



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT 117 OF 2004

CHRISTINE CHAMAIYEK (*suing as the legal administrator*

of the estate of the late RICHARD SIMIYUMALABA*.....**PLAINTIFF*

VERSUS

UNISTER TRANSPORTERS LTD.....DEFENDANT****

JUDGMENT

The plaintiff, Christine Chemayiek Simiyu has filed this suit on behalf of the estate of the late Richard Simiyu Malaba (*hereinafter referred to as the deceased*). The plaintiff averred that she was the administrator of the estate of the deceased. She stated that while the deceased was traveling as a fare paying passenger in Motor vehicle registration No. KAR 226C Toyota Hiace Matatu on the 27 April, 2004 along the Kericho-Kisumu road, the same collided with motor vehicle registration No. KAQ 961X/ZC 0244 Renault Trailer owned by the defendant. The plaintiff attributed the said accident to the negligence of the driver of the defendant's motor vehicle. The defendant filed a defence. It denied that its driver caused the said accident. Instead, the defendant blamed the driver of motor vehicle registration No. KAR 226C for causing the said accident. The defendant did not however apply for the owner of motor vehicle registration No. KAR 226C to be enjoined as a third party in the suit.

On the 24th May 2006, the plaintiff and the defendant entered into a consent agreement whereby liability between the plaintiff and the defendant was apportioned at the ratio of 80:20 in favour of the plaintiff. Consequently, the defendant was to shoulder 80% liability whilst the plaintiff, on behalf of the deceased's estate was to bear 20% contributory negligence. The consent of the plaintiff and the defendant was adopted as a judgment of the court.

The issue that was left for determination of this court is the quantum of damages that is to be paid to the estate of the deceased. Evidence was adduced by the plaintiff to the effect that the deceased at the time of his death was aged 51 years old. His death certificate was produced as *plaintiff's exhibit No. 2*. At the time of his death, the plaintiff was working as the Kericho branch manager of the Kenya Farmers Association (KFA). The plaintiff produced the pay slip of the deceased for the month of February, 2004 as *plaintiff's exhibit No.3*. The said pay slip indicated that the deceased earned a net salary of Kshs. 15,901/=. The plaintiff testified that the deceased was married to two wives: herself and her co-wife Emily Chemesunde Simiyu. The plaintiff was blessed with 8 children aged between 36 years and 16 years. At the time she testified before court, only three of her children were still in school. The twins, Victor Kipkoech and Ernest Chesiron are form four students. The last born Edwin Khisa is a form two student. The third last born, Gilbert Tuke who is aged 18 years is supposed to join college *i.e* the Medical Training College. The co-wife of the plaintiff was blessed with three children. Two of the older children dropped out of school due to lack of school fees. The last born Tony, aged 12 years is a standard six pupil.

The plaintiff testified that the deceased was in good health at the time of his death and used to provide for his two families. She testified that she and her co-wife were unemployed and used to depend solely on the deceased for their support. The plaintiff conceded that after the death of the deceased, the estate of the deceased was paid the death benefits due in respect of the deceased estate. She further conceded that the parents of the deceased had given her land to cultivate so as to sustain herself and her family. She further conceded that the majority of her children were adults and were self dependant. She testified that she had been issued with limited grant of Letters of Administration *ad litem* which gave her authority to file suit on behalf of the deceased's estate. She testified that although the plaintiff could have retired when he reached the age of 55 years, there was a provision in his employment contract that could have enabled his employment contract to be extended. The said letters of administration *ad litem* were produced as *plaintiff's exhibit No. 1*. After the plaintiff testified, she closed her case. The defendant did not offer any evidence in its defence.

The plaintiff and the defendant agreed by consent to file written closing submissions. It is only the defendant who filed its written closing submission by the 26th February, 2007 when this court had fixed to be the last day upon which the said written submission should have been filed. The plaintiff did not file any written submissions. I have carefully considered the evidence that was adduced by the plaintiff and the submissions that were filed by the defendant. The issue for determination by this court is what quantum of damages should be paid to the deceased's estate. The deceased was at the time of his death aged 51 years. He was expected to work another four years before he retired. However, the deceased's period of employment could be extended. I have considered the facts of this case and the applicable law. Taking into consideration the nature of the employment contract of the deceased, I would apply a multiplier of six (6) years.

It is not disputed that the deceased earned a net income of Kshs.15,901/= at the time of his death. His pay slip for February 2004 which was produced as *plaintiff's exhibit No. 3* established the said salary as the one which was received by the deceased. The defendant has submitted that the dependency ratio that should be applied is $\frac{2}{3}$. I will adopt the said dependency ratio proposed by the defendant. The damages that shall be paid to the estate of the deceased under the Fatal Accidents Act shall therefore be as hereunder:

$$\text{Kshs } 15,901/= \times 6 \text{ years} \times 12 \text{ months} \times \frac{2}{3} = \text{Kshs } 763,328/=$$

The plaintiff pleaded that she should be awarded funeral expenses. I will award her a global sum of Kshs 30,000/- being the funeral expenses. I will make no award under the Law Reform Act in view of the Court of Appeal decision of Kemfro Africa Ltd, t/a "Meru Express Services (1976)" & another vs Lubia & another [1987] KLR 30 which prohibits this court from making a double award in damages to an estate of a deceased person in respect of the same cause of action.

The upshot of the above reasons is that judgment is entered for the plaintiff as against the defendant as hereunder:

(i) On Liability

Liability was apportioned by consent at the ratio of 80:20 in favour of the plaintiff. The defendant is to bear 80% liability while the plaintiff will shoulder 20% contributory negligence,

(ii) On quantum

(a) Under the Fatal Accident Act.....Kshs 763,328.00/=

(b) Special damages *i.e* funeral expenses...Kshs 30,000.00/=

Total.....Kshs 793,328.00/=

less contribution of 20%Kshs 634,662.40/=

(iii) The plaintiff shall have the costs of the suit.

(iv) Interest of the sum awarded shall be paid from the date of this judgment.

DATED at Kericho this 22nd day of March 2007.

L. KIMARU

JUDGE