



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 32 OF 2016

KKK (Deceased)

WBN (Suing as Legal Administrator of the

Estate of KKK (Deceased).....PLAINTIFF

VERSUS

EKC.....1ST DEFENDANT

HKC..... 2ND DEFENDANT

Coram: Hon. Justice R. Nyakundi

Matara Advocate for the plaintiff

Emmanuel Kazungu Chai in person

Hassan Katana Charo in person

J U D G M E N T

The claim under the Fatal Accidents Act and Law Reform Miscellaneous Act has been filed by the plaintiff **WB** suing as Legal Administrator on behalf of the **Estate of KKK**. As pleaded in the admitted amended plaint, the deceased was a lawful pedestrian while the 1st defendant was a registered owner or beneficial insured owner of motor-vehicle registration number KAY 776J, whereas the 2nd defendant was authorized, driver, agent or servant in respect thereof.

It is averred in the plaint that on or about 14.12.2013 the deceased aged thirty five (35) years had gone to answer a call of nature off Jaribu Road, when the aforesaid offending vehicle was negligently and carelessly driven by the 2nd defendant as an employee or servant to the 1st defendant, causing the same to veer off the road and as a result occasioned fatal injuries. The deceased on being rushed to Jocham Hospital passed on due to the sustained injuries. The particulars of negligence pleaded against the defendants include driving at an excessive speed, causing death by dangerous driving, driving on the road without due care and attention, failing to notice, alert or warn the deceased.

In the same plaint, its pleaded that prior to the negligent accident by the 2nd defendant, the deceased enjoyed good health working for gain as a mason earning Kshs.8,000/= from the various assignments undertaken. From the income its further alleged that the deceased made family provisions in favour of:

WB,	the spouse,	aged 38 years
NW	daughter	aged 17 years
GW	son	aged 16 years
RW	son	aged 14 years
MW	daughter	aged 12 years

JW	daughter	aged 9 years
JW	son	aged 6 years
SW	daughter	aged 5 years

As a consequence of the death that legitimate expectation of being supported by the deceased is lost. The defined which who were duly served failed to enter appearance or defence what followed was an interlocutory Judgment on liability.

The plaintiff's case

The plaintiff **WB** in his evidence told the Court that on 14.11.2013 his wife was knocked down by motor-vehicle registration number KAY 776J. In view of that fact he petitioned for grant of Letters of Administration to form the basis of filing suit on behalf of the Estate of the deceased. According to the plaintiff, prior to that death, the deceased as a wife had been blessed with children who looked upto her for support and maintenance.

According to the plaintiff on the fateful day, he was at home when the accident hit the deceased. He therefore rushed to the scene soon thereafter the collision, only to inform the injuries suffered. Further, the plaintiff testified that on rushing the deceased to the hospital she passed on while undergoing treatment. In support of the claim the plaintiff produced grant of Letters of Administration, exhibit 4, piece of evidence on income earned by the deceased of Kshs.8,000/= per month, the death certificate and other documentary evidence on expenses incurred to inter the body.

Besides **(PW1)** testimony, there was also witness statement on oath by **(PW2) – Johnson Ben Khumwakani**. In his evidence **Johnson** stated that on 14.12.2013 while walking home he met the deceased whom they exchanged greetings. Thereafter a vehicle from the opposite direction emerged driving towards Kilifi, leaving its lane and suddenly colliding with her. As a result of the collision, she suffered fatal injuries. He therefore blamed the driver for the accident. As shown from the record interlocutory Judgment had been entered against the defendant, jointly and severally.

Further, to the evidence of the two witnesses, Learned counsel on behalf of the plaintiff relied on brief written submissions. On his part, Learned counsel contended that on the strength of the evidence adduced, the issue on liability remains uncontroverted. Hence, the Court should move to assess damages which he proposed as follows:

Pain and suffering:	Kshs. 100,000.00
Loss of expectation of life	Kshs. 100,000.00
Loss of dependency	Kshs,1,600,000.00
Loss of consortium	Kshs. 800,000.00

He also prayed for costs and interest.

Determination

As the facts stated both issues on liability and quantum are at stake.

Liability

On the face of things to prove negligence the plaintiff task is to lead evidence to establish the following elements on a balance of probabilities:

- (a). That the defendant owed the deceased a duty of care.**
- (b). That the defendant breached that duty of care.**
- (c). And that the Estate of the deceased suffered loss and damage as a direct consequence of the breach.**

The Court in comparative jurisprudence thus **Anns v Merton London Borough Council {1977}; Caparo Industries PLC v Dickman {1990} AC:**

“Brought into the dimension on negligence by introducing proximity and fairness. Proximity simply means that the parties must be sufficiently close so that it is reasonably foreseeable that one party’s negligence would cause loss or damage to the other. Fairness means that it is fair, just and reasonable for one party to owe the duty to another.”

It is expected that in motor traffic accidents, any motorist has a duty to drive with reasonable care. That statutory duty is contained in the express provisions of the Traffic Act under Section 46, 47 and 49 of the aforesaid Act.

The provisions imports the following language that any person who drives a motor vehicle on a road without due and attention or without reasonable consideration for other persons using the road commits an offence is liable to the prescribed sanctions. That position of the Law was propounded in **Devon Higgins & Shanice Brown v Uriah Campbell & Winston Campbell & Orville Senior HCVO 4716** in which **Thompson James J** stated as follows:

“A driver of a vehicle on the road, owes a duty of care to take proper care and not to cause damage to other road users whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations.”

The burden of proof rests with the plaintiff throughout the trial to demonstrate to the trier of facts that the cause of damage was due to the negligence of the defendant. The yardstick of the expected burden and standard of proof is on a balance of probabilities. The Court in **Henderson v Henry Jenkins & Sons {1970} AC 282** held as follows:

“In an action for negligence, the plaintiff must allege and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving Judgment at the end of the trial, the Judge had to decide whether, he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not so satisfied, the plaintiffs action fails. The formal burden of proof however does not shift but if in the course of the trial there is proved or set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiffs favour unless, the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation, there is said to be an evidential burden of proof resting on the defendants.”

Reverting back to the salient features of the instant case, **(PW2)** was an eye witness to the accident. He testified and stated that on the 14.12.2013 he was a lawful pedestrian on the same road, in which the deceased was knocked down by the offending motor vehicle. In his explanation and observation, the defendant motor vehicle was being driven in the opposite direction being Mombasa – Kilifi lane whilst the deceased was walking along Kilifi-Mombasa lane. According to **(PW2)** in a spur of the moment and without warning the defendant motor vehicle swerved from its lane to the lane of the deceased hitting him simultaneously. Thereafter, the defendant motor vehicle landed in a nearby ditch.

Apparently, from the circumstantial evidence of **(PW1)** on the material day he heard a commotion of a loud bang which happened near their house occupied also by the deceased. On rushing to the scene, he came face to face with the collision in which his wife was the victim of the loss and damage. From these set of evidence by **(PW1)** and **(PW2)**, the defendant driver, agent or servant failed to keep a proper look out so as to take reasonable care not to knock the deceased walking on the opposite lane of the highway. It is clear from the explanation given by **(PW2)**, the defendant driver failed to take evasive steps to avoid the accident by either slowing down or taking off his foot on the accelerator.

I find that the central test on negligence when applied to the facts of the case proves an aspect of the defendants being the sole author of the accident. In regard, the 1st defendant is vicariously liable for the acts of negligence committed by the 2nd defendant in a substantial degree satisfying the burden of proof of a balance of probabilities. Admittedly, the defendants side failed to present evidence in rebuttal of the acts of negligence as presented by the plaintiff in his direct and circumstantial evidence.

In the case at hand, the plaintiff succeeds to proof negligence on a balance of probabilities against the defendant without an element of contribution.

(b). Damages

The main issue for consideration is what quantum of damages is the plaintiff entitled to recover from the defendants. The plaintiff relies on the provisions of the Fatal Accidents Act and Law Reform Miscellaneous Act. This Court is called upon to establish the correct principles of Law applicable in assessing damages in cases such as this where the victim of the accident passed on soon thereafter the act of negligence. As a general view, the subject of damages for personal injury may it be survivor victims or total loss in the event of death is an area of the Law which cries out for legislative reform. The disparity resulting from application of past similar awards sometimes occasions injustice. Take for example, the trilogy that compensation is to be tied to a lump sum system and once and for-all award. In my view, the sum award presents problems of great importance. Nevertheless, I acknowledge, that the current system on assessment of damages is not hopeless. There are settled principles to shed light in this branch of Law. In our homegrown jurisprudence, the Court in **Beatrice Wangui Thaini v Hon. Ezekiel Bargetuny NRB HCCC 1638 of 1998** provides

“the much needed guidance for assessment of damages under the Fatal Accidents. Although a precise ascertainment is impossible, the quantum cannot be taken at random out of the act, but must bear some practical relation to the realities of life founded on evidence.”

What the **Beatrice case** espouses is the maxim that compensation cannot be perfect but must be fair. In the second realm of the case, **Fatal Accident Legislation** provides that:

“In a single action, brought by the deceased’s personal representative or dependant, the entire damages sustained by all those entitled to be compensated shall be determined by the Court.”

The relevancy of these principles to the instant case are that the deceased died at the prime age of 35 years. She was married to the plaintiff **(PW1)** and in their lifetime they were blessed with seven children. As stated in evidence, the deceased worked as a mason in the construction industry earning an income of Kshs.8,000/= per month. This income formed part of the family provision in support of the

dependants. It's expected that the deceased could have worked way beyond sixty (60) years unless there are pre-existing compelling and extenuating circumstances of importance to prophesize an earlier death.

For this case, the premature death was brought about by the negligence of the defendants. However, in the calculation of damages, I bear in mind existence of infinite variety of circumstances which does not permit the evolution of a precise formula capable of solving all the financial problems of the deceased dependants.

The quantum of damages to be awarded to the spouse and children of the deceased depends on the answers to the following questions:

- (a). If the deceased had lived, what otherwise would have been her normal life?**
- (b). Which moneys out of his annual earnings she would have contributed to the dependants.**
- (c). What portion of any additional savings she would or might have accumulated would probably have accrued to the dependants either on her intestacy or under her will.**

The general characteristics of the quantum is as stated in the **Beatrice case (supra)**. The starting point is the amount of wages which the deceased was earning prior to her death. Then there is the factor on the estimate on how much she was required or expected for her personal and living expenses. Thereafter, the balance will give basic figure which generally be turned into a lump sum by taking a certain number of years purchase. In doing all these, the assessment has to also factor in the aspect of uncertainties.

As a cautionary principle, there is no real hard formulae to measure the number of years purchase commonly referred to as the multiplier – multiplicand for conceptual framework. Therefore, all circumstances legitimately pleaded by the plaintiff and proved in evidence are hereby considered in line with the guiding principles in the above cited authority by **Ringera J.** as he then (**See Beatrice supra**).

In calculating loss of dependency, the income of Kshs.8,000/= due to the deceased as a mason is not in dispute. The deceased age was confirmed to be thirty-five (35) years. In absence of the wrongful death, the deceased could have earned pecuniary advantage beyond the public service retirement age of sixty (60) years. The fact of the matter, exacting the correct years of purchase involves complicated inquiries, nevertheless, the past awards provide a reasonable and fair guide on these matter. In exercising such discretion a multiplier of twenty five (25) years as proposed by counsel for the plaintiff is appropriate and within reasonable limits. The calculation under this head bears resemblance of the following assessment.

- (a). 8000 x 12 x 25 x 2/3 = Kshs.1,600,000**
- (b). Loss of expectation of life Kshs. 100,000**
- (c). Pain and suffering Kshs. 50,000**
- (d). Special damages proved by receipts Kshs. 49,800**

The plaintiff also is entitled to costs and interest on the total sum till payment in full.

DATED, SIGNED AND DISPATCHED AT MALINDI VIA EMAIL ON 29TH DAY OF OCTOBER,2021

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R. NYAKUNDI

JUDGE