



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

H. C. C. NO. 22 OF 2013

V Z L & ANO.....PLAINTFFS

VERSUS

CHRISPINE AGUNJA OMOGA.....DEFENDANT

J U D G M E N T

1. The plaintiffs brought this suit as legal representatives of the estate of Daniel Aldo Lestingia (deceased) by virtue of grant of letters of administration in HCSC 135 of 2011 issued to them on 28th June, 2013 claiming general damages under both the law Reform Act and Fatal Accidents Act; special damages costs and interest at court rates.
2. The defendant filed defence dated 23rd September, 2013 denying liability and damages and sought that the plaintiff's suit be dismissed with costs. The plaintiffs filed reply to the defence dated 4th October, 2013 praying that the defendant's defence be dismissed with costs. The plaintiffs' Counsel filed issues for determination dated 10th October, 2013 together with pretrial questionnaire, whereas the defence counsel did not file any.
3. On 12th March, 2014 the suit came up for hearing when both counsel sought a week to record consent on liability. The plaintiffs gave evidence through 1st plaintiff and called no witness whereas the defendant opted not to adduce any evidence or call any witness. The plaintiffs' case was that the deceased was husband to the two plaintiffs who are the legal representatives of his estate and had two children as mentioned in the plaint. That on 5th September, 2010 the deceased was a fare paying passenger in M/V KBL 337V travelling towards Isiolo when he was involved in a road accident at a place called Lelata. That he passed on as a result of the said accident. PW1 produced the motor vehicle record from KRA as exhibit P3 and police extract as exhibit P4 covering the occurrence of the accident.
4. That at the time of the accident the deceased was aged 37 years as per death certificate Exhibit P1 and an employee of K-Rep Bank Isiolo Branch with monthly gross salary of 62,500 and a net of Kshs.46,077/- as exhibits P2. He was survived by two wives namely J K M and V Z L and two children namely A S L a son now aged 6 years and B M a daughter now aged 3 years.
5. The plaintiff exhibit P3 confirms the motor vehicle KBL 337V at the time of the accident was owned by the defendant and insured by M/S APA Insurance Ltd Exhibit P4 shows that the deceased herein was fatally injured. The plaintiff issued demand notice exhibit P5(a) before action and served the same as per certificate of postage exhibit P5(b) and have obtained letters of

administration as per exhibit P6 clothing them with capacity to file this suit on behalf of the estate of the deceased.

6. The plaintiffs blamed the defendant's driver for the accident averring that the vehicles do not go about overturning. The plaintiffs prayed for damages as prayed in the plaint with specials of Kshs.500/- and produced KRA receipt for Kshs.500.
7. On being cross-examined PQW1 testified that she did not witness the occurrence of the accident and further though she has birth certificates for the children of the deceased she had not brought them to court. She further testified that she did not know whether the deceased had life insurance cover. However, she admitted some money was paid by the insurance for a group cover. PW1 said the money paid for a group cover was combination of the other dues to the deceased and totaled at around Kshs.8.2 Million.
8. On 14th April, 2014 by consent of Counsel Judgment was entered on liability at 20%: 80% in favour of the plaintiffs and witness statement by Gitonga Mbaabu Benjamin dated 18th August, 2013 was adopted as exhibit PW2. The plaintiffs closed their case and the defence opted to call no evidence and closed their defence. Both counsel agreed to put in written submissions on quantum of damages. The plaintiff's submissions were filed on 23rd May, 2014 whereas submissions on behalf of the defendant were filed on 1st July, 2014.
9. I have carefully considered the pleadings, the proceedings and written submissions by both counsel and the issue for consideration is what damages are the plaintiffs entitled to, issue of liability having been settled by consent of counsel and parties.
10. The deceased at the time of his death was aged 37 years as shown by Death Certificate Exhibit P1, his monthly net salary was Kshs.46,077 as per payslip produced from K-Rep Bank Exhibit P2. He was a man of two wives with two children A S L aged 6 years and B M who was born a few years after the deceased's death. The birth certificates of the two children were not produced and their ages were not challenged.
11. The plaintiffs' counsel urged court to apply a multiplier of 28 years urging that the deceased would have retired at 65 years of age and certainly he would have climbed the ladder. Referring to the case of **JOYCE MUMBI V CO-OPERATIVE BANK & 2 OTHERS CITED IN HCCC 24 OF 2009 MILDRED AORI ODUNGA V HUSSEIN DIARY LTD** in which a deceased aged 51 years at the time of his death, the Court of Appeal approved a multiplier of 11 years. The defence on the other hand urged due to deceased travel habits there was the usual imponderables of life which would still have effect on the deceased's expectation of life if he had not died through traffic road accident and submitted a multiplier of 12 years as fair and reasonable. He referred to the case of **NAIROBI HCCC NO. 3987 OF 1987 JAMES W. MUNENE V WALTER BERNARD MUKURIA** whereas a deceased died at 36 years as a multiplier of 12 years was applied.
12. I have carefully considered the evidence by the plaintiffs and the fact that the defence did not call any evidence on the deceased travel habits and that he was engaged in a risk employment and was travelling regularly; I however that notwithstanding agree with the defence submission that there are risks in life and one may not live full life expectation period but this is once again a matter of speculation as one may live to 80 years and beyond. I am also alive to the fact that retirement age has been increased in Kenya to 60 years for most of the employees both in public service and private sector. I have considered the two authorities and find the defence authority to have been made many years ago before retirement age had been increased whereas the plaintiff's authority being a decision of the Court of Appeal it is binding on this court. I would therefore find that the deceased who was 37 years old would have worked with the bank for 23 years but life being what it is and there being no assurance of one working upto the age of 60 years, doing the best I can and considering the usual imponderables of life which would have still affected on the deceased's expectation of life, I consider a multiplier of 20 years reasonable. On dependency ratio the

deceased had two wives and two children who depended on him for their support. Both counsel are in agreement in their submissions on application of 2/3 income as the ratio which the deceased spent on his family. I find the same fair and reasonable.

13. The defence submitted that it should be taken into account that under Fatal Accident Act and the Law Reform Act the awards are made to the same dependants and as such the same should be taken into account by way of deduction (See Mombasa HCCC No.400 of 2012 Charity Mapenzi & Another V National Water Conservation & Pipeline Corporation(2008) Eklr where the Court taking into account of such factor, discounted the award made by 5 percent in both claims. The defence further urged the deceased has already benefitted by payment of Kshs.6,000,000/- through another insurance scheme that was in existence and that the amount is supposed to be taken into account by way of deduction from the amount awardable. The defence relied on the case of JOHN BARASA WAKISE & ANOTHER V DEVKI STELL MILLS LTD(2013) EKLR. Significantly the defence did not call any evidence to show that Kshs.6,000,000/- allegedly paid to the deceased family were in anyway related to what was paid by which insurance company nor was there any documentary evidence tendered before this court. PW1 in her evidence testified that the amount paid was in respect of group cover and was combined with other dues. The defence if it wanted to show there was such amount paid through another insurance scheme that ought to have been taken into account by way of deduction from the amount that could be awarded by the plaintiffs he should have called evidence and not to leave court to speculate. In absence of evidence as to what amount was paid to the deceased estate and for what purpose it would be contrary to law for the court to speculate and order the amount to be deducted from the award that the court may find due. In the circumstances I find the defence submissions on this point far-fetched and reject the same as it was not pleaded and not proved by way of evidence as required.

14. In view of the foregoing I enter judgment in favour of the plaintiffs against the defendant as follows:

a. *General damages under Fatal Accident Act.*

i. *Pain and suffering taking into account the deceased died at the spot as evidenced by both police abstract and death certificate and that the deceased death was instant without much pain an award of Kshs.20,000/- would be affair and reasonable..... Kshs.20,000/-*

ii. *Loss of dependency*

46077x2/3x12x20.....Kshs.7,372,320/-

3. *Special damages..... 500/-*

4. *Damages under the Law Reform Act*

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

Less 7,492,820-

ii. *Loss of expectation of life.....100,000/-*

Total

7,392,820

iii. *Less 20% contributory.....1,478,564*

5,914.216

iv. *Discount with percent due to accelerated lump sum Payment.....5,9142/50*

Balance due.....Kshs. 5,855,113/50

15. Section 4(1) of the Fatal Accident Act requires that the amount recovered for the benefit of the family of the deceased person, after deducting the costs not recovered from the defendants, shall be divided amongst these persons in such shares as the court by its judgment shall find and direct.

16. Having taken into account the ages of the deceased's children I direct that upon recovery of the decretal sum and after deducting reasonable fees payable to the plaintiffs' advocates 25 percent of the net sum be divided equally between the deceased's children and respective shares be invested in a reputable bank in the name of each respective child's mother and this court's Deputy Registrar until each child attains the age of 18 years. The remaining 75 percent share shall be shared equally amongst the two deceased wives, the plaintiffs for their upkeep as well as that of their children.

17. The plaintiffs' are awarded costs of this suit with interest on general damages to run from the date of this judgment. Interest on specials of Kshs.500 from the date of filing this suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF SEPTEMBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF :

1. Mr. Mwanzia for the plaintiff
2. Mr. M. Kariuki for the defendant

J. A. MAKAU

JUDGE