



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 605 OF 2009

MARY NABWIRE OMALLAPLAINTIFF

VERSUS

DAVID WACHIRA1ST DEFENDANT
COMMISSIONER OF PRISONS2ND DEFENDANT
ATTORNEY GENERAL3RD DEFENDANT

JUDGMENT

The personal Representative of the estate of Maxwell Were Omala (hereinafter referred to as ‘The deceased’) has filed this suit to seek damages pursuant to Law Reform Act (Cap 26) and The Fatal Accidents Act (Cap 32).

The Plaintiff gave evidence and the facts emerged from her evidence are that she was the mother of the deceased who was 19 years of age at the time of the road accident which occurred on 19th January, 2005 at about 2.00 pm along Dar-es-Salaam Road in Nairobi. The Plaintiff was informed of the accident and on visit to Mater Hospital, she found him covered with blood. The next day, she was told by the doctor that he is dead. With struggle, the body was released to her and the deceased was buried. She produced the Police Abstract, Limited Grant of representation in respect of the estate of the deceased.

The deceased used to have his meals with her and she had six other children apart from the deceased out of which four were adults at the time of the death.

The deceased according to her was self employed and used to be in Prison team as a boxer. The deceased used to bring home shs.10,000/= to shs.15,000/= from casual jobs and from the Prison. She agreed that other children do support her but not like the deceased.

She also produced the copies of charge-sheet and Judgment of the case being Traffic Case No. 6386/05 wherein the 1st Defendant was charged and convicted of the offense of causing death by dangerous driving contrary to Sec. 46 of the Traffic Act (P Exhibit 6 (a) and 6(b)). She further produced receipts (P Exhibit 8 collectively) to support her claim of shs.48,160/= spent on funeral as special damages and court fees of Kshs.1,950/= for limited grant (P Exhibit 9).

In cross examination, it was shown to her that as per the certificate of death, the date of death is 23rd January, 2005 and in the charge-sheet it is shown as 20th January, 2005. She explained the delay in filing this suit and leave granted by the court. As per her affidavit in support of application for leave, she had to first finalized the payment of hospital bills and negotiations out of court. I do note that no bills as such are

produced by her. She also agreed that she did not have any documentary proof to substantiate her averments in the affidavit as regards the earning of the deceased. She however, has averred that she had to apply for grant of representation as well as certified copies of court proceedings.

The Defence did not adduce any evidence.

In the submissions, it was contended that the deceased died after few days and thus the court should grant shs.200,000/= for pain and suffering.

The loss of expectation of life with multiplier of 25 years considering the age of 'the deceased as 19 years at the time of death, was proposed as shs.2,250,000/= with ½ dependency.

The learned counsel for the Defendant began with the contentions that the leave to institute suit out of time was not granted properly and thus the suit be struck out having been filed out time.

It was contended that the leave granted ex-parte is provisional and the Defendant then has every opportunity of challenging the facts and law *at the trial*. The judge who tries the case is the one who must rule finally whether the Plaintiff has satisfied the conditions for overcoming the time bar (see *Cozens –vs- North Devon Hospital Management Committee and Another (1966) 2 ALL ER*)

The English court was of the view that the party can challenge the ex-parte leave at the trial on the facts and law but cannot raise the issue in appeal.

Sec. 4 of the Limitation of Actions Act (Cap 22) gives the time limit of filing the different types of actions. It stipulates that ***“the actions may not be brought after end of”***. The Section thus stipulates different periods for different cause of actions. Sec. 4 (2) stipulates that an action founded on tort may not be brought after the end of three years but gives twelve months period for actions for libel or slander.

Reliance was placed on sections 27 and 28 of the Limitation of Actions Act (referred to as 'The Act') which provides for the extension of the time and application for leave to file the action out of time.

Obviously, this action was filed after the leave to do so was obtained in HC Misc. Application No. 527 of 2009. It was obtained in pursuance to Sec. 27 (1) (c) and Sec. 28 (1) (2) of The Act. These provisions stipulate:-

27. (1) Section 4 (2) does not afford a defence to an action founded on tort where-

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until a date which –

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

28. (1) An application for the leave of the court for the purposes of section 27 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the

commencement of a relevant action.

(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the Plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient –

(a) to establish that cause of action, apart from any defence under section 4 (2); and

(b) to fulfill the requirements of section 27 (2) in relation to that cause of action.

I must observe that the said provisions are made unnecessarily complex and could have been provided in one section and that too in simple language. Be that as it may.

The Misc. Application filed by way of Originating Summons and the evidence before the court showed that the applicant is a single mother and was mostly relying on the deceased for her upkeep. She had to obtain the Letter of Administration from the court which was obtained in October 2006 and she was also making efforts to pay the medical bills while she also applied to get the proceedings of the Judgment of Traffic Case Nos. 6386/05 which was delivered on 24th April, 2007 and she obtained the same in April, 2009. Thereafter the application dated 31st July, 2009 was filed on 3rd August, 2009 and leave was granted on 4th November, 2009. The suit was filed the next day i.e. 5th November, 2009.

With the above facts and evidence, I am of the opinion, that the leave was appropriately granted as it appeared to the court on evidence adduced by or on behalf of the Plaintiff, that such an action could not have been brought forthwith, in absence of the grant and copies as per Sec. 28 (2) (a) and (b).

The Plaintiff would not have been in position to establish her case. She obtained the satisfactory evidence which she did obtain before the filing of the case.

The Plaintiff has also explained the delay to the court and the court has exercised its discretion appropriately.

Moreover the Defendant, despite making specific averments to raise the issue of Limitation at the earliest as a preliminary point, has failed to do so and did not raise the same at the trial as observed in the case of *Cozens (supra)*. It was subsequently raised only during submissions.

The learned counsel, apart from asking the question as to whether the Plaintiff knew the materials of the accident, did not go into the details of her efforts to obtain the necessary materials/evidence to support her case. She was not present at the time of accident and there were no eye witness. She had to await the outcome of the criminal case to establish her case.

I thus find that the leave obtained was as per law and established principles for leave to extend the time of limitation.

The only issue thus remains to be determined is the damages under the Law Reform Act and the Fatal Accidents Act.

The Defendant proposes shs.10,000/- for pain and suffering for the death occurring after three days.

In respect of loss of expectation of life, the award of shs.100,000/= was proposed.

Under the Fatal Accident Act, it was submitted that the Plaintiff failed to prove the income of the deceased at shs.10,000/= and who was only 19 years of age as well as a casual worker. The sum of kshs.3,000/= was proposed as the monthly income and dependency was proposed as ?. The multiplier of 26 years was proposed considering the risk involving in casual working and profession of boxer. Thus the

sum of Kshs.312,000/= was proposed i.e. Kshs.3,000 x 12 x 26 x ?.

It was finally submitted relying on the authorities of ***Jivanji –vs- Sanyo Electrical Co. Ltd. CA No. 225 of 2001 (2003) KLR 425*** and ***Hahn –vs- Singh CA No. 42 of 1985 (1985) KLR 716*** that the special damages had to be specifically pleaded and strictly proved.

I would totally agree on the above propositions of law and would also cite the passage quoted by the learned counsel for the Defendant in Hahn’s case (supra), namely:-

“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves.”

It was stressed that the Plaintiff when filing the case after 4½ years ought to have known the details of funeral expense and costs of obtaining limited grant.

I do tend to agree on the aforesaid submissions and also look at the first two receipts of 22nd January, 2005 (which is the date before the death) and 2nd February, 2005 which is once again almost 20 days before the funeral. The only amount which I tend to accept as funeral expense is for the coffin. The grocery receipt of 23rd February, 2005 also does not really seem to be genuine as it almost repeats the goods purchased in the first two receipts. I thus allow Kshs.15,000/= in respect of funeral and Kshs.1,250/= for obtaining grant of representation along with specified sums for police abstract and death certificate.

In short, I allow the claim of special damages in the sum of Kshs.16,550/=.

I have considered the submissions from both the counsel in respect of damages under the Law Reform Act and Fatal Accident Act and find as under:-

Law Reform Act:

(1) Pain and Suffering:

The deceased suffered fatal injuries and survived for about three days in Intensive Care Unit. I cannot deny that the deceased agonized for three days and thus I would award Kshs.50,000/=.

(2) Loss of Expectation of Life:

The deceased was a young male of 19 years. He was, even at that age, working for gain. His life was tragically cut short and thus I would award Kshs.150,000/= under this heading.

The total sum awarded under the said Act is:-

Pain and Suffering	Kshs.50,000/=
Loss of Expectation of Life	<u>Kshs.150,000/=</u>
	<u>Kshs.200,000/=</u>

Under the Fatal Accident Act:

Loss of Dependency.

I do agree that the dependants/beneficiaries under the Act are specified under Sec. 4 (1) of the said Act. Thus I shall not consider the sisters and brothers of the deceased as the dependants of the estate. Moreover, out of them, four were adults and the other two would be at the threshold of majority. Moreover, no evidence is before the court that the deceased was in any event, looking after any of his siblings.

Coming back to the issue of Loss and Dependency, the Plaintiff did not substantiate her claim as regards income of the deceased being shs.10,000/= to shs.15,000/=. Moreover, she also did not give details of her dependency to the deceased. She only stated that the deceased was living separately but he used to eat his meals with her. The submissions as regards dependency of $\frac{1}{2}$ is in my considered view not tenable and I find that usual $\frac{1}{3}$ ratio should be applied.

Again, the Plaintiff fell short of giving proof of the income averred on the balance of probability. The figures coming from both the counsel are not acceptable by the court.

Doing best, I find that the multiplicand of shs.5,000/= shall be appropriate and the same shall be taken. As the Plaintiff has proposed 25 years of multiplier, I would take it.

Loss of Dependency should be calculated as under:

$$5,000 \times 12 \times 25 \times \frac{1}{3} = 500,000/=.$$

There shall be thus Judgment for the Plaintiff against the Defendant in the sum of Kshs.716,450/= as under:-

(1) Special damages	Kshs.16,450/=
(2) General damages under Law Reform Act	Kshs.200,000/=
(3) General damages under Fatal Accidents Act	<u>Kshs.500,000/=</u>
Total	<u>Kshs.716,450/=</u>

The Defendant shall pay costs and interest as per law.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of **March, 2011**

K. H. RAWAL

JUDGE

16.03.2011