



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 155 OF 2010

CHARLES MATU KIBOI

(Suing as the legal representative of the estate of the

CATHERINE WAMBUI MATU (Deceased).....PLAINTIFF

VERSUS

1. DEANSBROOK SCHOOL LIMITED

2. HAKIKA TRANSPORT SERVICES LIMITED.....DEFENDANT

J U D G M E N T

1. In this matter parties did on the 19/4/2016 record a consent on liability by which the plaintiff consented to bear 10% while the 1st defendant was to bear 75% and the 2nd defendant 15%.

2. What is outstanding for courts determination, on which evidence was led by two witnesses called by the plaintiff, is the quantum of damages payable.

3. The plaintiff's case as put forth in the evidence by the two witnesses is now short and succinct. It is to the effect that the plaintiff brings the suit in his capacity as the administrator of the estate of the deceased for own benefit and for the benefit of the estate. He produced grant of letters of administration Exh. P1 obtained in HCC Succ. Case No. 129/2009.

4. Evidence was also led that at the time of her death, the deceased was employed as a freelance advertising agent with Nation Media Group and based in Mombasa. On 26/4/2009, the plaintiff was informed by the colleagues to the deceased that she had been involved in an accident that morning and died. He proceeded to the hospital identified the body and removed it to Pandya Memorial Hospital where it was preserved as burial arrangement were being made. He produced receipt for Kshs.50,000/= dated 28/4/2009 as exhibit P3. He produced the police abstract and said he paid Kshs.200/= for the same. He also produced a degree certificate to show that the deceased had graduated with a degree in business marketing from Moi University. A certificate of death was produced to show that the deceased was aged 25 years upon death and was unmarried. She was a mother to one R M born on 31/01/2009 and a birth certificate was produced to that effect.

5. The witness produced pay slips from Nation Media Group which showed that the deceased was employed as an advertising freelancer and assigned employment No. 001843 earning commissions which were paid into her personal account at Standard Chartered Bank Account No. 0101817944500. He produced pay slips for months of January to December 2008 and had them marked **PEXH 9**.

6. He added that in her lifetime, the deceased would assist him and the mother with fees for the siblings which assistance had been lost due to the death. He prayed for damages costs and interests.

7. On cross examination by Mr. Mogaka he denied the suggestion that he was not dependent upon the deceased and repeated that he would get assistance toward payment of school fees as he was a retired civil servant and that all her siblings were either in college or school as at the date of her death.

8. On cross examination by Mr. Shikeli for the 2nd defendant, the witness admitted that the deceased employer participated in the funeral arrangements by payment of mortuary charges but did not give to him any other money. He conceded that of the Kshs.50,000/= he paid, his own contribution was 5,000/= while the rest was from well-wishers. He confirmed not to have had the contract of employment between the

deceased and the Nation Media Group.

9. In re-examination, the witness said the deceased qualified with specialization in marketing. The same witness was recalled at a later date purposely to produce the certified copies of the pay slips which he did. On further cross-examination by the 1st defendant, the witness admitted that the deceased earned commissions rather than salary which was dependent upon input and that the income was subjected to PAYE and other deductions.

10. On further cross examination by the 2nd defendant he said that he only had the pays lips produced but did not have evidence of income for the other years.

11. PW 2 was DANIEL MUNYAO, an administrative assistance with Nation Media Group. His evidence was basically to confirm that the deceased worked with his employer as a freelance advertising agent, who joined the company in 2006 till the date of her death. On cross examination, he confirmed the obvious that the deceased was earning commissions not salary and that he had no other pays lips save for those of 2008. With such evidence the case was closed and, liability having been agreed, the defendants closed respective cases without calling any evidence.

12. In the plaint filed, the plaintiffs seeks general damages under both Law Reform Act and Fatal Accidents Act as well as special damages. It is on the aspect of damages the parties have addressed the court by the written submissions filed. I propose to assess damages under both Acts well reminded that damages awarded under the law reform Act need be taken into account while awarding those under Fatal Accidents Act.

Pain and suffering

13. All sides concur that the deceased died immediately after the accident hence was not conscious for long to endure the pain from the injuries suffered. In such circumstances, the practice is to award modest and nominal damages. Being so guided, I award to the plaintiff the sum of Kshs.60,000/=.

Loss of expectation of life

14. Even though some courts term this as being settled at a conventional sum of Kshs.100,000/=, I do not think there is any firm justification for maintaining a static sum for such damages[1]. There is no basis to have it as a conventional sum. What should be conventional is the principle that damages are compensatory and being so they must serve that very purpose[2]. Accordingly, and taking into account, realities of life including inflationary trends and the attendant erosion of the value of money, what was reasonable more than 20 years ago may not be reasonable nor compensatory today.

15. In awarding damages courts takes into account what would be just in the circumstances. For this case therefore, and taking into account the evidence given on the life of the deceased, I decline to be held back that the sum awardable cannot be any other but Kshs.100,000/=. I consider that to be too low considering the dates the cases cited to me were decided. I award to the plaintiff sum of Kshs.150,000/= for loss of expectation of life.

Special damages

16. The plaintiff pleaded and prayed for Kshs.60,250/= and at trial produced receipts totaling Kshs.50,000/=. He also produced a police abstract which he said he obtained at a costs of Kshs.200 and a grant of letters of administration he said to have obtained at a cost of Kshs.10,000/=.

17. I am aware that special damages must be specifically pleaded and strictly proved. However, strict proof does not mean proof by receipts only. A court of justice is allowed in law to take judicial notice of not only matters and practices of common notoriety but also the existence and provisions of the law[3].

18. I do take notice that a police abstract is obtainable upon payment of Kshs.200/=. I also take notice that when one files a succession cause there is court fees payable beside legal fees if an advocate be employed. Accordingly a claim of Kshs.10, 000/= to obtain a grant by the plaintiff is thus reasonable and modest and I find that the plaintiff has proved special damages of Kshs.60,200/= to the requisite standards. I award that sum to the plaintiff.

Lost dependency

19. It is common ground that the deceased was, at the time of her death, engaged as a freelance advertising agent or execute with Nation Media Group. In that capacity she was earning according to output and production. For the period from January 2008 to December 2008, certified copies of salary slips, with varying monthly income, were presented and produced as exhibits.

20. The plaintiff has urged that the said evidence be employed to circulate and establish the deceased's average monthly earnings. On the other side the defendants have urged that was only a period of one year yet the deceased was said to have been engaged by the same employer for a much longer period. To them the average should have been ascertained more accurately by production of the pay slips or evidence of earning for the entire period. To them the plaintiff having failed to avail the evidence of earnings prior to January 2008, the court should ignore the evidence on earnings as basis of ascertaining the average and pluck a figure of Kshs.50,000/= per month, from the air as the multiplicand.

21. This court appreciates its duty to base its decisions, where evidence is availed, on such evidence and holds the opinion that to ignore

evidence adduced and come with own way or figures would be contrary to its notion of judicial decision making.

22. Here I have evidence that for the whole year, 2008, the deceased earned various monthly income whose average is in the sum of Kshs.110,601.65. That to this court is the accurate average monthly income of the deceased which cannot be ignored in preference for, some arbitrary and abstract figure incapable of accurate mathematical discernment. I refuse to be persuaded that the average earning must be for the entire period she worked. This I do so noting that when a court decides to adapt the multiplier formula of calculating damages for lost dependency or loss of expected income or earning capacity, the figure to be adopted and applied is the last known income of the deceased. This to me is the logical and judicious approach. Logical because, take the example of a salaried employee who meets his death the second month after the salary is increased. Would it be fair or reasonable to insist that an average be ascertained by reckoning with the old salary? I don't think so. In any event, the principles as laid way back in 1957, in **Mrs. Hayes & Others vs C.J. Patel and Another [1961] EA 129** has, to this court, never changed. In that case the court said.

“The court should find the age and expectation of working life of the deceased, and consider the ages and expectations of life of his dependants; the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum reached should be discounted to allow for the possibility or probability of the remarriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependents will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants”.

23. Without purporting to add or amend the principle, it might be just necessary to say that, the last known income, if it establishes some sense of consistency, is the basis of establishing the multiplicand. If it be a salary, the last is sufficient. If it be some other source of earning an average calculated over a period of time is sufficient. In this case, a period of one year to this court is sufficient. For that reason I adopt the sum of Kshs.110,000 per months as the multiplicand.

24. On the multiplier, having taken the undisputed position by evidence adduced that the deceased was aged 25 years and noting that the statutory mandatory retirement age is 60, and while cognizant of the vicissitudes of life including in fact that one is never assured of continuous employment, prospects of death prior to attaining the retirement age and the principles that damages are not intended to enrich but to compensate, together with the fact that the payment would be an accelerated payment capable of being invested to earn and grow, I adopt a multiplier of 19 years. I come to this figure well aware that ultimately the goal is to award a fair and just figure as to appear compensatory

25. On dependency ratio, it is a fact and trite law that dependency is a matter of fact to be proved by evidence. While the plaintiff, as father to the deceased, even with accepted expectation of support from the deceased^[4], needed to prove how the deceased provided for him and the mother, such was not expected of the minor offspring to the deceased. I hold the opinion that it is a legal duty upon a parent to provide for the child or children. Such obligations are indeed constitutional and statutory established. One only need to refer to article 53 (1) e and (2) of the constitution and the provisions of children's Act, PART III to know that such an obligation is imposed as a matter of law and need no proof under section 60 of the Evidence Act.

26. There was also the uncontroverted evidence that the only child to the deceased was barely 3 month at the time the mother died. That is a fact that ought to be taken into consideration in settling on the years of dependency for the child upon the mother. Taking into account all factors, including the ages of the plaintiff and his wife, the fact that parents in the african set-ups expect support from children, and as said before, the vicissitudes of life, I adopt a multiplier of 19 years and a dependency ratio of 2/3.

27. Having done so, the damages under this heading works out as follows:-

$$110,000 \times 19 \times 12 \times 2/3 = 16,720,000/=$$

28. In making this award, I have taken into account the other awards already made and noting that the plaintiff sued for both his own benefit and the benefit of other dependants and the estate. There was submissions by the 2nd defendant that the amount payable under Law Reform Act should be deducted from those made payable under the Fatal Accident Act.

29. For that proposition and submission the 2nd defendant cited the decision in **Maina Kamaru & Another vs Joseph Mwiuki Wayondo Nairobi CACA No. 14 of 1989** delivered on 11/7/1995. In that decision the Court of Appeal said:-

“This doesn't mean that damages can be recovered twice over but that if damages recovered under Law Reform delves on the dependants, the same must be taken into account in reduction of the damages recoverable under the fatal Accidents Act”.

30. In coming to that conclusion the court relied on a decision of the House of Lords^[5] which merely said that an award under one Act be taken into account in considering award under the other. Even though that judgment was made later than the often cited decision in **Kenfron Africa vs Labia No. 2 [1985] eKLR** dated 27/2/1985, on my part I find the decision in Kefro case more educating. It is to me more reasoned and gives a justification for the existence of the provisions of section 2(5) of the Law Reform Act including the practical circumstances in the United Kingdom that could have informed the decision in **Davies & Another vs Panel Duffryn Associated Cocleries Ltd (1942) All EKR**. I am in particular more educated and feel bound by the enunciation by the leading judgment, Kneller JA, when the judge said:-

“The law commission in England proposed that (a) damages for loss of expectation of life be abolished and (b) there should be

no deduction from the damages under fatal accident Act in respect of benefits received from the deceased's estate. The courts there await any consequent changes that parliament may make in the law. We have a Law Reform Commission in Kenya and it has not made such a recommendation and nor has our parliament changed the law so, in my view, it would not be right for this court to do so".

31. That decision was concurred with by the other two judges of the court with Nyarangi J.A. on his part observing:-

"The Judge said that he was anxious that the awards do not overlap and there would be no double compensation. That was a correct direction having regard to the Law Reform Act, to the Fatal Accident Act and to the facts. There can be no question of this disturbing the award, which in the circumstances is modest".

32. Even judge Chesoni, JA, was not in disagreement with his brothers.

On his part he proceeded and placed the burden at the doorsteps of the defendant to prove that the damages under both acts were to go to the same persons. He was more succinct on the interpretation to be given to section 2(5) Law Reform Act when he said:-

"To be taken into account and to be deducted are two different things. The words used in Section 4(2) of the Fatal Accidents are taken into account. The section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the court shows that in reaching the figure awarded, under Fatal Accidents Act, the trial judge bore in mind or considered what had been awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in mathematical deduction as suggested by Mr. Barasa".

33. Being so guided, I have hereto before said and now repeat, that in coming to the multiplier I adopted, and even the dependency ration, I took into account and kept my mind awake to the sum I had awarded under the Law Reform Act.

34. Consequently the awards made to the plaintiff work out as follows:-

Special damages	60,200.00
Pains & suffering	60,000.00
Loss of expectation of life	150,000.00
Lost dependency	<u>16,720,000.00</u>
TOTAL	16,990,200.00
Less 10% contribution by the	
Plaintiff	(1,699,020.00)
Balance due to plaintiff on the decree	15,291,180.00
Damages due from 1st Defendant (75%)	12,742,650.00
Damages due from the 2nd Defendant	
(15%)	2,548,530.00

35. I award interest to the plaintiff on special damages to be calculated from the date of the suit while interest on general damages shall be calculated from the date of this judgment.

36. I award to the plaintiff the costs of the suit which shall be subjected to the agreed contribution ratios and payable by the defendant on the basis of their respective liability.

Dated and delivered at Mombasa this 22nd day of June 2018.

P.J.O. OTIENO

JUDGE

[1] As for loss of life expectation, my review of authorities shows that the first time an award of Ksh. 100,000/= was made by Kenyan courts was by Justice Apaloo, then a Judge of the Court of Appeal in 1986. Many years later our courts are still awarding the same amount which

for a long time has been taken as a conventional sum. In my view, time has come for our courts to consider inflation and adjust damages under the said head upwards.

Per Mativo j, in *David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another* [2016] eKLR

[2] *CECILIA W. MWANGI & another v RUTH W. MWANGI* [1997] eKLR

[3] Section 60, Evidence act

[4] “the fact of the matter is, however, that today parents in kenya do expect their children when adults to help their parents if they need it”
Per Kneller JA in *Hassan vs Nathan mwangi kamau(1986) KLR 457*

[5] *Davies & Another vs Panel Duffryn Associated Cocleries Ltd (1942) All EKR.*