



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL APPEAL NO. 21 OF 2015**

**SHIV HAULIERS LIMITED.....  
.....APPELLANT**

**VERSUS**

**FREDRICK MAKOKHA SISALA (*Suing on behalf of Erick Ouma Oliver Deceased*).....**RESPONDENT**  
**(Appeal arising from the judgment and decree of the Busia Chief Magistrate's Court Civil Suit No. 257 of 2011 delivered by C.I. Agutu, RM)****

**JUDGEMENT**

1. 1. On 30<sup>th</sup> November, 2009 E O O aged 10 years was knocked down by a tractor at Malanga area along Nambale-Malanga road. He was rushed to Busia District Hospital where he succumbed to the injuries which included the crushing of both of his legs.
2. 2. Subsequently the Respondent, Fredrick Makokha Sisala sued the Appellant, Shiv Haulers Limited whose tractor registration number KAR 829 pulling trailer number ZB 1919 had caused the accident. At the conclusion of the trial in Busia CMCC No. 257 of 2011, the trial Magistrate, C. I. Agutu, Resident Magistrate entered judgment in favour of the Respondent as follows:

**“On Quantum, I will award as follows:-**

**PAIN AND SUFFERING**

**The deceased did not die at the scene but died at Busia District Hospital. I will award Kshs.50,000/=. I base my decision on the case of FOAM MATTRESS - VS - ROSE AKOTH, KISUMU HCCA No. 65 of 2009.**

**LOSS OF EXPECTATION OF LIFE AT TENDER AGE**

**The deceased was aged 10 years at the time of his demise. I do award a conventional sum of Kshs. 150,000/=. I base my decision on the case of FOAM MATTRESS LIMITED - VS - ROSE AKOTH, KISUMU HCCA NO. 65 OF 2009.**

**PARTICULARS OF SPECIAL DAMAGES**

a)	<b>Post mortem report</b>	-	<b>Kshs. 10,000/=</b>
b)	<b>Funeral expenses</b>	-	<b>Kshs. 30,000/=</b>
	<b>Total</b>	-	<b>Kshs. 40,000/=</b>

**LOST YEARS**

$$3000 \times 12 \times 21 = 756,000/=$$

**In summary the award is as follows:-**

<b>Contributory negligence</b>	-	<b>10%</b>
<b>Pain and suffering</b>	-	<b>50,000/=</b>
<b>Loss of expectation of life</b>	-	<b>150,000/=</b>
<b>Particulars of special damages</b>	-	<b>40,000/=</b>
<b>Total</b>		<b>996,000/=</b>

3. The Learned Magistrate then went ahead and subtracted 10% contributory negligence and awarded the Respondent the sum of Kshs. 896,400/-

4. In summary, the Appellant’s case as conveyed by the Memorandum of Appeal filed on 22<sup>nd</sup> May, 2015 is that the Magistrate failed to take into account the evidence adduced and misdirected herself on the principles applicable when assessing damages thus arriving at an inordinately high award.

5. The advocates agreed to proceed with the appeal by way of written

submissions.

6. Through submissions dated 3<sup>rd</sup> September, 2016 and filed on 9<sup>th</sup> September, 2016 counsel for the Appellant conceded that they would not be opposing the finding on liability. The Appellant's case was reduced to the issue of quantum on special damages and lost years.
7. On the special damages awarded to the Respondent, counsel submitted that special damages are direct expenses incurred in any given endeavor. It is the Appellant's case that for a person to be reimbursed or compensated for expenses incurred it is proper that such a person shows what was spent and on what particular goods or services. According to the Appellant, without proof it is possible for one to come up with an arbitrary figure of convenience much to the disadvantage of the other party.
8. In support of its position, the Appellant cited **Agroline Hauliers Limited and Joseph Opiyo Omollo v Michael Abongo Kisemba, Migori HCCA No. 6 of 2015** and **Coast Bus Service Limited v Sisco Murunga Ndanyi & 2 others, Nairobi CA Civil Appeal No. 192 of 1992** where it was held special damages must be specifically pleaded and proved.
9. It is the Appellant's case that although the Respondent pleaded Kshs. 40,000/- in special damages particularized as Kshs. 10,000/- for post mortem report, Kshs. 100 for police abstract and Kshs. 30,000/- for funeral expenses, he only proved Ksh. 8,820/- for the post mortem report. It is the Appellant's submission therefore that

the award of Kshs. 40,000/- as special damages is inordinately high and without basis.

10. 10. On lost years, the Appellant contends that the Learned Magistrate arrived at an award of Kshs. 756,000 without explaining the basis upon which the sum was arrived at. It is the Appellant's case that one cannot foretell the future possible earnings of a minor and it would be unreasonable to apply arbitrary figures in order to arrive at a certain figure. The Appellant urged the court to follow the decision of Nambuye, J (as she then was) in **Moranga Abel Nyakenyanya v Jackson Kichwen [1999] eKLR** and make an award of Kshs. 300,000. In that case the learned Judge stated that:

**“Under the Fatal Accidents Act the deceased was a minor of 10 years. Although it cannot be said that the parents depended on the child, it is evidently clear that had he lived and grown up he would have rendered services to his family and so the family has suffered by virtue of his death. I am aware no amount of money can replace his future expectations but it is a token of consolation. He had no income and so the multiplier rule cannot be involved here. I make a global assessment of Kshs. 300,000/- as being adequate.”**

The Appellant urges the Court to allow the appeal and award special damages and damages for lost years based on its submissions.

11. In response, the Respondent asserts through the submissions dated 31<sup>st</sup> October, 2016 that he pleaded and proved by way of receipts that he paid Kshs. 10,000/- for the post mortem report, Kshs. 100/- for the police abstract and Kshs. 30,000/- as funeral expenses.
12. On lost years, the Respondent cited the decisions in **Hassan v Nathan Mwangi Kamau Transporters & 4 others [2008] 1 KLR (G & F)**

**90; Board of Governors of Kangubiri Girls High School v Jane Wanjiku & another, Nyeri Civil Appeal No. 35 of 2014 and Eliud Sindani Majimbo Matumbai v Cleophas Wanyonyi Simiyu & another, Nairobi HC No. 880 of 2002** in support of the trial Court's award.

13. The Respondent filed further submissions dated 1<sup>st</sup> November, 2016 and cited the decision in **Jane Katumbu Mwanzia v M. Wanzui & another, Nairobi HCCC No. 3177 of 1997** where the Court after considering the failure to produce receipts for funeral expenses nevertheless went ahead and awarded the claimed amount of Kshs. 100,000 holding that:

**“In deciding this, this court is well aware that special damages must not only be specifically pleaded but also proved. However, there are cases as this one where the court will be called upon to apply its wisdom and decide the case in light of social realities of the day. It is very hard for people attending to burial procedures of their loved ones to concern themselves with matters of details such as receipt for every expense in contemplation of a suit which they may not even be aware of at the time of the burial. To insist on strict legal rules in such case would not only amount to denial of justice but also present the court as out of touch with reality.”**

I must state that I have not had the benefit of reading the full judgment in the cited case and I am not in a position to make any useful comment on the same.

14. In my view, **Hahn v Sigh [1985] KLR 716** states the law applicable to special damages thus:

**“Now the next two grounds of the memorandum concern special damages which must be not only claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”**

15. 15. Special damages must not only be specifically pleaded but they should also be proved. Although I do not see any prove of any of the specific claims for special damages, the Appellant concedes that there was prove of Kshs, 8,820 for the post mortem. I will thus allow the appeal on the award of special damages of Kshs. 40,000. The award of Kshs. 40,000 is therefore set aside and replaced with an award of Kshs. 8,820 as special damages.

16. 16. Turning to the lost years, I agree with the Appellant that the law is indeed as stated in **Moranga Abel Nyakenyanya (supra)** by Nambuye, J (as she then was). In **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporter & 4 others, Mombasa CA Civil Appeal No. 123 of 1985** the Court of Appeal laid down the principles applicable in award of damages. One of those principles was that a young child's present or future earnings in most cases could be nil. Applying a multiplier in a case of a child of ten years would therefore go against that principle. Taking into account the fact that **Moranga Abel Nyakenyanya (supra)** was decided sometimes back, I find an award of Kshs. 500,000 appropriate for lost years. The appeal is thus allowed so that the award by the Magistrate of Kshs. 756,000 for lost years is substituted with an award of Kshs. 500,000 on that head.

17. 17. The award will then be as follows:

a)	Pain and suffering	-	Kshs. 50,000
b)	Special damages	-	Kshs. 8,820
c)	Loss of expectation of life	-	Kshs. 150,000
d)	Lost years	-	Kshs. 500,000

<b>Total</b>	-	<b>Kshs. 708,820</b>
Less 10% contribution	-	Kshs.
70,882		
Total payable	-	<b>Kshs. <u>637,938</u></b>

18. As a result of the partial success of this appeal, the Appellant will have half the costs of this appeal.

**Dated, signed and delivered at Busia this 16<sup>th</sup> day of February, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**