REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)

CIVIL SUIT NO. 246 OF 2009

BERLY BETHA MALOWA WERE (suing as the Administrator of the estate of the late JOHN PAUL LUBALO WERE[deceased])…….....PLAINTIFF
- VERSUS -
KENYA PORTS AUTHORITY…….....…….DEFENDANT
JUDGMENT

The plaintiff moved the Court by plaint dated ***17th July, 2009***, in her capacity as the holder of Letters of Administration ***ad colligenda bona*** issued in Mombasa H.C.C.C No. 124 of 2009.
The suit was brought under the Fatal Accidents Act (Cap. 32, Laws of Kenya) and the Law Reform Act (Cap. 26, Laws of Kenya), for the deceased's estate.
The defendant was at all material times the owner of a tug-master registration No. MFT 50 – HTR 215, the machine that hit the deceased causing his death on or about ***5th January, 2009***. it was pleaded that the deceased was lawfully in the course of his employment at the container terminal Block D, within the defendant's premises, when the defendant's driver or agent, one ***Bob John Riah***, carelessly and negligently drove the said tug-master and caused the death in question.
The plaintiff pleaded that the said driver had driven the tug-master at an excessive speed, in the circumstances; had driven without due care and attention; had failed to keep any, or any proper look-out on the road; had failed to exercise or maintain any, or any proper or effective control of the defendant's tug-master, thereby causing the accident; had failed to have any, or any sufficient regard for the safety of the plaintiff ; had failed to stop, to slow, to swerve, or in any other way to so manage or control the defendant's tug-master so as to avoid the accident; had failed to exercise reasonable care and attention in driving and managing the defendant's tug-master; had driven in a manner that was dangerous to other road users – with the consequence that the deceased sustained serious injuries, from which he later died.
The deceased, at the material time, was aged 28 years, and working at Mombasa Port as a clerk, earning a salary of Kshs. 1,000/= per day, with "good prospects of life, enjoying good, healthy life and was a happy man with a normal expectation of a healthy and happy life". The plaintiff pleaded that the deceased's expectation of a happy life "was considerably shortened and the plaintiff therefore suffered loss and damage".
The plaintiff claimed: (i) general damages; (ii) special damages; (iii) costs of the suit; (iv) interests on special damages and on costs.
The defendant filed a statement of defence on ***26th October, 2009*** pleading, ***inter alia***, contributory negligence on the part of the deceased.
After the plaintiff's statement of issues for trial was filed on ***4th September, 2009***, the parties recorded a consent, duly signed by their respective Advocates, M/s. P.A. Osino & Co. Advocates for the plaintiff, and M/s. Mogaka Omwenga & Mabeya Advocates for the defendant, on ***22nd February, 2010*** (filed on ***5th March, 2010***), to the effect that liability for the causation of the death of the deceased would be borne in the proportions of 40% by the estate of the deceased, and 60% by the defendant. The effect of the consent is to yield forth the possible interpretations from the testimonies given on ***15th October, 2009*** and ***3rd December, 2009***.
In the submissions, learned counsel ***Ms. Osino*** stated that the sole issue for determination is ***quantum of***

damages payable to the estate of the deceased.
Counsel submitted that the plaintiff had filed suit as the administrator of the estate of ***John Paul Lubalo Were***, pursuant to a grant issued by the High Court in Succession Cause No. 124 of 2009, for her own benefit as the deceased's sister, and on behalf of three other sisters as specified in paragraph 6 of the plaint.
Learned counsel submitted that, by s.2 (1) of the Law Reform Act (Cap.26), on the death of any person, all causes of action subsisting against or vested in him or her, shall survive for the benefit of the estate; and where, under s. 2(2) (c) of that Act, the cause of action survives for the benefit of the estate, damages recoverable for the benefit of the estate of the deceased shall be calculated without reference to any loss or gain to the estate, consequent upon the death – except that a sum in respect of funeral expenses may be included.
Counsel urged that although the plaintiff and the defendants, as sisters of the deceased, are excluded as applicants for any damages, by virtue of s.4(1) of the Fatal Accidents Act (Cap.32), the cause of action is maintainable, by virtue of s.2 of the Law Reform Act: and hence the plaintiff is entitled to sue for damages, and there is case authority in support of this position: ***Samuel Mbugua Thuku v. G. K. Brothers Ltd & Another***, Nairobi HCCC No. 2305 of 1988; ***Sheikh Mushtag Hassan v. Nathan Mwangi Kamau Transporters & 5 Others*** [1982-88]1KAR 946.
Under the head, ***suffering, pain and loss of amenities***, counsel relied on the evidence of PW1 and PW2: that the deceased died about four hours after the accident, and he was at the time awaiting treatment at Mombasa Hospital. Under this head, counsel asked for an award of Kshs. 30,000/=.
The plaintiff sought damages under the head, ***loss of expectation of life***: the deceased's estate had suffered a loss, since his life was terminated at the age of 29 years when he was in good health and had an expectation of a healthy life. The sum of Kshs. 150,000/= was proposed as general damages, in this regard. Learned counsel relied on a similar case decided by ***Khaminwa***, C.A. (as she then was) in ***Rosemary Ondele v. Kenya Ports Authority***, Mombasa HCCC No. 733 of 1995. The suit in that case had been brought by the administrator of the estate of ***Peter Ondele*** who had died in the accident occasioning the cause of action. The parties in that case reached a consent in which liability was apportioned at 35% to 65%, to the plaintiff and the defendant respectively; the award for pain and suffering was agreed at kshs. 15,000/=; the deceased, at the material time, was aged 38 years; his basic pay at the time stood at Kshs. 3,600 per month. The issues remaining for the Court's determination were: the multiplier to be applied for loss of dependency; and the award for loss of expectation of life. The deceased was in that case husband to the plaintiff; the two had four teen-age daughters; and he appeared to be enjoying a healthy, normal life. The Court adopted a multiplier of 17 years, which would have taken the deceased store clerk up to the retirement – age of 55 years. The Court considered the deceased's rate of contribution to his family to be two-thirds of his monthly income.
Learned counsel submitted that evidence was on record showing that the deceased's family had incurred expenses to be recompensed as special damages, notably funeral expenses and, in this regard, the sum of Kshs. 137,295/00 was being claimed.
Counsel urged that the entire family of the 29 - year- old deceased man was dependent on him, and that, by the applicable Government regulations operative since 2008, he would have retired at the age of 60 years; and so a multiplier of 31 years and a multiplicand of 2/3 should be adopted as follows:

- Kshs. 1000/= x 30 days x 12 months x 31 years x 2/3 = 7,440,000/=.

Counsel for the defendant made submissions beginning from the background that the relevant law on quantum of damages was the Law Reform Act (Cap. 26, Laws of Kenya), in respect of the benefit of the deceased's estate; and in the case of the benefits of dependants, the relevant law is the Fatal Accidents Act (Cap. 32, Laws of Kenya).
Counsel contested the plaintiff's case, on the basis of the provisions of s. 4(1) of the Fatal Accidents Act, which provides:
"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, 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……"

Learned counsel submitted that "sisters and brothers of a deceased person are completely statutorily excluded from benefiting under the Fatal Accidents Act (Cap.32, Laws of Kenya), which only recognizes the beneficiaries thereto, [being] the wife, husband, parent and child". Counsel urged that damages under "lost years" are only available to members of the family of the deceased as specified in S.4(1) of the enactment.

Counsel urged that the plaintiff had no ***locus standi*** to sue in this matter: because all she had was a limited grant of letters of administration. On this point, counsel sought reliance on a Court of appeal decision, ***Trovistick Union International & another v.Jane Mbeyu & Another***, Civil Appeal No. 145 of 1990, in which the following sentence appears:

"Any suit under the Law Reform Act without first obtaining letters of administration is incompetent"

Counsel then contended, in broad terms, that " In the present matter the element of [proof of special damages] has not been met".

On the plaintiff's claim for pain and suffering and loss of amenities, the defendant's advocate stated: "We concur [in] the plaintiff's suggestion of ……Kshs.30,000/= for pain and suffering, as well as Kshs 150,000/= for loss of expectation of life…….if the case were to succeed on quantum"

As regards "lost years", counsel urged the Court to consider that the payment "is now to be made in lump sum and the same should be reduced by 35% which ought ordinarily to be appropriated towards statutory taxes."

Counsel contended that there was no evidence to prove that the deceased "who worked as a casual for a private company at the port of Mombasa" , made daily earnings of Kshs.1,000/. Counsel asked the Court to be guided by the Government's wage guidelines, as set out in Legal Notice No. 70, published in ***Kenya Gazette*** supplement No. 25 of ***29th May, 2009*** and with regard to clerical grades working in Nairobi, Mombasa and Kisumu, and that by these guidelines the remuneration payable would be Kshs. 9,442 per month.

Learned counsel ***Ms. Osino*** contested the defendant's position , and urged that the limitations to ***locus standi*** contained in the ***Trovistick Union*** case had no application to the instant case: for the plaintiff had obtained a limited grant of letters of administration on ***4th June, 2009***, the same issued under s.54 of the Law of Succession Act (Cap.160, Laws of Kenya) as read together with the Fifth Schedule to that Act which incorporates a special form (Form 47A) designed for the purpose; that section thus provides:

"A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the fifth schedule"

Counsel urged that the plaintiff's suit had been brought within the legal framework established under the foregoing provision.

As regards loss of dependency, learned counsel urged the Court to adopt the basic ***minimum*** monthly wage of Kshs.9442; and a daily wage of Kshs.1000/=: for the reason that the Government has only prescribed "basic minimum monthly wages", which excludes housing allowance. The deceased's income, it was urged, was inclusive of house-rent allowance.

Learned counsel ***Mr. Mogaka***, for the defendant, contested the plaintiff's reliance on the statutory provision for limited grant of letters of administration, for the purpose of prosecuting legal proceedings or for any other matter: on the ground that the Chief Justice, not being the Rules Committee of the Judiciary, has no authority to prescribe the relevant from. Counsel urged that the plaintiff could not prosecute the instant proceedings without first obtaining a full grant of letters of administration. Counsel urged that a limited grant could not properly have been made, except within the terms of S.67(1) of the Law of Succession Act (Cap 160), which thus provides:

"No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired"

Mr. Mogaka urged that the Court lacked the power to make a limited grant of letters of administration, save "for the preservation and collection of assets"; and he asked that the suit herein be dismissed.

Although the nub of ***Mr. Mogaka's*** submission was that the elaboration of rules by the Chief Justice, for the filing of an application for a limited grant, was " unconstitutional", and that, by the authority of the Court of Appeal decision in ***Trovistick Union International & another v. Jane Mbeyu & Another*** (1990) a full grant of letters of administration was required before a party could prosecute a suit such as the instant one, the constitutional point was not systematically and cogently canvassed --- and for certain, the Court was not persuaded on this point.

Learned counsel, ***Ms Osino*** submitted that the Chief Justice had properly exercised his authority under Rule 70 of the Probate and Administration Rules (L.N. 104/1980) which thus provides:-

"The forms set out in the First Schedule, with such adaptations, additions and amendments as may be necessary, shall, when appropriate, be used in all proceedings under these rules:

Provided that the Chief Justice may by notice in the Gazette vary the forms and prescribe such other or additional forms as he thinks fit"

Counsel urged that it was in all respects proper, that the Chief Justice had published the Probate and Administration (Amendment of the Fifth Schedule)Rules, 2002 (Legal Notice No. 39) and provided a form for "Petition for Letters of Administration ***ad litem***" , the same providing that the petitioner could seek such a grant, "limited to the purposes only [of] filing suit and until further representation [is] granted by [the] court."

Counsel urged that there was indeed an existing limited grant of letters of administration, in favour of the plaintiff, which had not been nullified in any cause, and which could only be contested in a succession cause ? rather than in a tort suit such as the instant one.

There are two main issues in this case: the threshold one about the ***competence of the proceedings***; and the substantive one on the ***claims in tort***.

Although learned counsel, ***Mr. Mogaka*** urged that the instant suit be dismissed on the basis of the authority of the ***Trovistick Union*** case, a reading of the text of that judgment does not show the Court of Appeal to have adopted a principle that ***rules out*** the limited grant of letters of administration; had it been otherwise, that decision would have been expected to specifically address and determine matters of law and fact, and then to sanctify a rational jurisprudential position; indeed, the requirement of a grant of letters of administration as a basis for instituting suit is, in that case, addressed only in broad terms.

I will, therefore, decline to accept the defendant's argument, and instead, proceed to consider the claim on the merits.

The merits of the case turn in favour of the plaintiff at the very beginning, as the parties on their own, arrived at a ***consent*** on the allocation of responsibility for the tortious act that is the cause of action: the deceased's estate to bear ***40%,*** and the defendant to bear ***60%***. The Court is only left with the task of breaking the claims down to specific figures.

Through the testimony of PW1 and the exhibits produced, the plaintiff had reasonably established the special damages claim, and I see no need to take a different position; the plaintiff has asked for Kshs. 137,295/= under this head.

PW1 also gave evidence that the deceased was ***28*** years old at the time of the accident, and this is not disputed. Although the defendant contests the evidence (of PW1) that the deceased was on a compensation scheme of Kshs. 1000/= per day, the defendant's proof to the contrary is only based on presumptive figures based on minimum wages set out in Government documents; this point was met by the plaintiff's counsel who urged that such prescribed minimum wages exclude benefits such as housing, which had been accommodated in the deceased's daily earnings.

Whereas the plaintiff places the years of working-life lost by the deceased at 31, the defendant places this at 25 years: the former allows for a retirement age of 60 years, the latter for a retirement age of 54 years. Whereas no justification is given for placing the retirement age at 54 years, placing it at 60 years, quite apart from its attribution to a Government position on labour matters, is, in my opinion, to be judicially recognized as fair and commonplace, for a person of the status of the deceased. I would thus adopt the plaintiff's position, that the deceased had lost 31 years of useful working life.

Thus, I will adopt the multiplier of 31 years and the multiplicand of 2/3, thus: Kshs.1,000/= x 30 days x 12 months x 31 years x2/3 = 7,440,000/=. The 40% contribution to the accident by the deceased breaks down to the figure, Kshs.3, 102,918/00. From Kshs.30, 000/00 (pain and suffering), Kshs, 150,000/00 (loss of expectation of life), Kshs.137,295/00 (special damages) and Kshs.7,440,000/00 (loss of gainful working life), one gets a total of Kshs. 7,757,295/00; and allowing for the contributory portion (Kshs.3,102,918/00),one ends up with the sum of ***Kshs. 4,654,377/00***.

Although the defendant's position was that this Court should make a certain (35%) deduction in respect of income tax, no evidence was placed before the Court on the rates and the modalities attached to such a deduction. That matter, therefore, must rest exclusively with the tax authorities.

The plaintiff shall have the costs of the suit, and the same shall bear interest at Court rates as from the date of filing suit.

Special damages shall bear interest at Court rates as from the date of filing suit; but general damages shall bear interest as from the date of this judgment.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this 3rd day of October, 2010.

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J. B. OJWANG
JUDGE