



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 44 OF 2004

CHRISTINA HARRIS.....1ST PLAINTIFF

JOHN NICHOLAS.....2ND PLAINTIFF

VERSUS

LAWRENCE PHILIP MUTUA.....1ST DEFENDANT

WILLIAM J. KARISA2ND DEFENDANT

JUDGEMENT

1. The 1st Plaintiff, Christina Harris and the 2nd Plaintiff, John Nicholas through this suit seek compensation as the legal representatives of the estate of Charles Harris who died as a result of injuries sustained on 9th May, 2003 when his motorcycle registration number KAP 776R collided with motor vehicle registration number KAN 785A at Kwandomo area along Malindi-Lamu road. It is the plaintiffs' averment that the said motor vehicle was owned, managed and or driven by the 1st Defendant, Lawrence Philip Mutua and insured by the 2nd Defendant, William J. Karisa thus making them jointly and severally liable for the loss incurred by the estate of the deceased Charles Harris as a result of the accident.

2. On 6th July, 2009 the parties entered consent on liability in the following terms:

“By consent the liability be apportioned at 50% (fifty percent) against the plaintiffs and 50% (fifty percent) against the defendants”.

3. With that consent the only issues for determination of the court as per the statement of agreed issues filed by the parties on 20th May, 2009 are:

“6. Did the deceased suffer fatal injuries as a result of the accident?”

7. Has the deceased's estate and dependants suffered loss and damage as a result of the said death?

8. Are the deceased's dependants and his estate entitled to damages as a result of the accident? If so what is the quantum thereof?

9.

10. Are the plaintiffs entitled to the costs of this suit?”

4. The parties did not call witnesses having agreed on 28th September, 2017 to produce, as exhibits, the documents filed by the plaintiffs on 19th January, 2006. They thereafter filed and exchanged submissions which they relied on in support of their positions.

5. In submissions filed on 9th October, 2017 by counsel for the plaintiffs, it is submitted that the deceased was a working man earning Kshs. 25,760 at the time of his demise as evidenced by his income tax return for the year 2002. Counsel also submitted that the deceased died as a result of the injuries sustained in the accident as evidenced by the death certificate found in the plaintiffs' list of documents. Further, that the limited grant obtained by the plaintiffs in respect of the estate of the deceased had been produced in court. Counsel for the plaintiffs further submitted that the deceased did not die on the spot as evidenced by the receipt from Galana Hospital Ltd also produced as an exhibit in this case.

6. The plaintiffs' counsel urged the court to apply a multiplier of 19 years considering that the retirement age is 60 years and adopt a ratio of ? so that the award for dependency would work out as follows:

$$25,760 \times 12 \times ? \times 19 = 3,915,520.$$

7. On loss of expectation of life it was urged that an award of Kshs. 150, 000 would suffice. As for pain and suffering it was contended that as the deceased did not die on the spot an award of Kshs. 25, 000 under this head would be reasonable.

8. In regard to special damages the plaintiffs asked for an award of Kshs. 586,800 as tabulated in the plaint amended on 15th July, 2005.

9. The defendants' take on the quantum awarded was conveyed through the submissions filed on 16th October, 2017. According to them, the income tax document is not sufficient evidence of the fact that the deceased earned Kshs. 25,760 as a sports fisherman and the production of a payslip would have at least established his monthly earnings. Further, that the plaintiffs' claim that the deceased supported them has not been proved as no tangible evidence was placed before the court. The defendants therefore submitted that a lump sum award of Kshs. 300,000 is ideal for a person without employment. Reliance is placed on the Court of Appeal decision in **Theta Tea Company Limited & another v Florence Njau Njambi [2002] eKLR** in support of the proposition.

10. In the alternative the defendants submitted that if the court is inclined to hold that the deceased was working then due to lack of evidence on his earnings a multiplicand equivalent to Kshs. 5,000 being the minimum wage at the time of the deceased's demise should be applied thus resulting in an award of Kshs. $5,000 \times 19 \times 12 \times ? = 760,000$. In support of this proposition reliance is placed on, among other cases, the decisions in the cases of **Florence Kavutha Malusi & another v Transami (Kenya) Ltd [2004] eKLR** and **Kiarie Shoe Stores Ltd Vs Hellen Wanguru Waweru [2013] eKLR**.

11. For pain and suffering the defendants suggest an award of 10,000. As for loss of expectation of life, they ask the court to award Kshs. 70,000. In support of the proposed awards they cite the decision in **Felister Nduta Muthoni & Another v Attorney General [2014] eKLR**.

12. As for the claim of Kshs. 586,000 as special damages, the defendants submitted that the same was not specifically pleaded and proved and asks this court to follow the decision in the case of **Mungai Mbugua v David Mbugua Kariuki & Concord Container Services Ltd [200] eKLR** in dismissing this particular claim.

13. In conclusion, the defendants asked this court to deduct the award made under the Law Reform Act from the award made under the Fatal Accidents Act as was held in **Kemfro Africa Ltd T/A Mem Express Services (1976) & another v Lubia & another (No.2) [1987] KLR 30**.

14. From the submissions, two points of convergence also emerge, namely that a multiplier of 19 years and a ratio of 2/3 should be used in arriving at the award for loss of dependency. This takes care of the

defendants' assertion that there was no prove that the plaintiffs were supported by the deceased's earnings.

15. On the deceased's earnings at the time of his death, the income tax return for the year 2002, which was produced as an exhibit by consent, clearly establishes that he was earning Kshs. 25,760 a few months prior to his death. This evidence was not rebutted and the court does not have to look elsewhere to establish his earnings. On the evidence on record, I therefore find that the deceased earned kshs.25,760 per month. The award on the dependency will therefore be as follows:

$$25,760 \times 12 \times ? \times 19 = 3,915,520.$$

16. On loss of expectation of life a conventional award of Kshs. 100,000 will do. On pain and suffering, the evidence shows that the deceased's transition to the hereafter was painful as he did not die on the spot but passed away at the hospital where he had been rushed for treatment. Kshs. 20,000 is the standard award in such circumstances and this is what is awarded on this head.

17. Each and every item pleaded as special damages was proved by way of production of receipts and reports. The claim of Kshs. 586,800 made up of kshs.100 for police abstract, Kshs. 20,000 as mortuary expenses, Kshs. 13,700 as medical expenses, Kshs. 20,000 for obtaining limited grant, Kshs. 20,000 as cremation costs, Kshs. 510,000 being the pre-accident value of the motorbike and Kshs.3,000 as assessment costs for the motorbike is awarded as special damages.

18. The award will therefore work out as follows:

Loss of dependency	-	3,915,520
Loss of expectation of life	-	100,000
Pain and suffering	-	20,000
Special damages	-	<u>586,800</u>
Total		4,622,320
Less award for loss of expectation of life	-	<u>100,000</u>
Total		<u>4,522,320</u>
Less 50% contribution	-	<u>2,261,160</u>
Amount awarded to plaintiffs	-	<u>2,261,160</u>

19. The plaintiffs are therefore entitled to a global award of Kshs. 2,261,160. They are also awarded interest on the decretal amount from the date of judgement till payment in full plus the costs of the suit.

Dated, signed and delivered at Malindi this 18th day of January, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT.