



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.58 OF 2016

CROWN PETROLEUM LTD.....APPELLANT

VERSUS

PETER KARANJA.....RESPONDENT

(Being an appeal from the judgment/decreed of Hon. Wakumile, Principal Magistrate delivered on 11th May, 2016 in Nakuru CMCC No.581 of 2015)

JUDGMENT

INTRODUCTION

1. This appeal arise from suit filed by the respondent in the lower court seeking general damages under law reform Act and special damages for the death of **MN** who sustained fatal injuries while travelling in motor vehicle registration number KAU 319T which collided defendants vehicle registration number KBV 265M/ZE394 .

2. Parties recorded consent on liability at 85:15 % in favour of the plaintiff. The trial magistrate awarded kshs.3,120,185 less 15% contribution bringing a net of kshs 2,652,157.25.

3. The appellant being aggrieved determination on quantum filed this appeal on the following grounds:-

i. That the learned trial magistrate erred in law and in fact in adopting the wrong principles in awarding loss of dependency under the Fatal Accidents Act.

ii. That the learned trial magistrate erred in fact and in law in making an award for dependency which was manifestly excessive in the circumstances.

iii. That the learned trial magistrate erred in fact and in law in awarding Kshs.100,000 for pain and suffering when no evidence was led to prove that the deceased had endured any pain before death.

iv. That the learned trial magistrate erred in fact and in law in making an award for pain and suffering that was excessive in the circumstances.

4. Parties agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

5. Appellant is aggrieved by assessment of loss of dependency as being inordinately high; that use of 35 year as multiplier is excessive owing to vicissitudes of life. Appellant submitted that the deceased was 4 years old and he was not in gainful employment; that the court erred in using minimum wage.

6. Appellant submitted that this case was suited for multiplier/multiplicand approach in assessment of damages and cited the the case of **Daniel Mwangi Kimemi & 2 Others Vs JGM & Another**[2016]eKLR where the court cited **Ringera J. In Kwanza vs Ngalli Mutua & Another** and the case of **Chen Wembo & 2 Others Vs KK & Another** [2017]eKLR.

7. Appellant submitted that the issue of dependency is a question of fact and it invites strict proof. Appellant submitted that the deceased had not reached the age of majority to subject damages under this head to minimum wage as doing so will be speculation, which would be unjust to the appellant.

8. Appellant submitted that a global amount of kshs.400,000 is sufficient and cited the case of **Chen Wembo & 2 Others Vs IKK & Another** where the same amount was awarded for a minor aged 12 years. And the case of **Chabhadiya Enterprises Ltd & Another Vs Sara Alusa Mwachi Civil Appeal No.9 of 2017** and **Kenya Wildlife Services V Geoffrey Gichuru Mwaura[2018]** where a minor aged 14 years and 13 years respectively were awarded kshs 700,000.

9. On award of kshs.100,000 for pain and suffering, the appellant submitted that the respondent did not prove that the deceased was in pain at the time of death; further, that award under this head was excessive. He proposed an award of kshs.20,000 as being sufficient since the deceased died the same day. He cited the case of **Kenya Wildlife Services V Geoffrey Gichuru Mwaura [2018]** where the court substituted an award of kshs.150,000 with kshs.20,000 for a deceased who died on the same day.

RESPONDENT'S SUBMISSIONS

10. Respondent submitted in the case of **Butt V Khan [1982-88]1KAR1** the court held as follows:-

“An appellate court will not disturb award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate.

It must be shown that the judge proceeded on wrong principle or he misapprehended the evidence in some material aspect, and so arrived at a figure, which is inordinately high or low”

11. In respect of award for pain and suffering, the respondent submitted that the doctor's report indicated that the child died from medullary and abdominal injuries due to trauma; and court noted that the minor must have undergone a lot of pain. He submitted that the trial magistrate considered case of **Bobmil Industries Ltd & Another V Kennedy Indakwa Eshitemi [2010] Eklr** cited by appellant and found that it was outdated. He submitted that the award was not excessive

12. Appellant cited several authorities where courts held that the measurement of damages is a matter of discretion of the individual judge and the appellate court can only interfere if it finds that, the trial court applied wrong principles or misapprehended the evidence and arrived at a figure, which is inordinately high or low as to represent an entirely erroneous estimate.

13. On application of multiplier approach rather than global award, he submitted that the court did not err. Respondent cited authorities where the superior courts have upheld application of multiplier and minimum wage as multiplicand.

ANALYSIS AND DETERMINATION

14. I have considered arguments herein. It is trite law an appellate court can only interfere with assessment of damages awarded by the trial court if it is of the opinion that he/she applied wrong principles or misapprehended evidence and arrived at inordinately low or high figure.

15. Under loss of dependency, I note that the trial magistrate noted that in the absence of the contrary, the deceased as suggested in her report card was destined for a bright future. She indicated that the deceased probably would have started working at the age of 25 years and retired at 60 years. She adopted a multiplier of 35 years and ratio of 2/3.

16. In the case of **Jacob Anyiga Maruja Another Vs Simeane Obayo Civil Appeal N0.107 Of 2002[2005]eKLR**, the court of appeal upheld the reasoning in **Albert Odawa Vs Gichimu Githenji: Nakuru HCCA No.15 of 2003** where **Ringera J.** expressed himself as follows:-

“The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma, it can, and must be abandoned, where the facts do not facilitate its approach. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency and expected length of dependency are known or are knowable without undue speculation; where that is not possible, to insist on multiplier would be to sacrifice justice on the altar of methodology; something a court of justice should never do.”

17. The deceased herein is a minor who died at the age of 4 years. I do agree that if not for the accident, there are high chances that the minor would have grown to finish school and start working. However, my view is that, it would be difficult to know how long she would have lived to work; at what age the child would have started working, and whether she would have worked to the age of retirement.

18. I am of the view that the facts in this case do not facilitate application of multiplier approach, as the same will be speculative. My view is that, a global sum should have been awarded in this case.

19. Having found the above I have considered authorities cited and find that a global award of kshs.800,000 will be sufficient to compensate the plaintiff/respondent under loss of dependency.

20. Under pain and suffering, it is an obvious fact that trauma that caused injury leading to death subjected the victim to pain. The argument that the respondent did not prove pain cannot therefore stand. The sum awarded under that heading should be guided by length of time the victim is subjected to pain; such that prolonged pain should attract higher award.

21. I have looked at the authorities cited. The **Bob Mill** case cited by the appellant was decided in the year 2010 and the deceased was awarded kshs 10,000. In **Mam & Pao V Lawrence Micha Condit[2015]eKLR** and **Alexander Okinda Anagwe (Suing As Administrator Of The Estate Of Patricia Kezia Anagwe V Reuben Muriuki Kahuha & Other[2015]eKLR** The deceased persons died

the same day and was award kshs 150,000 for pain and suffering.

22. I have taken into consideration time when authorities cited were decided and note that they were decided around the same time with this matter. I therefore find the award granted herein for pain and suffering reasonable and will not interfere with the same.

23. FINAL ORDERS

1. Award under loss of dependency set aside & plaintiff/respondent awarded a global figure of kshs 800,000
2. Award for pain and suffering upheld
3. Each party to bear own costs of appeal.

Judgment dated, signed and delivered at Nakuru this 18th day of July 2019.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mr. Situma holding for Nasimiyu Counsel for Appellant

Wambui holding brief for Mbiyu Counsel for Respondent