



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Case 17 of 2004

MARY SHESIA KIVAIRU PLAINTIFF

VERSUS

JEFFA ENTERPRISES LTD. 1ST DEFENDANT

FRED LUGALI ASUDZI 2ND DEFENDANT

J U D G E M E N T

MARY SHESIA KIVAIRU, the Plaintiff, instituted the suit herein on 8-3-2004 in her capacity as the personal representative of the Estate of the late ESTONE KIVAIRU (the Deceased) who died on 28-3-2001 after succumbing to bodily injuries he sustained on 26-3-2001 when he was hit by a motor vehicle registration No. KAA 393A along Kisumu Kakamega road.

In her Complaint dated 27-2-2004, the Plaintiff named Jeffa Enterprises Ltd. as the 1st Defendant and Fred Lugali Asudzi as the 2nd Defendant.

The cause of action in the suit was tort. The plaintiff alleged that the 2nd defendant as the agent of the 1st defendant drove and managed motor vehicle KAA 393A on 26.3.2001 along Kisumu/Kakamega road when due to the negligence of the 2nd Defendant it hit and injured the deceased who was riding a bicycle. The Plaintiff contended that the 1st Defendant was vicariously liable.

The Plaintiff brought the suit on behalf of her children with the deceased who were the dependants of the deceased as well as on her own behalf. The plaintiff's claim is for special damages and general damages and costs of the suit.

The Defendants had a composite defence filed on 8.4.2004 which, though filed, was neither signed nor dated. Rule 14 of Order VI requires that every pleading must be signed by an advocate, or a recognized agent as defined by Order III Rule 2 (of the Civil Procedure Rules) or by the party if he or she sues or defends in person. A pleading that is not signed is not a valid pleading and cannot be relied on. The object of signing a pleading is to ensure a party takes responsibility for it and cannot resile from what he/she has pleaded. It is for this reason that a party is bound by its pleadings. The defence in this suit is struck out because it was neither signed nor dated and was consequently incompetent.

The Defendants through their advocates did on 8.4.04 file a Memorandum of appearance dated 29.3.2004. And by a letter dated 01-07-2005, the advocates for the Defendants and the Plaintiff filed a consent to the effect that liability (in the suit) be apportioned on the ratio of 80% on the Defendants' part and 20% on the Plaintiff's part. On this basis, I enter judgement in favour of the plaintiff on liability on 80% to 20% basis. When the suit came up for hearing before me on 15-11-2005, Mr. Eboso, learned

counsel for the plaintiff from the firm of Eboso & Wandago Advocates, called only the Plaintiff, Mary Shesia Kivairu. No advocate appeared for the Defendants. The firm of advocates on record for the Defendants was and still is M/S Wambugu Motende & Company.

In her evidence, the Plaintiff stated that the deceased was her husband and that she was a housewife who lived in Sabatia, Vihiga District. She testified how her husband had been hit while riding a bicycle at Chavakali junction on Kakamega-Kisumu road. He was taken to Aga Khan Hospital on 27-3-01 where he died at 1 p.m. on 28.03.2001. The Plaintiff produced the deceased's death certificate as exhibit No.1 and told the court that he was aged 49 years at the time of his death and was at the time an employee of the Postal Corporation of Kenya on permanent basis holding the position of a Postal Officer. He enjoyed good health, she said. She produced as exhibit No.2 the deceased's pay slip dated 28.3.2001 showing that the deceased earned a gross salary of Shs.12,020/= plus house allowance of Shs.4500/=. His salary was subject to deductions as follows:- NHIF – Shs.360/=; PAYE – Shs.1026/=; COTU – Shs.10/=, Pension – Shs.901/50.

The Plaintiff testified that she had 8 children with the deceased namely:

1. Caroline Karushi – aged 27 years
2. Beatrice Vihenda – aged 27 years
3. Gladys Musimba - aged 26 years
4. Edith Kagunga – aged 24 years
5. Sally Mudezi – aged 22 years
6. Collins Mudaida – aged 18 years
7. Gideon Adoli – aged 16 years
8. Humphrey Juma – aged 15 years

The first two children, namely Caroline and Beatrice were said to be twins and had gone to school up to Form 4 and had hoped to attend colleges but did not do so due to lack of funds after the death of the deceased. The children, whose ages are reflected against their names, were 3 years younger at the time of the filing of the suit. They all depended on the deceased who looked forward to working until retirement and getting a pension.

Mr. Eboso submitted to court that the deceased could have lived and supported his family and suggested a multiplier of 10 years.

On pain and suffering, Mr. Eboso suggested a figure of Shs.120,000/=. He also sought Shs.100,000/= for loss of expectation of life.

I have duly perused the pleadings and the evidence given by the Plaintiff.

The Plaintiff's claim for loss of dependency is premised on the Fatal Accidents Act Cap. 32 and the claim for the benefit of the estate of the deceased is premised on the Law Reform Act, Cap.26. As long ago as 1957, this court stated in HAYES v. PATEL (1961) EA 129 that *"the assessment of damages for the death of a husband and father of small children should start with ascertainment of the age and expectation of working life of the deceased and the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion thereof which he would have made available for his dependants. In this way, the annual value of the dependency should be arrived at, and this must then be capitalized by multiplying the annual value by so many years purchase. The multiplier will bear a relation to the expectation of life and dependency of the widow and children. The*

capital sum so reached should then be discounted to allow for the prospect of the widow's remarriage, and, in certain cases, of the acceleration of the receipt by the dependants of what the deceased left to them respectively; the resulting sum (which will depend on a number of estimates and imponderables) will be the lump sum to be apportioned among the dependants." It is necessary to add here that where the deceased was guilty of contributory negligence and liability is apportioned, the payment to which the plaintiff is entitled must suffer diminution of the portion of liability attributable to the deceased – see PATEL v. BARCLAYS BANK DCO (1963) E.A. 554. There is also authority by the Privy Council in appeal from the Court of Appeal for East Africa to the effect that "there is no reason why the support necessary for young children should, where the mother has been killed in an accident, be more sparingly estimated than if the mother had lived." This principle should apply with equal force in case of a father. See KASSAM v. KAMPALA WATER CO. LTD. (1965) E.A. 587. It is accepted principle in cases of this nature that what must eventually be ascertained is the pecuniary loss of each individual entitled to sue.

In this case, the deceased was aged 49 years. In HAYES v. PATEL (1961) E.A. 129 where the deceased was aged 46 years the court took a multiplicand of 15 years purchase. However, Counsel for the Plaintiff in this case submitted that a multiplier of 10 years would be reasonable. I am in agreement especially taking into account the ages of the dependants particularly the youngest dependant Humphrey Jumba who was aged 15 years at the time of the filing of the suit.

The salary of the deceased at the time of death was Shs.12,020/= plus house allowance of Shs.4500/= making a gross total of Shs.16,520/= from which PAYE, and NHIF were deducted leaving a net salary of Shs.15,234/= from which the deceased paid his loans and survived on. It is reasonable to assume that the deceased would have spent $\frac{1}{4}$ of the net salary on himself and the balance on his wife and children. On the material before me, after weighing one thing with another, it is my finding that the deceased would have spent a sum of Shs.8000/= on his family which would have progressively increased as his salary improved and payment of loans dissipated. This figure should be multiplied with 12 months to give annual value of dependency. This results in Shs.72,000 (8,000 x 12 = 72,000).

To get the capital sum, the annual value of Shs.72,000/= should be multiplied with the 10 years purchase. (i.e. 72,000/= x 10 = 720,000/=).

There was no evidence that the widow is likely to remarry nor do I see any reason why there should be any discount on capital sum on the basis of remarriage or acceleration of benefits. As regards special damages, the plaintiff claimed Shs.19450/= towards fees for processing Letters of Administration and sought funeral expenses which were not quantified. But there can be no doubt that the deceased was buried and expenses incurred in the exercise. In absence of proof, I am prepared to award towards funeral expenses Shs.30,000/=. On pain and suffering and loss of expectation of life, I award Shs.200,000/=.

In the result, I assess the damages in favour of the plaintiff at Shs.969,450/= this being the amount payable before deduction of contributory negligence. This sum (of Shs.969,450/=) is made up as follows:-

- (i) Lump sum Shs.720,000/=
- (ii) General damages Shs.200,000/=
- (iii) Specials Shs. 19,450/=
- (iv) Funeral expenses Shs. 30,000/=

- Total Shs.969,450/=

This figure must be reduced by the deceased's contribution of 20%. The deduction leaves damages at 775,560/=.

I would apportion the damages among the widow and the children as follows:-

| | |
|------------------------|----------------------|
| Widow..... | Shs. 79.260/= |
| Carolyn Karushi | Shs. 79,260/= |
| Beatrice Vihenda | Shs. 79,260/= |
| Gladys Musimba | Shs. 79,260/= |
| Edith Kagunga | Shs . 79,260/= |
| Sally Mudezi | Shs. 79,260/= |
| Collins Mudaida | Shs.100,000/= |
| Gideon Adoli | Shs.100,000/= |
| Humphrey Juma | <u>Shs.100,000/=</u> |
| Total | <u>Shs.775,560/=</u> |

The damages of Shs.775,560/= shall carry interest at court rates from the date of judgement. I award the costs of the suit to the Plaintiff. This is the judgement of the court.

Dated, signed and delivered at Kakamega this 15th day of February, 2007.

G. B. M. KARIUKI

J U D G E