



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 161 OF 2007

JANE KANANA KATHIRI.....1ST
PLAINTIFF

of **CECILIA KAIMURI KATHIRI (Both suing on behalf of the Estate**

GEORGE KATHIRI LINTURI (DECEASED).....2ND
PLAINTIFF

Versus

URGENT CARGO HANDLING LIMITED.....1ST
DEFENDANT

JOSHUA ONYANGO AMISI.....2ND
DEFENDANT

JUDGMENT

This is a claim for general damages arising from the fatal injuries the deceased suffered in a traffic accident. Liability having been apportioned at 50/50% basis, the remaining issue before me is the assessment of damages.

The plaintiffs claim damages under the headings of pain and suffering, loss of expectation of life and loss of dependence. Although the deceased's daughter Jane Kanana Kathiri, PW1 testified that her uncle paid kshs.50,000/= towards the hospital expenses for the deceased, there being no claim for special damages in the plaint the same is not sustainable. It is trite law that special damages should not only be specifically pleaded but should also be strictly proved **Hahn Vs Singh 1985 718**

The deceased died after about 7 months in hospital following the injuries he suffered at a road accident. As counsel for the defendant quite correctly conceded, there is no doubt that the deceased suffered pain. In their submissions counsel for the plaintiff suggested a sum of shs.120,000/=. On their

part counsel for the defendant suggested a figure of Kshs.50,000/= under this head. Given the long period of suffering, I award the estate a sum of Kshs.100,000/= under this head.

At the time of his death the deceased is said to have been 54 years old. He however enjoyed good health. I award the estate a sum of Kshs.100,000/= for loss of expectation of life.

In their submissions counsel for the plaintiff sought Kshs.3,960,000/= as damages under the heading of “loss of expectation of life.” I have no doubt they meant lost years. That is, however, not claimed in the plaint. As I have stated what is claimed is loss of dependence. I agree with counsel for the defendant that in claims like this plaintiffs have to choose to claim either for lost years or for loss of dependence. An award cannot be made under the two heads as that would be double compensation – **Kemfro Africa Limited vs Rubia & Another [1987] KLR 30**. In the circumstances I ignore that submission and instead consider an award for loss of dependence that is claimed.

In claims for loss of dependence the courts normally take into account the ages of the dependents and that of the deceased to determine the multiplier to be applied and the deceased’s income upon which the multiplicand is determined. In this case as stated the deceased was 54 years old. His dependants are given as his widow and three adult children as well as two minor grandchildren. Counsel for the plaintiffs suggested a multiplier of 11 years. On their part counsel for the defendants submitted that the deceased did not have any dependant. His three children being adults they should fend for themselves. As to the grandchildren they said the deceased was under no obligation to support them. They did not say anything about the deceased’s widow’s dependence. If overruled on that they suggested a multiplier of 8 years.

It is clear from the evidence of PW1 that the deceased’s minor grandchildren depended upon him. They were born to the deceased’s daughters who are unemployed and lived with the deceased. In the circumstances I overrule counsel for the defendant’s contention that the deceased was not under any obligation to support them. Even the deceased’s adult children, being unemployed and living with him I find that they depended upon him just like the deceased’s widow did. Taking all this factors into account I find the multiplier of 8 years suggested by counsel for the defendant reasonable.

The multiplicand poses the greatest challenge in this case. The deceased was said to have been a nominated councilor and an employee of Kay Construction Limited between 4th August 2003 and 18th February 2004. So at the time of the accident on 6th May 2004, he had ceased to work for that company. His salary of Kshs.25,000/= per month cannot therefore be taken into account in this case. As PW1 conceded the deceased was also not a councilor at the time of the accident.

Regarding his income the deceased was said had been running a bar and lodging business, a retail shop and also doing miraa farming. From all those activities PW1 said he earned an average of Kshs.90,000/= per month. PW2, an accountant who examined the deceased’s farming and business record testified that the deceased earned an average of Kshs.98,635/= per month.

Counsel for the defendant seriously disputed the alleged income. They said there is no documentary proof that the deceased was involved in any of the said economical activities. They contended that if indeed he was, those are non – technical activities that his family members can continue carrying on without any difficult.

I have considered the evidence on record on this point and the submissions by counsel for the parties. I have no doubt in my mind that the deceased was involved the said economic activities. If they wanted, the defendants could have challenged PW2’s financial statement by engaging their own accountant to examine the deceased’s record but they did not. That notwithstanding however the deceased’s children must have given a hand in those activities. PW1 said her mother assisted the deceased on the farm and in the retail shop. So the income earned from those activities cannot be attributed to the deceased’s endeavours solely. Taking all these factors into account I assess the deceased’s income to have been Kshs.60,000/= per month. In the circumstances I assess the loss of dependence at Kshs.3,840,000/=, that is $(60,000 \times 8 \times 12 \times \frac{2}{3})$.

From the above analysis I make an award of **Kshs.2,020,000.00** Made out as follows:

1. Pain and suffering	Kshs. 100,000.00
2. Loss of expectation of life	Kshs. 100,000.00
3. Loss of dependency	<u>Kshs.3,840,000.00</u>
Total	<u>Kshs.4,040,000.00</u>
Less 50% contribution	Kshs.2,020,000.00
Net award	<u>Kshs.2,020,000.00</u>

The said award shall attract interest from the date of this judgment. The plaintiff shall have the cost of this suit.

DATED and delivered this 20th day of July 2011.

D.K. MARAGA

JUDGE