



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

Civil Suit 23 of 2009

BEATRICE NYANCHAMA OBUYA (suing as the personal representative of

CHARLES NYANGAU OWORI – DECEASED).....PLAINTIFF

VERSUS

HUSSEIN DAIRY LIMITED.....RESPONDENT

JUDGMENT

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

CHARLES NYANGAU OTWORI, 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. KAH 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 16th October 2007.

The deceased was aged 45 years at the time of his death. He was working as the District Election Co-coordinator, Kisii District. His gross salary was Kshs. 56,545/=. The net salary after statutory deductions of Kshs. 12,847.25 was Kshs. 43,697.75. His pay slip was produced as **P. Exhibit 6**. The deceased left behind five children namely:

1. **J.O.N – 15 years old**
2. **S.M.N – 13 years old**
3. **M.B.N – 10 years old**
4. **Z.M.N – 8 years old**
5. **R.K.N– 3¹/₂ years old.**

The plaintiff and her children were fully dependent on the deceased. The plaintiff is not working. She testified that the deceased was spending about Kshs. 30,000/= per month on the family upkeep. He was paying house rent of Kshs.15,000/= per month and an average of another Kshs. 15,000/= was spent on household expenses on a monthly basis. 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. 20,000/= for purchase of a coffin though in the plaint the cost of the coffin was stated as Kshs. 10,000/=. No receipt was produced in support of that claim.

In cross examination, the plaintiff was unable to prove that the deceased was paying rent of Kshs. 15,000/= per month and spending an equal amount of money on household expenses. However, those sums do not appear to be far fetched.

Regarding the claim for pain and suffering, the plaintiff testified that the deceased died on the same day of the accident.

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

The deceased died shortly after occurrence of the accident. The certificate of death shows that the cause of death was cardio-respiratory arrest due to haemorrhagic shock following the road traffic accident. There is therefore no justification for an award of Kshs. 350,000/= as was claimed by the plaintiff's advocate under this heading. In my view, an award of Kshs. 20,000/= is reasonable and I give the same.

(b) Loss of Dependency

The deceased's monthly net income was Kshs. 43,697.75. He was aged 45 years at the time of his death. The current mandatory retirement age for public servants is 60 years. The plaintiff produced in support thereof a circular dated 20th March 2009 authored by the Head of the Public Service. The deceased would therefore have worked for another 15 years. In the circumstances, a multiplier of 15 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:

$$43,697 \times 12 \times 15 \times \frac{2}{3} = \text{Kshs. } 5,243,640/=.$$

(c) Special damages

The plaintiff did not adduce any evidence in support of her claim for Kshs. 200/= for police abstract, Kshs. 100/= for death certificate and Kshs. 40,000/= for transport and subsistence expenditure.

With regard to her claim for Kshs. 20,000/= for cost of coffin, the plaintiff did not produce any documentary evidence in support thereof. It is trite law that special damages must not only be specifically pleaded but must also be strictly proved. I therefore disallow that claim. I award Kshs. 20,000/= being the legal fees paid for obtaining a grant of letters of administration Ad Litem in Kericho Succession Cause No. 300 of 2007.

(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 **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICES(1976) & ANOTHER –VS- LUBIA & ANOTHER (No.2) [1987] KLR 30.**

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. 20,000/=

(ii) Loss of dependency Kshs. 5,243,640/=

(iii) Special damages Kshs. 20,000/=

B. Damages under the Law Reform Act

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

Total Kshs. 5,383,640/=

Less Kshs. 100,000/= (Loss of Expectation of Life) = Kshs. 5,283,640/=

Less 35% contributory negligence

(Kshs. 1, 849, 274) = Kshs. 3,434,366

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 amongst 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 on the judgment sum 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.