



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 136 OF 2007

E.C.S.....PLAINTIFF

VERSUS

JANE WANGUI NJUGUNA.....1ST DEFENDANT

JAPHETH KIPKORIR CHERUIYOT.....2ND DEFENDANT

JUDGMENT

The suit herein was commenced on 20th December, 2007 by E.C.S. in her representative capacity as the legal administratrix of the estate of her late husband, S.K.S. She claims in the suit against **Jane Wangui Njuguna** and **Japheth Kipkorir Cheruiyot** general damages under the **Law Reform Act** and the **Fatal Accidents Act** for loss of support and special damages which were not qualified in the prayer but were stated to be Kshs. 41,180/= in the particulars of special damages.

The Plaintiff's claims arise from tortuous acts alleged against the defendants. In paragraphs 4, 5 and 6 of the **Plaint**, the Plaintiff alleged that her late husband, **S.K.S.**, was hit and knocked down by motor vehicle registration KAU 732T on 3rd September, 2006 while lawfully walking "off the verge of the road known as Kakiptui – Chebocho road as a result of which he sustained fatal injuries". It was alleged by the Plaintiff in the **Plaint** that the said motor vehicle was at the material time owned by the 1st Defendant and/or was under the care and control of the 1st Defendant and that the 2nd Defendant was driving it as a servant and/or agent of the 1st Defendant and/or with the authority of the 1st Defendant. It was the Plaintiff's case that the accident in which the Plaintiff's late husband was fatally injured was caused by the negligence of the 2nd Defendant and that the 1st Defendant was vicariously liable. The Plaintiff pleaded *res ipsa loquitur* and relied on the Highway Code and the provisions of the **Traffic Act, Chapter 403** of the laws of Kenya.

The Defendants entered appearance to the summons on 26th March, 2008 through the firm of Messrs Wheldon Ngetich & Co. Advocates who also filed a written statement of Defence on the same day denying liability and attributing negligence to the Plaintiff's deceased husband on the grounds, *inter alia*, that he crossed the road suddenly and without first ensuring that it was safe to do so and that he suddenly jumped onto the said road, and that he was walking on the highway instead of walking on pedestrian pathway and that he was "joy walking". The Defendants also alleged in their defence that the deceased failed to heed the presence of and/or approach by the Defendant's said motor vehicle or to keep a proper look out or to have sufficient regard to traffic expected on the road.

On 6th July 2010, the advocates for the Plaintiff on record, Messrs **SILA MUNYAO & COMPANY**, and the advocates on record for the Defendants Messrs **WHELDON NGETICH & COMPANY**, filed a

written consent to the effect that the parties had agreed to apportion liability in the ratio of 80:20, the Defendants taking the bigger share of blame i.e. 80%. The consent also sought determination of damages by the Court.

The hearing of the suit came up before me on July 21st 2010. Mr. P.C. Mitei, Advocate, appeared for the Plaintiff while Mr. Wheldon Ngetich, Advocate, appeared for the Defendants. Mr. Wheldon Ngetich sought adjournment which was opposed by the Plaintiff's counsel. I declined to adjourn the hearing because no sufficient ground was advanced for the adjournment sought. The Plaintiff opened her case and gave evidence and produced as evidence various exhibits. She called no witnesses. Neither Defendant was in Court. Their counsel, Wheldon Ngetich, tendered no evidence after the close of the Plaintiff's case. In effect therefore, the hearing on damages proceeded *inter partes*. The Plaintiff's counsel filed written submissions on 3rd December, 2010 which I have perused. The Defendants' counsel did not.

The evidence emerging shows that at the time of his death on 4th September 2006, the Plaintiff's deceased husband, S.K.S., was aged 45 years. He had seven children with the Plaintiff, five sons and two daughters. He was in good health. He was an officer employed by National Intelligence Service (NSIS). He earned a net salary of 48,942/=. His gross salary was 94,553/=. Pay slips for April 2005 to July 2005 were produced to prove this. The deceased was buried in Kakiptui. When he lived, his children depended on him for their upkeep and education. His wife also depended on him for support. The funeral expenses included Kshs. 30,000/= for the coffin. The Grant of legal representation taken by the Plaintiff qua widow of the deceased cost Kshs. 11,180/=.

In her evidence, the Plaintiff also told the Court that the seven children were aged between 24 years and 7 years. The oldest child, E.K.K. was an adult. The second born, F.C., was aged 18 years and the 3rd born, V.K., was aged 15 years. V.C. and K.C., the 4th and 5th born were aged 15 years and 10 years while the 6th born, C.K., was aged 10 years and D. the 7th child was aged 7 years. V.C. and V.K. are twins.

It was the Plaintiff's submission that damages under the **Law Reform Act** for loss of expectation of life was Kshs. 150,000/=. A further sum of Shs.30,000/= was sought for pain and suffering. The Plaintiff prayed for Kshs. 50,000/= for loss of consortium. As regards damages under the Fatal Accidents Act, it was argued that the deceased who earned Kshs. 100,000/= per month with a net of Kshs. 45,000/= would have spent the latter amount less 1/3 on his family. Advocate P.C. Mitei of M/S Sila Munyao & Company on behalf of the Plaintiff suggested a multiplicand of Kshs. 45,000/= and a retirement age of 60 years. A multiplier of 12 years was submitted to be fair and computation for dependency was accordingly done on this basis and it resulted on a sum of Kshs. 4,319,999/= (45,000 x 2/3 x 12 x 12) which was to be apportioned among the dependants.

Damages for loss of expectation of life have over the years remained measly. They are for the benefit of the estate of the deceased. That they are nominal is because they are predicated on the fact that life is priceless and no amount of money can compensate it. There may also be a moral reason militating against astronomical awards under this head. The awards under this head have tortuously slowly increased from the original figure of Shs. 20,000/= to Shs. 120,000/= over the years and the courts here in Kenya generally award Shs. 200,000/=. The Plaintiff has sought payment of Shs. 150,000/=. I award Shs. 150,000/= prayed for by the Plaintiff.

As regards funeral expenses, a sum amounting to Shs. 30,000/= has been prayed for. This figure is modest and I take judicial notice of the fact that the various expenses attendant to coffin, transport, etc in funerals of our people, is normally much larger than what is claimed in this case. I have no hesitation in awarding the Plaintiff Shs. 30,000/=. In addition, the Plaintiff claimed shs. 11,180/= for the expenses attendant to obtaining a Grant of Letters of representation. I also grant this claim.

In the judgment delivered by the then Chief Justice in **Nairobi H.C.C.C. No. 173 of 1956 (Pegg Frances Hayes & others V. Chunibhai J. Patel & Another)**, which, on appeal, was upheld by the former Court of Appeal, the learned Chief Justice stated the method of assessment of damages under the **Fatal Accidents Acts** as follows:

“The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants”

In this case, the deceased died at the age of 45 years. He was in good health. He was an officer with the National Security Intelligence Service (NSIS). The pay slips produced as exhibit 7(a)(b)(c) & (d) show that his net salary was Shs. 45,000/=. It is not difficult to see that the expectation of his working life would have been in the region of 15 years if he were to retire at the age of 60 years. As regards his net income and the proportion of such income which he would have made available to the named dependants, the evidence adduced shows that he earned a gross salary of Shs. 94,553/= and a net of Shs. 48,942/= after deductions. He had dependants. These were the widow who is the Plaintiff in this suit and five sons and two daughters. These are

Widow, E.C.S.

Son, E.K.K. aged 20 years in 2007

Daughter, F.C. aged 17 years in 2007

Son, V.K. aged 14 years in 2007

Daughter, V.C. aged 14 years in 2007

Son, K.C. aged 10 years in 2007

Son, C.K. aged 8 years in 2007

Son, D.K. aged 5 years in 2007.

The widow and her children with the deceased depended on the deceased who met the expenses relating to their education and upkeep. The deceased augmented his salary with income from farming activities. The proportion the deceased would have made available to the dependants, according to the Plaintiff’s evidence, would have been more than 2/3 of the net salary. The first born son, E.K. is now aged 24 years. He has completed standard 8 and F.C. has gone up to Form 4. Victor is in class 8 as is also Caroline. Kenneth Cheruiyot is in standard 7 and C.K. is in class 5 and D.K. is in class 3. The 1st born son was dependant on the deceased at the time of his death and would have depended on him for several more years. All the other children would have depended on the deceased for periods ranging from 8 years to 18 years. The dependency of the widow would linger on for much longer and increase with her age. In absence of actual figures of dependency made available to each child, it is reasonable to proceed on the basis that the deceased would have spent 2/3 of his net salary for the needs of the family and used 1/3 on himself. As no evidence was adduced on the income allegedly made from farming, I am constrained not to have regard to it.

It would not be unrealistic to expect that the period of dependency would stretch to age 60 years if the deceased had lived. Taking into account all imponderables, a multiplier of 12 years would not be unreasonable. A multiplier must bear a relation to the expectation of life and dependency of the dependants. Doing the best I can, I hold that the amount expended on the dependants from the net salary per month, would have been Shs. 25,000/= thus leaving the deceased with Shs. 20,000/= for personal use. The annual value would be Shs. 300,000/= (Shs. 25,000 X 12). The sum of Shs. 300,000/= must be capitalized by multiplying it with 12 years purchase. The capital sum reached stands at Shs. 3,600,000/= (i.e. 25,000 X 12 X 12 = shs. 3,600,000/=). The lump sum would therefore be as follows:

- (i) Damages under Fatal
Accident Act - Shs. 3,600,000/=

(ii) Special damages	- Shs. 41,800/=
(iii) Under Law Reforms Act	- Shs. <u>150,000/=</u>
Lump sum	3,791,800/=
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As liability was agreed on at 80%:20% in favour of the Plaintiff, the lump sum must be reduced by 20% which represents the Plaintiff's contributory negligence and amounts to Shs. 758, 360/= (i.e 3,791, 800/= ÷ 5X1). **The balance of the 80% of the lump sum amounts to Shs. 3,033, 440/=.**

The said balance of the lump sum of Shs. 3,033,440/= must be apportioned among the dependants. In apportioning damages, I consider that the last three children ought to get the full period of 12 years dependency while the twins, V. and V. should get 10 years and F. and E. 6 years and 4 years respectively. The widow will get the full period of 12 years dependency.

In the result, the apportionment of Shs. 3,033, 440/= shall be as follows;

1) E.C.S. (widow)	- Shs. 466,685/=
2) E.K.K. (son)	- Shs. 155,561/=
3) F.C. (daughter)	- Shs. 233,341/=
4) V.K. (son)	- Shs. 388,902/=
5) V.C. (daughter)	- Shs. 388,902/=
6) K.C. (son)	- Shs. 466,683/=
7) C.K. (son)	- Shs. 466,683/=
8) D.K. (son)	- <u>Shs. 466,683/=</u>
Total	Shs. 3,033,440/=
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Accordingly, I enter judgment in favour of the Plaintiff for the sum of Shs. 3,033,440/= against the Defendants jointly and severally. The sum of special damages amounting to Shs. 41,800/= shall carry interest at court rates from the date of filing suit until full payment and the sum of Shs. 2,991,640/= (Shs. 3,033,440/= less Shs. 41,800/=) shall carry interest at court rates from the date of this judgment until full payment.

I award costs of his suit to the Plaintiff.

DATED at KERICHO this 23rd day of March, 2011

G.B.M. KARIUKI, SC
RESIDENT JUDGE

COUNSEL APPEARING

Miss P.C. Mitei Advocate for the Plaintiff

Mr. E.M. Orina Advocate for Wheldon Ngetich for the Defendants

Mr. Bett -Court Clerk