



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE 91 OF 2001

MARGARET WANJIRA NJENGA (*Suing as the personal Representative of the Estate of DAVID NJENGA NDUGIRE – (DECEASED)*)..... PLAINTIFF

VERSUS

**ATHI RIVER MINING CO. LTD.
..... DEFENDANT**

JUDGMENT

1. On 20/3/2007 advocates for the parties in this matter appeared before Sitati J and recorded a consent in the following terms inter-alia that:

“Judgment be and is hereby entered on liability for the Plaintiff as against the Defendant at 80%: 20%.”

2. What was thereafter left was determination of the sums payable to the estate of the deceased and I note as follows:-

PW3, Margaret Wanjira Njenga, mother of David Njenga deceased stated that the said David was 21 years old at the time of his death and was employed by Jofam Clearing and Forwarding as Operations Manager and earned Kshs.35,000/= per month. A letter of appointment (P. Exh.10) confirmed that fact. PW4, John Muhia Ndugire, David’s employer also confirmed David’s employment and income.

3. Counsel for the Defendant in his submissions took issue with the evidence of PW4 as regards the deceased’s income. PW4 is brother to PW3 and therefore uncle to the deceased and the submissions were that the deceased was too young and inexperienced to have risen to the post of Operations Manager having just finished his ‘O’ level exams. Further that even if the deceased was earning Kshs.35,000/= as suggested, his mother could not have been receiving Kshs.15,000/= from the deceased and in any event, had there been deduction of statutory obligations, the deceased would have been left with about Kshs.6,000/= for his mother. He referred me to the decisions in **H.C.C.C 4742/1987 – Benjamin Nzomo vs Benjamin Mutunga & Another** where a multiplier of 18 years was used and where the deceased had parents and a son who were his dependants.

4. In H.C.C.C 5406/1990 – Margaret Kahiga vs Kenya Bus Service & Another, a multiplier of 18 years was used for a 19 year old unmarried deceased person and a dependency ratio of 1/3 was used.

5. I have carefully considered the submissions made and I note that the advocate for the Plaintiff proposes a multiplier of 32 and a multiplicand of Kshs.35,000/= as the basis for the claim under loss of dependency.

6. Having regard to the current trends in award of damages I am aware of the words of R Kuloba in his book, “**Measure of Damages for Bodily Injuries**”, Law Africa 2006 where the learned retired judge wrote as follows:

“When claims are filed in courts, the measure for the quantum of damages to be awarded nearly always present intricate problems. Broadly, the difficulty is double pronged: (1) which factors to take into account or ignore, and (2) what amount of money to award as damages. The first problem is a matter of legal principle, and is relatively less puzzling. The second problem is a matter of judgment upon given facts. Where damages are capable of arithmetical computation, such as medical expenses incurred, the second problem, too, presents no great difficulty; but where the assessment involves imponderables like pain, suffering, loss of amenities and future unquantified losses, looking for a fair and reasonable sum of money is an unenviable task. In the exercise the impartial judge keeps out of consideration pity and partisan sympathy. It is only his judicial discretion shaped by his individual outlook to life, his understanding of the society within which he operates and his ability to keep pace with the spirit of his times, having regard for the peculiar facts of the particular case, which will determine and shape the award he makes.”

7. I agree with the learned judge emeritus and appropriately persuaded I would then determine as follows:-

Under the heading of special damages, the sum of Kshs.73,100/= being funeral expenses and the cost of the police abstract was specifically proved and is granted as prayed.

Regarding the award under the head “**pain and suffering**”, the deceased died moments after impact and the advocate for the Plaintiff proposes Kshs.10,000/= as was also the case in H.C.C.C 1993/1990 – Fredrick Mungai vs George Kibunji & Another and I agree that the said sum is fair and reasonable in the circumstances.

As for loss of expectation of life under the Law Reform Act, the deceased was said to be motivated and had a great future and under that heading, I will grant kshs.100,000/= as was also the case in H.C.C.C 3969/1994 – Wamuhu Kamau vs Omusunde Ndati.

8. Turning back to the claim under the heading loss of dependency, the deceased was unmarried and his mother is clearly a well to do person and her dependency was limited to the period when she had no employment but later established a successful private school. I agree with the advocate for the Defendant that dependency in such a situation can be fairly put at 1/3.

9. Regarding the multiplier, the deceased was 21 years old and I agree that based on his quick entry into business after ‘O’ levels, he would have worked until at least 55 years and therefore 34 years is a fair figure in that regard. His income may however have been Kshs.35,000/= but taken into account personal expenses and the exigencies of a young man’s life, he would only have had Kshs.5,000/= per month to spare for his mother and that is a fair sum as a multiplicand.

10. In the event, on that item I will award $Kshs.5,000 \times 12 \times 34 \times 1/3 = \mathbf{Kshs.680,000}$.

11. Judgment is therefore entered as follows:-

Loss of Dependency - Kshs.680,000

Pain and Suffering - Kshs. 10,000

Loss of Expectation of Life - Kshs.100,000

Total - Kshs.790,000

Less damages under

Law Reform Act - Kshs.100,000

Total - Kshs.690,000

Less 20% - Kshs. 138,000

Kshs. - Kshs.562,000

Plus Special Damages - Kshs. 73,100

Kshs. - Kshs.635,100

12. The Plaintiff will also have costs and interest as prayed costs and interest as prayed in the Plaint.

13. Orders accordingly.

Dated and delivered at Machakos this **16th** day of **July** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Oyugi h/b for Mr Wandabwa for Plaintiffs**

Mr Masika for Defendant

ISAAC LENAOLA

JUDGE