REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 702 OF 2007

PIUS MAJANI SHISALA (suing as the legal representative and administrator of

THE ESTATE OF REGINA SHIKKOYA).....……. APPELLANT

VERSUS

STEPHEN AMBULWA.....……. RESPONDENT

(From the Judgment and orders of W. Mokaya (Mrs), SRM in Milimani MCC No. 10910 of 2001)

J U D G M E N T

In a judgment for general and special damages arising from a fatal motor vehicle accident which involved motor vehicle registration No. KAE 050 A, the honourable trial magistrate entered judgment for the Appellant/Plaintiff in the sum of Kshs. 60,000/= for loss of expectation of life and Kshs. 24,000/= for loss of dependence, and finally, Kshs. 18,000/= as special damages, all with costs and interest. She refused to award general damages under the head "pain and suffering" on the ground that there was no evidence that the deceased suffered any pain since he died on the same day of the accident.

The above awards aggrieved the appellant who then filed this appeal. The main grounds of appeal are:

a. That the honourable trial magistrate failed to award damages under law Reform Act.

b. That Kshs. 60,000/= awarded as loss of expectation of life was much too low compared with awarded damages in other similar cases.

I have considered the grounds of appeal above after perusing the full record of appeal. I observed that at the lower court, the Appellant sought Kshs. 80,000/= but got Kshs. 60,000/= under the heading "loss of expectation of life." The honourable trial magistrate must have taken into account the issues which affected the claim including the age of the deceased and that she expected another at least 10 years in which to live. In the view of this court therefore, the trial Magistrate was in the best position to decide the issue. Indeed the appellant, as stated above, did not ask for any higher figure like Kshs. 120,000/= or so. It is obvious that Appellant had opportunity to do so but failed to request for such higher figure.

It is the view of this court further that such a higher figure could not be asked for because the appellant

must had good reasons not to do so. The appellant cannot wait until the relevant issue has been properly decided to raise the stakes in appeal. In any case, 60,000/= awarded is not too low from 80,000/= sought by the appellant in the court below and here. The appellant has not shown that the trial court did not properly exercise its discretion in awarding the said damages nor shown that any relevant principles of awarding damages were breached. In the circumstances this court has no good reason to interfere with the lower court's finding.

The second ground of appeal is that the lower court failed to award any damages under the Law Reform Act. In particular, the court failed to award damages for pain and suffering.

There is no denial that the lower court indeed did not award any such damages. The Respondent as well admitted as much but argued that no evidence was placed before the trial court to assist it to award such damages. That the deceased may have died instantly and did not suffer any pain. I have perused the record. The plaint averred that the deceased had died later after the Respondent motor vehicle had hit her. Although the Respondent first filed a defense denying everything, he nevertheless later made admissions on record which led to a consent order on full liability later being entered against him. There was no denial at any stage that the deceased underwent pain after the accident before she succumbed to it. In those circumstances, the fair approach and conclusion should have been to accept that what was pleaded and was not denied was conceded. To that end this court concludes that the deceased suffered pain until she died later, and general damages for pain and suffering should have been awarded.

I award the conventional sum of Kshs. 10,000/= which the trial Court ought to have awarded. The result accordingly is that the awards would be as follows:

1. Loss of expectation for life – Kshs. 60,000

2. Loss of dependence - Kshs. 24,000

3. Pain and suffering - Kshs. 10,000

4. Special damages - Kshs. 18,000

TOTAL **Kshs. 112,000**

To the above extent only, the appeal is allowed with costs and relevant interests. Orders accordingly.

DATED and delivered in Nairobi this 23rd day of May 2012.

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D. A. ONYANCHA

JUDGE