



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 252 of 1999

JOHN NJENGA NJOROGE

(suing on his behalf and on behalf of the Estate of

MONICAH MWIHAKI NJENGA – DECEASED)..... PLAINTIFF

VERSUS

ALEX MUREITHI.....DEPENDANT

JUDGMENT

At around 7.00 am on the 28th August, 1998, Monicah Mwihaki Njenga (the deceased) was walking along Kenyatta/Casino Road Junction in Molo town when she was knocked down and killed by the defendant's vehicle registration number KTZ 324. Alleging negligence on the part of the defendant and/or his driver, servant and/or agent, John Njenga Njoroge, the father and administrator of the estate of the deceased, brought this suit and claimed damages for the benefit of the deceased's estate and for her dependants under the **Law Reform Act Cap 26** and the **Fatal Accidents Act Cap 32 of the Laws of Kenya** respectively.

Before he died and was substituted by his legal representative, the defendant filed a general defence denying liability and attributing the cause of the accident to inevitable circumstances. Though served, however, neither the defendant nor her advocate attended court for the hearing. The plaintiff therefore formally proved his case.

In his evidence the plaintiff stated that at the time of her death the deceased was a 17 year old form 2 student whose ambition was to be a doctor. To prove her ability to achieve that ambition, he produced a letter from her former school which he claimed shows that she used to be between positions 9 and 12 out of a class of 44. He said the deceased's parents expected her to support them in their twilight years.

The traffic proceedings relating to Traffic Case No. 1417 of 1998 in which the deceased defendant was charged with inter-alia causing death by dangerous driving show that the defendant went off the road and knocked the deceased down. The witnesses in the traffic case also testified that the deceased was driving at a high speed and in a zigzag manner.

On that evidence the deceased defendant was convicted of that charge of causing death by dangerous driving. He did not appeal against that conviction. By dint of **Section 47A** of the **Evidence Act** and the defendant having not testified in this case, the evidence on record remains uncontroverted. In the circumstances I find the deceased defendant wholly liable on the issue of liability.

On quantum in their written submissions, counsel for the plaintiff have, in addition to special damages, claimed damages for pain and suffering, loss of expectation of life and lost years. For pain and suffering and loss of expectation of life, they have recommended awards of Kshs. 80,000/= and Kshs. 120,000/= respectively which I find reasonable and I accordingly award them. What has caused me anxiety is the claim for lost years.

The plaintiff testified that his deceased daughter's ambition was to be a doctor. Basing their submissions on that ambition, counsel for the plaintiff urged me to take Kshs. 20,000/= as the minimum salary of a doctor employed in public service apply a multiplier of 40 years and award him Kshs. 3,200,000/= under this head.

Damages are awarded for pain and suffering and loss of amenities as well as for the pecuniary loss suffered. They cannot fully compensate an accident victim or his family for the injuries or death suffered. They are intended, as much as possible, to put the victims back to the position they occupied before the accident.

Granted, there is some amount of speculation in all awards of general damages especially those under the head of lost years. However, there is and should always be a basis for each such award.

It is trite law as is clear from the Court of Appeal decision in **Sheikh Mushtaq Hassan Vs Nathan Mwangi Kamau Transporters & Others, (1982-88) 1 KAR 946** that damages for lost years are awarded to both living plaintiffs and the legal representatives of deceased persons. So the plaintiff's claim in this suit for damages for lost years is perfectly in order but as I have said there should always be a basis for such award. What I am called upon to do in this case is to base the award for this head of damages on the deceased's ambition and expectation. Having an ambition is one thing and achieving it is quite another.

I do not want to appear to denigrate the deceased's ability to achieve her ambition but to base the award of damages for lost years on that would in this case be taking speculation a little too far. This is because the deceased was only in form 2. Although the plaintiff testified that the deceased used to be between position 9 and 12 in a class of 44 students, the letter from her school which he produced as **Ex. 5** does not say that. I therefore have nothing to prove her capability. Had she lived, she may or may not therefore have attained the grade required for admission to university to study medicine.

All the cases cited by counsel for the plaintiff had bases for the awards under this head. In the said case of **Sheikh Mushtaq Hassan Vs Nathan Mwangi Kamau Transporters & Others, (1982-88) 1 KAR 946**, the deceased had passed his exams and had actually been admitted to the University of Nairobi to study architecture. Though the trial judge based the award of damages for lost years on the income of a High Court judge and not on that of an architect, the Court of Appeal had no quarrel with the award as such because there was a basis for it. Had it not been for his death the deceased would have definitely studied architecture for which he had been admitted to the University of Nairobi. The other cases of **Charles Mageto Vs Douglas Ochwang Onachi, Nakuru HCCC No. 404 of 1998** and **Elijah Ole Kool Vs George Ikonya Thuo, Nairobi HCCC No. 1299 of 1998**, cited by counsel for the plaintiff, related to deceased persons who, prior to their deaths, were in salaried employment. I cannot appreciate the basis for the award for damages under this head to the plaintiff in **Henriet Mahero Khamati Vs Terry Bell & Another, Nairobi, HCCC No. 335 of 1996**, also cited by counsel, in respect of a 15 year old student still in high school.

In this case I find no basis for an award to the deceased's estate of damages for lost years as though the deceased were in employment. However, had the deceased lived she could have been in some form of employment but I cannot say which. In the circumstances I think a global award under this head will serve the interest of justice. And taking all the factors in this case into account, I find award of Kshs. 300,000/= under this head to be reasonable.

As regards special damages, the plaintiff produced vouchers to show that the deceased's estate suffered loss of Kshs. 52,280/=. I award him the same.

In the result I award the plaintiff Kshs. 552,280/= made out as follows:-

Pain and suffering and loss of amenities.....Kshs. 120,000.00

Loss of expectation of life.....Kshs. 80,000.00

Lost years.....Kshs. 300,000.00

Special damages..... Kshs. 52,280.00

Total..... Kshs. 552,280.00

The plaintiff shall also have the costs of this suit and interest at court rates on both the amount awarded and costs.

DATED and delivered this 29th day of April, 2009.

D. K. MARAGA

JUDGE.