



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 178 of 2002

JULIUS OKUSIMBA POMBO (suing as Administrator

of the Estate of Late **BRUNO OKWAKO POMBO**) **PLAINTIFF**

VERSUS

GILBERT KIPKURGAT **1ST DEFENDANT**

SOYONINI FARM **2ND DEFENDANT**

JUDGMENT

1. The suit herein was initially instituted by the father of the deceased one Bruno Okwako Pombo by filing plaint on the 22nd July 2002 seeking damages for and on behalf of the Estate of his son JULIUS OKUSIMBA POMBO (deceased) both under the Fatal Accidents Act and the Law Reform Act together with special damages, costs and interest following a road traffic accident that allegedly occurred on 18th November 2000 along Oyugis-Kisumu road. The suit proceeded ex parte because the defendant had failed to file a memorandum of appearance and defence within time but by a consent letter dated 26th June 2003, the parties agreed to set aside the ex parte proceedings and judgment and the matter then started de novo.
2. Bruno Okwako Pombo, the plaintiff unfortunately passed on on the 2nd March 2004 before he could testify and vide an application dated 30th September 2004 MILLICENT KATAKA AMBANI was substituted as administrator of the estate of the deceased herein JULIUS OKUSIMBA POMBO.
3. The plaintiff testified that she is the widow of the deceased herein JULIUS OKUSIMBA POMBO. She produced a Grant of Letters of Administration as her **Exhibit No.1**. She told the court that her deceased husband died out of a road accident on 18th November 2000 when he was 28 years old, she produced a death certificate as her **Exhibit 2**. According to the plaintiff, at the time of the deceased's death he was working with a company known as ISSACO a road construction company and was a mechanic with a monthly salary of Kshs.20,440/=. She produced a pay slip for the month of November 2000 which was marked as **MF1-3**.
4. The plaintiff also testified that at the time of the deceased's death, she had one child BRANDY NABURU and that she was pregnant and later got baby EMMANUEL OKUSIMBA. She therefore had two children who survived the deceased. She further testified and produced receipts for special damages totaling Kshs.51,585/=. This evidence by the plaintiff was not challenged by the defence.
5. Police Constable John Maturi testified as PW2. He was attached to the Oyugis police station at the time of the accident. He testified that an accident occurred on 18th November 2000 along Oyugis-Kisumu

road involving motor vehicles KAE 980 M a Lorry which was pulling a trailer No.250 8Z and Isuzu canter Reg. NO. KAD 386 W.

6. According to PW2, he found the canter on the left hand side of the road as one faces Oyugis from Kisumu and it was extensively damaged. He also confirmed that one of the victims of the accident was the deceased Julius Okusimba Pombo whose body was retrieved from the bridge.

7. He forwarded the police inquest file to the state counsel who recommended that the driver of the lorry KAE 988 M be charged with the offence of causing death by dangerous driving.

8. From his observation of the accident, PC Maturi was of the view that the driver of the lorry KAE 980 M the 1st defendant herein be blamed for the accident. He further added that motor vehicle KAD 386 W in which the deceased was a passenger was properly on its side of the road and it could not be blamed for the accident. He produced the police Abstract Report as **P. Exhibit 4**.

9. Evans Odera, PW3, testified and confirmed to the court that as at the time of his death the deceased was earning Kshs.20,240/= net from his gross earnings of Kshs.25,492/=.

10. PW4 one Zedekia Omullo an eye witness testified that he is a car washer who was a few feet from where the two vehicles collided. To him this accident was caused by the 1st Defendant who was the driver of motor vehicle Reg. No. KAE 980 M. He says that he saw the 1st defendant try to overtake a canter from Oyugis side and thus got into the lane of the canter which was coming from the Kisumu side. The canter was on its proper side of the road and to him the lorry was to blame. The evidence by the plaintiff's witnesses was not challenged and/or controverted in any way as the defendants did not call any witnesses.

11. Counsel for both the parties herein have filed and exchanged their written submissions together with list of authorities.

12. The Defendants have denied that the plaintiff/administrator had the *Locus Standi* to institute this suit. PW1 at the hearing of the suit herein failed to produce and exhibit the Grant of Letters of Administration obtained by the deceased plaintiff administrator before filing of the suit.

13. What she produced as exhibit No.1 is a grant of letters of administration in respect to the Estate of BRUNO OKWAKO POMBO the father in-law instead of the subject of this litigation JULIUS OKUSIMBA POMBO.

14. The defendants' view is that **P. Exhibit I** cannot and will not entitle the plaintiff to claim damages for and on behalf of the estate of JULIUS OKUSIMBA POMBO. The deceased plaintiff BRUNO OKWAKO POMBO at the time of filing the plaint herein had applied and been issued with a grant of letters of administration *ad colligenda bona* and the purpose for which the same was issued was only of collecting and getting on and receiving the estate and doing such things as may be necessary for the preservation of the estate. What comes to my mind is that in order to preserve the deceased estate the suit herein was necessary. Thus the letters of administration *ad colligenda bona* herein was, in my view and according to its purpose intended for instituting this suit to preserve the estate of the deceased.

15. To be able to preserve something there are measures one has to take and in this case the administrator BRUNO OKWAKO POMBO filed a suit on behalf of the estate of the deceased after duly been issued with grant of letters of administration *ad colligenda bona*.

16. The letters of administration issued to the current plaintiff were in respect of the estate of Bruno Okwako Pombo. Does the estate of Bruno Okwako Pombo entail/include the assets and liabilities of the deceased? I will answer this in the affirmative and these include the suits filed by the deceased. Now the wife of the deceased had to take out letters of administration for the Estate of Bruno Okwako Pombo who was an administrator of the Estate of the deceased herein for purposes of preserving the said estate. Does this mean that she does not have locus standi to continue with the case herein only because the letters she has are not for the deceased's estate?

17. Counsel for the defendants have relied on various authorities:-

1. ***Yohana Omumia –vs- Mumias Sugar Company Ltd. – Civil Appeal No.18 of 2004 at Bungoma.***
2. ***Civil Appeal No.175 of 2004 – East African Sea Ltd. –vs- Joel Muga Opija***

In all the above quoted cases it was held that Letters of administration ad colligenda bona do not confer to the holder any benefit from the estate of the deceased, because the purpose for which the letters were issued was not stated.

18. In the instant case the letters were issued to the administrator for the purpose of preserving the estate of the deceased, including the filing and institution of this suit. When the current plaintiff who is the wife to the deceased applied to be substituted as plaintiff in place of Bruno Okwako Pombo, the application was allowed and she was substituted as such despite the defendant's opposing the same. Therefore as things stand the plaintiff has *locus standi* in this suit to bring the same on behalf of the deceased (Bruno Okwako Pombo). I have looked at the arguments raised in the reply to the defendant's submission in the alternative and to me the submissions by the defendant on the issue of *locus standi* are on technicality of procedure and not the substance of the evidence given in court. The same ought to have been brought at the earliest opportunity and not at the end of the trial. These arguments are in my view in contravention of the provisions of **sections 1A and 1B of the CPA and Article 159 (2) (d) of the Constitution of Kenya, 2010.**

19. Lack of grant of letters of administration will only affect a claim under the Law Reform Act which in the plaintiff's case is the claim for loss of expectation of life. It has been held and the same has been quoted and cited in a full bench of (5) five judges that lack of grant of letters of administration did not stop a claimant from getting an award under the Fatal Accidents Act. See the case of **Tronistik Union International & another –vs- Mrs. Jane Mboya & another – CA of Nairobi, Civil Appeal NO. 145 of 1990.**

20. The evidence adduced by the plaintiff and her witnesses has not been challenged at all. It is the plaintiff's submission that the two defendants be found 100% liable. The defendant suggests that liability be apportioned at the ratio of 50:50 on the grounds that PW2 did not investigate the matter nor did he produce the police file and finally that the evidence of PW4 was not credible.

21. Therefore on the issue of liability, I would apportion the same at 100% in favour of the plaintiff as against defendant.

22. The plaintiff's counsel has in his submissions divided the issue of quantum into four heads as follows:-

(a) Pain and Suffering.

(b) Loss of Expectation of life.

(c) Loss of Dependency.

(d) Special damages.

(a) Pain and suffering

23. According to the evidence of PW2 and PW4 the deceased died almost instantly. Plaintiff submit that an award of Kshs.20,000/= will suffice under this head. The defendant on their part feel that no evidence was led to demonstrate when the deceased died, the presumption being that the deceased died instantly. They have proposed Kshs.10,000/=. An award of Kshs.15,000/= would in my view be appropriate under this head, and I accordingly award the same.

(b) Loss of Expectation of life

24. Under this head the defendants have proposed Kshs.80,000/= being the conventional award. The plaintiffs on their part have suggested an award of Kshs.100,000/= under this head. In my humble opinion, an award of Kshs.100,000/= will be sufficient under this head.

(c)Loss of Dependency

25. The plaintiffs herein have suggested a multiplier of 30 years as being fair. The deceased according to the plaintiff was earning Kshs.20,240/= per month whereas the defendants maintain that his (deceased's) basic salary was Kshs.8,000/=. I think the figure given by the plaintiff included allowances. I will therefore adopt the figure given by the defendants but I will use a multiplier of 25.

$$8,000 \times 2^2 / 3 \times 12 \times 25 = 1,600,000/=$$

(d)Special damages

26. The defendants have proposed Kshs.30,000/= as reasonable expenses. The plaintiff has produced receipts for Kshs.51,585/=. Therefore special damages having been proved should be awarded as pleaded and proved. Accordingly I award Kshs.51,585/= under this head.

27. Conclusion

In conclusion, I enter judgment for the plaintiff as against the defendants jointly and severally as follows:-

General damages

(a) Law Reform Act

(i) Pain and suffering Kshs.15,000.00

(ii) Loss of Expectation of life Kshs.100,000.00

(b) Fatal Accidents Act Kshs.8000x2/3x12x25..... Kshs.1,600,000.00

(c) Special Damages Kshs.51,585.00

Total

Kshs.1,765,585.00

28. The plaintiff shall also have costs and interest on general damages at court rates from the date of this judgment.

Dated and delivered at Kisii this 12th day of September, 2012

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. G.S. Okoth for Kerario Marwa for Plaintiff

M/s Muma Nyagaka (absent) for Defendants

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.