Case Number:	Civil Suit 415 of 2002
Date Delivered:	03 Mar 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Joseph Kiplagat Sergon
Citation:	Daniel Kiamba Kimithi & 62 others v David Mutiso Kiilu & 4 others [2016] eKLR
Advocates:	Mr. Siro for the Defendants
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment entered for Plaintiffs and against the Defendants jointly and severally
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL SUIT NO. 415 OF 2002

DANIEL KIAMBA KIMITHI & 62 OTHERS…… PLAINTIFFS

- **V E R S U S –**

DAVID MUTISO KIILU……..... 1ST DEFENDANT

STEPHEN KASYOKA MAKAU ……..……..……..……2ND DEFENDANT

THE TEACHERS SERVICE COMMISION……..……... 3RD DEFENDANT

THE BOARD OF GOVERNORS .

KYANGULI MIXED SECONDARY SCHOOL……..…….. 4TH DEFENDANT

THE HON. ATTORNEY GENERAL…..……... 5TH DEFENDANT

JUDGEMENT

1. Daniel Kiamba Kimithi and 62 others hereinafter referred to as the 1st to 63rd Plaintiffs sued David Mutiso Kiilu, Stephen Kasyoka Makau, The Teachers Service Commission, The Board of Governors, Kyanguli Mixed Secondary School and the Hon. Attorney General hereinafter referred to as the 1st to 5th Defendants vide the plaint dated 8th March 2002. In the aforesaid plaint the Plaintiffs sought for judgment against the Defendants in the following terms

i. ***Payment for the value of the personal effects, school uniforms, books, mattresses, shoes, boxes, beddings, buckets and clothes belonging to the students who perished.***

ii. ***General damages under the Law Reform Act.***

iii. ***General damages under the Fatal Accidents Act.***

iv. ***Costs of this suit***

v. ***Interest on items (i), (ii), (iii) and (iv) above at the rate to be determined by court.***

2. The Defendants denied the Plaintiffs' claim by filing a common statement of defence dated 8th April

2002.

3. When the suit came up for hearing, the Plaintiffs summoned five (5) witnesses to testify in support of their case. The Defendants on their part summoned two witnesses in support of their defence. The Plaintiffs sought for damages out of the fatalities following an arson which razed down the 4th Defendant's dormitory where the Plaintiffs' children perished in the inferno on the night of 26th March 2001 while the deceased children were students of Kyanguli Mixed Secondary School. It is the Plaintiffs' averment that the 4th Defendant's dormitory caught fire and was set on fire as a result of the 1st, 2nd 4th and 5th Defendants' negligence in managing, governing, maintaining, controlling and or supervising of the students thus causing the said arson and the Plaintiffs children suffered fatally.

4. The Defendants on the other hand are of the view that the dormitory in which the students were burnt was set on fire by unknown arsonists meaning that the fire was not set and or was not caused by the negligence of the 1st and 2nd Defendants but it was an act of criminals which act was beyond the powers and control of the Defendants. The Defendants pointed out that the 1st and 2nd Defendants were charged and convicted for the offence of failing to prevent a felony contrary to Section 392 of the penal Code. The duo appealed and were eventually acquitted on appeal on basis that they acted in a manner reasonable men were expected to do in the circumstances. The Defendants urged this court to hold that the Plaintiffs' case does not hold water because the Plaintiffs have not adduced any evidence upon which would support a finding of negligence against the Defendants.

5. I have considered the evidence tendered by both sides. I have also taken into account the rival written submissions. There is no dispute that the Plaintiffs are the parents and legal representatives of sixty three (63) students of Kyanguli Secondary School who perished when a fire engulfed their dormitory. It is also not in dispute that the dormitory was set on fire by unknown arsonists.

6. Pursuant to the provisions of Section 4(1) of the Fatal Accidents Act the Plaintiffs are empowered as the parents of their deceased children to bring this action to claim damages either as the executors or administrators of the estate of their deceased children against the Defendants. The evidence tendered showed that the students' dormitory became a death trap. The students' lives were plucked cruelly and in the most horrific manner. It can be safely stated here that this tragedy and disaster has deprived this country of future lawyers, doctors, teachers and the like.

7. In the wee hours of 26th March 2001, the dormitory in which the Plaintiffs' children were sleeping in was set on fire by an unknown arsonist. Several students managed to escape but 63 of them were unable thus they perished. The evidence presented to this court shows that indeed the Plaintiffs are the parents to the children who perished in the inferno. Each parent tendered the death certificate of his or her child who died as a result of the burnt dormitory.

8. The question relating to liability is a crucial issue which must be addressed and answered first before other issues. The Defendants are of the view that the Plaintiffs have failed to prove their case on a balance of probabilities and that the Defendants are liable and or contributed to the arson and or the setting on fire of the dormitory where the Plaintiffs'' children died. The Plaintiffs on the other hand are saying that the Defendants are culpable. The evidence presented before this court shows that there were two student unrests before the affected dormitory was set on fire. David Mutiso Kiilu (DW1) told this court that prior to the dormitory being set on fire the students had broken into the school canteen and stoned the principal's office. D.W.1 further stated that the students attempted to burn his office. DW1 further admitted that prior to the incident some leaflets were circulated within the school compound with the aim of inciting the students not to attend the school assembly. The aforesaid activities were within the knowledge of the school administration. It is unfortunate that the school administration comprising of the school board and management (i.e board of governors) and the headmaster and his deputy did not make any decision to prevent the incident. A prudent administration(s) and or board of management could as well have closed the school by sending students home for a whole in order to guarantee the students' safety and the school property. Both David Mutiso Kiilu (DW1) and Stephen Kasyoka Makau (DW2) ignored the information and the threats conveyed by leaflets.

9. From the evidence of the school headmaster (DW1), it is clear that there were previous attempts to burn and damage school property. DW1 stated that he simply informed the school board of governors but since there were no culprits identified no action was taken. There was no evidence that the 1st, 2nd and 4th Defendants involved the relevant authorities to investigate the incidences with the aim of ensuring that the lives of the students under their care and custody were safe and secure.

10. I agree with the submissions of the Plaintiffs' counsel that there was a nexus between the previous unrests and the burning of the school dormitory that led to the deaths of the 63 students. The causes of the previous unrests and incidences were aptly captured by this court in **David Mutiso Kiilu and another =vs = Republic H.C.Cr.A no 155'A' and 153 of 2002,** as follows***: first, the cancellation of the Kenya National Examination results for the candidates who sat for their examination in the year 2000 and secondly, the school's decision to send away students regularly to get school fees from their parents. In my humble view it is clear to me that the 1st, 2nd and 3rd Defendants***

disregarded and put less attention to the welfare, safety and well being of the students. They failed to initiate investigations and to take appropriate measure to address the causes of dissent, vandalism arson and hooliganism by students.

11. According to the evidence of Jackson Kioko Muindi (PW 2), it is clear that the dormitory which was razed down was overstretched in capacity but the school principal kept on admitting more students thus creating a lot of congestion.

12. Joseph Munzyu Kimau (PW 5), a former student who survived the arson told this court that on the fateful night the dormitory housed 134 students yet the dormitory had the capacity of only housing 60 students. The headmaster and his deputy (1st and 2nd Defendants) denied that the dormitory had excess students that night. The 1st Defendant was unable to explain how students spend the night in the dormitory either prior to the arson or after the incident. The 2nd Defendant was equally unhelpful in unearthing the truth as to how many students spent the night in the burnt dormitory. He failed to tender school records of number of the students who slept in the aforesaid dormitory. He simply stated that there were 139 students being housed in a dormitory with 139 beds instead of a capacity of 96 beds. I observed the demeanour of DW1 and DW2 and they appeared to me to be evasive witnesses. It would appear those witnesses had something to hide to cover their managerial shortcomings. It is curious to note that when the 1st Defendant testified before the Senior Principal Magistrate's Court, Nairobi, in **criminal case no. 761 of 2001**, where he faced a charge of failing to prevent a felony, he stated that the ill fated dormitory had a capacity of 96 students though at the time of the fire it was holding 139 students. DW1 completely departed from that line of evidence when he appeared before this court. Jackson Kioko Muindi (PW2,) Solomon Muteti Malingo (PW3) and Stephen Kasyoka Makau (DW 2) were in agreement in their evidence that the dormitory was not fitted with any fire extinguishers. It was reckless on the part of the 1st, 2nd and 4th Defendants to fail to fix such an equipment in view of the previous attempts to burn the school, vandalism and hooliganism. There was clear evidence that the only equipment used to put out the fire were buckets of water which did not assist much. The 1st and 2nd Defendants vehemently denied that one of the exit doors was permanently locked. I do not believe their testimonies because they appeared inconsistent and evasive. The testimonies of PW2, PW3 and PW5 were consistent that one of the exit doors of the dormitory which housed the deceased students was permanently locked since its key was lost. In the absence of an extra alternative exit door, the dormitory became a death trap thus allowing the raging fire to consume the lives of 63 young Kenyans.

13. It is also curious from the testimonies of DW1 and DW2 that the duo never searched inside the ill-fated dormitory nor involve the students in the search for the petrol despite the strong smell which was apparent. The duo failed in their duties as the administrators in whose hands and responsibility is the safety and security of the students was left to perform the simple and straightforward safety measures.

14. Evidence was also tendered showing that at time of the inferno there were no guidelines and regulations for the construction of dormitories. Despite the magnitude of the disaster threat took place in Kyanguli Secondary School, the Government took almost seven (7) years before releasing its 1st Edition of a safety standards manual for schools in Kenya, 2008 with guidelines for the construction of school dormitories.

15. A careful perusal of the manual vis-a-vis the evidence touching on the manner the ill fated dormitory was built, reveals that the building was done in a manner that did not aid any escape in case of an emergency. In short, I find that the general construction of the dormitory together with the overpopulation and congestion in the dormitory coupled with the fact that there was only one escape route, made it extremely difficult for the students to escape the raging fire. I am convinced that the 1st, 2nd, 4th and 5th Defendants are liable for negligence in the construction, management, regulation and administration of the school and the dormitory. If the government which is represented by the 5th Defendant had been keen in securing the safety of the students, it could not have allowed the 1st, 2nd and 4th Defendants to allow students to occupy a dormitory which in essence acted as a death trap. I have already alluded that the 1st and 2nd Defendants had a duty of care towards the students who were in their custody and care. They however failed to prevent the arson when they did not ensure that the school was supplied with fire fighting equipment. The 3rd Defendant is vicariously liable for the negligent actions and or omissions of the duo which led to the painful loss of young innocent lives. The 4th Defendant cannot escape because it is the statutory body established under the Education Act for the management, governance, control and supervision of the school.

16. Having determined the question of liability, let me now turn my attention to the issue in relation to quantum. When it comes to assessment of damages learned counsels were in agreement that the same be done according to the following heads

i. Pain and suffering

ii. Loss of expectation of life

iii. Loss of dependency

17. On the first head of pain and suffering, Mr. Siro learned litigation counsel proposed that an award of ksh.10,000/= was sufficient since the deceased perished on the spot. The Plaintiffs of the other hand proposed a sum of kshs.1,000,000/= was sufficient. I have considered the two proposals. The deceased students were aged between 14 and 19 years at the time they perished. Evidence tendered showed that they enjoyed robust health. The details of how the deceaseds met their death was horrific. They all tried to escape from the dormitory but were unable to do so since they were crowded with only one exit door. They fell over each other as the inferno consumed them. The evidence presented to this court indicate that they all screamed for help but none came to their rescue. They silently perished in the raging fire. Their suffering was painful and slow. I am convinced that in the circumstances of this case an award of ksh.150,000 for pain and suffering is appropriate for each deceased. I find the proposal by the Defendants to be too low while that of the Plaintiff is excessive.

18. The second head is for loss of expectation of life. This claim is based on the principle that a deceased person was deprived of normal expectation of life due to the alleged negligence on the part of a tortfeasor. On this head, conventional figures are normally awarded. The Defendants proposed an award of ksh.50,000/= on this head. The Plaintiffs proposed an award of kshs.250,000/=. I have considered the previous decisions of this court and it is apparent that this court has so far made awards on this head of between ksh.50,000 and 300,000. In my assessment and in the circumstances of this case I think an award of ksh.200,000/= is sufficient.

19. On the third limb of loss of dependency, the Plaintiff proposed to this court to apply the Regulation of wages (general) (Amendment) order, 2015 at a figure of ksh.18,595/20 for a period of 30 years for each Plaintiff. The Plaintiffs' counsel therefore proposed that each Plaintiff be paid ksh.4,462,848/= which figure is arrived at as follows:

18,595.20x12x30x2/3=4,462,848/=.

20. The Defendants on the other hand were of the view that since the deceased persons were not earning and were below the age of majority, there is no justification to make the award. I have found both the Plaintiffs and the Defendant not persuasive on this head. This court and the court of appeal have preferred to make global awards instead of applying a multiplicand as proposed by the Plaintiffs. The Plaintiffs' hopes, dreams and aspirations that their children would one day reach for their stars and support them at old age were dashed and went in flames.

In **P.I (Suing as a next of kin of C.M (deceased) =vs= Zena Roses Ltd & another 2015 eK.L.R Kimondo** expressed himself in part as follows:

"I have previously stated that damages are clearly payable to the parents of a deceased child irrespective of whether there is or there is no evidence of pecuniary contribution."

I share the same view with Justice Kimondo. In the circumstances of this case, I will award a global sum to each plaintiff of kshs.300,000/=

21. There was a prayer for special damages but no evidence was tendered to establish the claim. I will therefore make no award.

22. In the end I enter judgment in favour of the Plaintiffs and against the Defendants jointly and severally as follows:

i. **Pain and suffering ksh.150,000x63 =9,450,000/=**

ii. **Loss of expectation of life 200,000x63 =12,600,000/=**

iii. **Loss of dependency 300,000x63 =18,900,000/=**

Net total =40,950,000/=

iv. **Cost of the suit**

v. **Interest on (i), (ii), (iii) and (iv) above at court rates from the date of judgment until full payment**

Dated, Signed and Delivered in open court this 3rd day of March, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant