



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 149 of 2003

**ANN NJOKI NJENGA (Suing as the administratrix of the estate of the late
Benson Njenga Njuguna).....PLAINTIFF**

VERSUS

UMOJA FLOOR MILLS.....1ST DEFENDANT

WALTER BOSIRE.....2ND DEFENDANT

JUDGMENT

The plaintiff filed a suit as the Administratrix of the estate of the late Benson Njenga Njuguna, her husband (hereinafter referred to as “*the deceased*”) who died on 2nd March 2002 as a result of a road traffic accident along Nakuru-Nairobi road when he was travelling as a passenger in motor vehicle registration number KAL 609K belonging to the first defendant and driven by the second defendant. She alleged that the said motor vehicle was driven negligently by the second defendant in the course of his employment with the first defendant and so the first defendant was vicariously liable.

The plaintiff claimed damages under the Law Reform Act and the Fatal Accidents Act. She stated that they had three children with the deceased aged 13, 10 and 8 years and that she had suffered loss of dependency as a result of the demise of her husband. She further claimed that the deceased was aged 36 years and was engaged in the business of buying and selling maize and was earning an average of Kshs.5,000/- per day.

Although the defendants filed a statement of defence and denied the plaintiff’s claim the advocates for the parties entered into a consent whereby liability was apportioned at **30% as against the plaintiff** and **70% as against the defendant** and the hearing proceeded for purposes of assessment of damages only.

The plaintiff testified that she got married to the deceased in 1986 and the marriage was solemnized on 18th October 1998 at the Presbyterian Church of East Africa, Rongai where they were issued with a certificate of marriage. She produced the same in court as well as birth certificates for their three children namely; Naomi Wanjiru, who was born in 1989, Sammy Ngunjiri born in 1991 and Nahashon Njuguna born in 1995. The plaintiff also produced a death certificate in respect of the deceased which showed that he died on the same day the accident occurred. She further testified that the deceased used to buy and sell maize and beans. He was selling the cereals at Nairobi and Thika. She used to assist him in doing the said business and she was the one who was doing the purchasing while the deceased was engaged in the selling of the cereals. She said that during maize harvesting season she would buy three or four lorries per day at a price of Kshs.495/- per bag. A lorry used to carry between 120 and 130 bags. She said that she was not able to continue with the said business after the demise of her husband as she did not know the marketing aspects of the business.

The plaintiff further testified that the deceased used to get a profit of Kshs.50/- per bag. She produced a document titled "***NFM MAIZE PURCHASE PAYMENT***" (Exhibit 6(b) issued by Nairobi Flour Mills Ltd on 18th February 2002 which showed that the deceased had on that day delivered to the said company 122 bags of maize and the same was valued at Kshs.85,540/-. From the above sum, Kshs.1,710.80 was deducted as tax and Kshs.733.20 as offloading charges leaving a balance of Kshs.83,096/- which was paid to him vide cheque number 441818/2/02. The deceased was also issued with a certificate of tax deducted from the aforesaid payment and the same was produced in court as Exhibit 6(a).

In cross examination by Mr. Kisila for the defendant, the plaintiff said that she had no other documents to prove that the deceased was engaged in the business she testified about. She further said that the deceased had no bank account and that he used to be paid by open cheques. He did not keep any records of his business and neither did he keep any books of accounts. She further claimed that the deceased started the said business in 1986. The plaintiff did not know what the cost of 122 bags of maize was and so she could not tell what the actual profit received by the deceased for the sale of that consignment was.

With regard to her claim for loss of dependency, she did not state what the deceased was paying for the upkeep of herself and their children. She testified that the children were now in Government schools and she was the one who was taking care of them.

The defendants did not adduce any evidence but both parties made written submissions. The plaintiff urged the court to award a sum of Kshs.100,000/- **for pain and suffering** and cited the decision of Ang'awa J in ***PETER NDUNGU VS APRICOT APPLE PROMOTIONS SYSTEMS LTD AND ANOTHER*** Nairobi HCCC No. 1424 of 2001 (unreported) where the court awarded for pain and suffering a sum of Kshs.10,000/- on 4th February 2004 where the deceased died a few hours after an accident. On the other hand the defendants submitted that an award of Kshs.5,000/- would be fair and reasonable for pain and suffering. It is evident that the deceased died on the same day the accident took place. It was however not clear how long he suffered pain before he passed on. I will award a sum of **Kshs.10,000/-** for pain and suffering.

For **loss of expectation of life**, the deceased was aged 36 years at the time of his death. His life was cut short by the said accident. In ***JOHN NJOROGE NJUGUNA VS HENRY KITHAKA IRERI*** Nairobi HCCC No. 5255 of 1989 Githinji J (as he then was) awarded a sum of Kshs,75,000/- where the deceased was aged 35 years. I will award a sum of **Kshs.80,000/-**.

With regard to the plaintiff's claim for **lost years**, while the deceased's age was not in dispute, there was no certainty as to what his average monthly income was. There was no proof that the deceased was engaged in the business of buying and selling cereals since 1986 as was claimed by the plaintiff. The deceased did not maintain any business records and if any other relevant documents apart from Exhibit 6(a) and 6(b) existed, the same were not produced. The plaintiff's advocate urged this court to hold that the deceased was earning a profit of Kshs.5,000/- a day and was therefore making Kshs.120,000/- per month. He further urged the court to adopt a multiplier of 25 and assuming that he used to spend two thirds of his monthly earnings for the upkeep of his family compute the claim for lost years as follows:-

$$120,000 \times 25 \times 12 \times \frac{2}{3} = 24,000,000/-$$

The figure of Kshs.120,000/- is unsupportable in the circumstances as already pointed out hereinabove. I found the plaintiff's evidence regarding the deceased's earnings not credible. If indeed the deceased had been a businessman since 1986, he would most likely have kept some records, however scanty they could have been. I cannot put much reliance on the two documents which were produced by the plaintiff to assess the deceased's monthly income. Apart from the plaintiff's bare testimony, there is nothing else that proves that the deceased was indeed a businessman. Exhibits 6(a) and 6(b) in my view show an isolated transaction which the deceased undertook on 18/2/2002 when he sold 122 bags of maize to Nairobi Flour Mills. The deceased may as well have been a small scale farmer in Rongai who happened to have sold his maize to the said company. In a matter where the plaintiff was urging the court to award Kshs.24 million on the basis that the deceased was a businessman who was making an average of Kshs.120,000/- per month, the plaintiff should not have spared any effort to prove her claim. If the

deceased used to be paid by open cheques, she could have called witnesses from the company or companies which the deceased was dealing with to produce copies of payment cheques which they were issuing to him. Even the original cheques, once paid by the receiving banks, are retained for a considerable period of time and they could have been produced in evidence. The plaintiff could also have called as witnesses some of the lorry owners or drivers who used to transport the maize for him, the people who were selling the maize to them and such other relevant witnesses. It is a basic principle of law that he who alleges must prove. In the absence of any proof of the deceased's income prior to his death, I will adopt a monthly figure of Kshs.10,000/- as the net sum which the deceased could reasonably have been making in his business or any other economic activity that he might have engaged in. Since the deceased was 36 years old, a multiplier of 14 would be reasonable. This is after taking into account vicissitudes of life. I will adopt the conventional figure of two thirds as the ratio of the deceased's income that he was using towards maintenance of his family and compute the claim for lost years as hereunder:-

$$10,000 \times 12 \times 14 \times \frac{2}{3} = 1,120,000/-$$

The plaintiff also prayed for damages under the **Fatal Accidents Act** for loss of dependency. Dependency is a question of fact which must be proved strictly. The plaintiff did not prove her claim under that heading and I will not therefore award anything.

The plaintiff did not also prove her claim for special damages and I will consequently make no award in respect thereof. In summary, I make the following awards:-

(a) General damages for pain and suffering = Kshs. 10,000/-

(b) Loss of expectation of life = Kshs. 80,000/-

(c) Lost years = Kshs.1,120,000/-

TOTAL = Kshs.1,210,000

In terms of the consent which the parties had recorded on liability, the defendants will pay 70% of the aforesaid sum which amounts to **Kshs.847,000/-**. There will therefore be judgment for the plaintiff against the defendants jointly and severally in the sum of **Kshs.847,000/-** plus costs and interest.

DATED, SIGNED and DELIVERED at Nakuru this 19th day of May, 2006.

D. MUSINGA

JUDGE

19/5/2006

Judgment read in open court in the presence of Mr. Mwangi for the plaintiff and Mr. Murimi holding brief for S. Gitau for the defendant.

D. MUSINGA

JUDGE

19/5/2006