



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 63 OF 1998(RD)
FARAJ MOHAMEDPLAINTIFF

VERSUS

TAWFIQ BUS SERVICE1ST DEFENDANT
DAVID MUTISYA2ND DEFENDANT
JACOB KANITY LUMUNGE3RD DEFENDANT

J U D G M E N T

Nasrudin Faraj Mohamed (deceased) was fare paying passenger in motor vehicle registration number KAE 904 R make Nissan Bus on the 13th day of October 1996 travelling from Busia to Mombasa. At about 5.45 a.m. the aforesaid bus collided with motor vehicle registration number KAG 854N make Mitsubishi Lorry at Bachuma Trading Centre with the result that Nasrudin Faraj Mohamed (deceased) got fatally injured. The deceased's father, Faraj Mohamed, the plaintiff herein took out letters of administration ad colligenda bona of the estate of Nasrudin Faraj Mohamed (deceased).

Upon obtaining the aforesaid letters of administration, the plaintiff filed this suit in which he claimed both special and general damages arising out of the accident against Tawfiq Bus Services, David Mutisya and Jacob Kanity Lumunge as the 1st, 2nd and 3rd defendants. The 1st defendant was the registered proprietor of Motor vehicle registration number KAE 904R. The defendant was the registered owner of motor vehicle registration No. KAG 854 H which at the material time was driven by the 2nd defendant.

All the defendants filed their defences to deny the plaintiff's claim.

When the case came up for hearing the parties were in agreement that liability should be apportioned as per the decision of the honourable Mr. Justice Maraga in a judgment he delivered on 29th July 2005. In that judgment Justice Maraga blamed equally the drivers of motor vehicle registration No. KAG 854H and that of motor vehicle registration No. KAE 904 R, that is to say that the 1st defendant was 50% liable and on the other hand the 2nd and 3rd defendants were shouldering 50% liability. The remaining issue was the issue of quantum.

The plaintiff summoned the evidence of three witnesses in support of the suit. The plaintiff Faraj Mohamed, (P.W.2) produced before this court a copy of the letters of administration *ad colligenda Bona* in respect of the deceased's estate. He said the deceased used to run timber business in Mombasa and that he used to give him a sum of Kshs.12,000/- per month. The death certificate produced indicate that the deceased died at the age of 24 years and by then he was married with four children. The plaintiff summoned the evidence of Mohammed Abubakar Mohamed (P.W.3) who told this court that he did a joint furniture business with the deceased. P.W.3 said that the business used to fetch between Kshs.30,000/- and Kshs.50,000/- per month. P.W.3 confirmed that the deceased was married with 4 children. It is P.W.3 evidence that he used to receive 30% of the proceeds. P.W. 3 claimed that the business closed when the deceased died.

At the close of the plaintiff's evidence the defence case was closed when they failed to attend court. The parties were given the green light to file written submissions on quantum. The parties submitted on four heads namely:

- (a) pain and suffering
- (b) Loss of expectation of life
- (c) Loss of dependency
- (d) Specials

On pain and suffering the plaintiff asked for an award of

Kshs.40,000/- . The 2nd and 3rd defendants asked this court to ignore making an award on this head because there was no evidence as to whether or not the deceased died on the spot. I have perused the post mortem report dated 13.10.96 prepared by Doctor G.G. Kimani. It is a fact that the accident occurred at about 5.45 a.m. on 13.10.1996. The post mortem report which was produced as an exhibit before the Voi R.M.'s court vide Voi Traffic Case No. 4708 of 1996 indicates that the deceased passed away on the same date at about 1.30 p.m. It means that he must have suffered great pain before he passed on. The figure of Kshs.40,000/- which has been suggested by the plaintiff for pain and suffering is in my view low because the deceased took about 8¹/₂ hours before succumbing to his injuries which were serious and multiple. When it comes to assessment of damages in this respect the court ought to take into account the effect of the injuries and of course the period the deceased endured the injuries while fighting for his life. I will not of course forget to remind myself that the court is also guided by recent comparable awards. In this case I am convinced that a sum of Kshs.100,000/- is a fair estimate in the circumstances. Consequently a sum of Kshs.100,000/- is given on this head.

The second head is that of loss of expectation of life. It would appear there is no dispute over this head. Both the plaintiff and the 2nd and 3rd defendants agree that an award of Kshs.100,000/- should be made. I grant this prayer and proceed to state that it is in the range of recent awards made by this court.

The third claim made is that of loss of dependency. The plaintiff has prayed for an award on this head in the sum of Kshs.3,600,000/-. The plaintiff has arrived at the figure as follows:

The plaintiff said the deceased used to give him a sum of Kshs.12,000 per month. The plaintiff prayed for the sum to be paid per month. The plaintiff prayed for the sum to be paid per month for 25 years i.e.

12,000x12x25= 3,600,000/-. The 2nd and 3rd defendants are of the contrary view that no award should be made on this head because the plaintiff did not plead. It is also the submission of the defendants that the plaintiff had failed to show accounts that the plaintiff was earning between Ksh.30,000/- and Kshs.50,000/- p.m. It was also pointed out that the plaintiff did not mention the other dependants despite the fact that there was evidence that the deceased had a wife and four (4) children. It is the submission of the defendant that it was not feasible for the deceased to give the plaintiff a monthly sum of Kshs.12,000/- and at the same time run his business. The defendants suggested that an award of Kshs.1000/- is sufficient on this head. I have carefully considered the two opposing positions. What is clear is that when dealing with the multiplier, the deceased's age is applied not that of the plaintiff as suggested by the defendants. I am satisfied that a multiplier of 25 years is reasonable. What has disturbed my mind is what monthly sum should be fixed. The plaintiff has said he has been receiving a sum of Kshs.12,000/- per month. The defendants have not tendered evidence to counter that. It is therefore a question of my assessment of the evidence to determine whether or not the evidence is credible, reliable and believable. There was the evidence of P.W. 3 who said that he used to receive 30% of the deceased's business monthly income. Assuming that the deceased used to receive a sum of Kshs.50,000/- per month. It means that Kshs. 12,000/- would go to the plaintiff, Kshs.15,000/- (30%) would go to P.W.3 and the remaining sum of Ksh.23,000/- would go to the deceased. It is not clear whether the amount of Kshs.50,000/- is gross or net profit. After a careful consideration and appreciation of the evidence I am not prepared to believe that the deceased used to give the plaintiff a monthly sum of Ksh.12,000/-. It is not feasible nor reasonable for the deceased to do that in view of the fact that the deceased had a wife and four (4) children. The plaintiff did not suggest to this court that he lived with the deceased's family so as one can infer that the amount was used to maintain the deceased's children. Apart from the family's financial commitments the deceased must have had other financial commitments like paying tax, transport etc. In this regard I am of the view that the figure suggested should be slashed by $\frac{3}{4}$ so that instead of the plaintiff receiving a monthly of Kshs.12,000/- he is deemed to have actually been receiving Kshs.3,000/- per month. I will consequently award on this head a sum of Kshs.900,000/- arrived at as follows: $3000 \times 12 \times 25 = \underline{900,000/-}$

On the last head is a claim for special damages in the sum of Kshs.20,000/- It is conceded that the plaintiff did not plead the same nor offered evidence to establish the same. It is trite law that special damages must be specifically pleaded and strictly proved. None of these two ingredients have been established. It is not enough to say that it is obvious that the plaintiff expended money during the funeral of the deceased. The claim on this head is dismissed.

In the end I enter judgment in the sum of Kshs.1,100,000/- plus costs of the suit to be shouldered between the 1st defendant and the 2nd defendant and 3rd defendant jointly at the ratio of 50%. The aforesaid sum is arrived at as follows:

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|---------------------------------|----------------|
| (a) Pain & suffering | Kshs.100,000/- |
| (b) Loss of expectation of life | Kshs.100,000/- |
| (c) Loss of dependency | Kshs.900,000/- |

Consequently quantum is apportioned as follows:

- (i) 1st Defendant to shoulder 50% of Kshs.1,100,000/- i.e. 550,000/-
- (ii) 2nd and 3rd defendants to should jointly and severally 50% of Kshs.1,100,000/- i.e. Kshs.550,000/-.

The defendants shall shoulder costs of the suit in the above ratio too.

Dated and delivered at Mombasa this 23rd day of February 2007.

J.K. SERGON

JUDGE