



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAKURU

?

Miscellaneous Civil Application 1 of 2006

DAVID NDUNGU

**(Suing as the legal representative of the Estate
of the Late Simon Kimani Kibe).....
.....PLAINTIFF**

VERSUS

WESLEY KIPTALAM KIPTOO.....DEFENDANT

JUDGMENT

The plaintiff brought this action as the legal representative of the deceased by an amended plaint claiming damages under the **Fatal Accident Act** and the **Law Reform Act** following the fatal accident involving the deceased **Simon Kimani Kibe** and the defendant's motor vehicle Registration No.KAE 567W on 6th March, 2004.

The plaintiff blames the defendant for the occurrence of the accident and has sought compensation for the deceased person's dependants and estate as follows:

- 1) Loss of dependency Kshs.14,635 x 36 x 12 x 1/3 =Kshs.2,107,438.00
- 2) Loss of Expectation of life – Kshs.150,000.00
- 3) Pain and suffering Kshs.80,000.00
- 4) Special damages – Kshs.25,000.00

The claim is premised on the grounds that at the time of his death, the deceased, who was in good health was aged 29 years, unmarried and employed as a Prisons Officer with a monthly income

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of Kshs.14,625.00. That the plaintiff and the deceased person's other siblings and mother depended upon him. That the deceased died two days after the accident. The plaintiff therefore prays that a multiplier of 36 years be adopted and an award of Kshs.80,000.00 be made for pain and suffering; that Kshs.150,000.00 be awarded under the head of loss of expectation of life and finally; that Kshs.25,000.00 spend on the succession cause to obtain grant of letter of administration to bring this suit be refunded as special damages. The plaintiff relies on a number of authorities in support of the above proposals.

The defendant denied liability and blames the deceased for contributing wholly to the accident. He has further averred that the plaintiff does not qualify to be a dependant of the deceased and finally that the suit is fatally defective and does not disclose any reasonable cause of action.

The plaintiff called three (3) witnesses while the defendant did not call evidence at all.

The two broad questions to be determined are whether the defendant by his negligence caused the accident and whether the plaintiff is entitled to the quantum of damages proposed. The only eye witness to the accident was P.W.2 Jedidah Wairimu Hinga, (Jedidah) who was in the company of the deceased at the time of the accident. She testified how the deceased was knocked down while walking on the footpath on the left side of Gusii Road in Nakuru Town. That the motor vehicle which knocked him down came from behind them at a high speed; that the driver, the defendant, appeared drunk. These averments have not been rebutted. Indeed the defendant was charged with causing death in Nakuru Chief Magistrate's Court Traffic Case No.615 of 2004 in which he was found guilty, convicted and sentenced to a fine of Kshs.10,000/= in default nine months imprisonment. It is now settled law that a

conviction by a court of competent jurisdiction in a traffic case for careless driving (and I may add dangerous driving) in relation to an accident, the subject of a civil suit such as the one before me, is *prima facie* evidence of negligence. See **Robinson Vs. Oluoch** (1971) EA 376 at Page 378. See also **Dilip Asal Vs. Herman Muge & Another** Civil Appeal No.49 of 2000.

I am persuaded by the evidence of Jedidah that the motor vehicle was being driven dangerously and at a high speed. It lost control, left the road and hit the deceased who was walking on the pedestrian footpath by the road side. It has also been shown by evidence that the motor vehicle belongs to the defendant and that he was driving it at the time of the accident. I come to the conclusion on the first question that the defendant is 100% liable for the cause of the accident and therefore the death of the deceased.

On quantum, the plaintiff's advocate has submitted for general damages of Kshs.2,337,439.00. On loss of dependancy, I would like to observe that the plaintiff, by his own admission, did not depend on the deceased and was indeed earning more than him. The deceased however, supported his elderly mother and other siblings. His salary was Kshs.14,635.00. He was 29 years old. Two (2) cases have been cited in support of a multiplier of 36 years. **James Gichuru Kiunjuri and Another Vs. Mainyo Investments Limited** HCCC No.1681 of 1999 where a multiplier of 30 years was adopted for a deceased who died at the age of 25 years. A multiplier of 19 years was adopted in a case where the deceased was 32 years – See **Meru Packers Ltd. Vs. Herbert Liatema Omwaka**, HCCA.78 of 2001.

I have considered these decisions but think a multiplier of twenty six (26) years is appropriate in the circumstances of this matter.

On loss of expectation of life, I award Kshs.100,000.00 again based on the decision of **James Gichuru Kiunjuri and Another Vs. Mainyo Investments Limited** (Supra) and bearing in mind the circumstances of this case. On pain and suffering, it is noted that the deceased died after two days. An award of Kshs.50,000.00 would suffice. On special damages, it is the plaintiff's contention that he spent Kshs.25,000.00 as advocates fees for filing the Succession Cause. A receipt for that sum issued to the plaintiff by the advocates was produced. I award that sum for special damages.

I enter judgment for the plaintiff in the following terms:

- Loss of dependancy $14,635 \times 12 \times 26 \times 1/3 = 1,522,040.00$
- Loss of expectation of life - 100,000.00
- Pain and Suffering - 50,000.00
- Special damages - 25,000.00

Kshs.1,697,040.00

Applying the Principle in **Maina Kainiaru & Another Vs. Josphat Muriuki Wangondu**, Civil Appeal No.14 of 1989 (unreported), I take into account the award under the Law Reform Act while dealing with the award under the **Fatal Accidents Act** and award the plaintiff Kshs.1,622,040, costs of the suit and interest.

Dated, Signed and Delivered at Nakuru this 15th day of January, 2010.

W. OUKO
JUDGE