



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CIVIL APPEAL NO.46 OF 2010**

**DANIEL WAWIRE EUNGU.....1<sup>ST</sup> APPELLANT**

**ABU SHITABU SABWA.....**  
**2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHARLES MAKOKHA OPONDO (suing as the legal representative  
of the estate of DAVID MAKOKHA (Deceased)..... RESPONDENT**

**JUDGMENT**

The Respondent is the administrator of the estate of David Makokha (Deceased). The deceased died on 7<sup>th</sup> August 2008 in a road accident along Busia – Mumias road. The motor vehicle involved was Registration No. KAN 933T, Toyota matatu. The motor vehicle was at the time being driven by the 1<sup>st</sup> Appellant. It was owned by the 2<sup>nd</sup> Appellant. The deceased was at the time of his death aged 17 years and was a Standard 8 pupil at Madende Primary School. The Respondent, the father of the deceased, filed suit on behalf of the estate of the deceased, against the Appellants seeking to be paid damages as a result of the said death of the deceased. The Respondent sought to be paid damages under the **Law Reform Act** and the **Fatal Accidents Act**. The Appellants filed a defence denying being the authors of the accident that caused the death of the deceased. They further denied that they were entitled to pay damages to the estate of the deceased. However, prior to the hearing of the case before the trial court, a consent was entered whereby a liability as between the estate of the deceased and that of the Appellants was apportioned at the ratio of 80:20 in favour of the Respondent. The Appellants were to bear 80% liability while the Respondent was to bear 20% liability.

The issue that was placed for determination by the trial court was the question regarding what quantum of damages should be paid to the estate of the deceased. After hearing the evidence, the trial court awarded the sum of Kshs.640,000/- to the estate of the deceased as lost years under the **Fatal Accident Act**. The Respondent was further awarded the sum of Kshs.35,100/-. This sum was reduced by 20% on account of the agreed contributory liability. The estate of the deceased was thus awarded the sum of Kshs.540,080/-. The Respondent was awarded costs and interest of the suit. The Appellants were aggrieved by this award and duly filed an appeal against the said decision to this court.

In their memorandum of appeal, the Appellants raised six (6) grounds of appeal challenging the decision of the trial court in awarding the damages to the Respondent. They were aggrieved that the trial court had awarded a sum that was inordinately excessive as to amount to an erroneous estimate of the damages. They faulted the trial court for failing to properly appraise the evidence on quantum. They were aggrieved that the trial court had applied the dependency ration of ? in the case where the deceased was a child and

unmarried. The Appellants took issue with the fact that the trial court had ignored their submission in arriving at the said award. The Appellants were finally aggrieved that the trial court had failed to take into consideration the applicable principles in assessing the damages to be paid to the Respondent. In the premises, the Appellants urged the court to allow the appeal, set aside the award and substitute it with an award of the court reassessing the damages paid to the Respondent. The Appellants further prayed to be award costs of the suit.

Prior to the hearing of the appeal, the respective counsel for the Appellants and for the Respondent filed written submission. Mr. Magare for the Appellants and Mr. Omondi for the Respondent later highlighted the said submission during the hearing of the appeal. This court has carefully considered the said rival submissions. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court and subject it to reassessment in light of the grounds of the appeal filed, before reaching its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (See **Selle –Vs- Associated Motorboat Co. Ltd [1968] EA 123**). This being an appeal, essentially on the assessment of quantum of damages by the trial court, this court is required to take into consideration the fact that such assessment is exercise of judicial discretion by the trial court. This court will only interfere with such exercise of judicial discretion if it is established that the trial court acted capriciously and against the established principles of the Law. In **Kemfro Africa Limited t/a Meru Express Service –Vs- A.M. Lubia & Another [1987] KLR 27**, Kneller J.A held that:

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 a wholly erroneous estimate of the damage. See Ilango v. Manyoka [1961] E.A. 705, 709, 713, Lukenya Ranching and Farming Co-operatives Society Ltd v. Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles”***.

In the present appeal, certain facts are not in dispute. It was not disputed that the deceased was 17 years old at the time of his death. He was a primary school pupil. He was in standard 8 at Madende Primary School. The trial court was not told of the academic prospects of the deceased. This court cannot therefore say whether the deceased would have proceeded with his higher education and thereafter become a professional or speculate that he may have dropped out of school in that class and thereafter engaged in manual labour. Mr. Magare submitted that the trial court erred in awarding damages under the **Fatal Accident Act** based on a dependency ratio of ? yet the Respondent had not established such basis by evidence. He further submitted that the trial court erred in using the multiplier of 20 years instead of the 10 years that the Appellants had proposed. He urged the court to apply the minimum wage of Kshs.2,771/- per month in assessing the damages to be paid to the estate of the deceased. On his part, Mr. Omondi for the Respondent urged the court not to interfere with the award that was made by the trial court. In his view, the award was justified taking into account or the circumstances of the case.

Having re-evaluated the facts of this appeal, it is clear to this court that issue that the trial court had to grapple with is an issue that has exercised the minds of courts for more than 20 years since Nyarangi JA made his seminal holding in the case of **Sheikh Mushtaq Hassan –Vs- Nathan Mwangi Kamau Transporters (1982 – 88) IKAR 946**. In that case, Nyarangi JA held that an African parent, in bringing up a child, and in educating such a child, expects that such child would take care of him or her in old age. This decision, in the considered view of this court, was a sound one. Such expectation by a parent of a child is not misplaced in the African setting where the family is extended and not nuclear. In decisions that have been rendered subsequent to the decision of Nyarangi JA, those representing the estates of such deceased children have striven to establish the fact that the future prospects of such child would have been bright were it not for the fact that the life of such child was cruelly terminated at its young and tender age. Unfortunately, in assessing damages on behalf of the estate of such a child, the courts are essentially engaged in informed guesswork. This is because the court, or anyone in that matter, cannot

predict how a young life will become in adult life.

A child with an apparent good academic prospect in primary or high school, may turn out not to be a productive member of the society due to failure to adjust in adult life. On the other hand, a child with no apparent academic prospect in teenage years may turn out to be a captain of industry in adult life. What the Appellants and the Respondent are asking this court to do therefore is to engage in foresight. This court is being urged to be a foreseer to determine what the deceased would have become if he had not died as a result of the accident that is the subject of this suit. It is only the Almighty God who knows the fate of every human being. However, that is a difficult exercise which courts have not been able to come up with a hard and fast rule. Unlike the situations where a deceased adult was working, in the case of a child, the court will have to do its best to award the family of the deceased who obviously suffered loss and damage as a result of the death of the child.

The Appellants took issue with award of damages of Kshs.540,080/- that was awarded to the estate of the deceased. In this court's considered opinion, taking into account that the family of the deceased had permanently lost a child with no prospects of ever benefiting from him, the award of Kshs.540,080/- was reasonable in the circumstances. This court cannot fault the trial court for applying the sum of Kshs.4,000/- in assessing the damages. This is not even the minimum wage at the moment. As regards the dependency ratio of ?, and the multiplier of 20 years, this court is of the considered view that since the deceased has been permanently lost to his family, this court cannot speculate as to whether or not he would have been married were he to reach the age of 30 years. The reality of the estate of the deceased is that the deceased is dead. He cannot be of any useful purpose to his family other than the memories. This court is unable to reach a finding as urged by the Appellants that the trial court committed an error of principle in assessing the damages to be paid to the estate of the deceased.

The upshot of the above reasons is that the appeal filed by the Appellants lacks merit and is hereby dismissed with costs. The decision of the trial court is hereby upheld. It is so ordered.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 30<sup>TH</sup> DAY OF JULY, 2013.**

**F. TUIYOT**

**JUDGE**