



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE 27 OF 2000

NELSON GICHANA MABEYA (*Suing as the legal representative of Alex Nyangeri Mabeya- Deceased*).....PLAINTIFF

VERSUS

AKAMBA BUS SERVICES.....1ST DEFENDANT

TRANSLUXE BUS SERVICES.....2ND DEFENDANT

JUDGMENT

The plaintiff, Nelson Gichana Mabeya, the administrator of the estate of Alex Nyangeri Gichana – deceased (*hereinafter referred to as the deceased*), filed suit against the defendants seeking to be paid damages on account of the death of the deceased which he alleged was caused in an accident involving motor vehicles registration No.KAG 699J and No. KUH 379. The plaintiff averred that on the 13th April 1998, while the deceased was travelling as a fare paying passenger in Motor vehicle registration No.KAG 699J, owned by the 2nd defendant, along Gilgil-Nakuru, the said motor vehicle was involved in a collision with motor vehicle registration No.KUH 379, owned by the 1st defendant, as a result of which the deceased sustained fatal injuries. The plaintiff averred that at the time of his death the deceased was 22 years old and was of good and vigorous health. The plaintiff averred that as a result of the said death, the dependants of the deceased, who included his parents and his siblings, had suffered loss. He therefore prayed for this court to award the deceased's estate damages under the **Law Reform Act** as well as the **Fatal Accidents Act**. He further pleaded with the court to award him special damages which he claimed he incurred during the burial of the deceased. He prayed to be awarded costs of the suit.

The two defendants each filed a defence denying responsibility for causing the accident. They blamed each other for causing the accident. They listed the particulars of negligence against each other by which each sought to have the other to be found liable for causing the said accident. On the 11th January 2007, the plaintiff and the 1st defendant entered into consent compromising the suit on liability. Liability was apportioned to the 1st defendant at 50%. Judgment was therefore entered on liability against the 1st defendant at the said ratio of 50%. The suit against the 2nd defendant appears to have been kept in abeyance. The plaintiff proceeded with his suit against the 1st defendant. He adduced evidence on his claim on how the damages should be assessed.

The plaintiff testified that the deceased was his son. He had obtained letters of administration prior to filing the suit (*letters of administration produced as plaintiff's exhibit No.1*). He testified that the deceased died on 13th April 1998 when he was involved in an accident along Nakuru-Nairobi road. The deceased was 22 years at the time of his death. He had attended St. Kawa Nyansiongo Academy where

he sat his Kenya Certificate of Primary Education examination (*KCPE certificate produced as plaintiff's exhibit No.2*). The deceased's birth certificate was produced as *plaintiff's exhibit No.3*. His death certificate was produced as *plaintiff's exhibit No.4*. The deceased was admitted at Cardinal Otunga High School where he attended for two years before he was transferred to St. Danes Eronge Secondary School due to the difficulty by the plaintiff to pay the deceased's school fees. (*Leaving certificate produced as plaintiff's exhibit No.5*).

The plaintiff produced the Kenya Certificate of Secondary Examination of the deceased as *plaintiff's exhibit No.6*. The leaving certificate from St. Danes Eronge Secondary School was produced as *plaintiff's exhibit No.7*. The plaintiff testified that after completing his secondary education, the deceased applied and was admitted at Minesota University in the United States of America. He testified that the plaintiff intended to undertake a course in education. The plaintiff did not however produce any documents in support of his claim that the deceased had been admitted to the said university. He explained he could not produce the admission documents because the said documents were lost during the accident. He testified that the deceased was talented in extra curricular activities. At one time during his schooling, he was awarded a certificate recognising his talent in the recital of poetry. Certificate produced as *plaintiff's exhibit No.8*.

The plaintiff testified that he expended certain sums during the funeral of the deceased. He testified that he paid Ksh.15,000/= to transport the deceased's body from Nakuru to Kisii (*receipt produced as plaintiff's exhibit No.9*). He bought a coffin at Ksh.10,000/= (*receipt produced as plaintiff's exhibit No.10*). He paid Ksh.6,000/= to preserve the body of the deceased in a mortuary before its burial (*receipt produced as plaintiff's exhibit No.11*). He transported the body of the deceased from Kisii to Nyansiongo where the deceased was buried. He paid Ksh.10,000/= (*receipt produced as plaintiff's exhibit No.12*). He paid Ksh.900/= to Kenya Broadcasting Corporation for the funeral of the deceased to be announced (*receipt produced as plaintiff's exhibit No.13*).

The plaintiff testified that he expected the deceased to take care of him once he graduated from university and was gainfully employed. He urged the court to pay the estate of the deceased damages on account of the loss that resulted from the death of the deceased. He confirmed that he had other older children who were all married, and some of whom were assisting him. He could not give the exact amount that he was offered as assistance by his children. He maintained that the deceased was expected to support him once he completed university education. He reiterated that he did not know whether the deceased died at the scene of the accident or upon being admitted at the hospital.

The plaintiff called one witness, PW2 Peter Nyambwengi Gabriel. He testified that he was a teacher by profession having graduated from the University of Nairobi in 1991 with a Bachelor of Education degree. He was a teacher at Sameta High School. He testified that as a teacher his gross salary was Ksh.41,200/=. After deductions, he was paid Ksh.30,773/=. He produced his payslip as *plaintiff's exhibit No.14*. He testified that a new teacher who is joining the profession would be in Job group J. He would earn a salary of Ksh.19,000/=: a house allowance of Ksh.12,000/=: commuter allowance of Ksh.1,700/= and health allowance of Ksh.2,600/=. The total sum that a new graduate earns is Ksh.35,000/=. The plaintiff closed his case.

The 1st defendant closed its case without adducing any evidence. After the close of both the plaintiff's and the 1st defendant's case, the parties to the suit agreed by consent to file written submissions in support of their quantification of damages. Both the plaintiff and the 1st defendant duly filed the said submissions. The issue for determination by this court therefore is what damages should be assessed as payable to the estate of the deceased. The deceased was 22 years old at the time of his death. He had just finished his secondary education and intended to travel to the United States of America to further his education. According to the plaintiff, the deceased intended to study a course leading to a degree in education. He testified that the deceased intended to have a career in teaching. The plaintiff did not however produce any documents to establish that the deceased had secured admission at the University of Minesota in the United States of America. The plaintiff produced the school certificates of the deceased. The deceased attained the minimum grade which would have enabled him at the time to join a public university. The deceased attained a mean grade of C+.

The plaintiff testified that the dependants of the deceased, including himself as his father, suffered loss as a result of the death of the deceased because his dependants lost the support which they could have expected from the deceased. The plaintiff testified that the deceased could have graduated from university and become a graduate teacher. He called PW2 as his witness. The plaintiff testified that the deceased could have earned a salary of a graduate teacher in Kenya. PW2 testified that a salary of a fresh graduate teacher was Ksh.19,000/= excluding the house allowance and other fringe benefits.

I have carefully evaluated the evidence adduced by the plaintiff in support of his case. I have also considered the submission made by the plaintiff and the defendant. The plaintiff submitted that the estate of the deceased should be paid the sum of Ksh.7,000,000/= under the **Fatal Accidents Act**. The plaintiff based his calculations on a salary of a fresh graduate teacher. As correctly observed by the 1st defendant, the deceased was not employed at the time he was fatally injured. The plaintiff cannot therefore speculate that the deceased would have been admitted to a university, graduated therefrom and would have been employed as a graduate teacher in Kenya and would therefore have earned a salary of a graduate teacher. However, the fact that the deceased was not in employment at the time of his death, and was waiting to be admitted at a university, is not sufficient reason to deny the dependants of the deceased damages. As was held by Nyarangi JA, in **Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters & 5 others (1982-88) 1KAR 1946** at page 953,

“...parents of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age suffers real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education is lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, to younger brothers and sisters of the deceased as the deceased natured physically and materially are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise.”

The Court of Appeal in **Mumias Sugar Company Ltd vs Francis Wanalo CA Civil Appeal No.91 of 2003 (Kisumu) (unreported)** in dealing with a claim made by a litigant for loss of future earning capacity, recognised that there is an element of uncertainty when assessing the damages to be compensated based on what would have occurred at a future date. The Court of Appeal noted that in assessing damages in such circumstances, the facts of each case must be independently considered. An award ought to be made that would compensate the claimant for the loss of future earning capacity.

In the present case, the plaintiff established that he lost an expected support from the deceased as a result of his untimely death. I agree with the dicta of Nyarangi JA, in the **Sheikh Mushtaq case** that in the African context, parents expect their children would take care of them in old age. It would not matter that such parents had many children who would equally render such support. I therefore hold that the damages that shall be paid to the estate of the deceased shall be on the basis of a salary of a fresh graduate teacher. This court noted the deceased was a bright student who could have definitely successfully completed his university education and would most probably have been employed in his chosen career. I will however apply the multiplicand of seven years. In the premises therefore, the damages to be paid to the plaintiff under the **Fatal Accidents Act** shall be as hereunder;

$7 \times 12 \times \text{Ksh.19,000/=} \times \frac{2}{3} = \text{Ksh.1,064,000/=}$.

I will award the plaintiff the proven special damages of Ksh.41,900/= being the funeral expenses. I will make no award under the **Law Reform Act**, as to do so would amount to this court paying double compensation to the plaintiff as a result of the same course of action. (See **Kemfro Africa Ltd vs Lubia & others [1987]KLR 30**).

In the premises therefore, judgment is entered for the plaintiff against the 1st defendant as hereunder;

(i) **On liability**

The 1st defendant shall bear 50% liability.

(ii) On quantum

(a) Damages under the **Fatal Accidents Act**Ksh.1,064,000/=

(b) Special damages.....Ksh.41,900/=

SUB-TOTAL Ksh.1,105,900/=

Less 50%Ksh.552,950/=

TOTAL sum to be paid; - Ksh.552,950/=

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

(iv) Interest on special damages shall be paid from the date of filing suit whilst interest on the damages awarded under the **Fatal Accidents Act** shall be paid from the date of this judgment.

DATED at NAKURU this 20th day of December 2007

L. KIMARU

JUDGE