



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 33 OF 2015

BENDETTAR KALONDYU MUTUKU & ANGELINA MUTHEU MUTUKU

(suing as the Administrators of the estate of the late

PETER MATHEKA MUTUKU (Deceased)..... PLAINTIFFS

VERSUS

PATRICK MUTUNGA.....DEFENDANT

JUDGEMENT

1. By a Plaintiff dated 9th July, 2015 the Plaintiffs sued the Defendants jointly and severally on their own behalf and for the benefit of the estate of Peter Matheka Mutuku (deceased). The Plaintiffs sought for both general damages pursuant to the Law Reform Act and Fatal Accident Act. The cause of action is that the deceased herein had been a passenger in the 2nd Defendants motor vehicle registration number KBH 194 Y which was being driven along Machakos – Kangundo road on the 10/07/2014 when the 2nd Defendant lost control of the same and as result the deceased sustained serious bodily injuries from which he died.

2. The Plaintiff pleaded particulars of negligence on the part of the Defendants vide paragraph 5 and 6 of the Plaintiff dated 9/7/2015 and blamed the Defendants wholly for the accident that claimed the deceased.

3. The Plaintiffs later on the 12/11/2015 filed a notice of withdrawal of suit against the 1st Defendant who was the 2nd Defendant's financier in the purchase of the suit motor vehicle and therefore the 2nd Defendant was left alone to defend the Plaintiffs suit herein.

4. The 2nd Defendant filed a statement of defence dated 17/11/2016 and denied the Plaintiff's claim and further pleaded that if an accident had occurred as alleged then the deceased had wholly or substantially contributed to the same for being negligent. The particulars of the deceased's negligence were pleaded vide paragraph 6 of the defence.

5. The Plaintiff called three witnesses in support of her case while the Defendant did not tender any evidence. PC. Benjamin Kimaiyo (PW.1) testified and stated that the accident that claimed the life of the deceased took place on 10/07/2014 at around 7.00 p.m. along Machakos – Kangundo road involving Motor vehicle registration Number KBH 194 Y make Subaru Forester then driven by the 2nd Defendant who lost control and hit a tree wherein the deceased Peter Matheka Mutuku who was a passenger died. He further testified that the 2nd Defendant was later charged with an offence of causing death by dangerous driving and fined Kshs.50,000/= . He blamed the 2nd Defendant for the accident and produced the police abstract.

Bendettar Kalondu Mutuku (PW.2) testified and stated that the deceased had been her son who used to be an international athlete and used to earn about Kshs.2 million per year from the races and that he used to support her and his siblings financially and that the death robbed the family of the support. She produced a burial permit, mortuary receipts, bundle of certificates, bundle of screen shots, agency agreement, bank statements, demand letters and prayed for compensation.

Nicholas Manza Kamakya (PW.3) testified and stated that he was the deceased's brother in law and confirmed that the deceased used to run international races one of which was in Singapore where he had won in a steeple chase event. He stated that the deceased had signed a contract with a foreign agent. He maintained that the deceased had requested him to bank his monies in his (PW.3's) account as he was then a young man and thus all the earnings were wired into the said account from where he could withdraw and give it to him to assist his mother. He stated that he had the bank statement relating to the period from January 2013 to 2014 where the deposits came to about Kshs. 2.2. Million. He produced the bank statements.

6. Learned counsels filed written submissions on issues of liability and quantum of damages and that the damages related to the head of damages namely; pain and suffering, loss of expectation of life, loss on dependency as well as special damages.

It was submitted for the Plaintiff that the Defendant should be held at 100% liable for the accident because the deceased had been a passenger who had no control of the vehicle and further that the Defendant had been convicted and fined Kshs. 50,000/= for the offence of causing death by dangerous driving. On pain and suffering a sum of Kshs. 50,000/= was proposed. The sum of Kshs.100,000/= was proposed for loss of expectation of life. On loss on dependency a multiplicand of Kshs.166,666/= was proposed and a multiplier of 24 years against a dependency ratio of (1/3) worked as $166,666/= \times 24 \times 12 \times (1/3) = 15,999,936/=$.

It was submitted for the Defendant that no birth certificates were produced by the Plaintiff to prove that deceased was her son. On the damage, the sum of Kshs. 10,000/= was proposed for pain and suffering while Kshs.100,000/= for loss of expectation of life. On loss of dependency, the sum of Kshs. 13,674/= was proposed as the multiplicand pursuant to the regulations of wages (General Amendment) Order 2013 since then there was no proof of earnings established. A multiplier of 12 was proposed and a dependency ratio of $\frac{1}{3}$ worked out as $13674 \times 12 \times 12 \times \frac{1}{3} = 656,352/=$. Special damages of Kshs. 6000/= was proposed.

7. I have considered the evidence presented on behalf of the plaintiff and the submissions of the learned counsels for the parties. I find the issues for determination in this matter are basically on liability and quantum of damages.

A. LIABILITY

The plaintiff has blamed the 2nd Defendant wholly for the accident which claimed the life of the deceased herein Peter Matheka Mutuku. It is clear from the evidence that indeed the deceased had been a passenger in the ill fated motor vehicle registration number KBH 194Y owned and driven by the 2nd Defendant. As the plaintiff has already withdrawn the suit against the 1st Defendant who was the 2nd Defendant's financier, it follows therefore that the 2nd Defendant was left alone to address the plaintiff's claim against him. The police officer who testified herein and produced the police abstract blamed the 2nd Defendant for the accident when he stated that the 2nd Defendant had lost control of the motor vehicle and hit a tree. The witness also confirmed that the 2nd Defendant was subsequently arraigned in court vide traffic case number 960 of 2014 where the 2nd Defendant was charged with the offence of causing death by dangerous driving and fined Kshs. 50,000/=. Even though the court proceedings were not produced as exhibits, I find the police abstract was sufficient as it contained the aspect of the 2nd Defendant's conviction. The 2nd defendant is noted to have opted not to tender any evidence in defence and hence the plaintiff's evidence remained unshaken.

Again the deceased who had been a passenger cannot be faulted for the accident as he was not in control of the said vehicle. This then rules out any contributory negligence on his part. The Defendant attempted to attribute some negligence against the deceased vide paragraph 6 of the statement of Defence but then the Defendant opted not to tender evidence so as to support the said negligence. It is common knowledge that a properly serviced vehicle and properly driven on a road does not just veer off the road and hit a tree or any other objects for that matter. It is therefore quite clear that the 2nd Defendant was negligent in the manner in which he drove and or controlled the vehicle and as a result endangered the deceased. The 2nd Defendant was the only one behind the steering wheel and therefore if an accident occurred he should be held solely responsible. I hold the 2nd Defendant wholly liable in damages to the plaintiff and I put liability at 100%.

B. DAMAGES

As noted from the plaintiff's pleadings and the submissions of both advocates, damages have been claimed in regard to pain and suffering, loss of expectation of life, loss on dependency and special damages. I shall address each of these as hereunder:

i) Pain and Suffering

It transpired that the deceased died on impact and therefore he did not experience so much pain before passing on. the conventional awards under this head have ranged between Kshs. 10,000 – 100,000/=. I find an award of Kshs 30,000/= would be reasonable under this head.

ii) Loss of Expectation of Life

The deceased was said to have been the sole provider for his mother and siblings as by then he had not yet married hence I find the death of deceased robbed the family of their only source of livelihood. The conventional awards under this head has always been Kshs. 100,000/= which I hereby award for the plaintiff.

iii) Loss of Dependency

The plaintiff died at the age of 23 years. It is not in doubt from the evidence and exhibits that he was an upcoming athlete. Indeed after he won the steeple chase race in Singapore, a foreign agent signed him in. It is common knowledge that most of the Kenyan athletes who have won races have always received payment and most of them have heavily invested back in the country while a few have squandered their earnings and now live in squalor. PW3 Nicholas Manza, Kamakya who is a brother in law to the deceased stated that the deceased had entrusted him with his money which was transferred in an account operated by the said brother in law.

Copies of bank statements provided herein showed that prior to the demise of the deceased the dollar account had a credit balance of about 2000 dollars. There were also agreements signed by the deceased with the agents and in which the appearance fee had been indicated as well as an annual sum of about 5000 dollars. The plaintiff has sought to rely on the sum of 2000 dollars a year as proof of income for the deceased. Of course the monies would not be trickling in frequently unless the deceased participated in the races organized by the foreign agents. Indeed the foreign agents are also in business and do shuffle the athletes from one race to the other to maximize on earnings and that is why most of the athletes retire from the track quite early at the age of about 35 years. Even though the deceased was then aged at 23 years old and an adult in his own right, I find his preference to allow his brother in law to operate the account must have been on the basis of trust and also to ensure the said brother in law would access the money for purposes of overseeing the deceased's family's needs and projects as

the deceased would probably be out of the country most of the time.

I believe the testimonies of the deceased's mother and brother in law that indeed the earnings had been deposited by a foreigner who must have been the foreign agent. As the deceased was still young and energetic, I find that earning about 2000 dollars in a year would not have been difficult and already a sum of that figure had been wired to the account which would then mean that the monthly income earned would be Kshs. 166,666/= as proposed by the plaintiff's counsel. I shall adopt this sum as the multiplicand. On the multiplier I would adopt 12 years since the deceased would be expected to hang up his boots at the age of 35 years old like a majority of other athletes. I would also adopt a dependency ratio of $\frac{1}{3}$ since the deceased would use the remainder for himself. Hence the awards herein shall be $166,666 \times 12 \times 12 \times \frac{1}{3} = 7,999,968/=$.

C. SPECIAL DAMAGES

The plaintiff pleaded the sum of Kshs. 7,550/= but managed to produce receipts for Kshs. 5,500/=. I shall award the sum of Kshs. 5,500 as special damages.

In order to prevent the plaintiff from receiving double compensation for the same cause, I shall discount the sum of Kshs. 130,000/= under the Law Reform Act.

8. In the result I enter judgment for the plaintiff against the 2nd Defendant as follows:

- a) Pain and suffering.....Kshs.30,000/=
- b) Loss of expectation of life..... Kshs. 100,000/=
- (c) Loss on dependency
- 166,666x12x12x $\frac{1}{3}$ Kshs. 7,999,968/=
- c) Special damages..... Kshs. 5,500/=

- TotalKshs. 8,135,468/=**

- Less Discounted Damages under**
- the Law Reform Act.....Kshs. 130,000/=**

- Net Damages.....Kshs.8,005,468/=**

9. The plaintiff is awarded costs of the suit plus interest at court rates. Interest on costs shall be from date of filing suit while interest on damages shall be from the date of judgment.

Orders accordingly.

Dated, signed and delivered at Machakos this 13th day of April,2018

D.K. KEMEI

JUDGE

In the presence of :

Langangala – for Maingi Musyimi for Plaintiff

No appearance for Itonga for Defendant

Kituva - court Assistant