



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 73 OF 2012

**JANET SYOKAU OKOYE (The legal representative of the Estate
of Julius Uvyu Mutune (deceased).....APPELLANT**

VERSUS

JAMES ITHAU MATHENDU.....RESPONDENT

JUDGMENT

Introduction

1. According to affidavit of Service sworn by Dickson Musyimi on 6th October 2015, Mention Notice dated 10th August 2015 was given to both the respondent and his counsel that “this matter has been fixed for mention on the 28th day of October 2015 at 9.00 O’clock for the purpose of fixing a date for judgment on the appeal.” The advocate indicated that he was no longer acting for the respondent in the matter and therefore declined to acknowledge receipt of service, while the respondent upon service decline to sign the original mention notice saying that he had a lawyer in the matter.

2. The Court accepted the affidavit of service and proceeded with the matter in the absence of the respondent or his counsel both whom had been duly served. Way back on 14 October 2014 upon advocate Kisaka of Ndonge Advocates for the respondent indicating that they had no instructions and seeking to file an application for leave to cease acting, the court had directed that the application to cease acting be filed within 14 days. As at 28th October 2015 when the matter came for mention for judgment, the respondent’s counsel had not filed the application to cease acting nor had any submissions been filed by or on behalf of the respondent.

3. Accordingly, the appeal proceeded to hearing on 28th October 2015, when the Court reserved judgment for 28th January 2016. The appellant had already filed his set of submissions dated 22nd July 2014. The Court granted leave to the respondents to file submissions within 14 days. On account of workload, judgment was not delivered on the 28th January 2016 and to date no submissions have been filed by the Respondent.

The appeal

4. The Appellant moved court through a Memorandum of Appeal dated 26th June 2012. The appeal was initiated by the appellant against the judgement and decree in CMCC No. 802 of 2008 in Machakos. The

grounds of appeal were that the learned magistrate had erred in law and in fact in declining to award the claim for special damages and in disallowing the plaintiff's claim for lost years/lost earnings.

5. The appellant was therefore praying for orders that the appeal be allowed and the appellant be awarded the sum of Kshs. 26,280 as special damages and Kshs.1,050,000/= for lost years/lost earnings.

6. The appellant filed submissions dated 22.07.14 wherein it was argued that PW1 had specifically proved the claim for special damages and further that on a claim for lost years the magistrate proceeded on a wrong assumption that a claim for lost years was a claim by dependants or a claim under the Fatal Accident Act.

7. Reference was made to the case in *Hassan V Nathan Mwangi Kamau Transporters & 5 Others* (1986) KLR 457 where Kneller J.A set out principles to be considered in such matters as follows:

“My summary of their relevant principles is this:

(i) A parent cannot insure the life of his child

(ii) The death of the victim of the negligence does not increase or reduce the damages for the lost years

(iii) The sum to be awarded is never a conventional one but compensation for a pecuniary loss;

(iv) It must be assessed justly and with moderation;

(v) The complaints of insurance companies at the size of such awards should be ignored;

(vi) Disregard remote inscrutable speculative claims;

(vii) Deduct the victim's living expenses during 'the lost years' for they would not form part of the estate.

(viii) A young child's present or future earning in most cases would be nil;

(ix) An adolescent's would usually be real, assessable and small;

(x) The amount will vary greatly from case to case for it depends on the facts of each one including the victim's station in life;

(xi) Calculate the annual gross loss;

(xii) Apply the multiplier (the estimated number of 'lost working years' accepted as reasonable in each case;

(xiii) Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her; and

(xiv) Living expenses include the reasonable cost of housing, heating, food, clothing, insurance, travelling, holidays, entertainment, social activity and so forth.”

8. The appellant contended that the claim for lost years under the Law Reform Act had been proven and that a multiplier of 50 years was reasonable in the circumstances of the case.

The Facts of the Case

9. The brief facts of the case are that the Plaintiff/Appellant had instituted a suit by filling a plaint dated

8.08.2008. The plaintiff had claimed that on or about 24th day of July 2002, the deceased Julius Uvyu Mutune was travelling as a fare paying passenger on motor vehicle registration number KAB 556Q along Machakos-Kitui road when at Ghetto area or thereabout the defendant, its agent or servant drove vehicle registration number KAB 556Q carelessly and negligently that an accident occurred causing the death of the deceased. The plaintiff brought a suit on behalf of the estate of the deceased and on behalf of the dependants of the deceased. The particulars of the claim were that at the time of his death the deceased was 21 years old, a pastor and business man who earned about Kshs.7,500/= per month.

10. The respondents filed a defence dated 05.05.09 in which he claimed that the plaintiff had no capacity to sue in the proceedings as leave to sue was obtained out of time. He denied being the owner of the said motor vehicle KAB 556Q and denied that the deceased was aboard the said vehicle and put the plaintiff to strict proof. The defendant also put the plaintiff to proof that the deceased had dependants and that he had any quantifiable earnings as pleaded. He also denied that the deceased suffered any fatal injuries, loss or damage.

Evidence before the Court

For the Plaintiff

11. PW1 Julius Uvyu Mutune, a brother to the deceased testified that the deceased had been involved in traffic accident along Machakos-Kitui road on 24.07.02 while aboard motor vehicle KAB 556Q following which the deceased was pronounced dead on arrival at the hospital. He stated that his late brother was a church pastor at AIC earning Ksh.1750 as per the letter dated 05.11.06. Also he said that the deceased was in the cereal selling business which earned him Kshs.20,000/- per month. He however stated that the deceased was not married. He also produced a police abstract of the accident in evidence.

12. PW2, George Mutune Uvyu mother to the deceased. She stated that the deceased died in a road accident involving motor vehicle KAB 556Q whose owner was James Ithau Muthendu. She said that the deceased died at 21 years and was a pastor and a posho mill owner. That the posho mill was a family business. She said that the deceased earned Kshs. 1,750 per month from church and Ksh. 5,500/- per week from the posho mill.

13. PW3 Joseph Ngumba Maluka stated that he was also a passenger on the said motor vehicle KAB 556Q at the time of the accident. He confirmed that the deceased was also aboard the vehicle and that an accident occurred between Makueni and Wamunyu area at Ghetu area. He stated that the vehicle was owned by the defendant and he had also sued him and had been paid. He stated that the deceased had passed away before reaching the hospital.

For the Defence

14. In his defence the defendant stated that indeed he owned the vehicle KAB 556Q; that on 24.07.02 he was driving the vehicle from Machakos to Wamunyu; and that he was neither over speeding nor careless. He testified that the front tyre sustained a tire burst and causing the vehicle to lose control and the accident happened. He claimed that he was not to blame for the accident.

Judgment of the trial Court

15. At the end of the proceedings the learned magistrate found that the doctrine of *res ipsa loquitur* was applicable and found that the defendant was liable for the accident. She however declined to award damages for lost years since the claim was brought under the Law Reform Act and the special damages were not proven. She however awarded Kshs.130,000/= for pain and suffering and loss of expectation of life.

Determination

16. The decision of the Court of Appeal in *Hassan v Nathan Mwangi Kamau Transporters & 4 Others*

(supra) is important in three respects relevant to this case namely that –

1. Damages for lost years are recoverable under the Law Reform Act for the benefit of the Estate of the Deceased.
2. It is an established custom among various African and Asian communities in Kenya that children are expected to provide for their parents. The custom is not repugnant to justice and morality.
3. Where trial court had proceeded on the wrong principles and in so doing, reached an inordinately low estimate on the award of damages for lost years, the appellate court would interfere with the award of damages.

17. Upon re-evaluation of the evidence in this case, I would agree that the doctrine of *res ipsa loquitor* applies and that the defendant is liable for the accident in which the deceased while travelling as a fare paying passenger was fatally injured.

Lost years

18. The principle applicable is that the award of damages under the Law Reform Act in addition to damages under the Fatal Accidents Act is as observed by the Court of Appeal at KISUMU Civil APPEAL NO. 49 OF 2000 (OMOLO, O'KUBASU & KEIWUA, JJ.A.), **DILIP ASAL v. HERMA MUGE, DIOCESE OF ELDORET, CHURCH OF THE PROVINCE OF KENYA [C.P.K.]** set out in the Court's earlier decision in the case of **MAINA KANIARU & ANOTHER V JOSEPHAT MURIUKI WANGONDU, Civil Appeal NO. 14 OF 1989 (unreported) as follows:**

"The rights conferred by Section 2 (5) of the Law Reform Act (Cap 26, Laws of Kenya) for the benefit of the estates of deceased persons are stated to be "in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act". This does not mean that damages can be recovered twice over but that if damages recovered under the Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act."

19. In rejecting the claim for lost years, the learned Magistrate held that-

“Lost years – lost earnings. Plaintiff’s claim is under the Fatal Accident Act. It is brought under the Law reform Act in the Estate of the deceased. A claim for dependence can only be brought by a dependant under section 4 of the Fatal Accident Act. I therefore decline to award the same.”

20. With respect the lost years is, as held in the **MAINA KANIARU** case, a claim on behalf of the estate of the deceased, which is *"in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act"*. The learned Magistrate was plainly wrong. The plaintiff herein had obtained a Limited Grant for the Letters of Administration *ad Litem* on 17th January 2007 and was thus competent to sue on behalf of the Estate under the Law Reform Act.

21. For lost years, letter of confirmation of employment dated 6th November 2006 indicated the deceased salary at Ksh.1750 per month. I consider that the deceased would meet his expenses from his Posho Mill business and I would therefore adopt the figure of Ksh.1750 Making the total annual loss at Ksh.21,000/-. A multiplier of 50 years was suggested on the basis that the deceased father PW2 was at 75 years still strong and working. The Court will however adopt the official retirement age of 60 years taking into account the vicissitudes of life. At the time of his death in 2002, the deceased was 21 years and therefore had 39 years of working life. I would therefore adopt a multiplier of 39 years

22. Accordingly, the calculation of lost years in this case would be $1750 \times 12 \times 39 = \text{Ksh.}819,000/-$.

23. As the damages go to the same dependants under the Fatal Accident Act and the Law Reform Act, the award of Ksh.130,000/- for pain and suffering and loss of expectation of life under the Fatal Accident Act, will be discounted in the total award of damages.

Special damages

24. As regards special damages, the learned magistrate declined to award the same reasoning that the receipt for the same had no revenue stamp. In my view, a revenue stamp does not authenticate the special damages, it only indicates that stamp duty has been paid on the transaction. The special damages herein were for (i) Funeral expenses, at 25,000/-, (ii) application for Grant, 1080/- and (iii) Police Abstract at 200/-. A receipt from the Machakos Funeral home for Ksh.10,100/- dated 2/8/2002 was produced; the Grant of Letters of Administration was produced; and the original Police Abstract dated 29/9/02 was also put in evidence. The Court had clear evidence to award the special damage as claimed as funeral expenses include transport and not only comprise the mortuary fees for which receipt was produced.

Orders

25. Accordingly, for the reasons set out above, the appellant's appeal herein is allowed. There shall be judgment for the plaintiff for general and special damages in the sum of (Ksh819000/-+26280/-) = Ksh.845,280/- with interest from 14th June 2012, the date of Judgment in the trial court and costs in the trial court and in this court.

DATED AND DELIVERED THIS 29TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Appellants

No appearance for the Respondents

Mr. Mutero. - Court Assistant.