



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Civil Case 70 of 2002

**APOLLO NYANGAYO HONGO suing as Personal Representative of the Estate of
RECKY ALUOCH OBIERO (Deceased)..... PLAINTIFF**

VERSUS

KENYA BUS SERVICE CO. LTD 1ST DEFENDANT

STEPHEN MWANGI NJATHA 2ND DEFENDANT

JUDGMENT

The plaintiff, Apollo Nyangayo Hongo filed this suit on behalf of the estate of Recky Aluoch Obiero seeking to be paid damages on behalf of the deceased's estate resulting from her death from an accident involving motor vehicle registration number KAH 162L allegedly owned by the 1st defendant and driven by the 2nd defendant. The accident is said to have occurred on the 8th of December, 2000 along Kericho-Sotik road near Kipsigis Girls High School. The plaintiff blames the defendants jointly and severally for the said accident. He avers that the said accident was caused by the negligence of the 2nd defendant who failed to manage the said motor vehicle and therefore caused the same to lose control and overturn as a result of which the deceased sustained fatal injuries. In his plaint, the plaintiff claims damages on behalf of the deceased's estate under both the Law Reform Act and the Fatal Accidents Act. He also prays for special damages as particularized in the plaint. The defendants in their defence denied that the deceased was a passenger in the said motor vehicle. They denied that they owed a duty of care to the deceased. They further denied being liable to pay damages to the deceased's estate.

At the hearing of the case however, the parties to this suit agreed by consent to settle the issues of liability. A consent was entered into between the plaintiff and the defendants whereby liability was apportioned at the ratio of 90:10 in favour of the plaintiff and as against the defendant. The parties in essence agreed that the plaintiff was to bear 10% contributory negligence whilst the defendant was to shoulder 90% liability in tort.

The plaintiff called one witness; himself. He testified that the deceased was his wife whom he had married in 1993 under the Luo customary law. He produced a letter written by the West Kisumu Location Chief which confirmed that indeed the plaintiff was married to the deceased under the Luo customary law (plaintiff's exhibit number 4). Their marriage was blessed with three children namely, Brian Ochieng born on 6th March, 1994, Valerie Atieno born on 11th July, 1995 and Churchill Ochieng born on the 18th October, 1998. The birth certificates of the children were produced as plaintiff's exhibit

no. 5(a),(b),(c). The plaintiff testified that he lived with the deceased at Awendo where he works as an agricultural manager with the Sony Sugar Company. The plaintiff testified that the deceased prior to her death was running her own business selling mitumba clothes and growing sugar cane.

He testified that the deceased used to sell the clothes from one rural market to the other and was so permitted to conduct the business by Awendo Town council (permit produced as plaintiff's exhibit no. 6). He further testified that the deceased used to get, on average, an income of between Kshs.10,000/- and Kshs.15,000/- per month. He produced the statements of accounts that the deceased held at National Bank of Kenya Awendo (Plaintiffs exhibit No. 7). From her income, it was the plaintiff's testimony that the deceased paid for the domestic expenses and also bought the children's clothes. She also paid the house maid whose salary was kshs.3,000/- per month. The plaintiff estimated the total costs for the household upkeep per month have been about Kshs.6,000/- which were catered for by the deceased.

As a result of the death of the deceased, the plaintiff claims that the family had lost this income. The plaintiff had further lost the consortium of his wife. He told the court that he had used Kshs.40,000/- to transport the body of the deceased to her burial place at Kisumu and further, for funeral expenses. He further testified that he had paid Ksh.1,125/- to file succession proceedings to obtain grant of letters of administration (grant of letters of administration and receipts produced as plaintiff's exhibit no. 8 and 9 respectively). The plaintiff further testified that the deceased was 26 years of age at the time of her death. He prayed the court to award him damages on behalf of the deceased's estate as prayed in the plaint.

When he was cross examined, the plaintiff conceded that from the bank statements adduced in evidence it would not be clear how much the deceased earned from her business. He conceded that from those statements it would be possible to reach a conclusion that the deceased earned less than 2000/- per month. He however testified that the deceased earned more than 2000/- per month because she catered for the family's domestic expenses. He testified that the amount which was banked was the extra amount after the profits were invested back into the business by the deceased. The plaintiff did not call any other witnesses. The defence opted not to call any witness. After the close of the case, the parties agreed to file written submissions in support of their respective cases. The plaintiff is the only one who filed submissions. This court did not receive any submissions filed on behalf of the defendants.

I have carefully considered the evidence adduced by the plaintiff. I have also considered the submissions filed by the plaintiff. As stated at the beginning of this judgment, the parties to this suit compromised the issue of liability by consent. Liability was apportioned and is to be borne by the defendant to the extent of 90%. The plaintiff agreed to shoulder 10% contributory negligence. Liability having been compromised, the issue that was left for the determination of this court is the quantum of damages that is to be paid to the deceased estate.

Having carefully considered the evidence adduced, the special damages claimed by the plaintiff was not seriously challenged by the defendants. Although the plaintiff did not produce any receipts to prove his claim that he had used the sum of Kshs.40,000/- as funeral expenses, this court takes judicial notice of the fact that in the community where the plaintiff comes from, funerals are such expensive affair putting into consideration the fact that it was incumbent upon the deceased family to feed the mourners, not only on the day of the funeral, but also several days preceding the said date of funeral. This court further takes judicial notice that transporting a body of a deceased person from Kericho to Awendo and then back to Kisumu is not inexpensive. In the circumstances of this case, the sum of Kshs.40,000/- as proposed by the plaintiff appears to be reasonable, I will allow it. I will also allow the sum of Kshs.1,125/- which was paid by the plaintiff to the court to obtain grant of letters of administration intestate.

Under the **Fatal Accidents Act (Cap 32 Laws of Kenya)**, the plaintiff has submitted that the deceased estate should be paid the sum of Kshs.3.6 million. Having considered the evidence in this case, I wish to state the following before I assess the damages to be paid to the deceased estate. The deceased was 26 years of age at the time of her death. The plaintiff proposes that a multiplier of 20 should be used to compute the damages paid to the deceased's estate. He has referred this court to the case of ***Joseph Ndirangu Kamuyu vs Kariuki Njoroge & anor Nairobi HCCC No. 510 of 1984 (unreported)*** where the

court is said to have applied a multiplier of 20 where the deceased was aged 26 years at the time of her death.

I have read the said decision and, with respect, wish to disagree with the plaintiff. Mbaluto J did not agree with the proposal by the plaintiff counsel in that case that a multiplier of 20 be used in calculating the damages. He however applied a multiplier of 15. In this case I will follow the decision of Mbaluto J and apply a multiplier of 15 in assessing the damages payable to the deceased's estate in this case. I have reached this decision after considering the fact that since the said decision was reached the life expectation of an average Kenyan has been reduced by increased incidences of poverty and the AIDS pandemic. I have not ruled out incidences of accidents and other diseases. In my view a multiplier of 15 is reasonable and fair in the circumstances of this case.

The plaintiff has asked this court to find that the deceased earned Kshs.15,000/- per month. Having evaluated the evidence it is clear that the deceased did not earn anywhere near the sum of Kshs.15,000/- per month. Although the plaintiff told the court that the deceased was in business of selling mitumba clothes and further that she had planted sugar cane, no evidence was presented to this court to prove that the deceased earned the sum of Kshs.15,000/- per month. The bank statements which were produced in evidence showed that the deceased could not have earned more than Kshs.3,000/- per month.

Upon evaluating the evidence, it is clear that the deceased was a house wife who dabbled occasionally in business. She was not a full time business woman. The business permit that was produced was of the year that the deceased died. If the deceased conducted any business in a full time capacity, then she only undertook such business during her last year in this world. On evaluating the evidence adduced I do therefore hold that the deceased earned the sum of kshs.3000/- per month.

From the evidence of the plaintiff, the deceased is said to have been providing for the domestic expenses of the family. However, no evidence was adduced to support such assertion. In my opinion the deceased and her family relied heavily from the income of the plaintiff to sustain her family. In the circumstance of this case therefore I would apply the dependency ratio of 1/2 . The deceased could have used half of her income to buy clothing for her children and maybe to purchase perishable foodstuff for her family. The damages to be paid to the estate of the deceased under the **Fatal Accidents Act** shall therefore be:

$Kshs.3,000/- \times 20 \times 12 \times \frac{1}{2} = 360,000/-$

I will not make any award under the **Law Reform Act (Cap 26 of the Laws of Kenya)** because to do so would amount to this court awarding the deceased's estate double compensation arising from the same cause of action. In any event even if I were to award damages under the **Law Reform Act**, I would be required in law to take into account such an award in assessing the final award to be paid to the estate of the deceased (see **South Nyanza Sugar Company Ltd vs James Martin Matoke Civil Appeal No. 91 of 1997 (Court of Appeal – Kisumu)(unreported)**).

In the circumstances therefore the damages to be paid to the deceased's estate is as follows

(i) Kshs.41,125/- being special damages (less 10% contribution Kshs.37012.50)

(ii) Kshs.360,000/- being damages assessed under the Fatal Accidents Act. These amounts shall be reduced by 10% being the contributory negligence agreed by consent to be shouldered by the deceased's estate. The amount assessed therefore is 324,000.00/-.

(iii) The plaintiff shall be paid the costs of the suit.

(iv) Interest on the special damages shall be paid from the date of filing suit whilst interest on the general damages shall be paid from the date of this judgment.

DATED AT **KERICHO** THIS 10TH DAY OF FEBRUARY, 2006

L. KIMARU

JUDGE