



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civi Case 66 of 2006

ELIZABETH NJERI MWANGIPLAINTIFF

VERSUS

CATHOLIC DIOCESE OF EMBU DEFENDANT

JUDGMENT

The plaintiff has brought this suit as the personal representative of the estate of Julius Muthike who died from injuries sustained following a road traffic accident on 21st February, 2006 along Embu-Kiritiri Road and involving motor vehicle Reg.No.KAH 672Q belonging to the defendant

It was alleged by the plaintiff that the said motor vehicle was driven negligently by the defendant's servant thereby knocking down the deceased who sustained injuries from which he died. The only eye witness, PW2, Luke Ndungu Gikonyo (Gikonyo) testified that he was cycling behind the motor vehicle in this case. Ahead of the motor vehicle was another cyclist with a pillion passenger.

Gikonyo saw the motor vehicle swerve to the path of the cyclist ahead in order to avoid a pothole and in the process the cyclist and his passenger were hit and the latter thrown on the road while the former fell off the path. The passenger, who is the deceased herein died while the cyclist was rushed to hospital. Gikonyo did not know the cyclist but knew the deceased, whose family he contacted to give the sad news.

The deceased person's wife PW1, Elizabeth Njeri Mwangi(Elizabeth) testified that the deceased was employed on full time basis by a company called Apex as a guard and earned Kshs.4,000/=. He also had a part-time job with another firm going by the description of Giant Auctioneers where his salary was Kshs.8, 000/= per month.

The deceased and Elizabeth had 3 children, the oldest being 9 years and youngest 2 ½ years. She stated that as a result of the deceased person's death she has, together with her children, lost the support of the deceased person, their sole breadwinner.

The driver of the motor vehicle on the material day, Bernard Nyaga(DW1) the only witness for the defendant stated that the cause of the accident was due to the cyclist swerving to his(DW1's) path as result of a bright headlight flash by an oncoming motor vehicle. That the bicycle in question had no rear reflectors and further that the accident occurred before daybreak.

He maintained also that the cyclist was riding on the main road on his (DW1's) path. I have considered the respective cases of the parties, submissions by their counsel and the useful authorities cited and these are my views on the matter.

It is common ground that the driver (DW1) was charged, with a traffic offence arising from this accident

which is yet to be concluded. From the evidence I am persuaded that the deceased met his death in this accident. It was not necessary, as demanded by (Learned counsel, for the defendant, to produce the death certificate in respect of the deceased to prove death and its cause. Being a civil claim where proof is on a balance of probabilities it was sufficient that there was evidence of Elizabeth that her husband died. This evidence was supported by the contents of the Police Abstract Form as well as by the fact that grant of letters of administration was issued in respect of his estate.

The first question after disposing of this issue is whether the accident was due to the negligence of the driver of KAH 672Q. It was Gikonyo's evidence that the accident was caused when the driver of the motor vehicle in question was trying to avoid hitting a pothole on the road. This has been denied and instead the driver maintains that it is the cyclist who swerved on his path at a short distance, hence he was not able to stop or swerve to avoid hitting them. This assertion does not support the defendant's statement of defence in which he blamed the accident on the deceased for having crossed and/or entered the road into the path of the motor vehicle.

Parties are bound by their pleadings. The driver in his evidence denied that the deceased was crossing the road or that he entered the road. His evidence was that the cyclist swerved on his path.

It is also conceded that the cyclist and the deceased were riding ahead of the motor vehicle and that the accident was on a depression. I find no reason why the driver failed to see them at a safe distance to either slow down or stop in order to let the on-coming motor vehicle proceed. I am convinced that he failed to do this or even to warn the cyclists because he was driving at a high speed.

It is further clear that it was not the deceased who was riding the bicycle. He was blameless. As I have stated the accident was on depression and just before the bridge. It is the driver's case that there was an on-coming motor vehicle. In view of all these the driver was duty-bound to be careful. From all these I find that vicarious liability of the defendant in the causation of this accident has been proved.

Regarding quantum, it was submitted for the plaintiff that the deceased was 30 years at the time of his death. Once again no proof of this in terms of birth certificate was produced. While birth certificate may be a means of proving the date of birth, it is not necessarily the only means of doing this. Elizabeth gave the age of the deceased at the time of his death as 30 years. That must be taken to be so unless the defendant has another age to the contrary. Section 112 of the Evidence Act places the burden at the defendant to disprove the age of the deceased as presented. Counsel for the plaintiff urged me to adopt a multiplier of 30. While counsel for the defendant suggested a multiplier not exceeding 15 years. Guided by the cases of Maina Kaniaru & Another V Josphat Muriuki & Another, CA No.14 of 1989, Leonard Obiero Bondo V Francis Muriru Murugu & Another, Nbi HCCC No.4125/1988(u.r.) and Martin Namicha & Another V V.K Mwangi & Another, Civil Suit NKU No.574 of 1994, a multiplier of 15 years is adopted.

Both counsel agreed to 2/3 loss of dependency. It was the plaintiff's evidence that from his two jobs, the deceased combined monthly earnings amounted to Kshs.12, 000/= . This was challenged as lacking basis as no evidence was led that he was employed in the first place or that he earned the sum.

A person's earnings must be proved. However, the courts in this country has given a liberal approach to this matter, in view of the level of illiteracy and poverty. Many working Kenyans neither have payslips nor books of account to prove earnings. If such a person becomes an accident victim he does not lose his remedy in damages merely because its quantification is difficult. Apaloo, J (as he then was) considered the difficulties in a case of a village-man dealing in cattle trade who was injured in a road accident. He said;

“ I am bound to say that the evidence he led of his earnings is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a State Commission, that is, the Kenya Meat Commission, he kept no books of account or any business books. So his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he

gave as his earnings supplied from his memory bank, may well be exaggerated. I think the figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. The defendant ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business methods”

That was in the case of Wambua V Patel & Another (1980) KLR 336. Recently in Jacob Ayiga Maruja & Another V Simeon Abayo, Civil Appeal No.167 of 2002, the Court of Appeal reiterated similar sentiments, when it stated;

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things”.

The trial court is free to draw conclusions based on evidence to prove the occupation of a deceased person who is in the category of the deceased in the absence of any documentary proof bearing in mind that there is a tendency of exaggeration.

According to Elizabeth in this case the deceased left her with three children. At the time of her testimony the first born, Mercy Wanjiku(9yrs) was in standard 2, the second born, Joyce Wangari, 7 years was in Standard 1, while Shelmeth Nyagothie being only 2 ½ years had not started school.

It was Elizabeth’s evidence that they depended on the deceased for their upkeep. Elizabeth produced two immunization cards in respect of Joyce and Shelmeth. There is nothing to suggest that Mercy is not a daughter of the deceased.

Although Elizabeth stated that the deceased had two jobs from which he earned Kshs.12, 000/=, there must be an element of exaggeration and for that I will only accept Kshs.4,000/=. Having come to these conclusions, the loss of dependency head will work out as follows; $4,000/= \times 12 \times 15 \times 2/3 = 480,000/=$.

On loss of expectation of life Kshs.150,000/= was proposed by counsel for the plaintiff. Awards under this head as reflected in the authorities cited range between Kshs (70,000 (Patrick Migwi Maina V Josphat Kariuki Njoroge, HCCC No.Nai.1965 of 2001 in 2004 and Kshs.180,000 (Ahmed Malfudh Awadh V Malindi Tobacco Wholesalers, HCCC NO.Msa 610 of 1995).

In the former the deceased was aged 33 years while in the latter the deceased was only 12years. I will go by the award in the Patrick Migwi case and grant Kshs.70,000/= under this head.

For pain and suffering the evidence led by Gikonyo is that the deceased died on the spot. It is now accepted that even when death is instantaneous, there is pain before death, albeit brief. Where death is immediate courts have generally awarded Kshs. 10,000/=. See Patrick Migwi and Martin Namicha (Supra). On the authority of Davies and Another V Powell Duffryn Associated Collieries Ltd(1942) ALL ELR 657 followed in numerous cases such as Maina Kaniaru(Supra)damages awarded under the Law Reform Act(Cap 26) must be taken into account in the case of dependants who will benefit under the Fatal Accidents Act. Kshs.70,000/= is therefore taken away from Kshs.480,000/= leaving a balance of Kshs.410,000/=.

Pleaded special damages is Kshs.20,450/= but the only evidence adduced was in respect of a Police Abstract form for Kshs.200/= and that is all I can award.

In the result I enter judgment for the plaintiff against the defendant as follows;-

- (a) Loss of dependency – Kshs. 410,000/=
- (b) Pain and suffering – Kshs.10,000/=

(c) Special damages – Kshs.10,000/=

Total - Kshs.420, 200/=

(Four Hundred and Twenty Thousand, Two Hundred Only).

(d) Costs and

(e) Interest at court rates on special damages from the date of the suit, and on general damages from the date of this judgment.

Orders accordingly.

DATED AND DELIVERED AT MERU THIS 19TH DAY OF JULY, 2007

W. OUKO

JUDGE