



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL 81 OF 2011

ROSE WANJIRU.....APPELLANT

~VRS~

VINCENT SULULU.....1ST RESPONDENT

CHRISTINE AKINYI OKOCHI.....2ND RESPONDENT

(Appeal from the judgment and decree of the Chief Magistrate Hon. U. P. Kidula in Bungoma Court in Civil Case No.389 of 2010)

JUDGMENT

On 21/11/2009 along Kitale – Bungoma Road there was an accident in which a matatu registration number KAU 107A make Toyota veered off the road and overturned. The deceased Henry Barasa Namachanja, a Police Corporal, was a fare-paying passenger in the matatu. He was injured. He was taken to Moi Teaching and Referral Hospital at Eldoret and admitted until 27/11/2009 when he died. The matatu belonged to the Appellant and was being driven by her employee. The Respondents, as the legal representatives of the estate of the deceased, brought this suit under the Law Reform Act (Cap.26) and Fatal Accidents Act (Cap.32) on their behalf and that of the other dependants and on behalf of the estate seeking to be compensated in general and special damages. They blamed the accident on the negligence of the driver of the Appellant. The parties agreed on judgment on liability at 80%: 20% in favour of the Respondents. The trial court awarded Ksh.100,000/= for pain and suffering under the Law Reform Act and Ksh.2,188,800/= under the Fatal Accidents Act for loss of dependency. It allowed Ksh.174,845/= as special damages, and then costs and interest. The Appellant was aggrieved by the court's decision on loss of dependency and on special damages.

Regarding special damages, the Appellant's complaint was that they were awarded when they were not specially proved. On loss of dependency, the Appellant questioned the multiplier, multiplicand and the dependency ration that the lower court had applied.

The parties' advocates agreed to file written submissions on the appeal. I have considered and evaluated afresh the evidence tendered before the trial court and the submissions made at the court and before this court. (**Selle v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**). I bear in mind that I did not have the advantage of seeing and hearing the witnesses.

There was no appeal on the finding on pain and suffering made under the Law Reform Act where Ksh.100,000/= was awarded. On the question of special damages, what was claimed in the plaint was Ksh.12,300/= being mortuary fees and Ksh.162,545/= which was paid at the Hospital as treatment expenses. The 2nd Respondent gave evidence and produced receipts for the amount which totaled Ksh.174,845/=. The amount was not challenged in cross-examination and no evidence was at all given in defence. Special damages were therefore proved. The appeal against the amount has no merit.

Under the Fatal Accidents Act, it was not disputed that the deceased was 42, in good health and left a widow, three children aged 10, 7 and 5 and his father. His gross salary was Ksh.37,771/=. The court took Ksh.19,104.80/= as his net salary and rounded it up as Ksh.19,000/=. It was correctly pointed out during this appeal that Ksh.5,606/= of what was taken to be the net salary represented Sacco dividend which was paid once every year. If the amount is deducted, the net salary that salary should have been used was Ksh.13,498/80. I will round it to Ksh.13,500/=.

The deceased was 42. The retirement age is 60. He was left with 18 years to work. The court gave 19 as the multiplier. That was wrong. Even if it was taken that he was going to work to retirement the multiplier should have been 18. However, the court ought to have considered that there was no guarantee that he was going to work until retirement, given the risky nature of his work and other imponderables. In the circumstances of this case, a multiplier of 13 is reasonable.

The evidence was that the deceased was staying at his place of work and the dependants were staying at his rural home. He was expected to pay rent, pay for his food, etc, and provide a reasonable balance of his salary for the dependants. A dependency ratio of 2/3 was reasonable.

This means that, under the Fatal Accidents Act the damages to be awarded to the estate shall be $Ksh.13,500/= \times 13 \times 12 \times 2/3 = Ksh.1,404,000/=$. Less 20%, the amount shall be Ksh.1,123,200/=.

The ksh.100,000/= and ksh. 174,845/= shall also be subject to contribution to bring it to Ksh.219,876/=. The grand total shall be Ksh.1,343,076/= together with costs and interest. However, the 1,123,200/= shall be distributed to the dependants as follows:

1. Christine Akinyi Okochi – 30%
2. Derrick Makokha Barasa – 20%
3. Regina Naliaka Barasa – 20%
4. Sylvia Nafula Barasa - 20%
5. Vincent Namachanja Makoro – 10%

The shares of Derrick, Regina and Sylvia shall be invested in an interest earning account in a reputable bank until they are of age. The account shall be opened in the name of the 2nd Respondent and the Deputy Registrar.

To that extend, therefore, the appeal is allowed with costs.

Dated, signed and delivered at Bungoma this 19th day of September, 2012.

A. O. MUCHELULE
JUDGE