



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL APPEAL CASE NO. 68 OF 2013**

*[Being an appeal from Bungoma CMC no. 69 of 2009 by Hon. R. Ngetich]*

GILBERT WANJALA FWAMBA ..... APPELLANT

**VERSUS**

P.N. MASHRU..... RESPONDENT

**JUDGMENT**

This is an appeal from the Judgment of Hon. R. Ngetich, Chief Magistrate in CMCC No. 69 of 2009 which judgment was delivered on the 21<sup>st</sup> of November, 2013. The appeals are on quantum of damages and ..... as relates to special damages. The parties filed consent on contribution at 25 – 75%. The grounds of appeal are as follows;

1. The learned trial magistrate erred in law and fact when she awarded extremely low damages under the Law reform Act and Fatal Accidents Act.
2. The learned trial magistrate erred in law when she did not fully set out conventional heads under which the award of general damages in a case present by the appellant.
3. The learned magistrate erred in law and fact when she completely disregarded the appellant's submission for the award of damages as it stands is tantamount to demand of justice.

In an amended plaint dated 28<sup>th</sup> April 2010, the appellant Gilbert Wanjala Fwamba suing as personal representative of the estate of the estate of Elias Wanjala – deceased sued the respondent P.N. Mashru for damages both general and special arising out of an accident that took place on or about the 28<sup>th</sup> of May, 2008 near Webuye road. The respondent filed his amended defence on the 3<sup>rd</sup> of September, 2010.

The 1<sup>st</sup> of March 2013, the parties recorded a consent to have the police abstract and photographs produced as exhibits and liability apportioned at 25 0 75% as against deceased and the respondent. Thereafter parties requested for judgment on quantum.

The trial court on quantum considered the evidence awarded damages as follows;

**General damages**

- i. Pain and suffering Kshs. 120,000/=

- ii. Loss of expectation of life Kshs. 100,000/=
- iii. Loss of dependency

Global figures	Kshs. 600,000/=
Specials	Kshs. 18,750/=
Less 25%	<u>Kshs. 184,750/=</u>
	<u>Kshs. 554, 0625/=</u>

Together with costs and interest.

In his submission the learned counsel for the appellant had proposed a sum of Kshs. 21, 000,00/=.

In his brief submissions in this court, the counsel for the appellant stated that the award by the trial court was too low and the special damages ought not to have been subjected to contribution.

Counsel for the respondent on the other had was in support of the judgment save that the court should consider reduction having awarded on both the Law Reform Act and the Fatal Accident Act.

I have considered the pleadings, submissions and authorities cited in order to arrive at an independent opinion. See Seile & another vs. Associated Motor Boat Company Ltd. & others [1968] EA 123.

In Kemero Africa Limited t/a MERU EXPRESS SERVICES GATHOGO KAMNOI VS. A.M.M. LUBIA & ANOR [1982 – 88] I KAR 77 at p. 730 Koech J.A held

***“The principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by a trial court were held by the former Court of Appeal Eastern Africa to be that it must be satisfied that either 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 damages.***

See Ilangot Manyoke [1961] EA 7105, Lukenya Ranching & farming Co-Operative Society Ltd Vs. Karolotol [ 1970] EA 414”.

In assessing whether the trial court’s assessment was either too high or too low to attract interference by this court I have considered the holding in the case of Sheikh Mustafa Hassan Vs. Nathan Mwangi Kamau Transporters & 5 others [1982 – 1988] I KAR

The learned judge of appeal had this to say

Nyarangi JA (as he then was

***“Financial assistance relating to the ability of the deceased which is normally expected and reality provided is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education is 105/- never to be redeemed. All the benefits that would accrue to the parents, and where it applies, to younger brothers and sisters of the deceased as the deceased matured physically and materially, are extinguished. Now almost all of this assistance of this kind would in the conditions of Kenya be almost wholly economic in substance, so much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the time is the assessment of a fair award in the circumstances of any one case.”***

The above statement by Nyarangi J summarizes what parties should expect from court. Not so much a windfall but fair compensation for the loss of a loved one. In the same case of Mustafa (supra) Koech JA stated,

***“And a member of an appellate court when he normally and reasonably says to himself what award would I have made? And reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are enlisted to their views or opinions so that their figures are no necessarily wrong if they are not the same as .....***

I will first consider whether the award of specials as proven should be subjected to conviction. I do agree with both the trial court and the respondents counsel that contribution ought to be apportioned to both general and special damages and will not fault the trial court for having rightly apportioned. The Mangenet T. Nyaga vs. Vilma Wambua Kioko [2004] e KLR.

The real question would be whether the Global figure of Kshs. 600,000 awarded as general damages was within the parameters awarded in similar cases, and if there is need to interfere with the trial court’s award. The deceased was 16 years of age and still in primary school.

His future career was not so forceable as it did not feature at trial, safe that he helped his parents ran errands.

In his submissions the appellant’s counsel relied on a number of cases in support of the proposal of Kshs. 4m. Peter Kanyango vs. Dave Muku Mekera –[2007] E KLR where the deceased Mukii Mereka was 18 years and the court awarded Kshs. 4m, Sheikh Mustafa Hassan vs. Nathan Mwangi Kamau [1982 – 88] I KAR (a) & (b) where the deceased was aged 17 years. The Court of Appeal awarded Kshs. 350,000/=.

In assessing whether or not to interfere with the trial courts award I have considered recent authorities namely Daniel Kuria Ng’ang’a vs. Nairobi City Council civil suit NO. 362 of 2001 where the court awarded loss of dependency of a deceased boy aged 14 years at Kshs. 888,728/= using the minimum wage of Kshs. 8,579.80/= and a multiplier of 37 years. In Pius Muindi Lidusi vs. the Headmaster Machakos Girls High School and 2 others Machakos HCCC no. 458 of 1998 where the court awarded Kshs. 1, 200, 00/= for loss of dependency for a 16 year old.

From the comparables it is obvious that the sum awarded by the trial court was inordinately low. Although not which was said of the deceased other than he did not perform well in school this does not mean that he had no prospects of earning a living, having a family and indeed help his parents, see holding of Nyarangi JA in Sheikh Mustafa (supra) not all sectors of employment require A’ students lots of uneducated or none. Professional making a living from informal sector or do manual work that attracts the minimum wage. The minimum wage in Kenya is current award Kshs. 8,579.80/=.

I am of the view that the minimum wage at the time of filing suit was Kshs. 8,579.80/= no doubt the deceased would have taken care of his parents upto a certain age, after his education. I propose to consider a multiplier of 25 years and not the entire 37 years he would have started to work probably at the age of 23 due to his lateness in school he may not have taken care of his parents for his entire working life, he may have also met other exegerances of life and therefore to arrive at the figure, I propose to have  $Kshs. 8,579.80 \times 25 \times 12 \times 2/3 = Kshs.1,715.960/=$ .

In so calculating it is obvious that the sum awarded by the trial court was inordinately low as there was no complaint on the sums awarded under the Law reform Act. I will adopt the same. The award will therefore be;

- i. Pain and suffering Kshs. 120,000/=
- ii. Loss of expectation of life – Kshs. 100,000/=
- iii. Loss of dependency Kshs. 1,715.960/=
- iv. Special damages Kshs. 18,750/=

