



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R MWONGO, PJ)

MILIMANI LAW COURTS

CIVIL SUIT NO. 241 OF 2014

HENRY MORUKA MONG'ARE

(Suing as the personal representative of the estate of

JUSTIN MATUNDURA MONG'ARE (Deceased).....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES CATHOLIC DIOCESE OF NAIROBI.....1ST DEFENDANT

DAVID NJENGA.....2ND DEFENDANT

JUDGMENT

1. This matter comes up only for assessment of damages a consent judgment, dated 10th March, 2017, having been entered into by the parties. Under the consent, liability was apportioned at 80%:20% in favour of the plaintiff.

2. The plaintiff, suing as the personal representative of the estate of the late Justin Matundura Mong'are, is the deceased's father. He states in his plaint that on or about 3rd August, 2013 the deceased was lawfully walking along the Southern By-Pass Road, near Lenana School. He was off the road on the verge when he was fatally knocked down by vehicle registration number KAP 619A. He blames the accident on the negligent management and control of the said vehicle by the 2nd defendant, his driver, agent and or servant. He blames the 1st defendant as vicariously liable.

3. In the plaint, the plaintiff seeks judgment as against the defendants for:

a . Special damages of Kshs. 240,300.00.

b. General damages to be assessed by the Honourable Court as per paragraph 6 (a) & (b) of the plaint.

c. Costs of and incidental to this suit.

d. Any other relief that this Honourable Court may deem fit and just to grant."

4. On behalf of the estate, the plaintiff claims damages for lost years under the **Law Reform Act**. The plaintiff has set out particulars of special damages under various headings to the tune of Kshs. 240, 300.00; and also seeks for damages under the **Fatal Accident Act** and the **Law Reform Act**.

5. The 1st defendant did not enter appearance. The 2nd defendant filed his defence dated 1st October, 2014. Whilst not disputing that an accident occurred, the 2nd defendant attributes it to the negligence of the deceased. He states that the deceased negligently failed to ascertain whether it was safe to cross the road leading to his demise.

6. At the hearing, the plaintiff testified that, at the time of his death, the deceased as an employee of China Road and Bridge Corporation. The deceased's gross monthly salary was Kshs. 34,797.00 or thereabouts, as exhibited in some three salary slips for April, May and July all for

the year 2013. According to PW1 the deceased was 27 years old and financially contributed towards the family.

7. In cross examination, the plaintiff however could not explain the discrepancies in the salary as contained therein

8. No witnesses were called for the defence.

Discussion and Analysis

Awards under the Law Reform Act and the Fatal Accident Act

9. In the case of **Mary Njeri Murigi v Peter Macharia & another [2016] e KLR** Aburili J., observed as follows on this head of the awards:

‘...under Law Reform Act, damages are awardable pursuant to Section 2(5) of the Act which provides that: “(5) the right conferred by this part of the benefit of the estates of deceased persons shall, in addition to and not on derogation of any rights conferred on dependants under the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom.”

*In the United Kingdom, the applicable law and principles are common law jurisprudence as adopted and applied by Kenyan courts. Thus, under the Law Reform Act, the courts are entitled to award damages for pain and suffering by the deceased and loss of expectation of life. The correct mode of assessing damages under the Law Reform Act is that the net benefit inherited by the dependants under the Law Reform Act must be taken into account in respect of damages awarded under the Fatal Accidents Act because the loss suffered under the Fatal Accidents Act must be offset by the gain from the estate of the deceased under the Law Reform Act (see *Kemfro Africa T/A Meru Express Service & 2 Others V D.M Lubia [1982-88] I KAR 727.**

10. At the time of his death, the deceased was 27 years old. According to the plaintiff, he was survived by his father, the plaintiff, his mother Miriam Nyaboke Nchora and siblings. He contributed financially towards the family. He however did not have a family of his own. Although there was a letter from the Chief, Emeronka Sub-location, confirming the names of his mother and father, there was no proof of his siblings.

11. From documents exhibited in the plaintiff’s list of documents, there are three pay slips. They show that for the month of April, 2013, the deceased earned a net pay of Kshs. 28,994.14; for May, 2013, he earned Kshs. 30,725.42 and in July, 2013, the deceased earned a net pay of Kshs. 32,017.84.

12. A careful perusal of the pay-slips shows that the payment rate for each month was pegged on the hours that he worked. In April, 2013, the hours are 352 and the rate is 83.26; in May, 2013 the hours are 380 and the rate 83.26; and in July, 2013 the hours are 397 and rate is 83.26. This explains the differentials and nothing much is to be made of them. It is sufficient that an average gross earning per month be adopted. The average hours are $380 + 352 + 397 \div 3 = 31,333.50$ per month. Better still, for purposes of the calculation of loss of earnings, to use the average net earnings.

13. The plaintiff urged that the deceased would have worked until his retirement age of 60 years. He thus had another 33 years of service. The 2nd defendant on the other hand urged the court to consider that the deceased would have worked for another 20 years.

14. It was urged, with regard to determining a dependency ratio, that the court should adopt a ratio of $\frac{1}{2}$ since the plaintiff was unmarried. On this, the 2nd defendant stated that given that the deceased was single, and no particulars of other dependents have been established, save for the plaintiff, then a dependency ratio of $\frac{1}{3}$ should be adopted.

15. On this head, I would reiterate the words of Ringera J, in **Republic v Leonard O. Ekisa & Another v Major Birgen [2005] e KLR**, where he aptly stated that:

‘...there is no line of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.

In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependants, the life expected, length of dependency, the lassitude of life and factor accelerated by payment in lump sum (Hannah Wangaturi Moche & Another vs. Nelson Waga (Nairobi HCCC No. 4533 of 1993)

16. Under the head of loss of dependency, I am guided by the court in **Albert Odawa v Gichimu Gichenji Nakuru HCCA 15/2003 [2007] e KLR** where Ringera J., in arriving at a figure that would be adequate as to damages stated that:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy and the expected length of the dependancy are knowable with undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something courts of justice never do.”

17. In **Stella Kanini Jackson & Another v Kenya Power & Lighting Company Ltd [2012] eKLR** this court adopted the position taken by Ojwang’ J, (as he then was) in **Berly Bertha Malowa Were (Administrator) v Kenya Ports Authority Mombasa HCCC No 246 of 2009**

in finding that the retirement age, based on a government circular, would be 60 years. I am inclined to follow those authorities, and find that the deceased had 33 years of working life remaining.

18. In my assessment, the court should take the following into consideration: the age of the deceased, an average figure of his net earnings, and a ratio that has been proved in terms of dependency. The court ought to consider the kind of work that the deceased was doing and the fact that he would earn according to the hours that he has billed. I would calculate the figure for loss of dependency under the Fatal Accidents Act as follows: $31,333.50 \times 12 \times 33 \times \frac{1}{2} = 6,204,033$

19. I think an award of Kshs. 6,204,033 would be appropriate under this head.

Pain and Suffering and loss of expectation of life

20. Under the head of loss of expectation of life, it is trite that it is usual to award a standard figure. My view is that a figure of Kshs. 100,000.00 would suffice under this head. See **Mary Njeri Murigi v Peter Macharia & Another** (*Supra*). As regards loss of expectation of life, a global figure of Kshs. 100,000.00

21. For pain and suffering the award is made in consideration of the amount of pain and suffering the deceased underwent before he died. It was shown from the death certificate that the deceased died the same day. Absent further evidence, it can only be assumed that he died instantly. I would award Kshs 10,000, under this head

Special Damages

22. Under this head, the Court of Appeal in the case of **Capital Fish Kenya Limited v. The Kenya Power & Lighting Company Limited [2016] eKLR** aptly observed that:

‘... it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs. Sifa International Limited (2016) e KLR, Macharia & Waiguru vs. Muranga Municipal Council & Another (2014) e KLR and Provincial Insurance Co. EA Ltd vs. Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that;

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”

23. From the documents on record, the claim under this head and which have been proved can be computed as follows:

(a) Mortuary fees	-	Kshs.	12,000.00
(b) K.R.A motor vehicle search-		Kshs.	500.00
(c) Death Certificate	-	Kshs.	250.00
(d) Letters of Administration Ad Litem-		Kshs.	25,000.00
(e) Coffin	-	Kshs.	35,000.00
(f) Burial expenses	-	Kshs.	80,450.00
Total		Kshs.	153,200.00

24. The plaintiff produced a receipt dated 29/8/13 for Kshs. 90,000.00. There is no explanation as to what the money was spent on. As stated above and in the cited authority, special damages have to be pleaded with specificity. It is not enough to simply produce a document. The documents must be evidence of what is covered. See **Benham Carler v Hyde Park Limited [1948] 64 JLR 177**. In other words, they have to be proved. Having perused the receipts, I award special damages of Kshs. 153,200.00 which have been proved.

25. Since the beneficiaries under are the same under the Law Reform Act and the Fatal Accidents Act are the same, and as such the claim for lost years and dependency will go to the same persons, the court cannot award a double compensation.

Disposition

26. As against the 2nd Defendant, liability attaches in the ratio of 80%:20% in accordance with the consent entered between them. As against the 1st Defendant, there having been no defence filed and judgment in default thereof having been entered, I find liability against them equally.

27. Given all the foregoing, I enter judgment as against the defendants jointly and severally in the following terms:

