IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kneller, Hancox and Nyarangi, JJ.A.)

CIVIL APPEAL NO. 123 OF 1985

BETWEEN

SHEIKH MUSHTAQ HASSAN .....APPELLANT

AND

NATHAN MWANGI KAMAU TRANSPORTERS

MICHAEL NJOGU

JOSEPH KATENDE

MURAGWE DAMAS

TASNEEM LALANI

SHEHEEN LALANI.....RESPONDENTS

(Appeal from a decree of the High Court of Kenya at Mombasa (Aragon. J.) dated 14th June, 1985

in

Civil Case No. 743 of 1981)

JUDGMENT OF KNELLER JA.

Sheikh Mushtaq Hassan (Hassan or the appellant) was awarded Kshs 600 being the agreed special damages with interest at 12% a year from September 25, 1981 until payment in full, Kshs 352,500 general damages with interest at 12 % from June 14, 1985 until payment in full, his costs, including those of two advocates, by the High Court in Mombasa (Mr Justice Aragon) on June 14, 1985 all of which has to be paid by one or more of the following – Nathan Mwangi Kamau Transporters, Michael Njogu Joseph Katende, Muragwe Damas, Tasneem Lalani and Sheheen Lalani (the respondents). Hassan is, apparently, dismayed by the paucity of the general damages (Kshs 352,500 or UK Pounds17,625) which is described in his memorandum of appeal filed on October 31, 1985 as so inordinately low that it is a miscarriage of justice.

His advocates (Mr Gautama and Mr Diniz) in Hassan's memorandum of appeal listed and Mr Gautama urged the reasons for what they call this miserable amount. They were that the learned judge misdirected

himself by;

1. Ignoring the material evidence of Grewal and Martins;

2. Drawing inferences adverse to Hassan based on the differences in living and working conditions in Mombasa and Nairobi.

3. Overlooking the probability that Sheikh Ishtiaq Hassan (Hassan's second son) would have increased his earnings as the years rolled on and not continued to earn Kshs 60,000 – (UK Pounds 3,000) a year; or the judge erred when he;

4. Misunderstood the effect of the evidence of Grewal and Martins;

5. Forgot their evidence was not rebutted;

6. Took into account his own experience of life at a University and in Mombasa or in Nairobi which was irrelevant.;

The respondents' advocates (Mr Mwaura and Mr Guram) filed a joint notice of cross-appeal in Mombasa on November 14, 1984 asking this Court to vary or reverse that award because Mr Justice Aragon:

(a) having rejected the evidence of Grewal and Martins as having no probative value then proceeded to award damages for them on his estimate of what the deceased would have earned and saved had he survived; and

(b) the award was inordinately high

Mr Guram led Mr Mwaura at the hearing of the appeal in Mombasa on January 24, 1986 and when it began he said the respondents abandoned the cross-appeal. Mr Gautama asked for it to be dismissed with costs and we reserved our ruling on it until we delivered the judgment. Thereafter Mr Guram opposed Mr Gautama's pleas for an increase in this award.

This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:

(a) proceeded on a wrong principle; or

(b) misapprehended the evidence in some material respect.

See Briggs JA in *Channan Singh v Channan Singh and Handa* (1955) 22 EACA 129; Law JA in *Butt v Khan* [1982-88] 1KAR 1; Hancox JA in *Mariga v Musila* (1982-88) 1 KAR 507.

And a member of an appellate court when he naturally and reasonably says to himself 'what award would I have made?' and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views of opinions so that their figures are not necessarily wrong if they are not the same as his own. *West (H) & Son v Shephard Ltd* [1964] AC 326, Lord Morris of Borth -Y-Gest.

And the judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country . Lord Denning MR in *Lim Poh Choo v Chamden and Islington Area Authority* [1979] 2 All ER 910 (CA); Hancox JA *Mariga v Musila* (*ibid*).

Here I must set out some undisputed facts to form a background to this contest. Hassan is a Caltex employee and he and his wife had two sons. The second was Sheikh Ishtiaq (Ishtiaq) who died on

February 18, 1980 in the Kenyatta National Hospital 48 hours after being involved in a traffic accident near Hunters's Lodge on the Mombasa-Nairobi road at about 9 pm. He was a passenger in Tasneem Lalani's vehicle driven by Sheheen Lalani which collided with a lorry and its trailer owned by Nathan Mwangi Kamau Transporters driven by Michael Njogu which had smacked into a vehicle owned by Joseph Katende driven by Muragwe Damas.

The respondents jointly and severally agreed they were liable in negligence for the death of Ishtiaq. Hassan's advocate withdrew his claim under the Fatal Accidents Act (Cap 52) on October 25, 1984 near the end of the trial and thereafter confined it to damages for the estate of Ishtiaq (of which he was appointed the administrator) under the Law Reform Act (Cap 26) and the headings of (i) pain and suffering (ii) loss of expectation of life and (iii) the lost years. The parties agreed on a figure of Kshs 7,500 for the first and Kshs 25,000 for the second. The total of those two sums is Kshs 32,500 (UK Pounds 1,625).

This left only the third, the 'lost years', for assessment and the figure reached by the judge was Kshs 320,000 – (UK Pounds 16,000).

And how did the judge calculate that sum? He estimated that Ishtiaq would have earned an average of Kshs 60,000 – (UK Pounds 3,000) a year and then he deducted two thirds for his expenses which left Ishtiaq with Kshs 20,000 surplus a year. Next he multiplied that sum by 16 (the multiplier having been agreed by the parties) and so he came to his Kshs 320,000– – (UK Pounds 16,000) for the 'lost years'. He would not be lured into an award of Kshs 900,000 – (UK Pounds 45,000) by the eloquence of Mr Gautama.

Mr Justice Aragon in his judgment held that under the Law Reform Act damages for 'the lost years' are recoverable for his estate where the victim dies in or as a direct result of an accident and before he can institute an action.

The reason for this was that to all intents and purposes the Law Reform Act of Kenya was identical with the Law Reform (Miscellaneous Provisions) Act 1934 of England so it was reasonable when the circumstances justified it to adopt when appropriate any clearly correct decision of an English court in its interpretation of the English Act.

It was held, for example, in *Rose v Ford* [1937] AC 826 that whenever a person dies as a result of another's negligence then because before his death he had had a cause of action for damages for loss of expectation of life that cause survived his death for the benefit of his estate. And this principle was also part of the Law of Kenya.

Later, in *Pickett v British Rail Engineering Ltd* [1980] AC 136 the House of Lords held that a living plaintiff was entitled also to damages for the'Lost years'. Pickett instituted his action and appealed but died before it was heard so his widow as administratrix carried on the appeal.

And it took the next step in *Gammel v Wilson* [1981] 1 All ER 578 by holding that they are recoverable by and for the estate of a victim who dies before the action is instituted (just as Ishtiaq did).

Mr Justice Aragon was of the view that all that was good law because the death of the injured party before he could file suit made no difference. The provisions of the Law Reform Act were to bury the maxim '*action personalis moritur cum persona*' and so not to follow the English decisions would simply resurrect it.

The fact that in England Parliament specifically smothered the effect of*Gammel v Wilson* (*ibid*) by legislation did not deflect the learned Judge. He observed that Pickett's case had been unhesitatingly applied in Kenya by this Court (Hancox JA and Chesoni and Nyarangi Ag JJA on March 16, 1984 in Nakuru in *Mariga v Musila)* because it was an appropriate English decision to which it was right to pay regard to in the circumtaces prevailing in Kenya.

There has been no cross-appeal from that part of the learned Judge's decision. There have been about three years for the Parliament of Kenya to legislate against the principle in *Gammel v Wilson* had its shadows disturbed the executive, legislature or insurance companies.

Then, having declared that principle to be part of the law of Kenya, Mr Justice Aragon went on to set out various guidelines to the assessment of damages for the 'lost years' from other relevant English decisions including:

Howard v Refuge Friendly Society (1886) 54 LT 644;

Harse v Pearl Life Assurance Co [1904] 1 KB 558;

Elson v Crookes [1911] 106 LT 462;

White v London Transport Executive [1982] QB 489, 499,

and *Adsett v West* [1985] 2 All ER 985, 989.

My summary of their relevant principles is this:

(i) A parent cannot insure the life of his child

(ii) The death of the victim of the negligence does not increase or reduce the damages for the lost years

(iii) The sum to be awarded is never a conventional one but compensation for a pecuniary loss;

(iv) It must be assessed justly and with moderation;

(v) The complaints of insurance companies at the size of such awards should be ignored;

(vi) Disregard remote inscrutable speculative claims;

(vii) Deduct the victim's living expenses during 'the lost years' for they would not form part of the estate.

(viii) A young child's present or future earning in most cases would be nil;

(ix) An adolescent's would usually be real, assessable and small;

(x) The amount will vary greatly from case to case for it depends on the facts of each one including the victim's station in life;

(xi) Calculate the annual gross loss;

(xii) Apply the multiplier (the estimated number of 'lot working years' accepted as reasonable in each case;

(xiii) Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her; and

(xiv) Living expenses include the reasonable cost of housing, heating, food, clothing, insurance, travelling, holidays, entertainment, social activity and so forth.

Lord Scarman was, with great respect, right in his speech in *Gammel v*

Wilson when he said (at 78).

> '… if sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probability which matters…'

and again later on in it:

> '… subtle mathematical calculations based as they must be on events or contingencies of a life which he will not live are out of place, the judge must make the best estimate on the known facts and his prospects at the time of his death.'

At this point I should now return to the facts and set out what those facts and prospects were.

Ishtiaq was 18 when he died. He was a healthy Kenyan citizen of Indian and middle class origin from Nairobi. He hoped to be an architect and he would have begun to study the subject at Nairobi University in September 1980.

Grewal and Martins who are architects in Mombasa testified as to their own careers and earnings and what Ishtiaq might have earned. Grewal is a partner and Martins an associate in the Mombasa office of the well established firm of Hughes and Polkinghorne. Martins gets 10% of the profits of the Mombasa office which in 1983 was Kshs 140,000 – (UK Pounds 7,000) gross. Their evidence was that it would take Ishtiaq five years to qualify and then he would get a job with a salary of Kshs 60,000 – (UK Pounds 3,000) to Kshs 84,000 – (UK Pounds 4,200) a year. Two years later, if he passed the examination, he would become a registered architect and could practice on his own or, if reasonably competent, become a partner or an associate in a firm. He would earn Kshs 96,000 – (UK Pounds 4,800) to Kshs 108,000 – (UK Pounds 5,400) a year until he had six to seven years experience when it might rise to Kshs 120,000 – (UK Pounds 6,000) to Kshs 144,000 – (UK Pounds 7,200) a year. An associate or a partner has a house and a car provided free and his water, professional subscriptions, electricity and telephone bills paid by the firm. The prospects for budding architects finding a job in late October 1984, which is when these two gave evidence, was dim because there was a recession in the building trade but it was thought that that would pass and then much would depend on Istiaq's ability and industry.

Ishtiaq's father, Hassan, and elder brother, Zubair, dealt with Ishtiaq's life up to his death. They spoke of him as a Kenya citizen, enjoying good health, as they did, very keen on being an architect and very artistic. They would provide for him until he could stand on his own. He had done well in his O-level examinations and poorly in his A-levels ones. There were numerous friends of the family who would employ him when he graduated. There was some suggestion that Ishtiaq had wanted to be an aeronautical engineer but had bowed to the wishes of the family (probably those of his father, in fact) and decided to study and practice architecture. At one point Mr Guram for the Lalanis conceded that Ishtiaq was a healthy, able, and virtuous young man.

When it came to the submissions (which Mr Justice Aragon heard) Mr Gautama suggested Ishtiaq might have lived another 47 years or more having graduated in 1986. Then for two years he would have had a surplus of Kshs 14,400 – (UK Pounds 720) a year, Kshs 90,000— (UK Pounds 4,500) for the next three years, Kshs 195,000 – (UK Pounds 975) for the next five years and then he would have become an associate with a surplus of Kshs 51,000 – (UK Pounds 2,500) a year. He handed up a calculation of all this for the 16 years agreed to be the multiplier which concluded with a total surplus of Kshs 923,000 – (UK Pounds 46,170). Mr Mwaura castigated all that as completely speculative and invited Mr Justice Aragon to exercise the discretion of the court in finding a figure roundabout Kshs 200,000 – (UK Pounds 10,000) which would be a reasonable on remembering that there should be some discount for a 'cash' payment. Mr Guram was at that state content to suggest there should be no award for the 'lost years' for *Gammel v Wilson* had not been applied in Kenya hitherto.

Mr Justice Aragon found all this cogent, lucid and most helpful. He went on to make some calculations. He begun with the salary of a High Court judge which he put as Kshs 128,000 – (UK Pounds 6,400) a

year, deducted 45% for income tax which brought it down to Kshs 70,400 – (UK Pounds 3,520) a year and then lopped off another Kshs 10,400 – (UK Pounds 520) which left Ishtiaq with Kshs 60,000— (UK Pounds 3,000) a year income.

Two thirds of that went to cover his expenses each year and that left Kshs 20,000— (UK Pounds 1,000) a year as his annual surplus. Then he multiplied the surplus by 16 and achieved the sum of Kshs 320,000 – (UK Pounds 16,000) which he called ' a more realistic figure' in the general circumstances prevailing in Kenya.

It is not the Kshs 200,000 suggested by Mr Mwaura and far off the Kshs 900,000 of Mr Gautama's calculations.

This was apparently the first time any court in Kenya made any award for the'lost years' when the victim had died before instituting a suit, so there are no reported decisions of the courts in neighbouring countries on the issue that I can find. It is therefore impossible to calculate a figure that is in line with recent ones in cases with similar circumstances.

The learned judge was entitled to his views and opinions on what was the appropriate sum.

He was of the view an award would do Ishtiaq no good because he was dead, and it would provide a windfall for his dependants or those deemed to be his dependants, which in this case were his father and mother, who in fact were not his dependants when he died and had not sustained an economic loss. They had, he acknowledged, lost Ishtiaq but that was not a loss that could be compensated for by money. None of this is objectionable and he went on later faithfully to apply *Gammel v Wilson* because he had just held it was the law.

There were, however, some unfortunate asides which plainly affected his approach and, in my respectful view, led him into error.

He described as outrageous and pernicious Mr Gautama's submission that in Kenya parents expect to be maintained in the autumn and winter of their life. He rejected it as an incorrect approach to such an award. The fact of the matter is, however, that today parents and children in most Kenya families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated against as 'a system of gerontocracy at its worst'.

Then the learned judge had it in mind that Ishtiaq might change his mind about being an architect. This was a possibility but there was nothing to suggest this was probable. The learned judge did so after his first two years in his university, he revealed, but that, with respect, was irrelevant. He also wondered if Ishtiaq might change his career when he had qualified as an architect. This, again, was not prompted by anything in the evidence.

These ruminations led the learned judge to declare the evidence of Grewal and Martins to be of no assistance in determining what Ishtiaq would have earned had he qualified and practised as an architect. He added to that by saying that he knew Grewal and Martins and they are both exceptionally gifted in their callings whereas Ishtiaq was unexceptional. The learned judge overlooked the fact that Ishtiaq had begun well enough by being accepted by the University of Nairobi to read architecture and the judge's own views of the ability of Grewal and Martins should not have been allowed to influence his view of the value of testimony which was relevant and unchallenged.

Likewise the judge brought in the differences in the competition among professionals in Nairobi and Mombasa and how that would affect the earnings of Grewal and Martins and what they thought Ishtiaq might earn if he were launched in his career as an architect. Grewal and Martins made helpful general observations on the salaries of emerging architects and were not questioned on the differences between those for Nairobi and Mombasa architects so that was also something the judge imported into the trial which he should not have done.

It is also not clear why he should choose as his starting point the salary of a High Court judge when all along the evidence was kept to Ishtiaq's ability and probable future as an architect. And an average of only UK Pounds 3,000 a year salary for Ishtiaq is probably an unwarrantedly low estimate.

It seems to me, therefore, that the learned judge, with respect, proceeded on those wrong principles and in so doing reached an inordinately low figure.

Following the guidelines I set out earlier in this judgment I reach the figure of Kshs 380,000 as compensation for the loss his estate suffered for Ishtiaq's lost years. This is Kshs 60,000 (UK Pounds 3,000) more than the learned judge awarded and cannot, I think, be termed mere tinkering with his figure. It is also not an inordinately high award but a reasonable one which might serve as a negotiating point for such claims in the future.

I propose, therefore, that the appeal should be allowed with costs, the decree of the High Court should be varied by increasing the award of damages by Kshs 60,000 from the date of the High Court judgment, and since it was abandoned when the hearing began there should be no order for the costs of the cross-appeal.

Hancox and Nyarangi JJA agree so those are the orders of the court.

Nyarangi JA. I agree, and I take respectfully the same view of the points raised by the appeal as Kneller and Hancox JJA I think that a question of some general importance is raised by this case and I therefore propose to give, shortly, my reasons for agreeing that the appeal succeeds.

The learned trial judge expressed strong sympathy with the views of Griffiths J in *Kandalla v British European Airways Corp* [1981] QB 158 at 169, letter D and then observed:

> 'the damages will be enjoyed by persons who, in actual fact, may well not have sustained any economic loss whatsoever as a result of the deceased's death as is the case in the present suit…'

That may well be the case in England and Wales – I will later explain why I am excluding Scotland – but in the context of Kenya, and that is the relevant context, parents of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age suffer real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education is lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, to younger brothers and sisters of the deceased as the deceased natured physically and materially are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the time is the assessment of a fair award in the circumstances of any one case. The award, the subject matter of this appeal, was obviously affected by the sympathy the trial judge had arising from a judgment which related to a different society with a different culture. The judge had before him a suit involving Kenya parties and he was therefore duty bound to apply the decision of the English High Court having due regard to the customs and reasonable expectations under the culture of the parents of the deceased who are Kenyans. It was an error on the part of the judge to approach the case as if the appellants were citizens of the UK and as if the trial was held in London. The error improperly influenced the judge to make a very low award.

A child has no insurable interest in the life of his parent: *Howard v Refuge Friendly Society* 1886 54 LT 644. A parent has by relationship no insurable interest in the life of his child. In Scotland, however, 'a parent has the right to be supported by his child, and vice versa and each will accordingly have an insurable interest in the life of the other, limited to the amount reasonably necessary to protect the assured against the contingency of the death of the life assured''– see for example *Houseman's Law of Life Assurance* (8th edn) p 30, para 2. So, the Scots, an economically advanced community of the UK who are anxious to preserve their culture expect their children to support them. And of course, children in

Scotland get married, too. That is not different from the expectations of Kenyan parents. The trial judge knows rather more about Scotland than I do. To assert therefore that the Kenya custom is anathema and will hinder development is tantamount to saying that no other development people anywhere practice that custom. With respect that is factually fallacious.

At the trial it was conceded on behalf of the respondents that the deceased was a healthy, able and virtuous man. Notwithstanding the concession, in his judgment the trial judge held that he was left with:

> 'a young man of upper middle class background with a good education, a pleasant personality but with nothing exceptional. I estimate that such a person would most likely earn on the average about Kshs 60,000 per annum.'

At a stroke the trial judge wrongly belittled the deceased's ability and under that misdirection wrongly estimated the average annual earning of the deceased at Kshs 60,000. At one stage the trial judge speculated to the disadvantage of the deceased by implying that the deceased would have changed his mind about studying architecture. Lord Scarman advised against all speculation in *Gammell v Wilson* [1981] 1 All ER 578 and that is the proper and fair approach.

That leads me to a branch of the case upon which I may have to make remarks which may cause pain. I shall do so with regret but this Court ought not to make a precedent where there is none and where there are good reasons why there is none. Dealing with Mr Gautma's urging that the damages which were sought would not be a windfall because parents in Kenya looked forward in old age to be maintained by their children, the trial judge remarked as follows:

> "To my mind that is both an outrageous and pernicious doctrine to which I will not subscribe..."

Later, the judge observed:

> "If the children wish to assist the parents that is highly commendable … but to impose a duty on them to support their parents is wrong. I can see no reason why children should be bound to provide for improvident parents."

In general, in Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian Communities in Kenya. This particular custom is broadly accepted, respected and practised throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the customs is supported by the Hindu religion whose influence on the life of the Hindu community is well nigh total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions *inter alia* to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act, Cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The customs is well within the tenets of the great religions of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is 'outrageous and pernicious' is not well founded and must be rejected. I would say a judge should be very slow to criticize any particular custom of people. There always is a purpose for the practice of a custom. Human beings do not partake for too long in customs which are not beneficial to them. If a judge is required to apply a custom, it is often safe to summon to its assistance one of more competent assessors from the tribe or community of the parties to the action – see section 87 of the Civil Procedure Act— before making critical comments on a custom. It is clear from the relevant part of his judgment that the trial judge does not fully understand the substance and application of the material custom. For example, children assist parents as a moral obligation when it is necessary and having regard to their means. Such assistance is not intended, in the remotest, to interfere with the necessity for such children to look after their own families. Kenyan parents like to take part in

the marriage of their children and so they would have a real interest in the welfare of their children, daughters-in-law and grandchildren. If only for that reason parents in Kenya would be the wary to ask for or look forward to such assistance as would wreck the marriages of their children or inconvenience their grandchildren. In Kenya, as elsewhere, children are dear to their parents' hearts and to their pockets. Also, children in Kenya by custom inherit some property from their parents to enable the children to prepare themselves to provide assistance when the time comes. The trial judge, with respect, misapprehended the application of the custom and condemned it with unjudicial haste. In my judgment, the judge's views of the custom referred to are a misdirection. The trial judge had no evidence for his erroneous conclusions and, I dare say, his contempt for the custom affected his assessment of the award. How can it be otherwise after the trial judge held it was outrageous for children to be expected to provide for their parents? In so many words the trial judge told the appellant that it was outrageous for him to expect assistance from his sons and that, for that reason, he would not award him very much. That was an error. For all those reasons, and for the other reasons given in the judgment of Kneller and Hancox JJ A I feel obliged to yield the appellant's contention and I concur that the trial judge proceeded on wrong principles and reached such a low figure that we must interfere, allow the appeal and raise the award to Kshs 380,000.

I concur with the order proposed on costs.

Hancox JA. The appellant sued the six respondents in his capacity as the administrator of his late son's estate for damages for negligence, for his death as a result of a multiple collision on the Nairobi/Mombasa road, near Hunter's Lodge in February 1980. The action was brought under the Law Reform and Fatal Accidents Acts. The boy was just under 17 (not 18) years of age at the time of his death.

Liability was admitted and most of the issues as to quantum of damages were agreed before Aragon J, who tried the case at Mombasa in October 1984. In the result the learned judge awarded damages as follows:

(i) Agreed special damages	Kshs 600
(ii) Damages for lost years using a multiplier of 16	Kshs 320,000
(iii) Agreed damages for loss of expectation of life	Kshs 25,000
(iv) Agreed damages for pain and suffering	Kshs 7,500
Making a total of	Kshs 353,100

Accordingly, in this appeal the only figure that was contested was (ii) above. The entitlement of the appellant on behalf of the dead plaintiff, under *Gammell v Wilson* [1982] AC 27, and the appropriate statute in Kenya, to damages for the lost years, as found by the judge, was not challenged in this Court, so we had no jurisdiction or occasion to consider that which we expressly left open in *Mariga v Morris W Musila* (1982- 88) 1 KAR 507, namely the validity of an award of damages for the lost years for a dead, (as opposed to a living), plaintiff, whose death was caused by the negligence of the defendant.

Having read his judgment in draft, I find myself in complete agreement with all that has fallen from Kneller JA. I agree that the main award was such that it warrants intereference by this court and I agree with the figure of Kshs 380,000 proposed by Kneller JA. That makes a total of Kshs 413,000 with the special damages, which, on any showing will produce a handsome income on investment to the surviving family of the deceased, though it is sad comfort to them.

I will just add a sentence or two regarding the deceased's prospects. Mr Gautama, who argued his case at length and with much repetition on behalf of the appellant, cannot get away from the fact that the calculation he provided at the hearing showing the breakdown of the figure of Kshs 923,000, which he then proposed as the correct amount to be awarded, inevitably included the deceased's prospects by way of promotion if he went into government, local government, or a large firm, and by way of reward if he

entered private practice, alone or with others, both of which were envisaged by the evidence of a partner in Messrs Hughes & Polkinghorne, Mr Grewal, pw 4.

We said specifically in *A-G v Waiyera* (1982-88) 1 KAR 84, that it must be shown to be likely that the plaintiff would have achieved promotion for damages to be given under this head. There was, and could be, no such proof in this case for the deceased had not yet embarked on his career. So that is a factor to be taken into account on the other side of the scales. Another factor not taken into account by the judge on the respondent's side, though mentioned in argument, was that there should be some discount to atone for a lump sum being paid immediately. I also find myself in agreement with Kneller and Nyarangi JJA, whose judgments I have also read indraft, that it was improper for the judge to describe the humane practice of children looking after and maintaining their parents in their advancing years as 'outrageus and pernicious'. It is nothing of the kind, and, as we have said repeatedly, both common law and its applicability must be tempered and adjusted to the circumstances, needs, and generally held views of the people of Kenya who come to its courts to receive justice from tribunals appointed to consider those very circumstances, needs and views.

Finally, I feel bound to say that I am obliged to Mr Guram for his very concise and noticeably proper conduct of the respondent's case and who rightly conceded his cross-appeal at the outset. I would dismiss the crossappeal but with no order as to its costs. I would allow the main appeal to the extent indicated by Kneller JA. I also agree with the order as to costs proposed by him.

Delivered at Nairobi this 14th day of February 1986.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR