



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 158 OF 2008**

**ADAN HUSSEIN ALI AND RAHMA DAHIR**

(SUING AS THE PERSONAL AND LEGAL REPRESENTATIVES OF

THE ESTATE OF AHMED HUSSEIN ALIO (DECEASED).....PLAINTIFFS

**VERSUS**

**GEOFFREY NDIKU MUTISYA**

**A.H. HAMEED TRADERS.....DEFENDANTS**

**JUDGMENT**

1. This is a fatal road traffic accident case. The Plaintiffs claimed in the plaint that the accident occurred on 7<sup>th</sup> May, 2007 along Nairobi Mombasa road near Mto Mawe at about 11.00 pm. That while the deceased was lawfully standing along the said road, he was hit by the 2<sup>nd</sup> Defendant's motor vehicle registration number KAT 422D. The Plaintiffs attributed negligence to the 1<sup>st</sup> Defendant. They claimed general damages under the Fatal Accidents Act (Cap. 31) and the Law Reforms Act (Cap. 26), special damages of KShs. 103,700/= and interest and costs.
2. Service of the plaint and summons to enter appearance were served upon the Defendants but they failed to enter appearance whereby interlocutory judgment was entered against them on 26<sup>th</sup> August, 2008. The case then proceeded partly on formal proof before Mwera J (*as he then was*). On 30<sup>th</sup> September, 2014, the Plaintiff and the 1st Defendant's advocates recorded a consent with the effect that interlocutory judgment entered against the 1<sup>st</sup> Defendant be set aside and that the 1<sup>st</sup> Defendant be at liberty to file his defence within seven (7) days. However, the 1<sup>st</sup> Defendant failed to file his defence within the said time and the interlocutory judgment reverted accordingly.
3. At the hearing Rahma Dahir (PW1) informed court that she was informed of the accident by her brother. She reported the accident to the police and was issued with a police abstract. That at the time of his death, the deceased was an employee of Y.H. Wholesalers working as a driver earning a basic salary of KShs. 30,000/= per month. She stated that she and her co-plaintiff obtained the grant of letters ad litem which enabled them to bring this suit. That she incurred funeral expenses of KShs. 78,200/=. She stated that the deceased had six (6) children and produced birth certificates to that effect. When the hearing continued on 29<sup>th</sup> April, 2015, PW1 produced grant letters of administration dated 11<sup>th</sup> June, 2010 (P. Exhibit 10). She stated that the burial costs incurred was KShs. 68,000/=. She stated that Halima Hussein was her co-wife as she too was a wife to the deceased. PW1 produced the deceased's children's birth certificates as P. Exhibit 7 (a) - (e). That Hussein Alio Gabare and Halima Hassan Hussein were the deceased's parents. She stated that the deceased used to provide for them but that she had no evidence for the same.

4. The Plaintiff need not prove liability in instances where interlocutory judgment is entered since such judgment is considered final on the issue of liability. All the Plaintiff is required to do therefore is to prove damages. See **Felix Mathenge v. Kenya Power & Lighting Co. Ltd (2008) eKLR** where the Court stated:

***“The role of the court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages.”***

5. Under the head of loss of dependency, the Plaintiffs argued that the deceased would have worked up to the retirement age of 60 years since he was in good health prior to his death. They proposed a multiplier of 28 years. They urged for the application of a multiplicand of 2/3 since the deceased was the sole bread winner for the family. It was further urged that his basic salary of KShs. 30,000/= be applied in calculating loss of dependency. I have considered the following cases:-
- a. **Amos Mungulusi Syomau & Another v. Mawingo Bus Services & Another Machakos HCCC NO.64 of 1997** decided on the 19<sup>th</sup> day of April, 2002 wherein the deceased was aged 35 years and the court applied a multiplier of 15 years.
- b. **Anwaraii Brothers Limited and Another v. Joyce Mundi and Another Machakos HCCA NO.126 of 2007** decided on the 25<sup>th</sup> day of February, 2009 wherein the deceased was aged 32 years old and the court applied a multiplier of 18 years because the deceased would have worked till the age of 50 years.
6. **I find the testimony of PW1 uncontroverted. The deceased was aged 32 years. He was earning Kshs.30,000/- per month. He was the sole bread winner of his dependents who are set out in the plaint.** Bearing in mind the vicissitudes of life or other imponderables which would have shortened the deceased's working life, and that the deceased would have enjoyed a retirement age of up to 60 years but also taking into consideration the nature of his work and the state of our roads, I find that a multiplier of 18 years to be reasonable. The Plaintiffs' loss of dependency therefore works as follows:-

KShs. 30,000/= x 12 x 18 x 2/3 = KShs. 4,320,000/=.

7. The Plaintiffs suggested a sum of KShs.10,000/= for pain and suffering and KShs. 100,000/= for loss of expectation of life. Regarding the damages under Law Reform Act the estate is entitled to loss of expectation of life which I award at KShs. 100,000/=. For pain and suffering, the evidence is that the deceased lost his life the same day of the accident. Therefore, a sum of KShs. 10,000/= is reasonable and I award the same. These awards are capped to a minimum so that the estate does not benefit twice from the same death under the Fatal Accidents Act and the Law Reforms Act.
8. The Plaintiffs claimed KShs. 500/= for motor vehicle search, KShs. 3,500/= for limited grant of administration, KShs. 100 for police abstract, KShs. 100/= for Death Certificate expenses and KShs. 68,000/= for funeral expenses. The only receipt on record is for motor vehicle search. The principle is that special damages must be both pleaded and proved. That is why Lord Goddard C.J. in **Bonham Carter v. Hyde Park Ltd [1948] 64 TLR 177** said:-

***“... Plaintiffs must understand that, if they bring actions for damages it is not enough to write particulars and so to speak, throw them at the court, saying “this is what I have lost, I ask you to give these damages, they have to be proved.”***

9. The Plaintiffs therefore only proved special damages of KShs. 500/= which I hereby award. Accordingly, I enter judgment for the Plaintiff against the Defendants as follows:

Pain and suffering                      KShs. 10,000/=

Loss of expectation of life      KShs. 100,000/=

Loss of dependency                    KShs. 4, 320,000/=

Special damages                        KShs. 500/=

**Total award                            KShs. 4,430,500/=**

Plus costs and interest at court rates.

10. Since there are minors involved the award is apportioned as follows:-

- a. For the minors – Kshs.2,400,000/=
- b. The rest of the dependants – Kshs.2,030,500/=

The sum due to the minors will be deposited in an interest earning account in the joint names of Rahma Dahir and the Deputy Registrar of this court until they turn of the age of majority or otherwise ordered by this court.

.....

**A. MABEYA**

**JUDGE**

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of September, 2015.**

.....

**JUDGE**