



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 45 OF 2014

1. **PETER WANYIRI KARIMI.....1ST APPELLANT**
2. **MARY NJOKI WAMBUGU.....2ND APPELLANT**

AND

1. **SILA MBALUKA1ST RESPONDENT**
2. **GEOFREY NDIRANGU MUREITHI.....2ND RESPONDENT**

(Being An appeal arising from the judgment of Honourable W.K. Chepseba – Senior Principal Magistrate, Nyahururu delivered on

10th March, 2014 in Nyahururu Principal Magistrate's court Civil suit No. 18 of 2012)

JUDGMENT

1. The appeal before the court is against the *quantum* of damages awarded by the trial court on the subhead of Lost years to the deceased estate. The deceased was a secondary school student at Igwamiti Secondary School and was in form two and aged 16 years when he met his death.

A letter from the said school was produced by consent of the parties during the hearing to confirm that he was a student therein.

It is not in dispute that no academic records or certificates were produced to inform the court of the academic ability and performance of the said student, not even his class eight certificate. No report forms or progress reports were tendered in court. It was said that the deceased aspired to become a pilot upon completion of school.

2. The trial Magistrate upon hearing the suit delivered judgment and awarded the appellants a total of Kshs.226,000/= Kshs.100,000/= out of the above was damages for lost years. In the body of the judgment, the trial Magistrate had made an award of Kshs.200,000/= as a global sum.

3. The appellant and the respondent agree that the final sum of Kshs.100,000/= as damages for lost years was an error that ought to be rectified to read Kshs.200,000/=.

Section 99 of the Civil procedure Act gives a court authority to rectify and correct a judgment if the error is merely arithmetical or a genuine mistake. The court shall correct the error to read Kshs.200,000/= damages for lost years.

4. **The appellant** submits that the said sum of Kshs.200,000/= is inordinately low and does not

represent any global awards and is not in consonant with precedent on damages for lost years. It is proposed to enhance the said damages to Kshs.1,666,667/=, citing the following authorities **David Ngunje Mwangi vs The Chairman, Board of Governor of Njiri High School (2001) eKLR**. The deceased was a 17 year old student. The court awarded Kshs.1,680,000/= general damages for lost years.

In **Daniel Kuria Nganga vs Nairobi City Council of Nairobi HCCC No. 362 of 2001**, the court awarded Kshs.1,269,819/40 general damages for lost years for a deceased who was 18 years at the time of death.

In **HCCC No. 458 of 1998 Machakos Pius Muinde Ndosi vs the Headmistress Machakos Gilrs High School**, the court awarded damages for lost years in the sum of Kshs.1,200,000/=. The deceased was a 16 years old student who aspired to become lawyer.

In all the above cases, evidence was tendered by the plaintiffs of the students academic performance through their report forms that showed them to have been bright and performing well in their classes.

5. In supporting the award of Kshs.226,000/= by the trial Magistrate, the Respondent submitted that the trial court had nothing to rely on as no report forms or academic certificates were produced to show the deceased's academic performance that would point to his becoming a pilot. Indeed, the appellant did not even know what qualifications the deceased got in his Kenya Certificate of Primary Education.

Citing the case **Hassan vs Nallian Mwangi Kamau Transporters and 4 Others (2006) e KLR**, it was submitted that the court has to make the best estimate it can based on the known facts and the prospects of the deceased at the time of death.

In this case, the trial court found that there was no evidence as to the deceased general performance in school.

That holding was followed in **Oyugi Judith and Another vs Fredrick Odhiambo Ongong (2014) eKLR** – that even if the deceased's prospects were known, no evidence was tendered to speculate that he would be an engineer. A sum of Kshs.120,000/= was awarded as damages for lost years.

6. The court is under a duty to reevaluate and reconsider the evidence tendered before the trial court – **See Selle vs Associated Motor Boat Co. Ltd and Others (1968) EA 123**. From that evidence, the court is mandated to make its own findings and conclusions. The appellant did not produce any evidence on the deceased academic performance, either in primary or Secondary school. He testified that he did not know the marks that the deceased attained in class eight examinations. He did not produce the report forms or progress reports from the school where a letter was written that the deceased was a form two student in the school. I agree with the respondent that the trial court had no evidence upon which any prospects of the student could be inferred from. A court cannot pluck figures from the air, or go into a fishing expedition to find evidence that ought be produced by the claimants. There was no slightest evidence to show what kind of student the deceased was.

Unlike cases where evidence is tendered to show the academic prowess of a student from the the deceased future prospects could be speculated, the trial court had nothing to rely on. He nevertheless made award off Kshs.2,000,000/=.

7. It cannot be overstated the value parents place on their children.

General damages are payable to the parent of a deceased child irrespective of their age. This was well stated in the case **Sheikh Mushtag Hassan vs Nathan Mwangi Kamau Transporters and 5 Others I KAR 946**.

They are treated like a “tall back and retirement benefit” as they are expected to assist their old age parents as well as taking the financial burden of educating and caring the younger siblings, when their parents are old and frail.

8. A loss by death can not be compensatable in monetary terms. In that regard a reasonable and fair award is normally awarded as a global sum. These observations were held and followed in several cases. In **P1 vs Zena Roses Ltd and Another (2015) e KLR**, the court adopted the global approach and awarded a sum of Kshs.300,000/=.The age of the child is relevant as an older child's abilities can be ascertained as opposed to a younger child.

9. Many times however, even a bright student with great prospects may not be successful after school for various reasons. The future life of a child is not easily ascertainable just like the mystery of life itself.

10. This court will think outside the box. A child may not excel in education or in his academic pursuits, but may be talented in other ways like in sports, business and arts and even in religious pursuits. That is usually manifested later after formal education. The court ought to accept that possibility in a child's life that even if a child were to fail in academics, he could in future excel as a shopkeeper, a farmer, a singer, an artist, a hairdresser, name it, or be employed in the informal sector where the Government basic wages guidelines would be applicable.

This court holds that the 16 year old deceased would have been engaged in either of the above ventures perhaps at age of 19 or thereafter after the basic formal education. His earnings would have been anything between Kshs.6,000/= to Kshs.15,000/= and would gainfully work for 40 years. However, as life is a mystery, the court finds a healthy working life of 30 years as reasonable. Using earnings of Kshs.8,000/= per month for 30 years, and a multiplicand of 1/3, damages for lost years would work as follows:

$$8,000 \times 12 \times \frac{1}{3} = \text{Kshs.960,000/=}$$

11. Guided by the above authorities and observations, and taking all imponderables and mystery of life, I am persuaded and hold that the 16 year old deceased young man would have lived a healthy and gainful working life save for the fatal injury.

For those reasons, I find the trial Magistrate's award of Kshs.226,000/= damages for lost years inordinately low.

The upshot is that the appeal succeeds. The trial court's judgment is set aside as far as it concerns the award on lost years which is substituted with an award of Kshs.960,000/=.

12. The appellant shall have costs of the appeal.

Dated, signed and delivered in open court this day 28th of July 2016

JANET MULWA

JUDGE