



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Civil Suit 24 of 2009

MILDRED AORI ODUNGA

**(suing as the personal representative of GILBERT SILVANO
MORUMBASI – DECEASED) PLAINTIFF**

VERSUS

HUSSEIN DAIRY LIMITED.....RESPONDENT

JUDGMENT

This judgment is for purposes of assessment of damages only, judgment on liability having been agreed upon by consent at the ratio of 35:65 in favour of the plaintiff.

GILBERT SILVANO MURUMBASI, the deceased herein, died as a result of a road traffic accident that occurred on 30th August 2007 along Kisii-Keroka road. The deceased was lawfully travelling in motor vehicle registration No. **KAT 302 Q** when the same collided with motor vehicle registration No. **KAX 308 Z** belonging to the defendant. The plaintiff is the widow of the deceased and brought this suit as a personal representative of the deceased, having obtained a Limited Grant of Letters of Administration Ad Litem on 6th December 2007.

The deceased was aged 28 years at the time of his death and was working as a secondary school teacher. His gross salary was Kshs. 37,799/= per month. The net salary after statutory deductions was Kshs. 25,407/=. His pay slip was produced as **P. Exhibit 4**. The deceased left behind two children, B.B aged 4 years and A.M aged 7 months.

The plaintiff is also a secondary school teacher. She testified that the deceased was spending about Kshs. 20,000/= per month on his family upkeep. He was paying house rent of Kshs. 12,000/= and another Kshs. 8,000/= was spent on household expenses. The deceased was supporting his wife and children fully. The plaintiff had just been employed when her husband died.

The plaintiff further testified that she paid to her advocate a sum of Kshs. 20,000/= as professional fees for obtaining Limited Grant of Letters of Administration Ad Litem. She produced a receipt (**P. Exhibit 5**) in support thereof. She further alleged that she paid Kshs. 10,000/= for purchase of a coffin. She produced a receipt **P. Exhibit 6** in support thereof. She also produced a receipt of Kshs. 10,000/= as transport costs of the deceased's body and another receipt of Kshs. 10,000/= for clothing of the deceased's body as part of the funeral expenses. No specific amount had been pleaded on account of funeral expenses. Except for the claim of Kshs. 20,000/= on account of legal fees for obtaining Limited Grant of Letters of Administration Ad Litem, the other three receipts aforesaid are not admissible in evidence as per the provisions of **section 19 (1)** of the **Stamp Duty Act, Cap 480** because they do not bear Revenue Stamps as required under **section 5** of the said Act.

In cross examination, the plaintiff conceded that she had not produced the deceased's death certificate but stated that the Limited Grant of Letters of Administration Ad Litem which she produced as **P. Exhibit 1** showed that the deceased died on 30th July 2007.

Although the parties were ordered to file their written submissions within 14 days from 1st March 2010 when the proceedings were closed, only the plaintiff filed hers on 29th March 2010.

The plaintiff brought this action for the benefit of herself and the other dependants of the deceased under the **Fatal Accidents Act** as well as for the benefit of the deceased's estate under the **Law Reform Act**.

Having taken into account the evidence of the plaintiff which was not controverted by any evidence from the defendant, I assess damages as hereunder:

Damages under the Fatal Accidents Act.

(a) Pain and Suffering

No evidence was led as to how long the deceased remained alive after the said accident. In that regard I will award a minimal sum of Kshs. 10,000/= for pain and suffering.

(b) Loss of Dependency

The deceased's monthly net income was Kshs. 25,407/=. Although there was no documentary evidence that he was aged 28 years at the time of his death as pleaded in the plaint, since the defendant did not adduce any evidence to controvert that of the plaintiff, I accept the plaintiff's evidence regarding the deceased's age as true. The current mandatory retirement age for public servants is 60 years. The deceased could therefore have worked for another 32 years. In the circumstances, a multiplier of 32 years is reasonable. In **JOYCE MUMBI MUGI –VS- THE CO-OPERATIVE BANK OF KENYA LTD. & 2 OTHERS**, the deceased was aged 51 years at the time of his death and the Court of Appeal approved a multiplier of 11 years. A multiplicand of two thirds is reasonable, considering that the plaintiff and her children were entirely dependent upon the deceased. I will therefore calculate loss of dependency as hereunder:

$$25,405 \times 12 \times 32 \times \frac{2}{3} = \text{Kshs. } 6,503,680/=.$$

However, bearing in mind the vicissitudes of life and the fact that the award for loss of dependency would be paid lump sum and may be invested to generate some income, I will discount this sum by 15% leaving a sum of **Kshs. 5,528,128/=**.

(c) Special damages

The plaintiff did not adduce any evidence in support of her claim for Kshs. 200/= for police abstract and Kshs. 100/= for death certificate. I have already stated that the documents that she produced in support of her claim for transport expenses, purchase of coffin and clothing are not admissible. I will only award Kshs. 20,000/= being the legal fees paid for obtaining a Grant of Letters of Administration Ad Litem in Succession Cause No. 353 of 2007 at Kericho.

(d) Damages under the Law Reform Act.

Loss of Expectation of Life.

I will award the conventional sum of Kshs. 100,000/= for loss of expectation of life. However, this award ought to be deducted from the total sum of damages payable because the net benefit will be inherited by the same dependants and they should not benefit twice from the same cause of action. See **ASAL –VS MUGE & ANOTHER**, [2001] KLR 202 where it was held that the rights conferred by **section 2 (5)** of the **Law Reform Act** for the benefit of the estates of deceased persons are stated to be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the **Fatal Accidents Act**. But this does not mean that damages can be recovered twice over but that if damages recovered under the **Law Reform Act** devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the **Fatal Accidents Act**.

I now enter judgment for the plaintiff against the defendant as hereunder:

A. General damages under the Fatal Accidents Act

- (i) Pain and Suffering..... Kshs. 10,000/=
- (ii) Loss of dependency Kshs. 5,528,128/=
- (iii) Special damages Kshs. 20,000/=

B. Damages under the Law Reform Act

- (i) Loss of Expectation of Life Kshs. 100,000/=

Total Kshs. 5,658,128/=

Less Kshs. 100,000/= (Loss of Expectation of Life) = **Kshs. 5,558,128/=**

Less 35% contributory negligence

(Kshs. 1, 945, 344.80) = **Kshs. 3,612,783.20**

Section 4 (1) of the **Fatal Accidents Act** requires that the amount recovered for the benefit of the family of a deceased person, after deducting the costs not recovered from the defendant, **“shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct.”**

In this regard, having taken into consideration the ages of the deceased’s children, I direct that upon recovery of the decretal sum and after subtracting reasonable fees payable to the plaintiff’s advocate, two thirds of the net sum be divided equally between the deceased’s children and their respective shares be invested in a reputable bank in the names of the plaintiff and this court’s deputy registrar until each child attains the age of 18 years. The remaining one third shall be paid to the plaintiff for her upkeep as well as that of her children.

I also award the costs of the case as well as interest at court rates.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF APRIL, 2010.

D. MUSINGA
JUDGE.

20/4/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Kaburi for Mr. Odongo for the Plaintiff

N/A for the Defendant

Court: Judgment delivered in open court on 20th April, 2010.

D. MUSINGA
JUDGE.