



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 286 of 1996

SOLOMON NDUNGU KABUGI

(Suing as the administrator of the Estate of

Dr. Agnes Wangechi Munjuga (deceased) PLAINTIFF

VERSUS

ZACHARIA MUREU KARUME DEFENDANT

J U D G M E N T

By a Plaint dated 10th October 1996 and filed in court on 22nd October 1996 through **Messrs Kahari & Kiai Advocates, Solomon Ndungu Kabugi** suing as the administrator of the estate of **Dr. Agnes Wangechi Munjuga** deceased hereinafter referred as "*the Plaintiff*" sought from **Zacharia Mureu Karume**, hereinafter referred to as "*the defendant*" special damages of Kshs.110/=, General damages, costs of the suit and interest. The basis of the Plaintiff's claim was a road traffic accident that occurred on 2nd January 1996 involving motor vehicle registration numbers KXV 810 Nissan matatu and KAG 800B, a lorry, along Sagana-Thika road. The deceased was a fare paying passenger in Nissan matatu. As a result of the accident the deceased suffered fatal injuries that led to her demise. At the time of the accident aforesaid, the Nissan matatu was being driven by the Defendant who also the registered owner of the same.

The Plaintiff blames the accident on the defendant because he drove the subject motor vehicle too fast in the circumstances, he drove without due care and attention, failed to keep a proper lookout nor have regard for the safety of his passengers. Finally it would appear that the defendant drove the subject motor vehicle contrary to the provisions of the Highway Code.

When the defendant was served with the plaint, he reacted by filing a defence denying that the deceased was a passenger in his vehicle. Though he admitted occurrence of the accident, he nonetheless denied that the said accident was caused by his negligence. He went all to deny all allegations of negligence attributed to him by the Plaintiff. As far as he was concerned the accident was entirely caused by and or substantially contributed to by the negligence on the part of the driver of motor vehicle KAG 800B. The particulars of negligence he attributed to the said driver were that he drove at an excessive speed in the circumstances, drove without due care and attention, failed to keep any or any proper look out or to have any sufficient regard for other vehicles that would be expected to be on the said road and finally failing to hoot and or to see the defendant's motor vehicle in sufficient time or at all as to avoid the accident.

The suit was then fixed for hearing on 2nd October 2008. On that occasion though the Plaintiff was present in court, neither the defendant nor his counsel were present. Having perused the affidavit of service filed by the Plaintiff, I was satisfied that the defendant's counsel had been duly served with the hearing notice. Accordingly I directed the suit to proceed to hearing the absence of the defendant and nor his counsel notwithstanding.

The Plaintiff testified as follows; that he was the father of the deceased. That his deceased daughter was a passenger in the defendant's motor vehicle registration number KXV 810, Nissan matatu when an accident occurred on 2nd January 1996. As a result of the accident, his daughter passed on. Subsequent thereto he petitioned and was granted letters of administration for the deceased's estate. The deceased had boarded the defendant's motor vehicle in Nyeri headed for

Nairobi. On reaching Kambiti area along Nyeri-Nairobi Highway, the defendant's motor vehicle collided with a lorry leading to the instant death of the deceased. He tendered in evidence a death certificate. Following the fatal accident, he obtained a police abstract which he too tendered in evidence. The deceased was a dentist based at Meru General Hospital. She graduated from University of Nairobi in 1990 with Bachelor of Dental Surgery. Though a civil servant, she was also engaged in private dental practice. He tendered in evidence Licence issued to her by the medical Practitioners and Dentist board to render Dental services. At the same time she was pursuing Masters degree in Community health. She was halfway through the second year when the unfortunate accident occurred. Though unmarried the deceased had a son by the name **Alex Gitonga Wangechi** born on 28th October 1991. The deceased used to assist in paying school fees for her other siblings. He also used to pay the defendant a monthly stipend of Kshs.3,500/= for the upkeep of the family from her monthly salary of Kshs.22,000/=. Following the death of the deceased, the family had lost this support. According to the Plaintiff the defendant was solely to blame for the accident since he drove his motor vehicle at an excessive speed. As a consequence he collided into the oncoming lorry KAG 800B. An inquest was subsequently held and the defendant was found to have been responsible for the accident and the death of the deceased. The Plaintiff therefore prayed for judgment in terms of the plaint. With that the Plaintiff closed his case.

Mr. Kahari, learned counsel for the Plaintiff applied to be allowed to tender written submissions. The application was allowed. Subsequent thereto written submissions with relevant authorities were filed which I have carefully read and considered.

Two issues arise for determination in this case; Liability and quantum. On liability there is unchallenged and uncontroverted evidence of the Plaintiff that the defendant drove his motor vehicle so negligently that he collided into an oncoming lorry. Colliding into an oncoming vehicle without more connotes negligence. Indeed it amounts to reckless driving. It also shows that the defendant was not keeping a proper look out, was driving without due care and attention and had no regard for other vehicles that would be expected to be on the said road at the time. There is also evidence that an inquest was held as a result of which the defendant was held liable for the accident. In his defence, the defendant denied negligence on his part and blamed the driver of the oncoming lorry for the accident. However and as correctly submitted by **Mr. Kahari**, his failure to appear in court to disapprove the Plaintiff's claim and his failure to pursue third party proceedings against the alleged owner of the lorry despite having commenced such proceedings vide application dated 4th June 1997 is a clear testimony that the defendant's allegation were not serious. On the unrebutted evidence of the Plaintiff, I would hold that the defendant solely caused the accident.

How about quantum? The Plaintiff brought this action pursuant to the provisions of the law Reform Act and the Fatal Accidents Act. Under the Law reform Act, the Plaintiff is claiming loss of expectation of life and damages for pain and suffering.

At the time of her death, the deceased was employed by the Ministry of health and was attached to Meru General Hospital as a Dental Officer. She was also pursuing a Masters degree in Community health. She was aged about 30 years. Certainly her future looked bright. In the case of **Maurice Odiwuor Ogande v/s Juma Obungu & Another KSM HCCC No. 375 of 1999** (UR) and **Martha Soyle Omondi v/s Webuye Escort Co. Ltd BGM HCCC 84 of 1999** (UR) the court observed that a claim of loss of expectation of life is a conventional sum and went ahead to award a sum of Kshs.140,000/= and Kshs.60,000/= respectively. In the case of **Sarah Kilonzi Ndoto v/s Obed Peter Mbithi MKS HCCC No. 129 of 1996**, the court awarded a sum of Kshs.70,000/= under the same head. This was on 30th January 2002. It would therefore appear that awards under this head range between Kshs.60,000/= and Kshs.140,000/=. Doing the best I can in the circumstances, I would award the Plaintiff a sum of Kshs.100,000/= under this head.

For pain and suffering, it is noted that the deceased died instantly meaning therefore that she suffered no pain or even if she did it was minimal. That notwithstanding, the courts have always awarded damages under this head even where the death was instantaneous. See for instance the case of **Maurice Odiwuor Oganda & Another** (supra) under this head, I think that a sum of Kshs.30,000/= would suffice.

Under the fatal accidents Act, the Plaintiff is entitled to claim loss of dependency. There is unchallenged evidence of the Plaintiff that she used to assist the family financially. She paid school fees for her siblings as well as her son. That task has since been left to the Plaintiff. At the time of her death the deceased was earning a net salary of Kshs.17,704/50 as per the payslip for the month of December 1995 tendered in evidence. The deceased was aged 30 years at the time of her death. She was a civil servant though she had a dental practice by the side. However no evidence was led as to how much income she derived from such practice. Accordingly I will ignore that aspect of the claim. Certainly the deceased's prospects in life were bright. After all she was pursuing a Masters degree in Community health. Assuming that she would have retired from government service at the age of 60 years, she had about 30 years to go. The Plaintiff's counsel has suggested a multiplier of 30 years. However on this aspect of the matter, I wish to point out just like **Ringera J** did in the case of **Martha Soyle Omondi** (supra) that the multiplier should not be equated with the deceased's balance of working life before retirement. That period is point of departure but it must be discounted to take

into account of the vicissitudes of life and the fact that the dependants are receiving an accelerated lump sum payment which is investable for continuous income. The age of the dependants is also a factor to be considered. The ages of the plaintiff and members of his family were not tendered in evidence. However, the deceased left behind a son born on 28th October 1991. By now he must be aged 18 years or thereabouts. He has just become an adult. Considering those factors, I think a multiplier of 20 years would be reasonable in the circumstances of this case.

As regards the multiplicand, I note that the deceased earned a net salary of Kshs.17,704/50 per month. I will adopt it as the multiplicand. In the premises I would assess the Plaintiff's lost of dependency at Kshs.2,832,720/= made up as follows:- $17,704/50 \times 12 \times 20 \times \frac{2}{3}$. However because the same claimant is benefiting under these two acts, the award under the Law Reform Act ought to be put in regard when that under the Fatal Accidents Act is being considered. (See **Kemp & Kemp on quantum of Damages and McGregor on Damages**). With that principle in mind I would award the Plaintiff a sum of Kshs.2,702,720/= under the Fatal Accidents Act. There was no prove of special damages I decline to make any award in that regard.

The Fatal Accidents Act requires that the award be apportioned among the dependants. Counsel for the Plaintiff has been of little assistance in this regard. The Plaintiff does not have a list of the dependants. Nor was evidence led as to the other dependants other than the Plaintiff and the deceased's son. Doing the best I can in the circumstances the apportionment shall be as follows:

- (i) **Plaintiff – 1,000,000/=**
- (ii) **Alex Gitonga Wangechi – 1,702,720/=**

No special damages were proved.

The upshot of this trial is that judgment is entered for the Plaintiff against the defendant in the sum of Kshs.2,702,720/= together with interest therein at court rates from the date hereof until payment in full plus the costs of the suit. The damages are apportioned as shown hereinabove.

Dated and delivered at Nyeri this 17th day of September 2009

M. S. A. MAKHANDIA

JUDGE