



Amicabre Travel Services & another v DKY (Suing as the Legal Representative of the Estate of VJK) (Civil Appeal 158 of 2019) [2023] KEHC 3787 (KLR) (Civ) (3 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 158 OF 2019

JN MULWA, J

MAY 3, 2023

BETWEEN

AMICABRE TRAVEL SERVICES 1ST APPELLANT

JARED ZACHAYO 2ND APPELLANT

AND

**DKY (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
VJK) RESPONDENT**

(Being an Appeal from the Judgment and Decree of the Chief Magistrates Court at Milimani in CMCC No 1663 of 2014 delivered by Hon M W Muragu (SRM) on February 26, 2019)

JUDGMENT

1. This is an appeal against the lower court's quantum of damages. Vide a Complaint dated March 25, 2014, the Respondent instituted Milimani CMCC No 1663 of 2014 against the Appellants and sought for general and special damages arising from a road traffic accident that occurred on March 30, 2011 along Embakasi Road near Harvest View Academy. The accident involved a pedestrian, the Respondent herein, and motor vehicle registration number KBK 639C Toyota Hiace, property of the 1st Appellant being driven at the time by the 2nd Appellant herein. The Respondent averred that the said motor vehicle was so negligently and carelessly driven that it lost control, veered off the road and ran over the deceased. As a result, the deceased sustained fatal injuries for which her Estate sought compensation.
2. The Appellants filed a joint Statement of Defence in which they denied the claim and contended that if the accident occurred then it was solely caused or substantially contributed to by the negligence of the deceased.



3. By a consent dated July 18, 2018, the parties agreed to apportion liability in the ratio of 90:10 in favour of the Respondent against the Appellants. Upon hearing the claim on the issue of quantum, the trial court entered judgment for the Respondent as follows;
- i. Pain & Suffering - Kshs 20,000/-
 - ii. Loss of expectation of life - Kshs 100,000/-
 - iii. Lost years - Kshs 1,200,000/-
 - iv. Special Damages - Kshs 191,640/-
 - v. Interest at court rate from date of decree as regards general damages and on special damages, from the date of filing suit until payment.
 - vi. Cost of the suit.
4. Aggrieved by the decision of the trial court on the award for lost years, the Appellants filed the instant appeal vide a Memorandum of Appeal dated March 20, 2019 citing the following three (3) grounds:
1. That the trial court erred in law and fact by making an award on lost years that was inordinately high.
 2. That the trial court erred in law and fact by failing to rely on relevant case law while making the award on lost years.
 3. That the trial court erred in law and fact by failing to rely on the Appellants' submissions and authorities cited therein.
5. The appeal was canvassed through written submissions.
- The Appellants submitted that the learned trial magistrate did not rely on any case law, relevant or otherwise, to arrive at the sum of Kshs 1,200,000/= for lost years. They contended that the award was manifestly excessive as the deceased was a minor aged five years at the material time. They proposed an award of Kshs 250,000/- as reasonable compensation under this head. In that regard, they relied on the case of *PI (Suing as the Next of Kin of C M (Deceased) v Zena Roses Ltd & Another* [2015] eKLR where the court awarded a sum of Kshs 300,000/= for a deceased minor who was six (6) years old.
6. The Respondent on his part submitted that the award was proper as the trial court evaluated the evidence placed before it and the law in making the award. The Respondent urged that the deceased was a girl of school going age and it is probable that she would have lived a normal life and engaged in an income-generating venture or in a profession. Reliance was placed on the case of *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD))* [2016] eKLR where the court awarded a sum of Kshs 1,000,000/= for lost years for a deceased who was aged 9 years.
7. The only issue for determination is whether the trial court's award on lost years was inordinately high. It is well settled that an award of damages is an exercise of discretion by the trial court and thus an appellate court will not interfere with such discretion unless there are good grounds to do so. In *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, the Court of Appeal stated thus:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge



proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..”

8. In *Emmanuel Wasike Wabukesa v Muneria Ndiwa Burman* [2019] eKLR, the Court of Appeal cited the case of *Sheikh M Hassan v Kamau Transporters* [1982-88] 1 KAR 946, where the court laid down guidelines for assessing damages for lost years under the *Law Reform Act* as follows:

“

- “(i) The sum to be awarded is never a conventional one but compensation for a pecuniary loss.
- (ii) It must be assessed justly and with moderation,
- (iii) Deduct the victims living expenses during the “lost Years” for they would not form part of the estate.
- (iv) A young child’s present or future earnings in most cases would be nil.
- (v) An adolescent would usually be real, assessable and small.
- (vi) Calculate the annual gross loss.
- (vii) Apply the multiplier (estimated number of “lost working years” accepted as reasonable in each case).
- (viii) Deduct the victim’s probable living expenses of a reasonably satisfying enjoyable life for him or her.”

9. The court of Appeal in the Emmanuel Wasike Wabukesa (*supra*) further stated:

“...subtle mathematical calculations based on events or contingencies of a life which a deceased victim will not live are out of place and the judge must make the best estimate on the known facts and the prospects at the time of his death.”

10. PW1 DKY, was the father of the deceased. He testified that that the deceased was 5 years and 4 months old at the time of death. She was in class one at [Particulars Withheld] Academy in Embakasi Village and had just closed school a day before the accident. PW1 produced a letter dated November 17, 2011 from [Particulars Withheld] Academy where the deceased was schooling confirming the above testimony.

11. Indeed, it is true that the learned magistrate did not refer to any past comparable decisions when determining damages for lost years. However, the court notes that the award was based on sound principles in view of the court statement that:

“The deceased was 5 years of age at the time of death. She was in pre-unit. The report book shows that she continually improved in her performance. There was no evidence as to what she would have been in future.”

12. However, the court agrees with the Appellant that the global award of Kshs 1,200,000/- was inordinately high in the circumstances of the case. In *South Nyanza Sugar Company Limited v Samson Odoyo Oyoo* [2017] eKLR, the Appellate court set aside an award of Kshs 900,000/- made by the trial court using a multiplier approach for a child who died aged 5 years and substituted it with a global sum of Kshs 400,000/- in 2017. In *Emmanuel Wasike Wabukesa v Muneria Ndiwa Burman* [2019] eKLR, the Court of Appeal set aside an award of Kshs 200,000/- on lost years for a deceased who died



was aged 1 ½ year at the time of death and substituted the same with Kshs 500,000/- in 2019. In the court's view, the sum of Kshs 800,000/- would suffice as adequate compensation for lost years.

13. Consequently, the court finds that the Appeal has merit.

- a. The trial court's award of Kshs 1,200,000/- for lost years is hereby set aside and substituted with an award of Kshs 800,000/-.
- b. The awards of Kshs 20,000/- for pain and suffering, Kshs 100,000/- for loss of expectation of life and Kshs 191,640/- for special damages are affirmed.
- c. The amount payable to the Respondent in damages shall now be Kshs 1,111,640/-, less the Respondent's 10% contribution.
- d. There shall be no orders as to costs of the appeal

14 Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF MAY, 2023.

JANET MULWA

JUDGE

