i. After reviewing the proceedings and the parties' submissions, the issues are: ***whether the Respondent discharged the burden of proof as required by law to render the Appellants liable.***
- ii. ***What are the measures for the assessment of loss of dependency/lost years?***
- iii. ***Whether special damages were proved to the required standards.***

29. ***Whether the Learned Trial Magistrate erred in law and fact in finding the Appellants 90% liable.***

30. The Appellant claims that the deceased ought to have been blamed for the accident and that liability ought to have been apportioned 50:50. There is no evidence that the Appellant adduced to the trial Court to show that the deceased, who was 4 years old at the time of the accident, had a role to play. There is no evidence that a 4-year-old has ever consciously caused an accident in the case of **BUTT Vs. Khan (1981) KLR** held that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. The test, as stated in **GOUGH VS. THORNE (1966) 1 WLR 1387 (referred to in the BUTT vs. KHAN decision)**, was whether the child was of such age as to be expected to take precautions for his or her own safety, and finding contributory negligence can only be made if blame could be attached to the child. See also **EWO (Suing as the next friend of a minor COW) V. Chairman Board of Governors Agoro Yombe Secondary School (2018) KEHC 125 (KLR) (Supra)**. Thus, in the absence of such proof, the ground fails.

31. On *whether the Learned Trial Magistrate erred in the assessment of loss of Dependency/lost years*. It is a well-established principle that the circumstances under which an appellate court would interfere with an award of damages are well-settled. An appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have erroneous estimate of the damage. Reliance made on ***Kemfro***

*Africa Limited t/a “Meru Express Services (1976)” & Another V. Lubia & Another (No. 2) [1985] KECA 137 (KLR).*

32. The deceased was a minor who had not yet attained the age to earn income, necessitating the court's application of the global sum approach. In the case of ***Daniel Mwangi Kimemi & 2 Others V. J G M & Another (the personal representatives of the Estate of N K (DCD) [2016] KEHC 6171 (KLR)***, which was relied upon by the lower court, the court in this matter awarded the sum of Kshs—1,000,000.00 for loss of dependency to a six-year-old. In the case of ***Erastus V. NK (Suing as the legal representative and Administrator of the Estate of the late BJK – (Deceased) Civil Appeal E003 of 2021) [2022] KEHC 14893 (KLR) (3 November 2022) (Judgment)***, the court awarded Kshs 1,000,000.00 to a minor who died at the age of 7 years. Therefore, it is apt to state and hold that the trial court did not err in awarding a sum of Kshs. 1,500,000.00 for loss of dependency after factoring in the inflation rate.

***33. Whether the Learned Trial Magistrate erred and misdirected himself in awarding special damages which were not strictly proved.***

34. The case of ***Mercy Muriuki & Another V. Samuel Mwangi Nduati & Another (Suing as the legal administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR)*** cited ***Maritim & Another V. Anjere (1990 – 1994) EA 312 at 316*** in this regard: ***“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages, but which were not pleaded in the plaint must be disallowed.”***

35. The Respondent pleaded a sum of Kshs. 249,289.00 as special damages and produced receipts as proof in support of the same. Thus, the ground has no substance. In summary, the court finds no merit in the appeal and therefore issues the following orders.

- I. **The appeal is dismissed** subject to correction by reduction of total amount by 10% blame on victims' part. Thus, damages will thus be ksh1,749,280.00 less 174928=1574352.plus costs.
- II. **Orders accordingly.**

**DATED AND DELIVERED AT NAROK VIA MICROSOFT TEAMS THIS  
14<sup>TH</sup> DAY OF OCTOBER 2025**

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**CHARLES KARIUKI  
JUDGE**