



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE 1368 OF 2006

JONNES ESHAPAYA OLUMASAYI AND

PHELISTUS AYIETA OLUMASAYI

(suing in their capacity as the Administrators and

Legal Representatives of the estate of

MICHAEL MUKAVANA OLUMASAYI – DECEASED).....PLAINTIFFS

VERSUS

MINIAL H LALJI KOYEDIA.....1ST DEFENDANT

THOMSON WAWIRE OGEMA.....2ND DEFENDANT

J U D G M E N T

The Pleadings:

1. The Plaintiffs herein, **JONNES ESHAPAYA OLUMASAYI** and **PHELISTUS AYIETA OLUMWAYI** instituted this suit by way of a plaint filed in court on 27/12/2006, suing in their capacity as the Administrators and legal representatives of the estate of **MICHAEL MUKAVANA OLUMASAYI** (deceased).
2. By the aforementioned plaint, the Plaintiff's pray for judgment against the Defendants jointly and severally for
 - (a) *General damages under the Fatal Accidents Act.*
 - (b) *General damages under the Law Reform Act*
 - (c) *Special damages in the sum of Kshs.126,109.00*
 - (d) *Costs of this suit*
 - (e) *Interest on (a), (b), (c) and (d) at court rates.*

3. Summons to Enter Appearance were served upon the 2nd Defendant on 7/02/2007 as per the Affidavit of Service filed on 27/06/2007 while the 1st Defendant was served by substituted service in the newspaper on 7/02/2008 pursuant to leave granted by the court on 28/09/2007. An Affidavit of Service confirming service upon the 1st Defendant was filed in court on 29/02/2008. Neither of the two Defendants filed any defence and accordingly interlocutory judgment on liability was entered against the 2nd Defendant on 24/07/2007 and against the 1st Defendant 7/04/2008.

3. Hearing notices were served upon the 2nd and 1st Defendants on 11/06/2008 and 29/05/2008 and Affidavits of Service were duly filed in that regard. Neither of the Defendants appeared at the hearing of the formal proof, so the case proceeded exparte.

The Facts and the Evidence

4. The 1st Plaintiff, Jonnes Eshapaya Olumasayi testified. He stated that he was the father of Michael Mukavana Olumasayi, (deceased). The deceased is said to have died in a road accident on 2/02/2005. The Plaintiff produced the grant of Letters of Administration Intestate, surrender of identity card form and Certificate of death. The latter documents confirmed that the deceased was born on 4/12/1977 and died on 2/02/2005 at the age of 27 years.

5. The Plaintiff also produced a Certificate of Search – copy of Records – as PExhibit 3 confirming that the motor vehicle registration Number KAA 682E was registered in the name of the 1st Defendant herein. The Plaintiff also produced the Exhibits to prove his claim against the Defendants:-

- ***PExhibit 4 – Police abstract dated 18/02/2005 which shows that the deceased was one of the persons injured in the accident that occurred on 1/02/2005 at the Nambale Trading Centre.***
- ***PExhibit 5 – being the Certificate of Death B. No.863940 dated 4/03/2005 confirming that the deceased was aged 27 years at the time of his death.***
- ***PExhibit 6 – the postmortem report dated 8/02/2005 confirming that the deceased died from cardio pulmonary arrest and due to severe head injury following a RTA.***
- ***PExhibit 7(a) (b) and (c) being ie Certificate of Posting payment receipt in respect of Probate and Administration Cause No.1815 of 2007 and the Receipt of Payment from KRA dated 13/04/2006 respectively.***
- ***PExhibit 8 – being the deceased’s Employment identity card with the Kenya Airforce.***
- ***PExhibit 9 – being bundle of original payslips for the deceased for August 2004 September 2004, October, 2004 and November 2004 respectively.***
- ***PExhibit 10 – being the deceased’s family particulars sent by Kenya Army Headquarters to the DC, Busia District.***
- ***PExhibit 11 – being a letter from the Office of the President on the deceased’s death Gratuity.***
- ***PExhibit 12 – being a demand letter by Plaintiff’s advocates to the Defendants.***
- ***PExhibit 13 – being statutory Notice dated 13/09/2006 issued under section 10 of Cap 405.***

The Submissions

6. Counsel for the Plaintiff submitted as follows:-

(a) **Loss of dependency**

7. Counsel submitted that if the deceased had lived out his full life, he would have worked up to age 55; that he thus lost 28 years of his active life. Counsel also submitted that the deceased was survived by the Plaintiffs and also by his siblings who were all dependent on him. He proposes a multiplier of 28 years with the usual 2/3 dependency ratio at a net salary of Kshs.80,377/50 as per PExhibits 9, thus $80,377.50 \times \frac{2}{3} \times 12 \times 28 = \text{Kshs.1,800,455/=}$.

He relied on the following two cases **Kenya Bus Services Limited –vs- Humphrey [2003] KLR 665** in which the court used a multiplicand of 20 years in respect of a 32 year old P1 teacher, and **Rev Leonard O. Ekisa & Another –vs- Major K. Birgen – Eldoret HCCC No. R.2 of 2003**.

At page 8 of the Eldoret case, the court set out the principles applicable to an assessment of damages as set out in **Beatric Wangui Theuri –vs- Ezekiel Barngetuny & Another NR HCCC No. 1638 of 1985**.

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Each value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum arrived at must then be discounted to allow the legitimate consideration such as the fact that the award being received is a lump sum and would if wisely invested yield returns of an income in nature”.

Regarding the two thirds dependency ratio, the court said:-

*“I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in **Bor –vs- Onduu [1982-1992] 2 K.A.R. 288**.”*

8. In the instant case, there is no dispute that the deceased was aged 27 years at the time of his death. There is also no dispute that he was in the employ of the Kenya Army earning a net income of between Kshs.80,144 and 80,585/=. The last payslip showed a net income of Kshs.80,377/50. The deceased was not married and it can be assumed here in my view that he spent 2/3 of that income on his parents and siblings. I think that considering the stability of jobs with the Kenya Army the deceased would have comfortably worked up to age 52 years, considering other factors that could lead to his early retirement or early death. In the circumstances, I would apply a multiplier of 25 years and a multiplicand of 80,377.50 at the 2/3 ratio and thus come to $80,377.50 \times \frac{2}{3} \times 25 = \text{Kshs.16,075,500.00}$.

Pain and Suffering

9. Counsel for the Plaintiffs has proposed a sum of Kshs.50,000/= on the ground that the deceased died within a few hours of the accidents. He cited the case of **Rev. Leonard O. Ekisa & Another –vs- Major K. Birgen** (supra). I would agree with this figure and award the same for pain and suffering.

Loss of Expectation of Life

10. Counsel proposed a sum of Kshs.300,000/=. It is to be noted that the deceased was a healthy young man aged 27 years with a good job and prospects of getting married and raising a family. Counsel relied on **Kakiki –vs- Abdo & 2 Others [1990] KLR 327**. I am persuaded that the sum of Kshs.300,000/= is reasonable in the circumstances. I accordingly award the same.

Special Damages

11. The Plaintiffs produced no receipts under this head. Counsel urged the court to however find that as the deceased was a military officer, his funeral must have attracted many visitors – see **Rev. Fr. Leonard O. Ekisa & Another –vs- Major K. Birgen** (supra). In my view a sum of Kshs.100,000/= for funeral expenses plus the sum of Kshs.6109.00 on account of death certificate, police abstract, motor vehicle search certificate and grant would be reasonable. I therefore award a total of Kshs. 106,109.00 under this head.

12. In the result, I enter judgment for the Plaintiffs as against the Defendants jointly and severally as follows:

Liability = 100%

Fatal Accident Act

Loss of dependency - Kshs.16,075,500.00

Law Reform Act

- (a) Pain and Suffering..... Kshs. 50,000.00
 - (b) Loss of Expectation of life..... Kshs. 300,000.00
 - (c) Funeral Expenses Kshs. 106,109.00
- Total Kshs.16,511,659.00

The Plaintiffs shall also have the costs of this suit plus interest at court rates.

It is so ordered.

Dated and delivered at Nairobi this 18th day of November 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant