



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 24 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

BERNARD KINYUA KIRIMARIA.....APPELLANT

AND

STEPHEN KAMAMIA MAINA

suing as the legal representative of the estate of

MOURINE NJOKI KAMAMIA (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Ambasi, CM dated 7th March 2016 at the Chief Magistrates Court at Meru in Civil Case No. 245 of 2014)

JUDGMENT

1. The deceased was a fare paying passenger in motor vehicle registration number KAV 618W belonging to the appellant when it was involved in an accident on 17th July 2011 along the Meru – Nanyuki road. Following her death, her personal representative lodged a claim for damages under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and the *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*. The appellant was found fully liable after trial and ordered to pay the following award;

Pain and Suffering	Kshs. 150,000/-
Lost years	Kshs. 3,680,000/-
Special damages	Kshs. 291,000/-
Total	Kshs. 3,520,000/-

2. The issue of liability is not contested in this appeal. Counsel for the appellant submitted that the award of lost years was inordinately high and excessive on the ground that the multiplicand of Kshs. 26,000/- was erroneous given that the deceased was still a student and was aged 21 years. She submitted that the claim was not particularised hence there was no basis to make an award for lost years.

3. The claim by the respondent as set out in the plaint was for lost years under the *Law Reform Act*. At paragraph 8 of the plaint, it was pleaded that;

8. At the time of her death, the Deceased was a first year student at the Kenya Medical Training College from where she would have graduated in April 2014 with a bright future as a Registered Nurse.

9. As a result of the untimely death of the deceased, the estate of the Deceased has suffered loss and damage.

4. The evidence in support of the respondent's claim on the issue of damages was not in dispute. Rosemary Muthomi Kamamia (PW 2) testified that the deceased was a student at Meru Kenya Medical Training College (KMTC) and was set to graduate in September 2013 and produced an admission letter dated 16th July 2010. She accepted in cross-examination that the deceased, being a student was dependent on her for support and upkeep. The respondent also called Susan Njeri Minjire (PW 3) to adopt her statement and testify. She stated that she graduated from Kisumu KMTC with a Diploma in Nursing in 2002 and started working at Kenyatta National Hospital in January at a

monthly starting salary of Kshs. 26,000/-. She told the court that at the time she was testifying a fresh graduate in nursing would earn about Kshs. 36,800/-.

5. Based on this evidence and the parties' submissions, the trial magistrate held that the testimony of PW 3 was not contested or discredited hence adopted, "*the sum of Kshs. 36,800 per month being the minimum wage for a Nurse in Kenya inclusive of the house allowance as at the time of the accident*"

6. Before I consider whether the trial magistrate erred, it is important to recall the general principle upon which this Court, as an appellate court, will interfere with an award of damages. The Court of Appeal summarised the principle in **Mariga v Musila [1984] KLR 251**, as follows;

The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles

7. As I understand, the appellant's case as submitted by counsel is that the adoption of a multiplicand of Kshs. 36,800/- based on the career of a nurse was speculative given that the deceased was a 21-year-old who had just been admitted to KMTC. Our law reports are awash with cases where the court has inferred the expected income of the deceased from the nature of education and expected career path (see for example **Richard Osoro Jindiga v Alex Thangei and Another NRB HCCC No. 42 of 2007[2013] eKLR**). The issue really is one of evidence and common sense as the Court of Appeal observed in **Kenya Breweries Limited v Saro MSA CA Civil Appeal No. 144 of 1990 [1991] eKLR** that;

We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law.

8. That the deceased was a student at KMTC and was well on her path to graduating as a registered nurse was not contested. The income of the nurse was proved by PW 3 and as the trial magistrate pointed out this evidence was not discredited. The appellant submitted before the trial court that PW 3 did not produce any evidence to show that she was a registered nurse and the salary of a nurse. The appellant had an opportunity to verify what was contained in her statement and challenge her statement on oath by providing contrary evidence. Having failed to challenge that evidence, I find that the respondent established a basis for determination of the deceased's future income in her chosen career path.

9. In **Steve Tito Mwasya and another (both suing as legal representatives of the estate of S K T (Deceased) v Rosemary Mwasya NRB HCCC No. 221 of 2011 [2015] eKLR** the deceased was 19 years old at the time of her death. She was not in employment but was a student at Strathmore University studying accounts and at the University of Nairobi where she studied Bachelor of Commerce. The plaintiff presented documents showing that the deceased undertook studies learning towards the study of accountancy or finance. In determining the multiplicand, the trial judge relied on the appropriate salary of an accountant or finance officer from the extract of the Salary Survey of Kenya. When the matter went to the Court of Appeal in **Rosemary Mwasya v Steve Tito Mwasya and Another NBI CA Civil Appeal No. 100 of 2017 [2018] eKLR**, the Court of Appeal upheld the trial court's assessment of the multiplicand where the trial court had recourse to other evidence to establish what the deceased would have earned and observed that:

As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions [Emphasis mine]

10. I find and hold that there was sufficient evidence upon which the trial court could assess the multiplicand and the trial magistrate did not error in adopting the starting salary of a registered nurse as the deceased's expected income in determining the multiplicand.

11. I dismiss that appeal with costs to the respondent which I assess at **Kshs. 40,000/-**.

DATED and DELIVERED at MERU this 7th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Moragwa instructed by Kairu & McCourt Advocates for the appellant.

Mr Ojiambo instructed by Musyoka Muigai & Company Advocates for the respondents.