



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 25 OF 2018

SAMMY KURIA NDUNGI.....APPELLANT

VERSUS

(1) RUTH KAMENE KILONZO

AND (2) KYEVU KILONZO

(Suing as Administrators of the Estate of

MULINGE KILONZO alias

STEPHEN MULINGE KILONZO (DECEASED).....RESPONDENTS

Being an Appeal from the Judgment of Hon Mogire Onkoba SRM delivered on 15th November 2018 in Civil Suit No 39 of 2017 in the SPM's Court at Voi.

J U D G M E N T

1.The Court has before it an Appeal from the Judgment of Hon Onkoba Mogire SRM in the SRM's Court at Voi delivered on 15th November 2018. In that case the Plaintiffs were the Personal Representatives of Stephen Mulinge Kilonzo (Deceased) who met his death in a motor vehicle accident on the Nairobi Mombasa Highway near Ndara. The Deceased died as a consequence of his injuries. The Plaintiffs sued the driver of the oncoming vehicle. The Parties entered a consent on liability where 10% liability was attributable to the Deceased and 90% attributable to the Defendant. The Plaintiffs are suing on behalf of the Estate according to the pleadings. The Appellant interprets that as suing on and on their own behalf as dependents and on behalf of the other dependants who are listed in the Complaint and supported by the Chief's Letter.

2. Since quantum was therefore in dispute, the trial court heard evidence on the question of quantum. Thereafter the Learned Trial Magistrate ordered:

(a) Special Damages in the sum of KShs.14,650;

(b) Pain and Suffering KShs.10,000/=

(c) Loss of expectation of life = KShs.130,000/=

(d) Lost years KShs.2,400,000/=

Coming to a total of KShs.2,299,185/=.

3. The Defendant was dissatisfied with this Judgment and filed a Memorandum of Appeal on 26th November 2018. The Grounds relied upon are set out in the Memorandum of Appeal as follows:

MEMORANDUM OF APPEAL

The appellant above named humbly appeals to the High court at Voi from the judgment of the Learned Senior Resident Magistrate

Hon. Onkoba in Voi Civil Suit No. 39 of 2017 in the Senior Principal Magistrate's Court, Voi dated the 15th day of November 2018 against his assessment of damages and sets forth the following grounds of objection to the Decree appealed from namely:-

1. That the Learned Senior Resident Magistrate erred in awarding to the Plaintiff the sum of Shs. 2,400,000.00 for lost years when there was no or no plausible and/or credible evidence tendered before him in respect of the deceased's earnings in that the said sum is so excessive as to amount to an erroneous estimate of the damages payable to the Plaintiff.
2. That the Learned Senior Resident Magistrate having held that only dependant of the deceased was his mother namely Ruth Kameni Kilonzo (who was born in 1950 and consequently her age is 68 years) erred in law and in fact in adopting a multiplier of 30 years whilst assessing damages for lost years.
3. That the Learned Senior Resident Magistrate erred in not taking into account the advanced age of the deceased's only dependant, the mother and the vicissitudes and uncertainties of life when he adopted a multiplier of 30 years whilst determining damages payable for lost years.
4. That the Learned Senior Resident Magistrate erred in failing to appreciate that by reason of the advanced age of the deceased's mother she would have been dependant of the deceased for a limited time only.
5. That the Learned Senior Resident Magistrate erred in failing to hold that the other adult siblings, named in paragraph 8 of the plaint dated 3rd March 2017, of the deceased would also have cared for their mother in the absence of the deceased and further failing to hold that by reason of this, their mother dependency on the deceased would be reduced.
6. That the Learned Senior Resident Magistrate erred in awarding to the plaintiff a sum of Shs. 130,000.00 for loss of expectation of life without giving any or any adequate reasons for doing the same.
7. That the Learned Senior Resident Magistrate erred in making awards under the various heads by failing to take into account that the general damages awarded to the plaintiff would be invested to earn interest. If the Learned Senior Resident Magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the plaintiff under each head.
8. That the Learned Senior Resident Magistrate erred in failing:-
 - a. To appreciate the significance of the various facts that emerged from the evidence of the plaintiffs' witnesses.
 - b. To consider or properly consider all the evidence before him and/or
 - c. To make any or any proper findings on the aspect of quantum of damages on the evidence before him
9. That the Learned Senior Resident Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the Defendant/Appellant.

REASONS WHEREOF the Appellant prays that this appeal be allowed with costs and that the Learned Senior Resident Magistrate's judgment dated 15th November 2018 be set aside or varied as to this Honourable Court appears proper and an appropriate order for costs be made in respect of this appeal and in respect of the proceedings in the court below.

The Record of Appeal was filed on 18th February 2019.

4. The Parties agreed that the Matter should be heard by way of written submissions. The Parties duly filed their written submissions as required.
5. The Submissions are voluminous. The arguments are set out herebelow for ease of reference and analysis The Court has considered the Submissions filed carefully.
6. The Appellant argues, inter alia, as follows:-

“3. The Defendant Appellant humbly appeals from the judgment delivered by the Learned Senior Principal Magistrate Hon Onkoba in the Senior Principal Magistrate's Court at Voi in Civil Suit No 39 of 2017 on 15th November, 2018 against his assessment of quantum of damages for lost years and loss of expectation of life.

4. The Judgment is found at **page 108 – 118 of the Record of Appeal**. In it the magistrate assessed general damages at **Kshs 2,400,000.00** for the estate of the Deceased whose only dependant was his mother, the 1st Respondent herein aged 68 years.

5. Your Lordship in the Memorandum of Appeal dated 22nd November 2018 and filed in court on 26th November, 2018 the Appellant raised nine (9) grounds of appeal. **See page 1 – 2 of the Record of Appeal**.

6. Your Lordship being an appeal against the award of damages, the principles that guide this court were as set out by the Court of

Appeal in **HENRY HIDAYA ILANGA V MANYEMA MANYOKA (1961) 1 EA 705 (CAD)** which applied the rule laid down by the Privy Council in **Nance v. British Columbia Electric Railway Co. Ltd. (4), (1951) A.C. 601** at p. 613 as follows;

“ when discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a judge, the principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v. Lovell (1935) 1 K.B. 354), approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd., (1942) A.C. 601.”

Your Lordship, having laid down the aforesaid principles and the appeal being about the assessment of damages, we propose to argue and submit on all the grounds of appeal cumulatively as hereunder; The Appellant relies on the authority of **Tayab vs Kinanu (1982 – 88) 1KAR 90** where the court therein stated that:-

“ I state this so as to remove the misapprehension so often repeated that the Plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law she is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendants. The Defendants are not wrong doers. They are simply the people who foot the bill.” .. and went ahead to hold that;

“ The claimant’s advocates tend to rely on more serious injury cases to try and obtain larger award whereas defendant’s counsel tend to rely on less serious injury awards. Such a practice is unhelpful to courts.... in the process there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to be considerable extent conventional.”

Your Lordship, the Respondents pleaded in the Plaintiff that Deceased was not married and that he was aged 24 years. *See page 5 line 19 – 20 of the Record of Appeal.* The Respondents further submitted before the trial court a sum of **Kshs 2,592,000.00** was sufficient compensation based on the following computation;

Kshs 20,250.00 x 12 x 32 years x 1/3 = Kshs 2,592,000.00 *See pages 78 – 81 of the Record of Appeal.*

The Defendant/Appellant on the other hand submitted that the Deceased was aged 24 years who had successfully completed his Diploma Course in a college and was in fact neither employed nor earning a salary..... the deceased having not been employed nor earning a salary is a fact that this Honourable court should not turn a blind eye to. Further, the deceased’s only dependant was the mother, the 1st Respondent herein aged 68 years whereas he left behind five siblings capable of providing to the 1st Respondent herein. It is not clear whether the contradiction between those two phrases was intended but it demonstrates clearly the difference between the basis of the Appellant’s arguments and the oral evidence the Learned Trial Magistrate heard

On the question of multiplier, the Appellant, indirectly relies on the authority of **KWANZIA vs NGALALI MUTUA & ANOTHER** that:-

“ The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

The Defendant;s Submission at trial were that “... court that in the instant case the damages under the Fatal Accidents Act cannot be calculated on the basis of a multiplier and multiplicand and therefore a global figure of the region of **Kshs. 450,000.00 – Kshs. 500,000.00** should be awarded.” That is repeated in the Appeal together with the issue of dependence to wit Section 4 (i) of the Fatal Accidents Act, Cap 32 of the Laws of Kenya which states:- **“every action by notice of the provision of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused.”**

7. The Appellant argues that the Trial Court erred in both fact and law on the question of dependence in particular the advanced age of the First Administrator and de facto dependence before death.

8. It is also argued by way of evidence, that “Your Lordship, the Respondent advertently failed to annex the several authorities relied on in coming up with the reasonable compensation to the Deceased’s estate with the sole intention of denying both the trial court and the Appellant herein an opportunity to critically analyze and distinguish the injuries from the authorities relied on. We humbly submit that failure to annex the said authorities infringed the Defendant appellant’s right to fair trial which is a fundamental right that cannot be limited pursuant to **Article 25 (c) of the Constitution of Kenya, 2010** hence the Plaintiff’s authorities in the trial suit should be disregarded as submitted by the Defendant in the trial court.”.

9. That argument does not take account of the fact that Advocates who represent their clients are assumed to know the law and conduct their own research. Failure to annex a copy of an authority cannot be the subject of any prejudice.

10. In summary the Appellant considers the award inordinately high. It relies on an English Authority where the dicta enunciated by Lord Denning (*Lim Pho Choo v Camden and Islington Area Health Authority (1979) 1 ALL ER 332*) relates to the specific circumstances of a National Health Service which is funded by the tax payer. That is not analogous to the situation here, where the ultimate defendant is a commercial entity in business for gain.

11. The Respondents Submissions remind the Court that this a first appeal and therefore, “*this Honourable court is duty bound to re-evaluate and analyze the evidence on record and the submissions that were before the subordinate court and make its own conclusions in the matter, only giving allowance for the fact that it neither saw nor heard the witnesses who testified during the trial – this is the holding as per the celebrated case of:- SELLE – VS – ASSOCIATED MOTOR BOAT COMPANY (1968) E.A 123 AT PAGE 126.*”

12. The Respondent’s Submissions then repeat the facts of the suit and the decision of the Court, reminding the Court that this is a case that involved a fatality. The Deceased is described as “**Mr. Mulinge Kilonzo alias Stephen Mulinge Kilonzo (deceased)** at the date or time of his death (2/7/2016) was 24 years old in good health or condition and had just completed a **Computerized Diploma Course in Customs, Clearing and Forwarding** from **Nairobi Aviation College**. The Submissions go on the set out that “*The Honourable Learned Trial Magistrate in his judgment held as follows in assessing the damages payable in the fatal case/matter in the Lower Court (page 113 through to page 117 of the Record of Appeal):-On pain and suffering, the Plaintiff submitted that the deceased had died on the spot. They proposed an award of Kshs 20,000/= and relied on the case Nairobi HCCC No. 1993 of 1990 Fredrick Gataka Mungai Vrs George N.Kibunyi & Another. The Defendant on his part plainly stated that an award of Kshs 10,000/= would suffice.*”

I have considered Civil Case No. 318/2017 Mary Njeri Vrs Peter Macharia & Another (2016) eKLR where the High Court at Nairobi while dealing with a claim under pain and suffering stated as follows;

“Under Law Reform Act, pain and suffering, it is evident that the deceased died on the spot. I would award a conventional figure of Kshs 10,000/=”

The deceased herein died on the spot. I award a conventional figure of kshs 10,000/= as per the authority cited above.

With respect to loss of expectation of life, the Plaintiff proposed a sum of ksh 200,000/=. They argued that the deceased had been deprived of normal expectation of life through this unexpected demise and that at the time of his death he was aged 24 years. The plaintiff relied on the case of Zakharia Bongoko Vrs Dhabir diarshama & Another Nairobi HCC No. 2377 of 1991.

The defendant on his part made a proposal of Ksh 100,000/=. In the case of Jacob Mutahi Githaiga Vrs Said K. Msellem HCCNo 98/1997, the court had made an award of Kshs 140,000/=. Where the deceased was aged 47 years. Looking at the general figures awarded by the Superior Courts, I awarded Kshs 130,000/= for loss of expectation of life.

The next head is on lost years. The Plaintiff submitted that the deceased was aged 24 years old, a student pursuing a computerized diploma in clearing and forwarding at the Nairobi Aviation College. That the deceased was on industrial attachment at the Kenya Ports Authority at the time of his death.

The Plaintiff relied on the case of Gladys Waithira vs Samuel Nakuru HCC No. 339/1998 Betty Ngatia (Administrator of estate of Kinuithia Thuita.

The Plaintiff submitted that lost years of damages is payable to parents of deceased person(s). the Plaintiff relied on the finding in Sheikh Mushtaa Hassan vs Nathan Mwangi Kamau Transporters & others (1982 – 1988) I.K.A.R. 946. In the said case the Superior Court gave the reason for payments of damages for lost years to the estate of the deceased. Key amongst the said reasons is that children help their parents when in a position to do so.

The Plaintiff urged the court to use/adopt a net salary of kshs 20,250/= as the multiplicand and a ration of 1/3. The Plaintiff too urged the court to use a multiplier of 32 years, considering that the retirement age in Kenya is 60 years.

The Defendant on his part submitted that the award be considered under loss of dependency and at the first instance urged the court to give a global figure in the region of between Kshs 450,000/= to kshs 500,000/= urging that the deceased only left his mother as the lawful dependant. The Defendant dissuade the court from adopting the multiplier and multiplicand approach. It is correctly submitted by the Defendant that the brothers and sisters are not lawful dependants under section 4(1) of the Fatal Accidents Acts. It is also clear that the Plaintiff had abandoned the claim under the Fatal Accidents Acts but anchored the same under the Law Reform Act, where compensation on behalf of the estate of the deceased is given as lost years.

The Defendant submitted in the alternative that if the court were to go the multiplier and multiplicand way, they urged the court to adopt Kshs 10,000/= as minimum wage in the rural areas in Kenya, and that the multiplier should be 7 years considering the age of the deceased’s mother (dependant).

I do not agree with the submissions by the Defendant. First, they did not give any basis for urging the court to use minimum wage for a non-skilled member in a rural area. The deceased was pursuing a computerized diploma in clearing and forwarding. He had good prospects of getting employed. In fact, as at the time of his demise, he was on industrial attachment at the Kenya Ports Authority.

From my own research, Kshs 10,000/= had been adopted in Civil Appeal No 143/2004 EPCO Building (K) Limited vs Rosaliah Kemunto Ongari (2009) eKLR with respect to a deceased who was a conductor.

Further to the foregoing, on computing the lost years, the court considers the age of the deceased at the time of demise and not age of the dependants. The multiplier is determined by considering the balance of the working life of the deceased. To this extent, I find the proposed 7 years to be erroneous. The deceased was aged 24 years. He was undertaking the last bit of his training i.e. attachment. The retirement age in Kenya is 60 years.

I have had occasions to consider a similar case as the one before me. The deceased in the said case was a student pursuing a bachelor of commerce at the University of Nairobi and Strathmore University studying account. That is the case of Civil Suit 221 of 2011 Steve tito Mwasya & Another (both suing as legal representatives of the estate of SKT (deceased) – Vs Rosemary Mwasya (2010) eKLR. The Hon Judge state as follows;

“the deceased was aged 19 at the time of her death, I will presume that had she begun to work at the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years.

I do not think there is any valid ground for this court not to adopt the same number of years as the multiplier, considering the vicissitudes of life.

With respect to the earnings, considering the professional services that the deceased would have relied in the field of study he was pursuing, I am of the view that a sum of Kshs 20,000/= would be ideal.

On the ratio, the parties have agreed that 1/3 is ideal. I adopt the same. The head for lost years therefore works out as follows;

$$120,000 * 30 * 12 \frac{1}{3}$$

$$= 2,400,000/=$$

With respect to special damages.

The next head of damages is special damages. The Plaintiff asked for an award of Ksh 14,850/=

The law regarding the award of special damages is clear. The Court of Appeal in C.A. No. 189 of 2014 Capital Fish Kenya Limited Vs The Kenya Power and Lighting Company Limited (2016) eKLR states as follows;

“it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit”

During the hearing of this case, the Plaintiff availed Dr. Roy Katisya of Moi Referral Hospital. He testified that he had conducted post mortem examination on the body of the deceased. For these services Dr Roy stated that he received Kshs 12,500/= and further gave a breakdown on the same. He availed receipt No 399, issued by himself. He explained that medical officers working at the said medical facility are permitted to offer pathological services at a fee. I'll not delve into the said agreement as it falls outside the scope of this proceedings. The scope he is limited to establishing prove towards the special damages, which in my view was done. It is my finding that with regard to special damages, the same way both pleaded and proven. In fact, in the submissions by the Defendant, they urged to award special damages as would have been found to have pleaded and proven. I accordingly award Kshs 14,650/=. I disallow the claim of Kshs 200/= for police abstract as no receipt for that amount was tendered.

In the end, properly evaluating the evidence on record, it is my finding that the Plaintiff has on a balance of probability proven his case against the Defendant. I accordingly enter a judgment for the Plaintiff in favour of the Defendant in the following terms;

a) Pain and suffering Kshs 10,000

b) Loss of expectation of life Kshs 130,000

c) Lost years Kshs 2,400,000

d) Special damages Kshs 14,650

Total = 2,554,650

(Less 10% contribution)

$$10/100 * 2,554,650$$

$$= 255,465$$

$$= 2,554,650 - 255,465$$

= Kshs 2,299,185

Costs and interest at court rates from the date of delivery of this judgment.

M. ONKOBA – SRM 15/11/2018

Your Ladyship the Appellant as per his Memorandum of Appeal has preferred or brought out 9 grounds of appeal which on a thorough scrutiny, analysis and/or consideration can be collapsed or condensed into one ground of appeal that is the Appellant was/is disagreeable, dissatisfied or aggrieved by the Honourable Trial Magistrate’s assessment of quantum which the Appellant *inter alia* considers ‘high’ especially based on the age of the deceased’s only dependant, **RUTH KAMENE KILONZO** who the Appellant considers too old (**68 years old**) undeserving of the supposedly ‘high’ award given by the lower Court because of her advanced age and vicissitudes of life which as per the appellant’s human estimation and/or thought - **she might not live long to fully enjoy or probably benefit from the Lower Court’s award**, and the advanced age therefore works against her making her undeserving of the award given by the Lower Court – Your Ladyship, simply put, the Appellant is discriminating on the 1st Respondent, **RUTH KAMENE KILONZO**, who is the only dependant of the deceased based on her age (**68 years old**) and thus the Appellant for age’s sake deems, **RUTH KAMENE KILONZO**, unfit or undeserving of the award in damages given the lower court all contrary to the provisions of **Article 27 of Constitution**. Your Ladyship in the foregoing premise and the appeal being purely on quantum and/or assessment thereof the first question to be answered by this Appellate Court is – **What is the power or jurisdiction of the Appellate Court when it comes to interfering or setting aside of the quantum as given or assessed by the Lower court?**

Your Ladyship, the settled principle of law when to the Appellate Court interfering with the quantum and/or damages as assessed by trial court was set in the celebrated Court of Appeal case of **BUTT – VS – KHAN (1981) KLR 349 AT 356**, and reiterated by the High Court(s) and other Superior Courts in numerous cases like the High Court in **BUNGOMA HCCA NO. 67 OF 2011 NTULELE ESTATE TRANSPORTTERS LTD & ANOR – VS – PATRICK OMUTANYI MUKOLWE** and also the High Court in **ELDORET HCCA NO 49 OF 2008 CHEBUT TEA FACTORY – VS – AMOS N. MUKOKHA** where the High Court rightfully held as follows in line with other Superior Courts’ precedents on the settled position in law (**as per BUTT – VS – KAHN**) pertaining to the Appellate Court’s jurisdiction or powers to interfere with Trial Court’s findings on quantum:-

.....*As to quantum, the jurisdiction of this Court is clear. In Henry Kidaya Ilanga – vs – Manyena Manyoka (19671) e.A. 705, the Court of Appeal for East Africa at page 713 applied with approval the dicta of the privy Council in Nance – vs British Columbia Electric Railway Company Ltd (4) (1951) A.C. 601 at p. 631 wherein it was held that:*

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v. Lovell, (1935)1 K.B. 354), approved by the House of Lords in Davies v. Powell Duffryn associated Collieries Ltd., (1942) A.C. 601.”

17. *Further in the Case of Butt – vs – Khan (1981) KLR 349 at 356, the C.A. of Kenya held that:*

“An appellate court will not disturb an award of 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 either inordinately high or low.”

.....*There are clear principles which have been established overtime and which guide an appellate court when a lower court’s award is challenged. In Butt – Vs – Khan (1981) KLR 349 the following passage is found at page 356.*

“an appellate court will not disturb an award of 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.

And in Kitavi – Vs – Coastal Bottlers Ltd (1985) KLR 470, Kneller J A rendered himself as follows:

“the court of appeal of Kenya, then should as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.

Chenan Singh – Vs – Chanan Singh & Handa (1955) EACA 125, 129 (CAK). Butt – Vs – Khan CA Civil Appeal 40 of 1997.”

With regard to findings of fact by the trial court the court of appeal held as follows in Peters – Vs – Sunday Post (1958) EA 424:

“it is a strong thing for an appellate court to differ from the finding on a question of fact of a judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. but the jurisdiction (to review the evidence) should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

13. The Respondent goes on to argue that “ a look at the excerpt of the judgment of the Honourable Trial Magistrate it is apparent that the Learned Trial Magistrate relied fully on the set and accepted principles of assessing damages in fatal cases pertaining to or involving people who die through road traffic accidents and at the time of their deaths were either students in colleges, high schools or just completed high schools, colleges or are in industrial attachments or internships the leading case in the area is the celebrated ***Court of Appeal*** case of:- **Sheik Mushtao Hassan – Vs – Nathan Mwangi Kamau Transporters And Others (1952 – 1988) L.K.A.R. 946.**

14. The Respondent also states that “all the referenced or referred to authorities in the Respondents or plaintiffs’ written submissions in the lower court were attached or annexed to their Lower Court written submissions for Trial Court’s consideration as the Lower Court file will rightfully bear witness/attest – therefore, with all due respect, it is in bad taste or light for Appellant’s Counsels in their submissions on this appeal as officers of this Honourable Court that the Respondents or plaintiffs in the Lower Court matter did not attach/annex the authorities they relied on in their submissions for the Honourable Trial Court’s consideration this is more so not the case because the Trial Court in its judgment fully appreciates and comments about the authorities relied on by each party, their position(s) in law and written submissions *vis – a – vis* trial court’s position on the same. And further that “looking at the entirety of the Trial Court judgment as found in **page 108** through to **page 118** of the Record of Appeal and specifically the excerpt of the said judgment as captured herein above (**Page 113 through to page 118 of the Record Appeal**) it is true to say that the Honourable Learned Trial Magistrate adhered fully to the law and principles thereof as set by the precedents of the superior courts in fatal cases or matters involving pupils or students who die as a result of road traffic accidents while still in high schools, colleges and universities or those who have completed high school, colleges and/or Universities. Your Ladyship the different heads for the award and/or assessment of damages in fatal cases or matters involving pupils or students who die as a result of road traffic accidents while still in high schools, colleges and universities or those who have completed high school, colleges and/or universities as mandated by law is/are as follows:-

a) PAIN AND SUFFERING:-

Pain and suffering head of damages is payable under the Law Reform Act and in this case evidence was rightfully tendered before the Trial Court that the deceased Plaintiff died on the spot as a result of the road traffic accident **2nd July, 2016** this was corroborated by the findings in a Post mortem Report dated **4th July 2016** filled by a Medical Doctor at **Moi District Hospital – voi** which was produced in evidence as a **Plaintiff Exhibit** and which Post Mortem Report confirmed the deceased Plaintiff died on the spot as a result of the accident on **2nd July 2016**. Your Ladyship in the Trial Court the Respondents in their written submissions relied on the authority or case namely **NAIROBI HCCC NO 1993 OF 1990 FREDRICK GATAKA MUNGAI – VS – GEORGE N. KIBUNYI & ANOR** which authority we still rely on in this appeal. Your Ladyship based on the authority relied on in this head and the appreciating standards of life since the delivery of the judgment in the relied authority we proposed an award of **Kshs 20,000/=** by the trial Court under this head. **The Trial Court after looking at parties’ submissions, the position of the law in the matter, parties authorities and other superior courts’ precedent awarded Kshs. 10,000/= under this head as per its judgment (page 108 through to page 118 of Record of Appeal).**

15. The Respondent also argues that “*it is quite clear that Appellant’s appeal is totally unmeritorious, devoid or lacking in substance and/or the law; brought about in bad light or taste and as ploy calculated to delay strategically or otherwise the 1st Respondent, a mother of deceased who is old and struggling financially, from enjoying the fruits of the lower court judgment – we therefore, Your Ladyship, humbly pray that the appeal herein be dismissed with costs to the Respondents.*” The Respondent lists and provides copies of the Authorities relied on in the Lower Court. The Appellant’s first complaint is that the Learned Trial Magistrate made an award for lost years on the basis of the life of the Deceased rather than the life of his Mother. In order to answer that one must analyse the suit. The person suing is the Estate of the Deceased, in other words the person standing in the shoes of the Deceased. It is not a claim by a beneficiary for loss of maintenance. It is a claim associated with the death of the person killed as a result of the Accident that cost his life. Therefore the number of years lost must relate to his life and not the life of any other family member. That ground of the appeal is dismissed.

16. The Appellant then argues that the award should be reduced because the Plaintiff has other children. Once again that is an incorrect analysis. The Plaintiff is the Estate of the Deceased not his Mother. The Administrators stand in the shoes of the Deceased. It is true he had siblings so, it is argued, his mother has someone else to support her. It is argued that the Learned Trial Magistrate failed to take that into consideration. In fact, the learned Trial Magistrate did take that into consideration. The record shows he heard oral evidence. The evidence was that the whole family was dependent on the Deceased and in particular because the majority of the children listed were minors. Therefore, on that ground the Appellant has failed to establish any misdirection.

17. In relation to the quantum based on future earnings, the Appellant feels the award is too high. Considering the Judgment of the trial court carefully, it is clear that the Learned Trial Magistrate heard evidence that the Deceased had already started a placement at KPA. He was already earning a salary. The Trial Court extrapolated that the Deceased would earn a salary of a person similarly employed in an urban setting. The Defendant/Appellant argued for an award based on the minimum pay for unskilled/semi-skilled labour in a rural setting. In the circumstances the Trial Magistrate preferred the evidence and comprables more in keeping with the reality of the situation rather than an irrelevant example designed to produce the lowest figure of damages. He was entitled to do so.

18. In the circumstances and for the reasons set out above, the Appeal is dismissed with costs.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 6th day of February 2020

In the Presence of:

Court Assistant: Josephat Mavu

The Judgment was delivered in Open Court, the Parties did not attend. The Hon DR is requested to inform the Parties that the Judgment was delivered.