



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 326 of 2001

NEHEMIAH KIBET BUNEI.....1ST PLAINTIFF

JOSEPH KIPNGETICH CHEPSOI.....2ND PLAINTIFF

(suing as the joint administrators and legal representatives of the estate of the late

BEATRICE JEPKOECH CHEPSOI)

VERSUS

PAUL KANGOGO TUITOEK.....DEFENDANT

JUDGMENT

The plaintiffs, Nehemiah Kibet Bunei and Joseph Kipngetich Chepsoi are son and brother respectively of Beatrice Jepkoech Chepsoi – deceased (*hereinafter referred to as the deceased*) who died on the 12th of February 2000 along Nakuru-Kabarnet, road when motor vehicle registration number KYR 020 wherein the deceased was travelling as a fare paying passenger, lost control and overturned thus fatally injuring the deceased. The plaintiffs have filed this suit as the administrators and legal representatives of the estate of the deceased seeking damages on behalf of the said estate. They claim that the deceased died due to the negligence of the driver of the said motor vehicle who failed to exercise due care and attention when driving the said motor vehicle in order to prevent it from being involved in the said accident. The defendant was served with the summons to enter appearance together with a copy of the plaint but failed either to enter appearance or to file a defence. Interlocutory judgment was entered against the defendant on the 25th of July 2002. This suit was then listed for formal proof.

At the hearing of the case on formal proof, the plaintiffs called three witnesses. PW3 Kiptum Elly Wesley Koimet recalled that on the 12th of February 2000 he was a passenger in motor vehicle registration number KYR 020 Nissan Matatu which was ferrying passengers from Nakuru to Kabarnet. He testified that the deceased was also a passenger in the said motor vehicle. He recalled that the journey to Kabarnet was uneventful until they reached near Mogotio, when he heard a loud bang after which the motor vehicle rolled several times and came to a halt. PW3 lost consciousness and when he regained his consciousness to he realized that several of the passengers in the said motor vehicle were injured. Some of the passengers died on the spot. Among the passengers who died at the scene was the deceased. He testified that the accident involved the only said motor vehicle that they were travelling in as passengers. PW1 Chief Inspector Christopher Muloli testified that he was the base commander of the traffic police based at Eldama Ravine Police Station. He took over in 2004 from Chief Inspector Sang who was transferred to another station. He perused the file in respect of the accident which occurred involving

motor vehicle registration number KYR 020 on the 12th of February 2000. He testified that according to the records, the said motor vehicle was involved in an accident when its front tyre burst thereby causing the death of the six passengers, two of whom died on the spot. Among the passengers who died on the spot was the deceased. PW1 testified that the said motor vehicle was owned by Paul Tuitoek Kangogo and was at the time of the accident driven by Joseph Kiprotich. He produced the police abstract report as *plaintiff's exhibit No. 1*.

PW2 Joseph Kipngetich Chepsoi, the 2nd plaintiff, testified that the deceased was his elder sister while the 1st plaintiff is the deceased first born son. The two of them took out letters of administration to administer the deceased's estate. The letters of administration were produced as *plaintiff's exhibit No. 2*. He testified that the deceased was not married but had left behind four children, namely Nehemiah Kibet Bunei, born in 1977 and who was now working for an NGO, Caroline Chepkurui, born in 1983 who was a student at Moi University, Edna Cheruto, born in 1985 and who was a student at Kampala International University and lastly Dorine Cheron, a form one student at Elimu High School Nakuru. The birth certificates of the children were produced as *plaintiff's exhibit No. 3 (a)(b)(c) & (d)*. PW2 produced the death certificate of the deceased as *plaintiff's exhibit No. 4*. When he was informed of the motor vehicle that was involved in the accident resulting in the death of the deceased, PW2 undertook a search at the offices of the Registrar of motor vehicles and was able to establish that the said motor vehicle was at the material time owned by Paul Kangogo Tuitoek (*search certificate produced as plaintiff's exhibit No. 5*). He testified that the deceased worked for the National Social Security Fund (NSSF) at Kabarnet as a secretary. The last payslip that she received before her death indicated that she received a salary of Kshs 43,198/05 gross salary and after tax and deduction of the co-operative shares, she earned Kshs 26,312/55 (*payslip produced as plaintiff's exhibit No. 6*). He testified that the deceased was a single parent and took care of her children and was at the time of her death aged 42 years. He further testified that the family spent Kshs 190,000/= for the funeral of the deceased. He prayed for this court to award the estate of the deceased damages as a result of her death and further pay the estate costs of the suit.

After the close of the plaintiff's case, the plaintiffs presented to this court written submissions quantifying the damages to be paid to the deceased's estate. I have considered the evidence adduced by the plaintiffs in this case, which evidence is uncontroverted. I have also considered the submission made by the plaintiffs quantifying the damages to be assessed as due to the deceased's estate. The issues to be determined by this court are two fold; firstly, whether it is the defendant who was liable for the death of the deceased and therefore liable in damages to the estate of the deceased. Secondly, if the answer to the first issue is in favour of the plaintiffs, then what is the quantum of damages that is to be assessed as payable to the deceased's estate.

On the first issue, PW3 testified that he was a passenger in motor vehicle registration number KYR 020 with the deceased on the fateful day. He testified that the said motor vehicle was involved in a self-involved accident before they could reach their destination of Kabarnet as a result of which the said motor vehicle overturned and rolled several times. When the said motor vehicle came to a halt, the deceased had sustained fatal injuries and died on the spot. PW1 testified that according to the records kept by the police of the said accident, the said accident was caused by a burst front tyre. PW2 undertook a search at the registrar of motor vehicles and confirmed that the said motor vehicle was at the material time owned by the defendant. PW1 similarly testified that the record kept by the police of the said motor vehicle involved in the accident on the material day, was owned by the defendant.

I do hold that the plaintiffs have established that the said motor vehicle was owned by the defendant at the time it was involved in the said accident. I further hold that the plaintiffs have established that the deceased was killed while she was travelling in the said motor vehicle as a fare paying passenger due to the negligence of the defendant who failed to maintain the said motor vehicle in such a mechanical condition that it could have safely transported the deceased from Nakuru to Kabarnet. I therefore hold that the defendant is solely liable in damages to the estate of the deceased on account of her death. Liability is therefore found against the defendant at 100%.

On quantum, the deceased was employed by the National Social Security Fund as a secretary. Her last payslip indicated that her gross salary was Kshs 43,198/05. The total amount deducted as tax and

statutory deductions was Kshs 9,610/=. The other sums that were deducted from her payslip were the amounts that she paid voluntarily to her co-operative society. The net salary that the deceased therefore earned was Kshs 33,588/05. This is the amount that the deceased earned per month and is the amount that shall be applied by this court to determine the damages to be paid to the deceased estate under the **Fatal Accidents Act**.

From the evidence adduced by the plaintiffs the deceased was a single mother of four children, three of whom are still studying. The deceased provided for her children single handedly from her salary. I therefore hold that the dependency ratio that shall be applied in determining the damages to be paid to the deceased estate shall be $\frac{2}{3}$. The education that the deceased was able to provide for her children shows that she used a substantial part of her salary to maintain her children and pay for their education. The deceased was 42 years at the time of her death. According to the plaintiffs, the deceased could have worked until she reached her retirement age of 55 years. They have suggested that this court applies a multiplier of 13 years to calculate the damages that is due to the deceased estate.

I however am of a different view. There is no guarantee that the deceased could have lived to the retirement age of 55 years. This court takes judicial notice the fact that the life expectancy of an average Kenyan has in the recent years gone down due to the increased incidences of poverty, the HIV/AIDS pandemic and other diseases. The fact that the salaried Kenyans are the ones who are most likely to die in road accidents due to their ability afford to travel from one urban centre to another, means that this court would be naive if it assumed that the deceased could have lived to a ripe old age. In the particular facts of this case, I will adopt a multiplier of ten years. The damages to be paid to the deceased estate under the **Fatal Accidents Act** shall therefore be:

$$\text{Kshs } 33,588/05 \times 10 \times 12 \times \frac{2}{3} = \text{Kshs } 2,687,044/=$$

The decisions of **Stephen Aluoch Omeyo –vs- John Gilbert Kahuria & Anor Nairobi HCCC NO. 3024 OF 1992 (unreported)** and **Rosemary Wanjiku Mungai –vs- Wilson Karigo Muniu Nairobi HCCC NO. 110 OF 1999 (unreported)** relied on by the plaintiffs have been particularly helpful in this court in determining the multiplier and the dependency ratio to be applied.

I will however make no award under the **Law Reform Act** in view of the decision of **Kemfro Africa Limited t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No. 2) [1987] KLR 30**. On special damages, the plaintiffs did not plead any special damages therefore this court will not make any award under that head. Special damages have to be specifically pleaded and specifically proved. In the premises therefore I enter judgment for the plaintiff against the defendant as hereunder:

(i) **On liability**

The defendant is held liable 100% in damages to the deceased estate

(ii) **On quantum**

General damages Kshs 2,687,044/=

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

(iv) Interest on the general damages shall be payable from the date of the delivery of this judgment.

DATED at NAKURU this 19th day of May 2006.

L. KIMARU

JUDGE