



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

?CIVIL CASE 69 OF 1997

**JAMLICK M'IKIARA (suing on behalf of WILSON MURITHI M'IKIARA
(deceased)...PLAINTIFF**

V E R S U S

M'MASAI NGUTHARI.....

DEFENDANT

JUDGMENT

1. On 15.12.1993 the Plaintiff alleged that his son Wilson Muriithi M'Ikiara died of fatal injuries as a result of a stab wound said to have been inflicted by the Defendant. In a Plaint filed on 18.6.1997, the Plaintiff further avers that he is the legal representative of the deceased having obtained letters of administration in Succession Cause No. 243 of 1995 He further avers that the Defendant was charged with the offence of manslaughter in Criminal Case No. 1240 of 1995 and was found guilty and convicted accordingly. I will return to the details of that case later but the plaintiff now claims damages for the loss he claims that he suffered as a result of the unlawful death of his son. The claims are made pursuant to the Fatal Accidents Act and the Law Reform Act. A further sum of Ksh.72,292.50 is also sought as special damages being the costs of **“transport and subsistence Ksh22,184.40” “funeral Expenses Ksh.31,858.50” and “Legal Fees – Ksh.18,200/-“** costs of the suit and interest thereon are also sought.
2. The Defendant filed a statement of Defence on 17.7.1997 and in it admitted that he was charged with the offence of manslaughter as averred in the plaint but stated that the suit was premature as he was still serving sentence and further denied that the Plaintiff was entitled to any damages under the Fatal Accidents Act, Cap.32 of the Law Reform Act and in fact contended that the two statutes were inapplicable to the claim.
3. When the suit commenced for hearing on 19.2.2002 before Kasanga Mulwa J. the plaintiff stated as follows:-

That on 15.12.1993 the Defendant unlawfully killed his son and upon conviction was ordered to serve a 2 year probation period. The proceedings in CM's court at Meru Criminal Case No. 1240 of 1994 were produced and as I said earlier the conviction was admitted in the statement of Defence. The Plaintiff further stated that the deceased was 28 years of age at the time of death and was a mason with a firm called Parkash Building and Construction of P.O. Box 22111 Nairobi. A letter of employment (Exh.8) was produced to show that his salary as of 3.1.1991 was Ksh.120 per day plus Ksh.500 House allowance per month and a medical allowance of Ksh.620/- per month. Apparently, the deceased left employment and returned home where he conducted farming activities on a 6 acre parcel of land being L.R. No. Kibirichia/1989 which was registered jointly in his name and that of the Plaintiff. The Plaintiff said that the deceased used to **“earn about Ksh.6,000/- per month”** but what was produced as Exh 10 were receipts for payments made in purchase of fertilizer and agricultural chemicals and not earnings from the farm produce per se. Notwithstanding the Plaintiff said that he was a dependant of the deceased and used

to receive Ksh.2,000/- per months from him.

4. As for the expenses incurred by the Plaintiff after the death of his son, he produced receipts for Ksh.33,243/- as funeral expenses and for Ksh.18,200/- being advocates fees in the Succession Cause relating to the administration of the deceased's estate.
5. In his evidence, the Defendant stated that on 15.12.1993 he was attacked by two men at 9.00 p.m. within Kibirichia Market and one of them tried to place a lit lantern very close to his eyes and he was temporarily blinded by the light. Two more men joined his attackers and he ran away and slept in the bush. The next day when he reported the incident to the police, he was arrested for stabbing one Mpongo and killing one Mureithi. He denied doing so and said that he did not know either of the two men. He admitted that he was charged in court for killing Mureithi and was placed on probation but he did not appeal against the conviction or even sentence.
6. The witness for the Defendant was Nelson Mwirigi Ruteere who said that sometime in December 1993, he was at one Karigia's house when the Defendant joined them and paid a debt he owed Karigia. One Mutuma then came and for no reason stepped on the Defendants foot and used a tin lamp to blind the Defendant who pushed it and the lamp went off. Commotion ensued and he heard Mutuma also known as Mpungu screaming that he had been stabbed. When the witness went out, he found that Mureithi, son of the Plaintiff had also been stabbed. He was taken to hospital but he died the next day. He confirmed that he was a witness for the state in the manslaughter trial against the Defendant.
7. The Advocates for the parties filed elaborate submissions with authorities and I will refer to them along the way if necessary but for me the issues for determination are these:-

- (i) Did the Defendant unlawfully cause the death of the Plaintiff's son on 15.12.1993?
- (ii) Even if the answer to (i) above is in the affirmative, is there a valid cause of action established?
- (iii) Are damages payable, in any event under the Fatal Accidents Act and/or the Law Reform Act and are special damages payable?
- (iv) Costs and interest thereon.

8. I have seen the proceedings in Meru CM's Court Criminal Case No. 1240/1994 in which the Defendant was the accused. In the judgment delivered in that case, the learned trial magistrate noted as follows:-

"The circumstantial evidence clearly points to the accused as the person who stabbed the complainant and the deceased and that explains why the accused fled from the scene immediately. I have rejected the accused's counter-claim that he never stabbed any person and consider the defence to be a big lie in the face of overwhelming evidence against the accused"

9. He proceeded to convict the Defendant and placed him on probation as elsewhere above stated. I quite agree with the advocate for the Plaintiff when he submits that without an appeal being filed, that judgment remains unchallenged and the conviction of the Defendant cannot be the subject of any interference by this court. The provisions of s.47A of the Evidence Act aptly sums up the law in that regard vis that;

"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the persons so convicted was guilty of that offence as charged".

10. It is my further view that the invocation by the Advocate for the Defendant of s.47 of the Act as the answer to s.47A is misplaced and misguided. The proceedings and judgment in Meru CM's Court Criminal Case No. 1240 of 1994 were produced without objection and it is clear that a judgment cannot be invalidated by submissions but by proof that the same was obtained by fraud

or collusion. The mere assertion of these facts is not conclusive of them and the submissions in that regard cannot be sustained.

11. I must find as I hereby do that on the law and the facts, the Defendant unlawfully caused the death of the son of the Plaintiff and the suit is properly before this court because letters of administration to the estate of the deceased are held by the plaintiff.

12. On the second and third questions above, the advocate for the plaintiff submits that the claim is premised on sections 3, 4 and 6 of the Fatal Accidents Act as well as s.2(2) of the Law Reform Act. I agree that there is a valid cause of action but the advocate for the Defendant on the other hand submits that without liability being proved, no damages are payable and further that without proof of dependency by the Plaintiff any claim in that regard must also fail. I have held elsewhere above that liability cannot be denied and I have said why. I would however agree that there was no evidence that the plaintiff was a dependant of the deceased. The land allegedly occupied by the deceased was jointly owned with the Plaintiff and there is no evidence that the deceased solely worked on it. He had no known employment having left his employment as a mason in Nairobi and the evidence of income were in fact receipts for chemicals bought by the plaintiff. I am not prepared to award any amount for loss of dependency in the face of such evidence which is inconclusive.

13. I am quite prepared however to award damages for pain and suffering and for loss of expectation of life once I have held the Defendant liable for the deceased's death. The advocate for the plaintiff has placed reliance on the following decided cases:

1. HCCC NO. 10 of 1993 (MACHAKOS) GIDEON MAUNDU KAVOI VS SAMSON MUSAKI KIILU

2. HCCC NO. 2267 OF 1992 (NAIROBI) DAMMAR OWUOTH VS HON. ATTORNEY GENERAL

3. HCCC NO. 6456 OF 1992 JOSEPH CHEGE VS HON. ATTORNEY GENERAL

4. HCCC NO. 3473 OF 1991 JOSEPHAT WAINAINA MWANGI VS HON. ATTORNEY GENERAL

14. I have had sight of them and I would on the basis of those decisions award Ksh.30,000/- as prayed by the plaintiff, it being damages for pain and suffering. A sum of Ksh.150,000 for loss of expectation of life is also sought and since there is no strong exception to it, the same is awarded. It is reasonable and fair to do so, I think.

15. In the end I shall enter judgment for the plaintiff in the sum of Ksh.180,000/- as general damages plus Ksh.51,443/- being the special damages properly proved making in total Ksh.231,443/= plus interest and costs.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS ...6th..... DAY OF march 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

Mr. Mugambi for Mr. Anampiu Advocate for the Plaintiff

Mr. Kosgey holding brief for Mr. Kioga Advocate for the Defendant

ISAAC LENAOLA

JUDGE