



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 185 of 2002

ABUBAKAR ABDALLA SALIM.....PLAINTIFF

VERSUS

1. TAWFIQ BUS SERVICE LTD

2. TSS BUS SERVICE.....DEFENDANTS

JUDGMENT

The plaintiff **ABUBAKER ABDALLA SALIM** suing as an administrator of the estate of **MOHAMED SALIM ABDALLA** (deceased) filed this suit on 7th May, 2002 seeking the following orders:

“(i) General damages under the Fatal Accidents Act;

(ii) General damages under the Law Reform Act;

(iii) Special damages of Kshs. 16,380/=.

(iv) The costs of this suit.

(v) Interest on (i), (ii), (iii) and (iv) above.

(vi) Any other relief this Honourable court will deem fit and just to grant.”

The genesis of this suit is a motor vehicle accident which occurred on 1st April, 2001. The plaintiff alleges that the deceased a child aged nine (9) years was travelling as a fare-paying passenger aboard a motor vehicle Registration No. KAK 885E belonging to the 1st defendant which was being driven along the Malindi – Lamu road. This first vehicle was involved in a collision with motor vehicle Registration No. KAL 292S belonging to the 2nd defendant and yet a third vehicle belonging to an un-named party. As a result of this collision the vehicle in which the deceased child was travelling was pushed off the bridge and plunged into the Sabaki River. The deceased died by drowning leading to this present suit. **MR. ABUBAKER** Advocate acted for the plaintiff whilst **COOTOW & ASSOCIATES** acted for the 2nd defendant. By consent it was agreed that the matter be disposed of by way of written submissions. The plaintiff and the 2nd defendants did duly file their written submissions. Although the firm of **C.B GOR & GOR** were on record for the 1st defendant, they did not file any written submissions.

On the question of liability both parties in their written submissions concede that the issue of liability was

determined by way of a test suit **No. HCCC 109 OF 2001, SWALEH SHOBE –VS – T.S.S. TRANSPORTERS & 2 OTHERS**. In that case, the court apportioned liability to the 1st defendant at 20% to the 2nd defendant at 10%, and to the third party at 70%. Although this particular ruling was not placed before this court for formal adoption in view of the fact that both parties have mentioned this case in their submissions as the test case, I will take it that this forms a consent agreement on liability. I will now proceed to consider awards under each of the headings as below:

1) **PAIN AND SUFFERING** – this is recoverable under the

Law Reform (Miscellaneous Provisions) Act 1934 which is applicable in Kenya. This award largely depends on how soon after the injury death occurred. Was death instantaneous or was suffering prolonged? In Kenya the courts do ordinarily award a nominal sum of Kshs. 10,000/= for pain and suffering [see **SALICIO MITHIKA M'RUKUNGA – VS – MILLICENT WAIRIMU KIMANI (2006) eKLR and DAVID NGUNJE MWANGI – VS – THE CHAIRMAN OF THE BOARD OF GOVERNORS OF NJIRI HIGH SCHOOL HCCC 2409 OF 1998**]. In this case where the vehicle in which the child was travelling plunged into a river the deceased most likely died as a result of drowning. This death may not have been instantaneous. The deceased quite likely did suffer some agony before he died. As such under this heading I do award a sum of Kshs. 20,000/=.

2) **LOSS OF LIFE EXPECTATION** – here again courts in

this country have tended to award a conventional figure of Kshs. 100,000/=. I find no reason to deviate from this practice and thus under this heading I do award the conventional sum of Kshs. 100,000/=.

3) **LOSS OF CAPACITY TO EARN/DEPENDANCY** –

this is also referred to as “*Lost years*”. Generally awards under this heading are made for loss of projected earning which the deceased would have realized if his life had not been cut short. It also refers to the contribution which the deceased would have foreseeably made to his dependants. In this case the deceased was a minor – a young boy aged nine (9) years. In such a situation would it be realistic to talk of projected earnings for a child who has barely left nursery school. In the case of **BUTLER –VS – BUTLER [1984] KLR** it was held that:

“Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.” [My own emphasis]

The plaintiffs in their submissions proposed a figure of Kshs. 1,000,000/= arguing that the deceased would have matured, secured a job and been able to support his parents. In the current Kenyan economy and job situation that is an arguable presumption. The defendants on their part argue that no award should be made under this heading since the deceased being a nine (9) year old child had no earning capacity at all. They cite the case of **TAFF VALE RAILWAY COMPANY – VS – JENKINS APP CASE NO. 1913**, which **R.J. RANSLEY** cited with approval in the case of **MOGARA –VS – ONACHI & ANOTHER 2004 e KLR** as follows:

“I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact – there must be a basis of fact from which the inference can reasonably be drawn.....”

Clearly in the case of a nine (9) year old child whilst the parents may have legitimate expectation of some pecuniary benefit upon his maturity, there is certainly no reasonable basis upon which a figure can be drawn. No assessable loss can be shown to have resulted from the child’s death. At nine (9) years he was certainly not working and therefore has no income upon which a computation can be made. For that reason, I am of the view that no computation based on any specific figure be it the minimum wage or

otherwise can be made under this heading. In my view it is more appropriate to award a global figure bearing in mind the custom in Kenya (and indeed in much of Africa) where families expect a child to contribute to their support when they become adults. In the case of **ALI ELMI SANEY & ANOTHER – VS – MOHAMED BAKARI & ANOTHER HCCC 2225 OF 1997** Hon. Lady Justice **MARY ANG’AWA** made an award of Kshs. 100,000/= in a case where the deceased was a child aged ten (10) years. The Honourable Judge argued that no evidence was led to show how much the deceased would grow up to earn. The same situation pertains in this case. Given that the award of Kshs. 100,000/= was made in 1997 – almost fifteen (15) years ago and taking into account inflationary trends, I find that a global award of Kshs. 500,000/= will suffice under this heading.

4) **SPECIAL DAMAGES** - the plaintiff claims a sum of

Kshs. 6,380/= as special damages. No evidence in the way of receipts was adduced to support this claim. It is trite law that any claim for special damages must be specifically proven. I therefore decline to make any award under this heading.

5) **FUNERAL EXPENSES** – Once again though a claim of

10,000/= was made, no evidence was brought to support this claim. The plaintiff’s submissions refer to payments to grave diggers, snacks for the funeral ceremony and dressing of the body. These are services for which the providers would have supplied receipts. He who alleges must prove. There being no proof of such expenditure, I decline to make any award.

Finally, I note that the suit was brought only against the 1st and 2nd defendants. The consent on liability made mention of a third party but such third party not being a party to this suit this court cannot make any award against it.

As such I find in favour of the plaintiff as against the 1st and 2nd defendants in the proportions of 20% and 10% respectively as follows:-

1. Pain and suffering	20,000/=
2. Loss of life expectation	100,000/=
3. Loss of dependence	500,000/=
4. Special damages	Nil
5. Funeral expenses	_____

Total 620,000/=

In addition, I do award to the plaintiff the costs of this suit plus interest at court rates.

Dated and delivered in Mombasa this 28th day of March, 2013.

M. ODERO

JUDGE

In the presence of Ms. Anyumba h/b Mr. Wafula for 2nd Defendant

Court Clerk Mutisya

Ms. Anyumba for 2nd Defendant:

We seek a stay of execution for thirty (30) days.

Court:

A thirty (30) day stay of execution is hereby granted.

M. ODERO
JUDGE