



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 183 OF 2017

KARIM ASHAKALI SAYANI

FARIN ASHAKALI SAYANI (suing as legal representatives of

ASHAKALI KANJI KARIM SAYANI).....PLAINTIFFS

VERSUS

STEPHEN NGAHU1ST DEFENDANT

JAMES MAINA2ND DEFENDANT

JUDGMENT

1. On 29th August 2017, the plaintiffs, *Karim Ashakali Sayani* and *Farin Ashakali Sayani* instituted suit against the defendants namely, *Stephen Ngahu* (1st defendant) and *James Maina* (2nd defendant) seeking general and special damages under the *Fatal Accidents Act* and the *Law Reform Act*. They filed the suit in their capacity as administrators of the Estate of the late *Ashakali Kanji Karim Sayani* (hereinafter the deceased) who was their father.
2. In their plaint, the plaintiffs averred that on or about 27th October 2015, the deceased was walking on a designated pedestrian walkway along Kenyatta Avenue in the Central Business District of Nairobi when the 1st defendant who was an employee, servant or agent of the 2nd defendant negligently and or recklessly drove the 2nd defendant's motor vehicle registration number KBG 809A causing it to veer off the road and to collide with the deceased occasioning him fatal injuries which led to his death on 3rd January 2016. The particulars of the 1st defendant's negligence are pleaded in paragraph 6 of the plaint.
3. The plaintiffs further pleaded that as a result of the serious injuries sustained in the accident, the deceased was hospitalized in three hospitals in Nairobi where he incurred medical expenses in the total sum of KShs.6,014,439.68 which they claimed as special damages.
4. When served with summons to enter appearance and the plaint, both defendants failed to enter appearance or file a defence. Upon application by the plaintiffs, the court entered interlocutory judgment in favour of the plaintiffs against both defendants on 5th October 2018. The case subsequently proceeded for formal proof hearing.
5. In his evidence before the court and in his written statement dated 29th August 2017 which he adopted as part of his evidence in chief, the 1st plaintiff who is the only witness who testified in support of the plaintiffs' case exhibited the grant of probate on the strength of which they had filed suit against the defendants. The grant of probate was issued by the High Court in Nairobi on 15th July 2016 (Pexhbt 1).
6. PW1 recalled that the accident in which his father sustained fatal injuries was negligently caused by the 1st defendant when he was driving the 2nd defendant's vehicle registration number KBG 809A Mitsubishi canter. The particulars of injuries sustained by the deceased are listed in paragraph 9 of the plaint.
7. To substantiate the averments in the plaint, PW1 produced in evidence the deceased's death certificate dated 22nd January 2016; a post mortem form dated 5th January 2016 and a police abstract as exhibits marked Pexhbt 2, 3 and 4. He also produced documents from Guru Nanak Hospital, Ladnan Hospital, Aga Khan Hospital and copy of receipt from *Dr. Peter M Ndegwa* to prove the claim for special damages in the sum of KShs.6,014,439 as well as a copy of records from the National Transport and Safety Authority as proof that motor vehicle registration number KBG 809A was owned by the 2nd defendant.
8. Given that the police abstract produced as Pexbt 4 confirms that an accident occurred on 27th October 2015 involving motor vehicle registration number KBG 809A and the deceased and considering that the plaintiffs' averments regarding how the accident occurred have not

been controverted as the defendants chose not to defend the suit, I have no difficulty in finding that the accident was caused by the sole negligence of the 1st defendant since vehicles are not normally driven on pedestrian walkways. The fact that the vehicle veered off the road and found the deceased on the walkway connotes extreme negligence on the first defendant's part.

9. The claim by the plaintiffs that the 1st defendant was driving the vehicle at the material time as a servant of the 2nd defendant has not been disputed. In the premises, I find that the 2nd defendant is vicariously liable for the negligent acts of the 1st defendant.

10. In view of the foregoing, I find that both defendants are jointly and severally liable for the accident in question at 100 %. The interlocutory judgment entered in favour of the plaintiffs against both defendants on 5th October 2018 is accordingly confirmed.

11. Having settled the issue of liability, I now turn to determine the quantum of damages payable to the plaintiffs. The plaintiffs claimed in their plaint that as a result of the deceased's death, his estate has suffered loss and damage. They also claim general damages under the *Fatal Accidents Act* in their capacity as children of the deceased. They did not however state any facts or give any particulars that would ground a claim for loss of dependency under the *Fatal Accidents Act* and the 1st plaintiff in his evidence did not adduce any evidence to support the claim for loss of dependency. This claim appears to have been abandoned after suit was filed since not a single reference was made to it by the plaintiffs even in the final submissions filed on their behalf by their advocates, Oraro & Company Advocates.

In the circumstances, I find that the claim for general damages under the *Fatal Accidents Act* has not been proved and the plaintiffs are thus not entitled to damages for loss of dependency.

12. Having found as I have above, the only task left for me is to assess the damages which the deceased's estate would in my view be entitled to under the *Law Reform Act* (hereinafter the Act). Under *Section 2* of the Act, a deceased person's estate is entitled to both general and special damages including funeral expenses. Under general damages, the estate is entitled to damages under two heads only, namely, damages for pain and suffering of the deceased prior to death and damages for loss of expectation of life.

13. In their submissions, the plaintiffs made proposals to guide the court in assessing damages for the deceased's pain and suffering before his death. They did not however make any proposals with regard to damages for loss of expectation of life.

14. For pain and suffering, the plaintiffs proposed a sum of KShs.8,000,000 relying mainly on the authority of *Beena Khambaita V Talvinder Sagoo & 3 Others, [2015] eKLR*, where the plaintiff was awarded KShs.4,000,000 for pain and suffering and loss of amenities. In my view, this case is inapplicable to the instant case and cannot guide this court in the assessment of damages under the above head because the facts and context in which the award of KShs.4,000,000 was made is completely different from the facts and circumstances in the current case.

15. In the *Beena Khambaita case*, the plaintiff was awarded compensatory damages in the sum of KShs.3,800,000 for pain and suffering and loss of amenities including loss of earnings following a road traffic accident in which she survived but escaped with severe injuries which included multiple fractures. It was not a fatal accident's claim like the one before this court.

16. The factors to be considered in claims for compensation for personal injuries are entirely different from the factors a court would consider when assessing damages for pain and suffering in fatal accident claims principally because in the latter case, the victim of the accident suffered pain for a specific period of time and then died. In such cases, the award is made to the estate of the deceased and not to a survivor of the accident who personally experienced or continued to experience pain and suffering for a long or indefinite period and may have suffered other losses, for instance, loss of earnings or loss of earning capacity depending on the nature of the injuries sustained in the accident in question.

17. It is important to point out here that the plaintiffs in this case did not cite any authority in their written submissions to guide the court in the assessment of damages for pain and suffering under the *Law Reform Act*.

18. In assessing general damages for pain and suffering under the Act, the court should as a general rule consider the length of time the deceased person endured pain before death and the intensity of the pain and suffering he or she may have persevered going by the nature and severity of the injuries sustained.

19. The undisputed evidence adduced by the plaintiffs in this case shows that the deceased sustained grave injuries following the accident which necessitated his hospitalization in three different hospitals for about two months. The deceased who was by then 76 years old, must have experienced immense pain and suffering during the time he was undergoing treatment and thereafter. It is important to note that the treatment included, inter alia, insertion of tubes and surgeries. This can be discerned from the invoices issued by the hospitals which attended to him.

20. Given the foregoing and doing the best I can, I find the sum of KShs.1,000,000 sufficient as compensation to the deceased's estate for the pain and suffering the deceased experienced before succumbing to his injuries and the same is hereby awarded.

21. Regarding loss of expectation of life, as stated earlier, the plaintiffs did not specifically pray for damages under this head in their plaint. But since they sought for general damages under the *Fatal Accidents Act* and the *Law Reform Act* and general damages for loss of expectation of life is one of the heads of damages that can be awarded under the *Law Reform Act*, I find that it is appropriate in the interest of justice to award the deceased's estate some damages under that head.

22. According to the death certificate produced as Pexbt 2, the deceased was 76 years at the time of his demise. He may probably have lived for a few more years had he not been involved in an accident that ultimately caused his death. The conventional sum usually awarded under this head is KShs.100,000 and the same is awarded to the plaintiffs in this case.

23. With respect to the claim for special damages, the plaintiffs produced a bundle of documents contained on pages 8-24 of the plaintiffs list and bundle of documents in support of their contention that the deceased's estate suffered pecuniary loss following payment of hospital bills and related medical expenses during the time the deceased was undergoing treatment. The total amount expended in treatment costs was stated to be KShs.6,014,439.68.

24. I have carefully scrutinized the said documents. I find that apart from the copies of the receipts acknowledging payment for ambulance services in the total sum of KShs.27,000 and KShs.15,000 being doctor's fees paid to *Dr. Peter M. Ndegwa*, the rest of the documents are interim invoices issued by the Aga Khan Hospital, Guru Nanak Hospital and Ladnan Hospital.

25. Case law abounds espousing the principle that special damages must not only be specifically pleaded but must also be specifically proved. This means that a party claiming special damages must prove that he had actually made the payments or suffered the loss subject of the claim. Proof of payment must be made through the production of receipts of payments made not production of invoices. Our courts have held that an invoice is not proof of payment and that only actual receipts meet the test for specifically proving special damages. See: *Total (Kenya) Limited Formerly Caltex Oil (Kenya) Limited V Janevams Limited, [2015] eKLR; Zacharia Waweru Thumbi V Samuel Njoroge Thuku, [2006] eKLR.*

26. In this case however, the invoices produced by the plaintiffs' evidence payment of deposits of KShs.25,000, KShs.100,000, KShs.60,000 and KShs.700,000 paid to Guru Nanak, Ladnan and Aga Khan Hospitals respectively towards payment of hospital bills incurred by the deceased in those hospitals and in my view, this is evidence sufficient to prove payment of those amounts on a balance of probabilities.

In view of the foregoing, I find that out of the sum of KShs.6,014,439.68 pleaded, the plaintiffs have only managed to specifically prove a sum of KShs.1,463,500 which is hereby allowed.

27. In the result, judgment is hereby entered in favour of the plaintiffs against the defendants jointly and severally for general damages in the total sum of KShs.1,100,000 and special damages in the sum of KShs.1,463,500 together with costs and interests. The general damages will attract interest at court rates from today's date until payment in full while special damages will earn interest from the date the suit was filed until payment in full.

28. The plaintiffs are also awarded costs of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 26th day of September, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Oguta holding brief for Mr. Mbaluto for the plaintiffs

No appearance for the defendants

Mr. Salach: Court Assistant