



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 362 OF 2001

DANIEL KURIA NGANGA (suing as a legal representative of the estate of SAMSON NJOROGE KURIA (Deceased).....PLAINTIFF

VERSUS

NAIROBI CITY COUNCILDEFENDANT

JUDGMENT

The plaintiff Daniel Kuria Nganga is the legal representative of the estate Samson Njoroje Kuria. The plaintiff has filed suit against the defendant Nairobi City Council on the 7th of March 2001. An amended plaint was filed on the 16th of January 2002. The plaintiff states that his claim is under the Law Reform Act Cap 26 of the laws of Kenya for the benefit of the dependants of the deceased under the Fatal Accidents Act Cap 32 Laws of Kenya. At paragraph 3a he states that: *On or about 23rd October 1998 at Kasarani division, Gituamba Location within Nairobi, while the deceased was lawful walking along a path in the said area, he slipped and fell into a hole full of water that had been negligently and recklessly left open, unattended and/or uncovered by the defendant's servants, employees and/or agents in their course of repairing and/or putting up a raw sewerage system; and as a consequence whereof the deceased sustained fatal injuries.*

The particulars of negligence of the defendant as particularised in the plaint are as follows;

- a. Leaving holes open and/or uncovered thereby exposing the area residents to risks which the defendant knew and/or ought to have known in particular the deceased.
- b. Failing to put warning signs where there was an open trench along the main path.
- c. Failing to put in place proper lighting system along the said walking path.
- d. Leaving unlit the said trenches and/or holes while the defendant knew or ought to have known it was risky to do so.
- e. Exposing the deceased to risk which the defendant knew or ought to have known.
- f. Failing to have sufficient regard to the safety of the area residents, in particular the deceased.
- g. In so far as the mistakes shall permit the plaintiff shall seek to rely the doctrine of *res ipsa loquitor*.

The plaintiff claims that the estate of the deceased has suffered loss and damage and holds the defendant entirely liable. That at the time of death, the deceased was a young, energetic man aged 14 years leading a healthy and robust life. He was a pupil at Korogocho Primary School and by reasons of his death; the dependants of the deceased have suffered loss and damage. The names of person to benefit under this heard are: Daniel Kuria Nganga father adult. The plaintiff prays for judgment against the defendant for damages under the Law Reform Act, Cap 26 Laws of Kenya and Fatal Accidents Act, Cap 32 Laws of Kenya, special damages together with costs of the suit.

The defendant filed a defence on the 18th February 2002. In its defence the defendant denies the particulars of negligence and puts the plaintiff to strict proof. It also denies the particulars of loss and puts the plaintiff to strict proof.

Parties filed a statement of agreed issues on the 27th of February 2007 dated 2nd of March 2002. The agreed issues are as follows;

- a. Did the deceased slip and fall in a hole that had negligently been left open and unattended and or uncovered by the defendant in the course of repairing and/or filling up a raw sewerage system on or about 23/10/98?
- b. Did the deceased slip and/or fall in the hole due to the negligence of the defendant, its authorized agent, servant and/or agent?
- c. Has the estate of the deceased suffered any loss and/or damage?
- d. Is the plaintiff entitled to any damages?
- e. If the answer in d) above is in the affirmative, what is the quantum?
- f. Is the plaintiff entitled to the reliefs sought?

The plaintiff also filed a list of documents under Order X rule 11A of the Civil Procedure Rules dated 27th February 2007.

The plaintiff filed a witness statement under Order 3 Rule 2 and states the following; Samson Njoroge Kuria was his son. He was 14 years and a pupil at Korogocho Primary School. On 20th October 1998 his son fell into a hole. He searched for him for three days then he reported to the police. On 23rd October 1998 he found him drowned in a trench that had been dug by the city council employees for purposes of repairing or putting up a new sewage system. It was so negligently left open and uncovered as a result of which his son fell into the hole full of water and he died. He called police officers from Kasarani police station who came took photos and removed his son from the hole. The said police took him to the city mortuary. A post-mortem was carried out and it was discovered that his son had died of drowning. He pray for judgment against the defendant for general damages, special damages cost of this suit and any other relief deemed fit by the Honourable court.

The plaintiff's case was heard by this Court on the 25th February 2013. The plaintiff testified and reiterated what is stated in his statement. He produced his son's death certificate, exhibit 1, and letters of administration exhibit 2. He also produced an invoice dated 3rd November 1998 for Kshs. 20,000/-to support his claim for funeral expenses and a picture showing his deceased son. He stated further that his son was in class 7 at the time of his death, he was hardworking and obedient and used to assist him. That his son would have been a judge. He blamed City Council stating that City Council had dug the hole and left it open. The hole was full of water. There was no warning at the site of the hole and his son fell into it. That people pass there even now. When he was cross examined, he stated that his son was not killed elsewhere and then the body dumped there as there is death certificate that shows the cause of his son's death being asphyxia due to drowning. That police confirmed that the water killed him and that after three

days the water brought up his body. He stated that his son was about 17 to 18 years old and that his report form was with the teacher at school. On re-examination he stated that the death certificate shows his age though he does not recall when he was born.

The defendant did not call any witness. Counsels agreed to file written submissions and only the plaintiff filed their submissions the defendant did not. In the plaintiff submissions the plaintiff reiterates the evidence given and states that the plaintiff gave consistent evidence in the events of 20/10/1998 to 23/10/1998. He was not shaken on cross examination. It is therefore not disputed that the defendant is to blame for the accident leading to the death of the deceased. Its officers left the sewer pit in issue open, covered with water and unprotected. It failed to cover the sewer pit or to warn members of the public of the eminent danger posed by the pit. It acted negligently in failing to protect the open sewer from members of the public. It is 100% liable for the death of the deceased who was a small boy of tender age. The deceased would still be alive; but for the negligence of the defendant.

On quantum under the Law Reform Act counsel submitted the damages are awardable to the estate of the deceased for pain and suffering, lost years which is similar to loss of dependency under the Fatal Accidents Act, loss of expectations of life and special damages.

That the deceased must have suffered a lot of pain and suffering prior to his death. He died of drowning. That it has been the practice of this honourable court to award damages for pain and suffering even where the deceased died instantly following an accident. That the estate is entitled to damages under this head notwithstanding the time frame within which the deceased died. Under this head they prayed for an award of Kshs. 1,500,000/- , and relied on the following cases **HCC No 58 of 1997 Hassan & Anor – Vs. Suma Properties Ltd (2004) KLR** where the deceased a 12 years old was given an award of Kshs. 1,000,000/- by Justice Mary Ang'awa on 02.12.2004.

On loss of expectation of life, Counsel submitted that the deceased was 14 years old. That they do not know how far he would have gone with his education that a life was lost and no amount of money can compensate the feeling of his parents. The plaintiff sought and award of Kshs. 300,000 and relied on the following cases; **Henry Karanja V. Joseph Endire Nrb (HCCC 231 of 2007)**, in this case an award of Kshs. 150,000/- was given by Justice Sitati on 16.9.2007 where the deceased had died while 30 years old, **HCCC 523 of 2001 John Jembe Mumba – Vs- Self Mbaruku & others – Mombasa**, an award of Kshs.150,000/- was granted by Justice Khaminwa on 21/03/2005 for a deceased who was 38 years old at the time of his death and **HCCC 48 of 2003- Rosemary Epurukel Vs. P. C Absalom Kariuki Meru**, Justice Sitati gave an award of Kshs.150,000.

On loss of dependency counsel submitted that; the estate of the deceased has lost the dependency of the deceased, that in African culture and practice, children are the security and insurance of their gaining parents, they provide for the sustenance of their parents notwithstanding their age. That the father of the deceased testified that his son was the source of joy of his life. He sued to provide for his parents in different ways. Counsel relied on the holding of **Justice Nyarangi in the case of Sheikh Mushtaq Hassan – Vs.- Nathan Mwangi Kamau Transported & others (1982-88) I KAR 946 at page 953** when he held that:

“...in the context of Kenya, and that is the relevant context, parents of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age suffer real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expenses of his/her educations is lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, to younger brothers and sisters of the deceased as the deceased natured physically and materially are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms.”

On the multiplier to be used counsel relied on Justice Ang'awa's decision in Nairobi **HCCC 1202 of 1992 Kinyosi Kitungi – Vs. Simon Okoth Obok & Another**, where the minimum wage of Kshs. 3,000 was granted by Justice M. A. Angawa on 19/11/2003 for a deceased who was 16 years old at the time of her death and on legal notice No. 71, Kenya Subsidiary Legislation, 2012 enacted under the Labour Institutions Act, 2007 which sets out the minimum wage at Kshs. 8,579.80 for a domestic worker. He argued that had the deceased been alive after finishing college, he would have earned the minimum of Kshs.8,579.80 as set out by the law, that amount is reasonable under the circumstances of this case. He used the multiplier of 45 years and argued that the deceased was a primary school pupil, he would have gotten employed and retired at the age of 60 years or thereafter. That according to presidential directive directed to the secretary of Public Service Commission, the retirement age was increased to 60 years from 55 years. That it is entitled to take judicial notice of that fact under section 60(1) of the Evidence Act and the fact is a matter of general and local notoriety. That this was observed in **Henry Karanja Vs. Joseph Endire Nrb (HCCC 231 of 2007)** in this case the Court noted that the retirement age was raised to 60 years. Secondly that the practice in our courts has always been to compute the multiplier on the working age of a servant and the said age is fair and reasonable.

He cited **HCCC 1202 of 1992 Kinyosi Kitungi – Vs. Simon Okoth Obok & Another** where Justice Mary Ang'awa took a multiplier of 35 years for a 16 year old deceased female minor who died following a road traffic accident and HCCC 739 of 2003 **Caroline Anne Mwangi Vs. Paul Ndungu Muroki** where Justice Mary Ang'awa gave a multiplier of 20 years for a 34 year old deceased male who died following a road traffic accident and HCCC 231 of 2007 **Henry Karanja Vs. Joseph Endire Nrb** where Justice Sitati while giving a multiplicand of 25 years in a matter where the deceased was 32 years old at the time of death observed as follows:

‘the deceased was only 32 years old when she died. She had risen to the level of supervisor at her place of work...with the retirement age raised to 60, I think that taking the vicissitudes of life into account, a multiplicand of 25 years seems reasonable.’”

On the dependence ration counsel argued that the deceased was survived by his father, his entire salary must have been used to support his father and possibly his family and that the ration of 2/3 is fair and reasonable under the circumstances. That this would translate to the following, $45 \times \frac{2}{3} \times 12 \times 8,579.80 = \text{Kshs.}3,088,728.00/-$

On Special Damages counsel argued that the plaintiff produced in court a receipt for Mortuary payments of Kshs. 20,000 and the same should be awarded. They propose the amount be awarded accordingly as prayed.

The issues for determination are on liability and quantum. On liability was the defendant negligent as alleged for leaving the hole open and uncovered and on quantum whether the defendant is liable for the loss and damage that was suffered by the estate of the deceased. On liability it is the plaintiff's evidence that he found his son having drowned in a hole that had been left open. He blames the defendant for leaving the hole exposed and failing to put any signs of the open trench and exposing the defendant to a risk. The defendant did not call any evidence to challenge the plaintiff's evidence, however this Court notes that the deceased was 18 years old at the time of his death, he owed himself a duty of care to be observant as he walked within an area that had an open trench. I therefore would not hold the defendant a 100% liable but apportion liability at 70% for the defendant and 30% to the deceased.

On quantum on pain and suffering I note that the deceased suffered pain as his cause of death was asphyxia due to drowning. Under his head I am persuaded that a sum of Kshs.1.5 million (1,500,000/-) is sufficient. 70% amounts to Kshs.1,050,000/-.

On loss of expectation of life it is not known what the plaintiff could have been in his life as concerns his career, I find that an award of 300,000/- is sufficient. 70% amounts to Kshs.210,000/-.

On loss of dependence I am guided by the words of Justice Nyarangi cited by the plaintiff. The deceased was 18 years old as per the death certificate exhibit 1. It is stated that he was a student at Korogocho

Primary school although his report form was not produced. I believe he could have worked to earn an income and taken care of his parents. I am persuaded that the use of the figure of the minimum wage of Kshs. 8,579.80 is appropriate as the deceased career path had not been determined. He could have married and had a family to take care too and worked maybe up to 55 years. Bearing this in mind I find that a multiplier of 37 years is appropriate and the dependency ration of 1/3 is fair and reasonable. This translates to $37 \times \frac{1}{3} \times 12 \times 8,579.80 = \text{Kshs.}1269810.40$. 70% amounts to Kshs. 888,867.28.

On special damages I decline to award the amount of Kshs.20,000/- as what the plaintiff attached was an invoice not a receipt. In a claim for special damages actual payment must be proved an invoice is not evidence of payment.

I therefore enter judgment for plaintiff against the defendant as follows for;

1. Pain and suffering..... Kshs.1,050,000/-.
2. Loss of expectation of life..... Kshs.210,000/-.
3. Loss of dependence.....Kshs. 888,867.28

TOTAL.....Kshs. 2,148,867.28

The plaintiff is also awarded costs and interests.

Orders accordingly.

Dated, signed and delivered this 28th day of May 2013.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk