



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 10 OF 2017**

**BETWEEN**

**EMMANUEL WASIKE WABUKESA (*Suing for BWW – Minor DCD*).....APPELLANT**

**AND**

**MUNERIA NDIWA BURMAN.....RESPONDENT**

*(An appeal from the Judgment of the High of Kenya at Kitale*

*(H. K. Chemitei, J.) delivered on 31<sup>st</sup> October, 2016*

*in*

**H.C.C.C. No. 27 of 2015)**

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**JUDGMENT OF THE COURT**

[1] The appellant who appears in person is aggrieved by the judgment of the High Court (**Chemitei, J.**) reducing the quantum of damages for lost years.

[2] The appellant is the father to **BWW** (deceased) a girl who was aged 1½ years when she suffered fatal injuries after she was knocked down by a tractor. The appellant filed a suit in the Chief Magistrate’s Court against the respondent as the owner of the tractor, registration No. KYU 931 Massey Ferguson. He averred in the plaint that the driver of the tractor, who was the agent or servant of the respondent, negligently drove the said tractor along an unmarked road in Kiminini Bungoma; that it caused fatal injuries to the deceased. The appellant claimed special and general damages under the Law Reform Act and Fatal Accidents Act. The respondent filed a defence denying the claim. He attributed the accident to the negligence of the child.

[3] At the trial the appellant gave evidence and called one witness. After that the case was adjourned on the application of the respondent’s counsel. At the resumed hearing, a consent judgment on liability was entered in the following terms;

**“By consent of the parties;**

**(a) Judgment on liability is hereby entered in favour of the plaintiff in the ratio of 80% to 20%.**

**(b) The plaintiff hereby closes this case.”**

The parties further agreed that the final submissions be made. The respective counsel duly filed written submissions.

[4] The trial court considered the submissions and gave judgment for the appellant as follows:

**“(i) Shs. 20,000 for pain and suffering and loss of amenities**

**(ii) Shs. 80,000 for loss of expectation of life.**

(iii) Lost years 3,000 x 12 x 35 = Shs. 1,260,000”

The trial court reduced the total awarded (Shs. 1,360,000) by 20% which resulted in a net award of Shs.1,088,000, plus costs and interest.

[5] The respondent appealed to the High Court particularly against the award for lost years on the ground that the award was inordinately too high. The respondent proposed a global award of Shs. 100,000. The High Court considered the appeal and said in part:

**“Obviously, there was no basis from the multiplier approach by the trial court. The infant was not in a position to earn anything but instead depended on his parents. There was no basis in my view that led the learned magistrate arrive at a sum of Shs. 1,260,000 under that heading...”.**

And held:

**“In the premises a global sum to the estate of Kshs. 200,000 would be appropriate in the circumstances under the said heading. As regards the other headings, I do not find any reasons to disturb the same.”**

The decree of the High Court was summarized thus:

**“(1) The judgment and decree of the lower court is hereby set aside.**

**(2) The respondent is hereby awarded damages as hereunder;**

<b>(a) Pain and suffering</b>	<b>- Shs. 200,000</b>
<b>(b) Loss of expectation of Life</b>	<b>- Shs. 80,000</b>
<b>(c) Lost year</b>	<b>- Shs. 200,000</b>
<b>Total</b>	<b>- Shs. 480,000</b>
<b>Less 20%</b>	<b>- Shs. 80,000</b>
<b>Grand total</b>	<b>= Shs. 384,000”</b>

The High Court also awarded interest on the judgment sum but did not award costs.

[6] The appellant neither filed written submissions nor made oral submissions. He merely relied on the grounds of appeal. The main ground of appeal states that the judge erred in law and in fact in reducing the award from Shs. 1,360,000 to Shs. 1,088,000.

Apparently, the appellant does not fully understand the impact of the decision of the High Court. The High Court in essence reduced the net award from Shs. 1,088,000 to Shs. 384,000 which is a reduction by Shs. 704,000.

[7] *Ms. Kipkesia*, learned counsel for the respondent adopted the written submissions filed in this appeal. It is submitted on behalf of the respondent that the Court should not deal with matters of fact; that the Court should not interfere with the award of damages which were reasonable; and that from the authorities, a global award of Shs. 200,000 for lost years was justified in the circumstances of the case.

[8] **Section 72(1)** of the Civil Procedure Act stipulates the grounds on which this court can entertain a second appeal from the appellate decree of the High Court. Those grounds comprise of matters of law. The award of the damages is in the discretion of a trial Judge and an appellate court is not entitled to interfere with the award unless it is satisfied that the judge took into account an irrelevant factor or disregarded a relevant one, or that short of this, the amount is inordinately so low or so inordinately high that it must be a wholly erroneous estimate of damages and thus an error of principle. In this case, the learned Judge relied on two authorities for the principle that a global award was the most appropriate. However, in the two cases relied on, the courts were assessing loss of dependency under the **Fatal Accidents Act**. The authorities relied on by the respondent’s counsel in this appeal to justify a global award also relate to loss of dependency under the Fatal Accidents Act. In particular, the **Kenya Breweries Limited vs. Saro [1991] eKLR** related to loss of dependency under the Fatal Accidents Act where a global award of Shs. 100,000 was made to the parent of a child in 1991. In that case, this Court stated:

**“In our view damages are clearly payable to a parent 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.”**

In **Kwamboka Grace v Mary Mose [2017] eKLR**, the Court awarded a global sum of Shs. 300,000 for loss of dependency under the Fatal Accidents Act in respect of the death of a child aged 4 years.

Indeed, no authority was cited where a global award has been made for lost years.

[9] In **Sheikh M Hassan v Kamau Transporters [1982-88] I KAR 946**, the court laid down guidelines for assessing damages for lost years

under the Law Reform Act. Those guidelines are, *inter alia*, that:

- (i) **the sum to be awarded is never a conventional one but compensation for a pecuniary loss.**
- (ii) **It must be assessed justly and with moderation,**
- (iii) **deduct the victims living expenses during the “lost ears” for they would not form part of the estate.**
- (iv) **A young child’s present or future earnings in most cases would be nil.**
- (v) **an adolescent would usually be real, assessable and small.**
- (vi) **calculate the annual gross loss.**
- (vii) **apply the multiplier (estimated number of “lost working years” accepted as reasonable in each case).**
- (viii) **Deduct the victim’s probable living expenses of a reasonably satisfying enjoyable life for him or her.”**

As the Court appreciated in that case, subtle mathematical calculations based on events or contingencies of a life which a deceased victim will not live are out of place and the judge must make the best estimate on the known facts and the prospects at the time of his death.

[10] In the instant case, the claim was for damages for lost years payable to the estate of the deceased whose life was shortened by the tortious act of the respondent. It was not a claim for loss of dependency by the appellant under the Fatal Accidents Act. The factors to be taken into account in assessing loss of dependency and the extent of such loss are distinct from the factors to be considered in computing the pecuniary loss to the estate. Indeed, the two categories of damages are of a different nature and are governed by different statutes. As already stated, in determining the quantum of the global award, the learned Judge was guided by the case law relating to assessment of loss of dependency under the Fatal Accidents Act. This was an error in principle which resulted in an inordinately low award. In **Kenya Breweries v Saro** (supra) the court further said:

**“...In Kenya society, at least as regards Africans and Asians, the mere presence in a family of 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.”**

Although the deceased had not even started schooling, it is probable that she would have lived a normal life and be engaged in an income generating venture or in a profession and save money for a rainy day at least for some years. Considering the value of money today and the improbables of life, a sum of Kshs. 500,000 would be a reasonable compensation to the estate.

Whilst we agree that a subtle mathematical calculation was not appropriate in assessing pecuniary loss to the estate in the lost years in the circumstances of this case, we reckon that the global award of Shs. 200,000 was not the best estimate of the prospective loss to the estate of the deceased.

The trial magistrate awarded Shs. 20,000 for pain and suffering and loss of amenities. The High Court increased this award to Shs. 200,000. There is no cross-appeal against the awards.

[11] In the premises, the appeal is allowed to the extent that the global award for Shs. 200,000 for lost years is set aside and substituted with an award of Shs. 500,000/-.

The summary of the award is thus:

<b>(i) Pain and suffering and loss of amenities</b>	<b>- Shs. 200,000</b>
<b>(ii) Loss of expectation of life</b>	<b>- Shs. 80,000</b>
<b>(iii) Lost years under law Reform Act</b>	<b>- Shs. 500,000</b>
<b>Total</b>	<b>=Shs. 780,000</b>
<b>Less 20% contributory negligence</b>	<b>- Shs. 156,000</b>
<b>Net Grand Total</b>	<b>- Shs. 624,000</b>

The sum of Shs. 624,000 shall carry interest from date of judgment at court rates. The appellant is entitled to half of the costs of the appeal.

We so order.

**Dated and Delivered Eldoret this 28<sup>th</sup> day of June, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**