



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 205 OF 2012

ISAAC KIMANI and CATHERINE NJERI MUGO (Suing as legal

Representatives of the Estate of **LOICE GATHONI MUGO (DECEASED).....PLAINTIFFS**

-VERSUS-

HELLENA WANJIRU RUKANGA.....DEFENDANT

JUDGMENT

FACTS

1. The Plaintiffs are the legal representatives of the Estate of Loice Gathoni Mugo and have brought their claim under the **Fatal Accident Act** and **Law Reform Act**.
2. The suit emanates from a Road Traffic Accident that occurred on the 20th April, 2011 along the Njoro Elburgon Road.
3. Before commencement of the hearing, the parties recorded a consent on the issue of liability which was apportioned on a ratio of 70% and 30% with the Defendant bearing the larger portion.
4. A consent was also entered for damages under the Law Reform Act as set out hereunder

UNDER LAW REFORM ACT

- a) Loss of expectation of life – Kshs.100,000/=
- b) Pain and suffering – Kshs.20,000/=

5. Lastly special damages were agreed upon in the sum of Kshs.58,000/=

6. Thereafter, the Plaintiff gave evidence on the remaining issues and was subjected to cross-examination. After the close of the Plaintiff's case, the Defendant did not call any witnesses and both counsel put in written submissions and highlighted the same.

PLAINTIFF'S SUBMISSIONS

The Deceased died at the age of 47 years. The law sets the retirement age at 60 years and a multiplier of 18 years proposed. On income, the deceased was a businesswoman engaged in the sale of timber and had a furniture workshop by the name 'SONGA SONGA'

Statements from Equity Bank for the period 2008-2011 were produced in evidence and marked as "**Pexh 1**". the net income was in the sum of Kshs.50,000/= per month.

On dependency, the Deceased had three adult children namely:

- i) Catherine Njeri;
- ii) Grace Wangui and
- iii) Moses Gachanja

All the three were financially dependant on the Deceased and a dependency ratio of 2/3 proposed to be reasonable in the circumstances.

The calculation for loss of dependency was submitted as thus:

$$\begin{aligned} 50,000 \times 18 \times 2/3 &= 7,200,000/= \\ \text{Less 30\% contributor negligence} &= \underline{2,160,000/=} \\ \text{Total} &= \underline{\underline{5,040,000/=}}. \end{aligned}$$

A figure of the sum of Kshs.5,040,000/= was the sum arrived at for general damages under the **Fatal Accident Act Cap 32 Laws of Kenya**.

Counsel placed reliance on the following authorities in support of the Plaintiff's claim:

- a. **RCR** (Suing as the administrator of the Estate of **J. K. V. Uniliver Kenya Limited**, Civil Appeal No.140/08
- b. **Patricia Mona & Another V. Samuel Opot Omondi & Another** (2014) Eklr
- c. **Richard Macharia V. Philemon Rotich Langa** (2013) eKLR
- d. **Rev. F. Leonard & Another V. Major K. Burgen** (2005) eKLR

A further sum for special damages of Kshs.50,000/= was claimed for funeral expenses.

DEFENDANT'S SUBMISSIONS

A consent judgment was recorded on the issue of liability and apportioned on ratio of 70% and 30%.

Under the Law Reform Act, it was agreed that for pain and suffering an award of Kshs.20,000/=. For loss of expectation of life, an award of Kshs.100,000/= and Special damages agreed at Kshs.58,901/-.

On income, it was submitted that there was no proof/linkage shown to establish that the money deposited in the Deceased account accrued from the business allegedly carried out.

That no books of accounts, no Income Tax Returns or audited reports were produced to establish that the Deceased was running a legitimate business. Reliance was placed on the case of **Mary Muthoni Gachau V. The A. G. & Others**, [2000] eKLR where it was held that Bank Statements needed other documents to corroborate the evidence on proof of income.

Counsel urged the court to adopt the minimum wage of a person in Kenya stipulated at Kshs.11,995/= as income for the Deceased.

The age of the Deceased was not in dispute and a multiplier of 6 years was proposed. Two authorities were relied upon where a multiplier of seven (7) and 8 years were adopted.

On the Dependency ratio, no evidence was tendered to support the claim that the three children were dependant on the Deceased. Nevertheless, it was proposed that a dependency ration of 1/3 be adopted.

In conclusion, it was submitted that, where the claimants under the Fatal Accident Act are the same beneficiaries under the Law Reform Act, general damages cannot be duplicated, in that they cannot benefit twice from the same cause action.

ISSUES FOR DETERMINATION:

7. Taking into consideration the evidence on record, the submissions of both Counsel by way of written submissions and the highlighting thereof and the applicable laws, this court has the following issued for determination:

- i) whether to make an award for general damages under the Law Reform Act
- ii) whether to make an award for general damages under the Fatal Accidents Act:
 - a) multiplier
 - b) multiplicand
 - c) dependency ratio
- iii) Special damages
- iv) Funeral expenses

ANALYSIS

8. Under the first head a consent judgment was recorded on the issue of liability and apportioned on ratio of 70% and 30%. A consent under the Law Reform Act was also entered by the parties which is as follows:

- a) Loss of expectation of life – Kshs.100,000/=
- b) Pain and suffering – Kshs.20,000/=

No evidence was adduced by the plaintiff as to how the deceased died, whether the death was instant or whether she was rushed to the nearest hospital for treatment. Since there is a consent agreed upon, I shall not interfere with the award for pain and suffering.

9. Under the head of Special damages, a sum of Kshs.58,901/= was agreed upon.
10. The most contentious issues arise as to an award for damages under the Fatal Accidents Act.
11. The age of the deceased is 47 years and this is not disputed. The Plaintiff suggested a multiplier of 18 years whereas the Defendant suggested a multiplier of 7 to 8 years. The retirement age set by the government is indeed 60 years, but taking into account the uncertainty of life, this court finds that a multiplier of 9 years would be reasonable. Refer to **Patricia Mona & Another V. Samuel Opot Omondi & Another**, [2014] eKLR.
12. On the issue of income, the Plaintiff adduced evidence that her Deceased mother had a timber business and also a furniture business by the name “**Songa Songa**”.
13. Assuming that the timber business involved the logging, cutting and ferrying of timber, at best, the Plaintiff would have produced a permit for the same. As for the furniture business, no registration of business name certificate was produced or a licence from the Council to show the existence of

- such a business.
14. This court has had the occasion to peruse the Statements from Equity Bank, produced by the Plaintiff to prove the Deceased's income. The credit entries are irregular. There are instances where the amount deposited is the same amount withdrawn, leaving a negative balance.
 15. This court states that if the business was legitimate and registered, it was incumbent upon the Plaintiff to show that the Statements were for a Business Account and also to produce documents or evidence such as Licences, receipts, receipt books, Books of Accounts, Audited Reports. These documents would have corroborated the evidence relating to the deposits made into the Bank and reflected in the Bank Statements.
 16. Counsel for the Defendant urged the court to adopt the minimum wage of Kshs.11,995/=. This cannot be adopted because the evidence on record adduced by the Plaintiff was that the Deceased was a business lady and was therefore in essence not an employee or a wage earner.
 17. This court makes a finding that there was no proof of income and adds that proof of income is the cornerstone for a claim of **“loss of dependancy”**. No award on dependancy can issue without proof of income. Refer to the case of **Authur Nyamwate Omutondi & Others V. United Millers Limited & 2 others**, HCCC No.152 & 153 of 2004 (Kisumu).
 18. On the issue of dependancy ratio, the Plaintiff's evidence was that the Deceased had three adult children, the Plaintiff being one of them.
 19. That the deceased was the sole bread winner and all the three children were Dependant on her.
 20. No receipts for tuition fees were produced or any other form of documentation was tendered to support dependancy particularly for these adult children. This court would not have needed any documentation if the children had been minors.
 21. This court finds that the dependancy ratio was not proved by the Plaintiff.
 22. On the last issue relating to funeral expenses, this court notes that the sum pleaded in the plaint for special damages which was inclusive of funeral expenses was Kshs.86,960/=.
 23. The sum consented by both parties was Kshs.58,901/=. Leaving a difference of Kshs.38,069/=.
 24. It is trite law that special damages must not only be pleaded but must be proved. The Plaintiff did not produce any receipts or documentation to support this additional claim.
 25. Nevertheless, this court observes that the reality is that there was a death and there must have been a funeral with correlated expenses. This court will therefore allow the sum of Kshs.50,000/= as funeral expenses. **DETERMINATION:**
 26. This court enters judgment in favour of the Plaintiff as against the

Defendant as summarised hereunder:

i) Liability – 70% as against the Defendant

ii) Quantum

Law Reform Act

“BY CONSENT”

a) Pain and Suffering - Kshs.20,000/=

b) Loss of expectation of Life - Kshs.100,000/=

Fatal Accidents Act

Multiplier – 9 years

Multiplicand – Nil unproved

Dependancy Ratio – Nil unproven

iii. Special Damages “By Consent” - Kshs.58,901.00

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|----------------------------------|----------------------------------|
| iv. Funeral expenses | - Kshs. <u>50,000.00</u> |
| | - Kshs.228,901.00 |
| Less 30% contributory negligence | - Kshs. <u>68,670.30</u> |
| Total award | - Kshs. <u>160,231.00</u> |

v. Interest at court rates on special damages from date of filing suit.

vi. Costs

It is ordered.

Dated, Signed and Delivered at Nakuru this 31st day of July, 2014.

A. MSHILA

JUDGE