



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 372 OF 2010

GERISHON MWANGI MUTHEMBA (Suing as one of the administrators of the estate of IBINSON MAINA MWANGI-Deceased).....PLAINTIFF

-VERSUS-

CRYSTAL INDUSTRIES LIMITED.....1ST DEFENDANT

GEORGE MAINA NDUNGU.....2ND DEFENDANT

JUDGMENT

1. Gerishon Mwangi Muthemba, the plaintiff herein, lodged a suit against the 1st and 2nd defendants in his capacity as one of the administrators of the estate of Ibinson Maina Mwangi (“the deceased”) by way of the plaint dated 20th July, 2010.
2. The 1st defendant was sued in its capacity as the registered owner of motor vehicle registration number KAS 606B Mitsubishi Canter (“the subject motor vehicle”) while the 2nd defendant was sued as the driver of the subject motor vehicle at all material times.
3. The plaintiff pleaded in his plaint that sometime on or about the 30th day of October, 2009 while the deceased was lawfully walking along Waiyaki Way in Nairobi, the 2nd defendant negligently drove and/or controlled the subject motor vehicle, causing the same to lose control and knock down the deceased, resulting in fatal injuries.
4. The plaintiff attributed the accident to negligence on the part of the defendants by setting out its particulars in the plaint. The plaintiff further pleaded the doctrine of *res ipsa loquitur*.
5. It was also pleaded that at the time of his death, the deceased was a robust 25-year old man who has now left behind the following dependants:

- | | | |
|-----------------------------|--------------|--------|
| i. Gerishon Mwangi Muthemba | Father | |
| ii. Jane Wanjiku Mwangi | Mother | |
| iii. Jason Muthemba Mwangi | Brother | |
| iv. Ayub Kamau Mwangi | Brother | |
| v. Hezron Kahungu Mwangi | Brother | |
| vi. Mirriam | Njeri Mwangi | Sister |

6. Consequently, the plaintiff sought for the following reliefs from this court:

a. General damages under the Fatal Accidents Act.

b. General damages under the Law Reform Act.

c. Special damages of Kshs.87,200/.

d. Costs of the suit.

e. Interest on a), b), c) and d) above at court rates.

7. Upon being served with summons, the 1st and 2nd defendants entered appearance and filed their joint statement of defence on 26th October, 2010 to deny the claim.

8. The defendants denied occurrence of the accident while pleading in the alternative that if at all the accident took place as alleged, then the same was either wholly or substantially the result of negligence on the part of the deceased, the particulars of which the defendants included in their defence.

9. At the hearing of the suit, the parties recorded a consent on liability in the ratio of 70:30 in favour of the plaintiff and which consent was adopted as an order of the court on 12th November, 2019. The suit therefore proceeded to hearing on quantum, with the plaintiff giving evidence as the sole witness while the defence closed its case without calling any witnesses.

10. The parties subsequently filed and exchanged written submissions. The plaintiff on his part submitted that an award of Kshs.10,000/ would form adequate damages for pain and suffering since the deceased did not die immediately following the accident.

11. On damages for loss of expectation of life, the plaintiff proposed an award of Kshs.100,000/ being the conventional award made under this head.

12. It was also the plaintiff's submission that the deceased died aged 25 years hence given the vagaries of life, he would possibly have worked for another 30 years or more. The plaintiff further submitted that the deceased was self-employed prior to his death, earning a minimum monthly income of Kshs.10,000/ and which income would increase since he had completed college and had good job prospects.

13. In the circumstances, the plaintiff suggested a reasonable award of Kshs.2,000,000/ on damages for lost years. In so submitting, the plaintiff relied on the case of **Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased) [2019] eKLR** wherein the court upheld an award of Kshs. 2,766,544/ made for loss of dependency.

14. Further to the foregoing, it was the plaintiff's contention that the beneficiaries of the estate of the deceased are entitled to the special damages in the sum of Kshs.87,200/, bringing the aggregate award to the sum of Kshs.2,107,200/.

15. On their part, the defendants proposed the sums of Kshs.20,000/ and Kshs.100,000/ on damages for pain and suffering, and for loss of expectation of life respectively, while citing the case of **Chania Shuttle v Mary Mumbi [2017] eKLR** where the High Court on appeal upheld similar awards made under the two (2) heads.

16. In respect to damages under the Fatal Accidents Act, the defendants contended that the plaintiff did not adduce any evidence to show that he is the father of the deceased or that he was being supported by the deceased prior to his death.

17. On this note, it was the defendants' submission that the plaintiff equally failed to prove that the deceased was earning an income prior to his death, quoting inter alia, the authority of **Godana Guyo Halake & another v Patrick Ndeli Ndoli & another [2017] eKLR** in which the court appreciated the holding in **Anne Njoki Njenga v Umoja Floor Mills and Another Nakuru HCC No. 149 of 2003** that dependency is a factual issue which ought to be proved.

18. In the alternative, the defendants urged that should this court be persuaded to award damages under this head, then a global award of Kshs.500,000/ would suffice, while quoting the High Court case of **Florence Mumbua Ndoo & Francis Kioko (suing as the Administrators of the Estate of the Late Alfred Safari) v Ezra Korir Kipngeno & another [2017] eKLR** where an award of Kshs.700,000/ was made to the estate of a 20-year old deceased person in the absence of proof of any earnings.

19. Finally, the defendants urged this court to only award a sum of Kshs.21,200/ on special damages proved.

20. I have considered the evidence tendered in court and the rival written submissions together with the authorities cited. Before I proceed to address the merits of the suit, I wish to consider an issue which was addressed in the defendants' submissions.

21. The defendants submitted that the plaintiff lacks *locus standi* to institute the suit on the premise that he did not enjoin the other administrator(s) in the suit.

22. I have examined the bundle of authorities filed by the plaintiff and I have identified a copy of the limited grant of letters of administration ad litem issued on 4th March, 2010. The same indicates that the authority to file suit is vested in the plaintiff and Jane Wanjiku Mwangi.

23. In his cross examination, the plaintiff stated that Jane Wanjiku Mwangi who is the mother to the deceased has since passed on.

24. Suffice it to say that it is noteworthy that the defendants never questioned or objected to the plaintiff's legal standing before this court at any one point in the preliminary stages of the suit despite their participation throughout; they cannot therefore be heard to now raise this issue at the conclusion of the suit.

25. I will now address the issue of quantum under the relevant heads hereinbelow.

a. Pain and suffering

26. It was the plaintiff's testimony that upon receiving information on the material accident, he immediately visited the hospital mortuary to identify the deceased's body.

27. From the evidence on record, it remains unclear whether the deceased died on the spot or soon thereafter, though the Certificate of Death confirms that the deceased died on the date of the accident. Having considered the awards proposed by the parties, I will therefore award the sum of Kshs.10,000/ under this head.

b. Loss of expectation of life

28. Both parties proposed a sum of Kshs.100,000/ which forms the conventional figure awarded under similar heads. In the circumstances, I see no reason to deviate from such conventional awards.

c. Loss of dependency/Lost years

29. It was the plaintiff's evidence that before his death, the deceased had just completed a Diploma in Business Administration and was an employee of Coopers on casual basis. The plaintiff availed a copy of a recommendation letter from St. Philips College of Arts and Technology confirming that the deceased was a student at the institution.

30. The plaintiff further testified during cross examination that the deceased; who was unmarried and without children; would support him and assist in paying school fees for his younger siblings.

31. I noted that while the plaintiff sought for an award for loss of dependency in his plaint, he submitted on damages for lost years. Being guided by the legal principle that parties are bound by their pleadings, I will consider an award under the head of loss of dependency as opposed to that of lost years.

32. The law on dependency is clear that for damages to be awarded under the heads of loss of dependency of lost years, dependency must be proved.

33. In cross examination, the defendant challenged the plaintiff to tender evidence showing that he was the deceased's father. The defendant did not tender evidence to prove otherwise. After observing the demeanor of the plaintiff as he testified, I am convinced that he was the father of the deceased. Though the plaintiff did not present evidence to show that he solely depended on the deceased, this court takes judicial notice that parents in the African set up depend on the support of their children to some degree.

34. It is also worth noting that according to the provisions of **Section 4(1)** of the **Fatal Accidents Act**, the meaning of the term 'dependants' is restricted to the parents, children and spouse of the deceased. It therefore follows that the siblings of a deceased person are not regarded as dependants.

36. I have considered the awards proposed by the parties and I have also considered the fact that the plaintiff did not tender evidence to support his averment that the deceased was earning a sum of Kshs.10,000/ on casual basis neither did he specify the nature of his work at the time. The evidence presented only shows that the deceased was a student.

36. In the absence of evidence to show earnings or nature of work that the deceased undertook, I am convinced that a global award would be appropriate here. I take into account the case of **Eric Nyale & another v Mwanamvua Musa Mwanyumba & another [2017] eKLR** where the court awarded Kshs.800,000/ to the estate of a deceased bearing similar age to that of the deceased herein. I also considered the more recent case of **Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another [2019] eKLR** decided by this court and where a global sum of Kshs.1,200,000/ was awarded under this head in the instance of a 25-year old deceased young man.

37. I will therefore make a global award of Kshs.1,200,000/ under this head.

d. Special damages

38. It is trite law that special damages ought to be both specifically pleaded and strictly proved. From my evaluation of the evidence, only the sum of Kshs.20,700/ comprising of the mortuary and funeral receipts, and the police abstract receipt was specifically pleaded and strictly proved. I can therefore only award this sum.

39. The upshot is that judgment is entered in favour of the plaintiff as against the defendants jointly and severally as follows:

i. Liability

70%:30% in favour of the plaintiff

ii. General damages

a. Pain and suffering	Kshs.10,000/
b. Loss of expectation of life	Kshs.100,000/
c. Loss of dependency/Lost years	Kshs.1,200,000/
iii. Special damages	Kshs.20,700/
Gross total	Kshs.1,330,700/
Less 30% contribution	(Kshs.399,210/)
Net total	Kshs.931,490/

Costs of the suit are awarded to the plaintiff. The plaintiff shall also have interest on special damages at court rates from the date of filing of the suit and interest on general damages at court rates from the date of judgment until payment in full.

Dated, signed and delivered at Nairobi this 28th day of February, 2020.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st and 2ⁿ^d Defendants