



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 519 OF 2011

1. BEATRICE OPIYO SHIKUKU

2. HESBON ANDITI OCHIENG.....PLAINTIFFS

VERSUS

ROYAL HISHAM LIMITED.....DEFENDANT

R U L I N G

1. The plaintiff a female adult Kenyan of sound mind as the legal representative of the Estate of Boniface Ochieng Onginjo sued the defendant, a limited liability seeking both general and special damages alleged and pleaded to arise from a road traffic accident pleaded to have occurred on the 23/3/2011 along Terminal Road junction at the port of Mombasa in which the deceased was knocked down by the defendant motor vehicle Registration No. KAX 258.5 occasioning to him severe bodily injuries to which the deceased succumbed thereafter.

2. By consent, the parties agreed that liability be apportioned between the plaintiff and the defendant at 95:5%, in favour of the plaintiff, with the implication that the defendant shall shoulder 95% of the blame while the plaintiff bears 5%. What therefore remains for the determination of the court is the quantum of damages payable by the defendant to the plaintiff.

3. In the plaint filed in this matter the plaintiff has prayed for damages under the Law Reform Act as well as under Fatal Accidents Act. The parties have filed written submissions and both agree on the heads under which the damages are awardable. What stands out as in dispute is the sums under each head. I have read and taken into account the submissions by both sides and I will proceed straight to the task of assessing damages due and payable. I will make my determination under the two statutes with clear understanding that the task of assessment of damages is a matter in exercise of judicial discretion and that no amount of damages is sufficient to adequately compensate a family and loved ones from the lost life.

4. What a court does is to try and make an award that would in monetary terms, assuage, and comfort the dependents of the deceased to something near the comfort the deceased would have provided if not for the death. In doing that however the court operates in a social context and must always appreciate that damages must be kept within limits capable of being accommodated and absorbed by the economy without adverse effects.

Damages under the Law Reform Act

5. These are damages that are due to the estate of the deceased as opposed to the dependants. Under the

statute damages are due under the headings; pains and suffering where the death is not instant, loss of expectation of life and special damages.

Pains and Suffering

6. The deceased is, by evidence proved to have been knocked at the port and rushed to hospital in a port ambulance but was pronounced dead thereafter. The Plaintiff when notified and rushed to hospital found him being attended to. I find, and the parties also agree, that the death was not instant hence damages under this heading are due and payable. The plaintiff has cited decisions in which awards under this heading range between Kshs.10,000/= and 20,000/=. To this Court there are no strictures on the sum a judge must award under this head. I hold the view that the length of time taken between the time of injury and death and how the injury was inflicted are all relevant factors. Like in this case, the deceased is said to have been crushed against a stationary container. He met his death by being pressed between two hard metals and he must have stared at the bus approach and so crush him. One cannot help imagining how traumatic and excruciating the resultant pain felt as the deceased struggled for dear life before death. This is a matter that had the plaintiff sought a higher sum, some I would not have hesitated to award upto Kshs.50,000/=. However the plaintiff has only ask for Kshs.20,000/= which I consider very modest and reasonable. I award to him that sum.

Loss of expectation of life

7. Even under this heading a court is free to award a sum considered just and reasonable regard being had to the age of the deceased at death. Although some judicial minds have termed the award to merit being made on conventional basis, I do not think that there is any conventional sum that must be awarded. It remains in the realm of judicial discretion. My reading of decided cases reveal that the awards under this heading is varied from one judicial officer to another and ranges from as low as Kshs.50,000/= to Kshs.200,000/=. That variation underscores the fact that it is an award out of judicial discretion. On my part and taking into account the age of the deceased and the ages of some of the decision cited and the fact that there is also earnings claimed under Fatal Accidents Act, I award to the plaintiff a sum of Kshs.100,000/=.

Special damages

8. The law remains that special damages must be specifically pleaded and strictly proved. The plaint has particularized the special damages and sought a sum of Kshs.93,232. Of the particulars, cost of police obstruct, motor vehicle registration search and the costs of obtaining a grant are to this court matter in the domain of judicial notice being matters of local notoriety. I take the same to require no proof under section 60(1) o of the Evidence Act. That leaves the question whether the claim of Kshs.82,132 pleaded as funeral expenses have been proved by evidence. There are documents which were produced at trial by consent as follows:-

| | |
|---------------------------------------|-----------------------------|
| (i) Transport agreement | Kshs.37,000/= |
| (ii) Gatitu Funeral Services | Kshs.25,000/= |
| (iii) Pandya hospital | Kshs.19,000/= |
| (iv) African Cargo Holding Ltd | <u>Kshs. 4,632/=</u> |

Total **Kshs.85,632/=**

9. It is therefore evident that evidence of expenses as proved by Receipts exceed the sum pleaded. I am not in doubt that the plaintiff is entitled to the sum of Kshs.93,236/= which I award as special damages.

DAMAGES UNDER FATAL ACCIDENTS ACT

10. Damages under this statute are intended for the benefit of the dependants. For this case the deceased had an established income, and his age is not in dispute. This is therefore a clear case to adopt the multiplier/multiplicand formula. However before I go to the calculations there is an issue raised by the defendant in the submissions to the effect that although the monthly income of the deceased is known, this court should use the net income rather than the gross income as the multiplicand.

11. The law as I understand it is that only statutory deductions not capable of deriving direct benefit to the income earner are not available for his use upon the dependants. To me, therefore, of all the deductions disclosed in the payslip for the month of February 2011 only income tax represent a deduction that was not directly available to be recouped by the deceased and his dependants.

12. The rest like loan repayments, cooperative share contributions as well as NSSF, Pension and NHIF were also deductions towards savings or medical and retirement schemes that had the deceased lived would be available for him to recoup either directly by retirement or indirectly by services like medical access. To me therefore for the gross salary of 66,627 only the income tax of Kshs.13,145 is deductible to set the multiplicand. That give me a sum of Kshs.53,482[66,627-13,145]. I will employ that sum as the multiplicand.

13. On the multiplier the deceased was aged 36 and was employed with a reputable and international fuel brand distributor. All things remaining constant he would have lived to retire at the statutory age of 60 years. However, regard being had to the imponderables and vicissitudes of life and while employing my discretion in fixing or choice of a multiplier I take 22 years.

14. On dependency ration, the evidence on record is that the deceased was married to the plaintiff who was a house wife and with whom they had four (4) children all aged between 12 and 5 years. All were minors at the time the deceased lost his life. The evidence by the plaintiff, that was never controverted, was that the deceased availed all provisions and family needs. In such circumstances, as both parties concur that the dependency ration should be 2/3, I adopt that to be ratio here.

15. I only wish to point out that there are many a situations in this county and I believe elsewhere, where a sole bread winner is totally unable to spare a whole 1/3 of his income for self. Like in the present case if the deceased lived with his family and provided all their needs it cannot be, with mathematical precision, said that he could only devote upto 2/3 only for their dependency on him. It may be different where the deceased lived separate for the family. Nothing stops one from devoting more. To this court dependency is a factual matter which in many situations and with due diligence in adducing evidence for such claims, it is not abstract to say that one may devote entire income to his dependants. I will however, well disabused of any notion that there is a rule sealing the dependency ratio at 2/3, adopt that ratio as the applicable one here.

16. Accordingly therefore, the workings for loss of dependency based on the above determined parameters would work out as follows:-

$$53,482 \times 22 \times 12 \times 2/3 = 9,412,832$$

17. Incoming to this figure I have taken into account the fact that I have earlier on awarded to the plaintiff sums under the Law Reform Act. I have taken account of that fact and the award itself and I am guided that the awards under both Accounts are in addition and never in derogation from each other. I decline to be persuaded that arithmetic deduction is desirable or advisable as submitted by the defendant.

18. In summary, I enter judgment for the plaintiff against the defendant in the sum of Kshs.9,626,064 made up as follows:-

Pains & suffering **Kshs. 20,000/=**

Loss of expectation of life **Kshs. 100,000/=**

Loss of dependency **Kshs. 9,412,832/=**

Special damages **Kshs. 93,232/=**

19. This sum when subjected to the agreed apportionment of liability works out:-

$$9,626,046 - (9,626,046 \times 5\% = 481,303) = 9,144,760$$

20. That sum will attract interest at court rates from the date of filing the suit till payment in full. I also award to the plaintiff the costs of this suit and interest thereon at court rates.

21. It is so ordered.

Dated and delivered at **Mombasa** this **23rd** day of **March 2017**.

HON. P. J. O. OTIENO

JUDGE