



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 79 OF 2008

**DORKA KWAMBOKA (*suing as personal representative of the estate of*)
AGNES NYANSIABOKA MIRORO (DECEASED).....PLAINTIFF
-VERSUS-**

GEORGE .M. ONDIEKI.....1ST DEFENDANT

JOSEPHAT ONGONGA OMARI 2ND DEFENDANT

JUDGMENT

On 16th July, 2009, the plaintiff filed this suit against the defendants jointly and severally through **Messrs Nyamori Nyasimi & Co. Advocates**. She sought for special damages of Kshs. 36,050/=, general damages, costs of the suit and interest. The suit was informed by the fact that the Plaintiff's daughter, **Agnes Nyansiaboka Miroro – deceased** was run over by Motor Vehicle registration number KAY 099U on 18th April, 2008 as she crossed Kisii-Migori road at Gesonso. That vehicle was owned by the 1st defendant and the 2nd defendant was at the material time his driver and or agent acting in the course of his work. The plaintiff blamed the accident on the defendants on the ground that the 2nd defendant was negligent in the manner he drove, managed and or controlled the said motor vehicle on the material day as he caused it to run over the deceased. The 1st defendant was thereby vicariously liable for the acts or omissions of the 2nd defendant.

Particulars of negligence attributed to the 2nd defendant were that he drove the motor vehicle at a speed that was excessive, drove without due care and attention, did not exercise or maintain sufficient or adequate control of the motor vehicle, caused or permitted the said motor vehicle to run over the deceased and finally that he failed to stop, slow down, swerve or in any other way so as to manage or control the said motor vehicle so as to avoid the accident.

The plaintiff filed the suit on her own behalf and for the benefit of the estate of the deceased. She was the mother of the deceased and had obtained a limited grant. The deceased besides her mother had also left behind one, **Sera Bosibori**, a sister as a dependant.

At the time of her death, the deceased was aged 25 years old and was employed as a purchasing and supplies officer earning a monthly salary of Kshs. 6,000/=. Besides the employment, she was also engaged in farming activities and she provided for the family who by her death had lost such support and thereby suffered loss and damage. In terms of special damages she incurred Kshs. 36,050/= in funeral expenses. With regard to general damages she wanted to be paid the same pursuant to the provisions of **Fatal Accidents Act** and the **Law Reform Act**.

On being served with summons to enter appearance, the defendant duly and jointly entered appearance and subsequently filed a defence through **Messrs E. M. Juma & Company Advocates**. The defence was to the effect that the suit was bad in law, incompetent, inept and did not disclose any cause of action. Otherwise the defendants denied that the plaintiff was the administrator of the estate of the deceased, nor that the 1st defendant was the registered owner of the subject motor vehicle nor was the 2nd defendant his authorized driver, agent and or employee. They denied the occurrence of the accident on the date alleged, the manner and place alleged in the plaint. All the particulars of negligence attributed to them were specifically denied. They went on further to deny that the deceased was in employment as claimed and that she earned the stated amount. The particulars pursuant to statute were all denied too. In the alternative, the defendants blamed the deceased for the accident and gave the particulars thereof. For all the foregoing reasons they demanded that the entire suit against them be dismissed with costs.

On 8th June, 2009 the case came up for hearing before **Muchelule J.** However a consent order was entered into with regard to liability. The consent was in terms: “... **By consent judgment is entered to the (sic) plaintiff as against the defendants on liability at 50%:50%.**”. Thereafter the case was set down for assessment of damages.

The assessment of damages came before me on 19th May 2010. Only the plaintiff testified. Before then parties had again agreed on special damages at Kshs. 26,050/=. The plaintiff testimony was along the same lines as set out in the plaint and reproduced elsewhere in this judgment. Save that she had obtained a grant of letters of administration **Ad Litem** before she commenced these proceedings. As evidence that the deceased was employed as a purchasing and supplies clerk earning a monthly salary of Kshs. 6,000/= she tendered in evidence a note from the deceased alleged employers – **Gikuru Inn Limited** to that effect. She further added that following the accident the deceased was rushed to hospital where she passed on after 2 hours. Before she met her death, the deceased used to assist the plaintiff with Kshs. 4,000/= monthly for her upkeep and paid school fees for her sister, **Sera Bosibori**.

The defence did not offer any evidence in rebuttal following the close of the plaintiffs case. Nonetheless Parties agreed to tender written submission in respect of their positions in the case. Those submissions were subsequently filed and exchanged. I have since read and considered them alongside cited authorities.

On the basis of the foregoing evidence, and written submissions this court is called upon to assess the damages payable to the plaintiff. Special damages as already stated is agreed at Kshs. 26,050/=. There shall therefore be judgment in those terms.

On pain, suffering and loss of amenities, the plaintiff has asked for Kshs. 100,000/=. On the other hand the defendants have suggested Kshs. 10,000/=. It is settled law that damages for pain, suffering and loss of amenities are awardable. See **Harold Powis V William Teveole (1949) (2) LRK 23**. However a claim for pain and suffering will be incompetent if it is shown that the deceased did not die immediately. See **William Juma V Kenya Breweries Ltd, NBI HCC No. 3514 of 1985(UR)**. The award however is conventional depending on how long after the accident did the deceased pass on. In the circumstances of this case, there is uncontroverted evidence that the deceased did not die on spot. Indeed she was taken to hospital after the accident and only passed on after 2 hours. For those 2 hours therefore the deceased suffered immense pain. I do not think that the conventional figure suggested by the defendant will suffice. Neither is the sum of Kshs. 100,000/= suggested by the plaint. Doing the best I can in the circumstances and considering the latest precedents I would award a sum of Kshs. 45,000/= in the circumstance.

The plaintiff has also asked to be paid Kshs. 1,680,000/= on account of loss of dependency. According to the plaintiff, the deceased was drawing a monthly salary of Kshs. 6,000/=. She died at the age of 25 years. She had 35 or so more years to work before attaining official retirement age of 60 years. She therefore proposed a multiplier of 35 years making a total award of Kshs. 1,680,000/= calculated as follows: $6,000 \times 12 \times 35 \times 2/3 = 1,680,000/=$. As for the defendants they took the position that there were no dependants as contemplated by sections 4, 7 and 8 of the **Fatal Accidents Act**. They also submitted that there was no proof that the deceased was earning a salary. The letter tendered in evidence was too suspect to be relied upon as it was written on 2nd February, 2009 almost a year after the accident.

ASIKE-MAKHANDIA
JUDGE