



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 101 OF 2012

T M (Minor)

and

N N (Minor) suing through the mother and next friend

D K M.....PLAINTIFF

VERSUS

MOSES KINYUA MURIUKI.....DEFENDANT

CONSOLIDATED WITH

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO 102 OF 2012

D K M (suing on behalf of the Estate of

A G G (Deceased).....PLAINTIFF

VERSUS

MOSES KINYUA MURIUKI.....DEFENDANT

AND

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 103 OF 2012

D K M.....PLAINTIFF

VERSUS

MOSES KINYUA MURIUKI.....DEFENDANT

JUDGEMENT

1. The three cases were consolidated and tried as one case under High Civil Case No. 101 of 2012.

They raise one common issue of law namely liability. The consolidation is authorized by Order 1 rule 1 of the 2010 Civil Procedure Rules. The three cases arise out of one motor vehicular accident in which the plaintiff's husband died and their two minor children sustained injuries.

2. This procedure of consolidating suits is advantageous as it avoids trials of a multiplicity of suits.

The Evidentiary Basis of the Plaintiffs' Cases on Liability:

3. The plaintiffs' claim against the defendant is for general damages, costs of the suit and interest. It is based on alleged negligence, whose particulars include, amongst others, driving at an excessive speed, driving without due care and attention and failing to keep a proper look out and failing to have regard for other road users.
4. The only witness who gave evidence in support of the plaintiffs' cases is Mrs D K M (PW 1). PW 1 adopted all her witness statements as her evidence. Her evidence is that on 8th March, 2011, they were travelling as passengers in their Toyota Station Wagon registration No. KAZ 242T along Embu – Mwea heading towards Meru. Her deceased husband was driving the said vehicle. When they approached Nyangali Secondary School, she saw a Nissan Matatu motor vehicle registration No. KAB 226S driven at a very high speed from the opposite direction from Meru towards Nairobi.
5. The matatu motor vehicle suddenly veered from its lane and entered the lane of the deceased. As a result it collided with their motor vehicle. Following the collision the deceased was injured in the head. According to her, her husband was not able to take avoiding action because next to his side was a trench. The plaintiff was travelling in their vehicle with their two children namely T M G and N N G (now the co-plaintiffs).
6. Furthermore, PW 1 stated that she was injured on the head, back and chest. T M sustained a cut on the lips and head. N N was injured in the neck and face. As a result of the injuries they sustained, PW 1 and their two minor children were taken to Kimbimbi Health Centre. They were given first aid and then transferred to Kerugoya District Hospital, where they were admitted for one day. They were then transferred to Aga Khan Hospital where they were admitted for a week. PW 1 while at Kerugoya District Hospital learned that her husband had died at the scene of the accident.

Injuries Sustained by Mrs Damaris Kanario Mureithi (PW 1)

7. A medical report of D K M (PW 1) was put in by consent as exhibit P ex. A. It was prepared by Dr. John Elijah Thiong'o after examining her on 21st March 2021. The doctor found that PW 1 had a right parietal scar measuring 5 cm, chest pain and also had a limited right shoulder movement due to pain. In his opinion, PW 1 was incapacitated for two weeks and was partially. The examining doctor concluded that PW 1 could not perform her duties effectively as a widowed mother.

Injuries Sustained by T M G:

8. Dr John Elijah Thiong'o also examined T M G on 21st March, 2012. He prepared a report which was put in by consent as exhibit P ex B. The patient complained of:
 - Deep cut wound on the upper lip.
 - Bruises on the face
 - Laceration on the tongue
 - Loss of 3 upper milk incisors
9. The doctor found that the patient had "*inverted L scar at nasalis base extending to left upper lip.*" The doctor also found that the patient was resuscitated and admitted for eight days after sustaining grievous harm of maxillo facial leaving ugly scars. On the date of examination the patient had no complaints

Injuries Sustained by N N G:

10. According to Dr John Elijah Thiong'o, the patient had pain in the neck. Upon examination, she was found to have traumatic torticollis. And by the time of examination on 21st March, 2012, she was found to have no complaints. Her report was put in by consent as exhibit P ex.C

The Plaintiffs' Submissions:

11. Counsel for the plaintiffs submitted that the defendant is wholly liable in negligence on the issue of liability. They have pointed out that only the plaintiff (PW 1) gave evidence, which they submitted was credible and uncontroverted. According to PW 1, the defendant while driving towards Nairobi veered and drove onto the lane of the plaintiffs. As a result, he collided with the plaintiffs' motor vehicle.
12. Furthermore, as regards quantum, counsel for the plaintiffs submitted that the two minor children who are plaintiffs in Embu High Court Civil Case No. 101 of 2012 are each entitled to compensation in the sum of Kshs 500,000/- for pain and suffering. Counsel cited **Anthony Keriga Mogesi v. Florence Nyomenda Tumbo, HCCA No 147 of 2012 (at Kisii)**, in support of his submission.
13. Counsel submitted that a sum of Kshs 300,000/- would be adequate compensation for D K M in respect of her pain and suffering. She is the plaintiff in Embu High Court Civil Case No **103 of 2012, D K M v. Moses Kinyua Muriuki**.
14. Finally, counsel submitted that the estate of the deceased Abraham Gitonga Gichaara in Embu High Court Civil Case No. 102 of 2012 is entitled to a sum of Kshs 14,368,000/- as general damages which is made up as follows:

Kshs 89,800 (monthly salary) x 12 (months in a year) x 20 (years to retirement) x 2/3 (rate of dependency) = Kshs 14,368,000/-

Counsel relied on Stella Kamini Jackson v. Titus Mutisya, HCCC No 338 of 2010 (at Mombasa).

Evidentiary Basis of the Defendant's Case

15. Counsel for the defendant submitted that their client did not give any evidence during the hearing. He therefore conceded that their client was 100% liable in negligence.
16. According to counsel, the only issue for determination was the quantum of damages to be awarded to each plaintiff and to the estate of the deceased. In this regard, counsel urged the court to take into account that the three plaintiffs suffered soft tissue injuries. According to counsel, each of the three plaintiffs is entitled to Kshs 50,000/- as general damages which comes to a total of Kshs 150,000/-
17. Furthermore, counsel submitted that the estate of the deceased is entitled to Kshs 11,068,500/- made up as follows:
 - a. Pain and suffering – deceased died on the spot – No award.
 - b. Loss of expectation of life – Ksh 100,000/- convention figure is fair
 - c. Dependency ratio – Two thirds (2/3)
 - d. Multiplier – 20 years
 - e. Multiplicand – Ksh 68,250/- (the net salary).
 - f. Special damages – agreed by consent at Ksh 48,500/- during hearing.

The award therefore works as follows for loss of dependency

$68,250 \times 20 \times 12 \times 2/3 = \text{Ksh } 10,920.00/-$

The summary of the award therefore is as follows:

- | | | |
|--|---|--------------------------|
| i. Loss of dependency | - | Ksh. 10,920,000/- |
| ii. Loss of expectation of life | - | Ksh 100,000/- |
| iii. Special damages | - | Ksh 48,500/- |

Total Ksh 10,920,000 + 100,000 + 48,500

- Ksh 11,068,500/-

18. Counsel relied on *Ann Wanjiku Ngugi & another v. The Hon. The Attorney General, HCCA No. 694 of 2004 (at Nyeri)* and *Teresia Njoki Mwangi v. Elizabeth Wanjiku Kimani, HCCA No. 162 of 2002 (at Nyeri)*.

19. Finally, counsel for defendant conceded that the plaintiffs are entitled to the costs of the suit.

Evaluation of the Evidence, Findings and the Applicable Law:

20. There are three main issues that fall for consideration in these cases. These are the issues of liability, quantum of general damages to be awarded and costs of the suit. As regards the issue of liability, the only evidence tendered was that of the plaintiff (PW 1). According to PW 1, her deceased husband was driving along Embu -Mwea Road towards Meru, while the defendant was driving in the opposite direction towards Nairobi.

21. It is her further evidence that the defendant's motor vehicle was driven at a high speed and it was fully loaded to the extent that a bicycle was tied on top of the load it was carrying on the **rack**. The offending motor vehicle drove into the lane of the deceased. The deceased had no where to swerve to as he was next to a trench. As a result, the offending motor vehicle collided with that of the deceased, killing the latter on the spot. The plaintiff and her two minor children sustained soft tissue injuries.

22. I believe the evidence of the plaintiff, which I find credible. It therefore follows that the defendant is totally to be blamed for the fatal accident. The defendant is therefore a hundred per cent (100%) liable in negligence. In the circumstances, I find myself in agreement with the counsel for the defendant that their client is to blame for the accident.

23. The next issue that falls for consideration is one of quantum of general damages for the three plaintiffs who sustained soft tissue injuries.

24. I will start with the then nine years old T M G who is a plaintiff in HCC No 101 of 2012. He was examined by Dr J.E. Thiong'o on 21st March, 2012. The patient complained of:

- Deep cut wound on the upper lip.
- Bruises on the face.
- Laceration on the tongue.
- Loss of 3 upper milk teeth.

Upon examination the doctor found that T M G had an “*inverted L scar at nasalis base extending to left upper lip.*” According to the doctor, T M G had no complaints. In his opinion, the patient was resuscitated and admitted for 8 days after sustaining grievous harm of maxillo facial leaving ugly scars.

25. Furthermore, counsel for the plaintiff (T M G) has urged the court to award him Kshs 500,000/- as general damages for pain and suffering. He has relied on the authorities cited in the foregoing paragraphs.

26. Counsel for the defendant on the other hand has urged the court to award Ksh 50,000/- as general damages. According to him, the plaintiff suffered soft tissue injuries. He relied on the authorities cited in the following paragraphs.

The plaintiff T M G suffered soft tissue injuries which have now healed. According to the examining doctor, the plaintiff suffered grievous harm of maxillo facial leaving ugly scars. These are permanent disabilities. I bear in mind that the plaintiff suffered pain and deep cut wounds, in regard to which he was hospitalized for 8 days.

27. After considering these injuries and submissions of both counsel, I find that the authorities cited by counsel for the plaintiff are distinguishable from the instant case. I find that the injuries suffered by the respondent in Kisii HCCA No 147 of 2012 are more serious than in the instant case.

28. After considering the injuries and pain suffered by the plaintiff and bearing in mind the incidence of inflation, I find that this first plaintiff is entitled to an award of Kshs 60,000 as general

damages.

29. In respect of the second plaintiff (N N G) counsel has also urged the court to award their client Kshs 500,000/- as general damages for pain and suffering. This plaintiff complained of pain in the neck.
30. The examining doctor (Dr J.E Thiong'o) found that she had traumatic torticollis. He also found that the patient had been admitted for 8 days in hospital and as of 21st March, 2012, the patient had no complaints.
31. Finally, the doctor was of the opinion that the patient suffered soft tissue injuries in the neck, which necessitated her being given strong analgesics for two months. Her counsel have urged the court to award Kshs 500,000/- while counsel for the defendant submits that a sum of Ksh 50,000/- as general damages is reasonable and adequate.
32. I have taken into account that this plaintiff suffered pain and soft tissue injuries and was admitted for 8 days. I also take into account that the patient has healed with no complaints.
33. After considering all these matters and bearing in mind the submissions of both counsel and the incidence of inflation, I hereby award Kshs 60,000 as general damages.
34. I now turn to the third plaintiff (D K G). Her counsel has urged the court to award Ksh 300,000/- as general damages for pain and suffering. According to Dr J.E Thiong'o who examined her on 21st March, 2012, this plaintiff complained of:

- Chest pain.
- Pain on the right hand.

35. Upon examination, the doctor found that this plaintiff had:

- Right parietal scar measuring 5 cm
- Chest pain
- Limited right shoulder movement due to pain.

36. In the opinion of the examining doctor, this plaintiff was incapacitated for two weeks and was partially incapacitated up to the time of examination. According to the doctor, the plaintiff cannot perform her duties effectively as a widow and a mother.
37. I have taken into account the injuries suffered by this plaintiff. I find that they are soft tissue injuries but with a resulting disability namely a limited right shoulder movement due to pain. This, the doctor says, has affected the performance of her duties as a mother of five children.
38. In assessing the general damages awardable to this plaintiff, I have taken into account the nature of the injuries (being soft tissue injuries), the period of incapacity and the partial disability, which has affected the performance of her duties as a widowed mother due to the limited right shoulder movement of her arm. I have also borne in mind the incidence of inflation. In the circumstances, I hereby award a sum of Ksh 70,000/- as general damages which I find to be a reasonable compensation.
39. In assessing the general damages to be awarded to the estate of the deceased, issues of the multiplier, multiplicand, dependency ratio, net income of the deceased and the possibility of the widow being re-married have to be considered.
40. The deceased was aged 40 years by the time he died in this fatal accident. He could have worked up to the current retirement age of 60 years. It therefore follows that the multiplier is 20 years. The multiplicand is determined by reference to the net income of the deceased. The net income of the deceased per month was Kshs 68,250/- according to his pay slip of February, 2011.
41. Furthermore, the dependency ratio commonly used according to *Nyokabi v. Public Trustee (1965) EA 530* is two thirds (2/3) which I find is appropriate in the instant case.
42. It was submitted by counsel for the defendant that there was a possibility of this 40 year old widow being re-married. He therefore urged the court to discount a sum of Ksh 100,000/- from the award of damages. The evidence of the widow (PW 1) in this respect was that she had not been re-married. The defendant did not produce evidence to show that there existed a possibility of the widow being re-married.
43. Although, it is legally in order to take into account the possibility of re-marriage as a ground of discounting the damages awarded, there was no evidence produced by the defendant in that

regard. In the circumstances, I am unable to accept this submission, which I hereby reject.
44.The upshot of the foregoing is that the damages to be awarded are as follows:

Under the Fatal Accident Act (Cap 32) Laws of Kenya

Loss of dependency

Net income x 12 months x 20 years x 2/3

Kshs 68,250 x 12 x 20 x 2/3 = Shs 10,920,000

Add under the Law Reform Act (Cap 26) Laws of Kenya

Under this head, I have considered loss of expectation of life, pain and suffering. In this regard, counsel for the defendant proposed a figure of Kshs 100,000/- being the conventional figure as being fair in respect of loss of expectation of life. As regards damages for pain and suffering, he urged the court not to award any damages because the deceased died on the spot.

45.Counsel for the plaintiff urged the court to award Shs 100,000 for pain and suffering. The evidence of the plaintiff (PW 1) in this regard is that she learned that her husband had passed away at the scene of accident. Her further evidence on the same issue was that her husband was injured in the head during the accident. There is no evidence on how long he took before he died.

46.It is clear that the deceased suffered pain as a result of this accident, before he died. The estate of the deceased is therefore entitled to damages under this head.

47.In the light of the evidence of PW 1, the rival submissions of both counsel and the authority of *Stella Kanini Jackson v. Titus Mutisya, supra*, I hereby award Shs 50,000 as general damages. I am guided in this regard by *Stella Kanini Jackson v. Titus Mutisya, supra*, which I must state is distinguishable.

48.In summary, the amounts awarded herein are as follows:

General damages of Kshs 60,000 for T M G

General damages of Kshs 60,000 for N N G

General damages of Kshs 70,000 for D K M

Add special damages of Kshs 48,500 agreed by consent during the hearing

Add general damages under Fatal Accident Act

Loss of dependency – Kshs 10, 920,000

Also add general damages under Law Reform Act

- Loss of expectation of life - Kshs 50,000.

- Pain and suffering - Kshs 50,000

- Total - **Kshs 11,258,500**

- Less damages under Law Reform Act i.e loss of expectation of life -Kshs 50,000, which is deductible from loss of dependency to avoid double awards.

- Total award - **Kshs 11,208, 500**

49.In the light of the foregoing I hereby enter judgement in favour of the plaintiffs in the sum of Khs

11,208, 500 with costs and interest at court rates.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 18th day of January 2016

In the presence of Mr. Kathungu for the Plaintiffs and in the absence of Mr. Kariuki for the Defendant.

Court clerk Njue

J.M BWONWONGA

JUDGE