



REPUBLIC OF KENYA

HIGH COURT AT MACHAKOS

CIVIL APPEAL 166 OF 2007

TOLA KAMENE DAUDI (*Suing as the Mother and Legal*

***Representative of the Estate of the late JOSEPH MUTUKU*..... APPELLANT**

VERSUS

JOYCE MUKUI KATUU RESPONDENT

(Being an appeal from the Judgment of Honourable (Mrs) Hellen Omondi

dated 9th August 2007 in Machakos Chief Magistrate Civil Case No. 662 of 2004)

JUDGMENT

1. This Appeal arises from the decision of H.A. Omondi, Chief Magistrate (as she then was) in **Machakos CM'S Court Civil Case No. 662/2004** in which the Appellant, Tola Kamene Daudi had sued the Respondent for special and general damages in respect of the death of one Joseph Mutuku (deceased). In her Complaint filed on 26/5/1999 Kamene aforesaid averred that she was the mother of the deceased and was suing as the legal representative of his estate.
2. At paragraph 4 and 5 of the Complaint, the Appellant averred that the deceased was walking along the Nairobi-Mombasa road on 12/10/1996 when m/v reg. No. KAG 915 Z Toyota being driven by the Respondent's servant and/or agent knocked him down and he later succumbed to his injuries. The death was blamed on the negligence of the Respondent's servant and/or agent and the particulars thereof were given as;
 - a. "Driving at an excessive speed in the circumstances
 - b. Driving without due care and attention to other road users.
 - c. Failing to keep proper or any look out
 - d. Failing to swerve, break or in any other way manage and/or control motor vehicle registration KAG 915 Z so as to avoid the accident."

3. The Appellant further averred that she suffered special damages in that she spent Kshs.80,000/= on funeral expenses and Kshs.100 for purchase of a Police Abstract. She also sought damages under the Fatal Accidents Act and the Law Reform Act on her behalf and on behalf of one Katuku Ivala, said to be the wife of the deceased and one Kamene Mutuku, 2 years old and said to be the daughter of the deceased. Costs of the suit were also sought.

4. The Respondent in her Statement of Defence filed on 27/6/1999 denied all the claims made in the Plaintiff but in the alternative averred that the accident occurred as a result of negligence on the part of the deceased and particulars thereof were given as that the deceased was;

a. **“riding too fast in the circumstances:**

b. **failing to keep any or any proper look-out or to have any or any sufficient regard for motor vehicles at the said road:**

c. **failing to heed the presence of the said motor vehicle at the said road:**

d. **failing to give any or any adequate warning of his approach:**

e. **riding on the wrong lane of the road:”**

5. At the hearing, only the Appellant testified and her evidence was that the deceased was 35 years old and died on 12/10/1996 at Makindu Hospital. Later she was issued with a Police Abstract (**Exh.1**) and a Death Certificate (**Exh.2**) as well as a grant of letters of administration to the deceased’s estate (**Exh.3**) and the latter was obtained at a cost of Kshs.10,000/=. As for funeral expenses, she produced receipts (**Exh.4**) totaling Kshs.42,870/=. Her other evidence was that the deceased had a wife and child who were all living in their rural home and that the deceased was employed by an undisclosed person who paid him Kshs.5,000/= a month and that he sent Kshs.3,200/= per month to his family.

6. When cross-examined, she stated that the deceased was a houseboy at Kyungwani but she did not know the name of his employer.

7. In her judgment, the learned Chief Magistrate found that on 31/5/2007, parties had recorded a consent judgment on liability in the ratio of 75% to 25% in favour of the Appellant and the only issue to be addressed was the quantum payable. She proceeded to award Kshs.125,000/= as general damages under the heading of loss of expectation of life and pain and suffering but declined to make any award in respect of the heading **“loss of dependency”**, for reasons that there was no evidence to prove that claim. Kshs.52,970/= was awarded as special damages and costs and interest from the date of judgment were awarded as well.

8. From submissions made and the Memorandum of Appeal, what is in issue is whether there was sufficient evidence laid before the subordinate court as regards the claim for loss of dependency. As I understand it, such a claim is made depending on the facts of each case and in calculating an award of damages, the dependency sum and the multiplier should similarly depend on those facts and no general rule can be applied as to how the multiplier should be determined – See **Serah Auma Juma vs BAT (Kenya) Ltd & Another (1976 – 1980) KLR 751** per Chesoni J.

9. In the instant case, the Plaintiff pleaded that the deceased was earning Kshs.5,000/= and that issue was unchallenged. She may not have known the name of her son’s employer but to dismiss the claim for that reason alone was improper. The fact that he had some form of employment would mean that a provision must be made for the loss of dependency suffered by his family. I therefore agree with the advocate for the Respondent that taking into account all the circumstances of this case, Kshs.2,000/= would be a reasonable multiplier as was also the case in **Mohamud Salim Omar vs M.A Bayusuf C.A 48/2006** where the Court of Appeal took the random figure of Kshs.2,500/= to represent a turn-boy’s monthly wage. The deceased in this case was 35 years old and a multiplier of 20 years for a house-help is reasonable. A 2/3 ratio for his young family is also reasonable as they almost wholly depended on him.

10. That being the case for loss of dependency the award shall be;

$2,000 \times 20 \times 12 \times \frac{2}{3} = 320,000/=$.

Less 25% = 240,000/=.

11. That being the case, the Appeal is allowed to the extent that judgment is entered for the Appellant as follows:-

Loss of Dependency - Kshs.240,000/=

Loss of Expectation of Life - Kshs.125,000/=

Special Damages - Kshs. 52,970/=

Total - **Kshs.417,970/=**

12. Costs of the Appeal shall be paid by the Respondent.

13. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **September** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kamanda h/b for Respondent**

N/A for Appellant

ISAAC LENAOLA

JUDGE