



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Case 152 & 153 of 2004

AUTHUR NYAMWATE OMUTONDI

AND OTHERS.....PLAINTIFFS

VERSUS

UNITED MILLERS LIMITED & 2 OTHERSDEFENDANT

CORAM

J. W. MWERA J.

AWINO FOR THE PLAINTIFF

YOGO FOR DEFENDANT

OWITI FOR 3RD DEFENDANT

COURT CLERK DIANGA INTERPRETER/ENGLISH/SWAHILI/LUO

J U D G E M E N T

There were two cases HCCC 152/04 and 153/04 by different plaintiffs but against the same defendants. The court was told that in another suit in the lower court treated as a test case liability there was found and apportioned as follows:

Plaintiff – 10%

1st & 2nd defendants – 60%

3rd defendant – 30% (see KSU CMCC 104/04)

So what remained was for the parties to prove damages claimed.

HCCC 152/04: The plaintiff Arthur Omutondi sued as a legal representative of the deceased Michael Amiani Nyawita who was said to have been a passenger in motor vehicle registration number KAP 587N. It was being driven by the 4th (3rd) defendant on 10th September 2003 along KISUMU - KATITO Road. It was involved in a traffic accident with motor vehicle registration number KAL 620L whereupon Michael suffered fatal injuries. Negligence on the part of drivers of both motor vehicles was particularized and since liability was found and apportioned as above not, much need be said about that. But it was pleaded under Fatal Accidents Act that the deceased was aged 52 years at time of his death earning an income of shs.27,710/= per month. He left four dependants, a wife, a son and 2 brothers of whom the plaintiff was one. The plaintiff prayed for damages, costs and interest.

A defence filed on behalf of the 1st and 2nd defendants did deny what it did, but because all sides accepted the ratio of liability found by the lower court (see above), that point need not be gone into. The record however does not reflect a defence filed by the 3rd defendant but again with the liability apportioned, that may be a moot point now.

The plaintiff (PW1) said that his brother, died on 10/9/03. He took out the grant to administer his estate (Exh.P3). The witness also exhibited the deceased's death certificate (Exh.P2). He referred to the police abstract in the matter. The witness stated the names of the dependants now coming to six, from four in the plaint but whose birth certificates he did not have. The court heard that Michael was an employee in the public service at Homa Bay earning a salary (Exh.P4). He had been feeding, educating and supporting the dependants. He had been supporting himself before the fatal accident. That closed the trial. No defence evidence was called. But as the parties wished they were permitted to submit on the case.

Each side was reminded if that was the close of trial, by a letter from the court dated 11th May 2009. Then course was taken to draft the following judgment.

The plaintiff's side submitted that the deceased Michael earned a gross salary of shs.27,710/= per month. Its net could be put at shs.20,000/= per month and with a multiplier of 8 the dependency lost came to shs.1,280,000/=. Other damages e.g. loss of expectation of life, pain and suffering normally pleaded under the Law Reform Act, but not so averred here, were added plus funeral expenses of shs.10,000/=.

The 1st and 2nd defendants were of the view that the plaintiff claiming dependency had not proved income earned by the deceased and so considered the claim misconceived. There appears to have been a confusion/error in these defendants' submissions properly headed HCCC 152/04, because down the line it was stated.

“.....plaintiff failed to prove how much income per month the deceased had been earning prior to her death, apart from just alleging that the deceased was a business woman selling fish and earning Kshs.100,000/= per month.”

The deceased in this case was not a woman fish monger at all. He was a man, Michael Amiani Nyawate, a public servant at Homa Bay.

Anyway, the court was obliged to do the best in the circumstances. So it took the deceased's net salary of July 2003, shs.17,604/= as his income (Exh.P4) over a multiplier of five (5). The total dependency comes to shs.704,160/= (1760x12x5x2/3). Add to this the specifically pleaded police abstract plus death certificate shs.350/= and the net award is shs.704,810/= (Seven Hundred four eight hundred and ten

only). The plaintiff does not get an award under the Law Reform act. It was not in the pleadings. The funeral expenses were not specifically pleaded. Each party to bear its portion as per ratio of liability set out at the beginning. The plaintiff gets costs and interest on the lower court scales.

HCCC 153/04 In that case Lazaro Ngwala Ogutu sued as the legal representative of one Sarah Kionge Maraka, who like in HCCC 152/04, died in the two – vehicle accident of 10th September 2003. The claim was laid under the Fatal Accidents Act in that the deceased died aged 43 years. She had been a business woman earning shs.100,000/= per month. The prayers were for damages costs and interest.

The plaintiff (PW1) told the court that the deceased was his guardian – the mother’s sister. She died on 10th September 2003 (Exh.P1). So PW1 took out letters to administer her estate (Exh.P2). The deceased was a business woman in “Omena” and her trading licence was produced (Exh.P4). She earned shs.100,000/= and to this end PW1 produced a slip from Barclays Bank (Exh.P5). She used to educate PW1 and catered for him. The deceased was unmarried and she left no children.

The witness had produced a trading licence (Exh.P4) which expired on 31st December 2002 while Sarah died in the accident of 10th September 2003. The bank slip only referred to transfer of shs.60,000/= to another account but not a running/trading account. The witness had no evidence about shs.100,000/= income per month.

It was submitted for the plaintiff that Sarah died at age 43 and the court should assume that she spent some 10,000/= on the plaintiff. This was worked over a multiplier of twenty (20) to give him shs.1.6 million. Again as in HCCC 152/04, damages which ought to be pleaded under the Law Reform Act, but were not so pleaded, were introduced into the proposed award. That cannot be.

On the defendant’s part the court was told that the deceased’s income was only claimed but not proved – shs.100,000/= per month. Even if she earned, it there was no tax component provided for or audited accounts produced. The defence could only concede some shs.2000/= per annum as income.

It is clear that the claim that the deceased was a businesswoman at the time of her death was not established. She had a trading licence up to 31st December 2002. She did not renew it in 2003 when she died. Thus Sarah cannot be presumed to have been a fish monger in 2003 as the plaintiff set out to prove. Further, it was not proved by accounts or other means that Sarah earned shs.100,000/=. A transfer bank slip for shs.60,000/=: could not be proof of income. Proof of income is basic to a claim of loss of dependency under the Fatal Accidents Act because one can only be supported financially by what was earned in hard pounds and cents. If income is not proved then no award of dependency can issue.

However, in our present case this court is prepared to take a minimum sum of shs.4,000/= as what Sarah could earn in rural Migori to support herself and the nephew (PW1). With a multiplier of eight (8) the court awards him shs.256,000/=

(4000x12x6x2/7)

Add to this the specifically pleaded fees for the police abstract plus a death certificate totaling shs.350. The net award is shs.256,350/= (Two hundred fifty-six thousand, three hundred and fifty thousand only.), plus costs and interest at the lower court scales.

Each side to bear part of the award as per the accepted ratio of liability.

Judgement delivered on 25th May 2009.

J. W. MWERA

J U D G E

C.C.

HCCC 153/04

JWM/mk.