



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 143 of 2004

EPCO BUILDING (K) LIMITED APPELLANT

VERSUS

ROSALIAH KEMUNTO ONGORI

(Suing as the Personal and Legal Representative

to the Estate of ZACHARIAH MAUTI ONDERI ... RESPONDENT

JUDGMENT:

The respondent filed a suit as the personal and legal representative of the estate of Zachariah Mauti Ondieki. However, the respondent had obtained only a Limited Grant of Letters of Administration Ad Colligenda Bona of the estate of Zacharia Mauti Ondieki, hereinafter referred to as “**the deceased**”. She filed the suit out of time, leave having been granted on 12th November, 2003. She stated that on 25th May, 1999, the deceased was lawfully traveling in motor vehicle registration number KAK 045 Z, Nissan bus, along Kericho Kisumu road when the appellant’s driver managed motor vehicle registration number KYR 906 negligently that it collided with the vehicle that the deceased was travelling in. As a result, the respondent sustained fatal injuries.

The respondent claimed damages under both the **Fatal Accidents Act** and the **Law Reform Act**. She alleged that the deceased was 35 years old at the time of his demise and was earning Kshs. 10,000/= per month.

The trial court found the appellant 100% liable for the said accident. On quantum of damages, a multiplier of 15 years was adopted and a dependency ratio was applied. The court awarded Kshs. 600,000/= for loss of dependency and under the **Law Reform Act**, Kshs. 100,000/= was awarded for loss of expectation of life and Kshs. 10,000/= for pain and suffering. Kshs. 10,000/= was awarded for special damages, all totaling to Kshs. 720,100/=.

The appellant was dissatisfied with the said judgment and preferred an appeal. The appellant questioned the leave that was granted to file suit out of time saying that the same was not merited. The appellant also faulted the trial court for holding that the appellant’s driver was 100% liable for the said accident. The appellant further faulted the trial court for holding that the deceased was earning a net salary of Kshs. 10,000/= when there was no evidence to that effect. Lastly, the appellant stated that the claim under the Law Reform Act was supposed to be subtracted from the sum payable under the Fatal

Accidents Act since the same person was entitled to benefit from the awards under the two headings.

From the foregoing, the appellant stated that the total sum awarded, Kshs. 720,000/= was manifestly excessive.

During the trial, **Abner Tumbo Bichanga, PW2**, who was traveling in the same bus as the deceased, testified that the appellant’s motor vehicle was coming from the opposite direction and the driver lost control of the same and it hit the bus on its correct lane of the road. That evidence was not challenged at all by the appellant.

Mr. Okong’o for the appellant and Mr. Minda for the respondent made brief submissions which I have taken into consideration.

Although the appellant stated in its defence that leave to file the suit was sought and obtained on insufficient grounds, that was not established. I reject grounds 1 to 4 of the appeal which is relative to the said leave.

I also reject ground 5 of the appeal which challenges the trial court’s findings on liability. This is because PW2 explained how the accident was caused by the appellant’s driver in his negligent manner of driving. That evidence was not controverted by the appellant.

As regards the deceased’s earnings, the respondent produced a letter from the deceased’s employer which showed that his salary for May 1999 was Kshs. 10,000/=. The deceased was a Bus Conductor.

The respondent was not a Legal representative of the estate of the deceased, having obtained a Limited Grant of Letters of Administration Ad Colligenda Bona. Such a Grant is only useful for collecting and getting in and receiving the estate of the deceased that may require preservation from waste. The grant did not entitle the respondent to file suit as a legal representative of the estate of the deceased. See **MORJARIA –VS- ABDALLA [1984] KLR 490.**

For that reason, no damages were payable under the Law Reform Act. I must therefore set aside the award of Kshs. 100,000/= for loss of expectation of life as well as award of Kshs. 10,000/= for pain and suffering.

The appellant’s dispute as far as the trial court’s computation of loss of dependency was the multiplicand of Kshs. 10,000/= per month. However, it has already been determined that there was sufficient basis in adopting the said multiplicand. The trial court’s computation for loss of dependency cannot be said to have been erroneous. However, in awarding the same, the court ought to have considered that the deceased’s dependants were going to receive the said award lump sum and therefore discount the same by a reasonable percentage. See **HANNAH W. MOCHE & ANOTHER –VS- NELSON NDOMO MUYA,** Nairobi HCCC No. 4533 of 1993 (unreported).

I will therefore discount the sum of Kshs. 600,000/= by 15% leaving a net sum of Kshs. 510,000/=.

The special damages that were proved amounted to Kshs. 10,000/= and I would also award the same.

In conclusion, I set aside the award of Kshs. 720,000/= and substitute therefor judgment as hereunder:

- (a) Loss of dependencyKshs. 510,000/=
- (b) Special damages Kshs. 10,000/=

TOTAL KSHS.520,000/=

The appellant, having partially succeeded will be entitled to $\frac{1}{3}$ of the costs of the appeal. The respondent shall have $\frac{2}{3}$ of the costs of the suit before the trial court as well as interest at court rates. Interest on

special damages shall be from the date of the suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

23/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Sagwe HB for Mr. Minda for the Respondent.

N/A for the Appellant.

Court: Judgment delivered in open court.

D. MUSINGA

JUDGE.