



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC CIVIL APPEAL NO.188 OF 2009

COSMAS MUENDO

MAWEU.....APPELLANT

VERSUS

**H.M.M. (suing as the legal representative of the Estate of K.M.
(DECEASED).....RESPONDENT**

JUDGMENT

(1)On the 7th October 2009, H.M.M. (“**the Respondent**”) suing as legal representative of the estate of K.M. (**Deceased**) in claim for special damages and general damages under the Fatal Accident Act and the Law Reform Act was awarded KShs.20,000/- for pain and suffering; KShs.80,000 for loss of expectation of life; KShs.720,000 for lost years and KShs.38,548/- in respect of special damages (all totaling KShs.858,548/-) together with costs and interest against Cosmas Muendo Maweu and Willy Muia Matuku (“**the Appellant**”) in a judgment of the Principal Magistrates court at Makueni (F. M. Nyakundi, PM) in Civil Case No.9 of 2008.

(2)The Appellants being aggrieved by the whole of the said judgment filed a Memorandum of Appeal on the 4th November, 2009 citing several grounds but on the 23rd November, 2009, this court ordered, **BY CONSENT**, that:

- 1) There be stay of execution pending appeal on condition that the Appellants will pay KShs.284,838/- to the Respondent within 14 days ; and**
- 2) The balance of KShs.645,763/70 be deposited in a joint interest earning account within 30 days.**

Consequent upon the said order by consent, and no cross-appeal having been initiated, the parties also agreed that the appeal would be limited to one ground on the aspect of lost years and written submissions were filed and oral arguments made accordingly.

(3) In his evidence before the subordinate court, the Respondent [PW 1] testified that the Deceased was his grandson and was a pupil at Kiatine Primary School at the time of his death. He said –

“K.M. was 14 years old at the time of accident. He was in Standard 8 at the time. He was an average student. I have his report forms. He used to be the top ten students in his class. There are report forms for Kelvin from Standard 1 to Standard 8 issued by the school. He was in good health before his death.”

(4) The learned trial Magistrate on considering the evidence rendered himself as follows:

“On lost years; counsel for the Defendant (Appellant) has submitted that an award of KShs.100,000/- would be sufficient; with counsel for the Plaintiff asking that a multiplier of 30 years and a multiplication of KShs.100,000 would be sufficient to make the award KShs.3,600,000. I have considered the evidence and documents produced which show the deceased was aged 14 years at the time of death; was in Standard 8, an average student aspiring to join the army. I would find that the authority cited by counsel for the Plaintiff Sanya Hassan and another –vs- Soma Properties Ltd; Civil Case No.1517/02 to be relevant in this instance. I find that a multiplicand of KShs.3000/- and a multiplier of 20 years to be sufficient for the lost years. I would then award KShs.720,000 working out as $3000 \times 20 \times 12$.”

(5) The Appellants filed written submissions on the 9th February, 2010. Relying on the decisions of this court (Bosire, J as his Lordship then was) and Githinji, J (as his Lordship also then was) in **Munja Wanguru Meshack Mbogo vs. Francis Gitonga Ndegwa** (Mombasa HCCC No.701 of 1984) and **Earnest Mwara Sikituma vs. Aziz Bin Ali Chirag dini** (Mombasa HCCC No.510 of 1989) respectively, they urged that the award of KShs.720,000/- was excessive and should be reduced to KShs.320,000/- based on a multiplicand of KShs.2000/- and a multiplier of 20 years but reduced by 1/3 in respect of the Deceased's living expenses which the learned trial Magistrate had failed to do. These submissions were reiterated by Mr. Thuku for the Appellants in oral arguments at the hearing of the Appeal.

(6) The Respondent opposed the appeal on the grounds and reasons set forth in the written submissions filed on the 24th February, 2011. The Respondent contends that the Deceased, who was aspiring to be an Army Officer, would have worked for 30 years before retirement at a salary of at least KShs.10,000/= per month. However, and as the Respondent did not file a cross appeal, the Respondent concedes that the award of the lower court should not be enhanced but urges that the judgment be upheld and the appeal dismissed. With regard to the multiplicand of KShs.2,000/- and ratio of 2/3 advanced by the Appellants, the Respondent submits that are unmeritorious and not based on facts or law particularly given that the minimum wage of Kenya is now KShs.5000/- per month. In his oral arguments however, Mr. Mulyungi, learned counsel for the Respondent, conceded to the multiplier of 20 years and the ratio of 2/3 but reiterated that the Appellants had not justified a multiplicand of KShs.2,000/-.

(7) This being a first appeal, it is the duty of this court to re-evaluate the evidence, assess it and make its own conclusion – see the decision of the Court of Appeal in **Mahmud Salim Omar –vs- M. A. Bayusuf** (Civil Appeal No.48 of 2006) cited by the Respondent. As I have already said, the learned trial Magistrate upon considering the evidence and documents produced by the Respondent who was the Plaintiff in the lower court made a finding that the Deceased was aspiring to join the Army. There is nothing in the evidence to support this and both learned counsel are so agreed. The parties are also agreed on the multiplier of 20 years adopted by the trial court. The Respondent also concedes to a ratio of 2/3 taking into account the education in the award in respect of the living expenses of the Deceased during “the years” for they would not form part of the estate. The only issue on which the parties differ is the multiplicand – the Appellants urge that it should be enhanced to KShs.5,000/- while in the same breath urging that the judgment of the lower court should not be interfered with.

(8) The principles to be considered in the assessment of damages for the “lost years” include that the sum to be awarded is never a conventional one but compensation for a pecuniary loss which must be assessed justly and with moderation; that the amount will vary greatly from case to case for it depends on the facts of each one including the victim's station in life; that from the annual gross loss must be

deducted to victims' probable living expenses of a reasonably enjoyable life for him or her; and that for an adolescent, future earning would usually be real, assessable or small – see **Hassan –vs- Nathan Mwangi Kamau Transporters & Four Others** [1986] KLR 457 AT 463.

(9) As I have already said, no evidence was let in the lower court on the basis of which the lower court could have made a finding that the Deceased was aspiring to join the Army. However, and following the decision in **Sanya Hassan and Another – vs- Soma Properties Ltd.**, (HCCA No.1517 of 2002 cited to the lower court by learned counsel for the Plaintiff, the learned trial Magistrate applied the right principles in reaching its decision but, in my respectful opinion, misdirected himself by failing to deduct by a 1/3 the Deceased probable living expenses. In the result, I allow the appeal and the judgment and decree of the lower court is hereby varied by reducing the sum of KShs.720,000/- awarded as damages for lost years to KShs.480,000/- from the date of judgment of the Subordinate Court. Since the Appellants abandoned all their other grounds of appeal, there will be no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 17th day of **May**, 2011.

P. Kihara Kariuki
Judge