



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 196 of 2003

MARY KERUBO MABUKA (suing as the legal representative and administratrix of the estate of RITAH MORAA GICHANA – DECEASED)..... PLAINTIFF

VERSUS

NEWTON MUCHEKE MBURU.....1ST DEFENDANT
FREDERICK CHEGE GACHERU.....2ND DEFENDANT
SALIM KITALI MWAVUMO.....3RD DEFENDANT
SUNTANA COMPANY LTD.....4TH DEFENDANT

JUDGMENT

Mary Kerubo Mabuka, the plaintiff herein has filed suit against the defendants herein seeking to be paid damages on behalf of the estate and the dependants of Ritah Moraa Gichana – deceased (*hereinafter referred to as the deceased*) who died in a road traffic accident involving motor vehicle registration number KAN 897A (*wherein the deceased was travelling as a fare paying passenger*) and motor vehicle registration number KAP 498U ZB 8585. The plaintiff avers that the said accident occurred on the 31st of December 2002 along Nakuru-Gilgil road near Kikopey. Although the 1st and 2nd defendants filed a defence blaming the 3rd and 4th defendants for the accident and although the 3rd and 4th defendants responded in kind by blaming the 1st and 2nd defendants for the said accident, at the hearing of this case, judgment on liability was entered by consent. The 1st and the 2nd defendants agreed to bear 50% liability whilst the 3rd and 4th defendant agreed to shoulder the remaining 50%. The issue that was left for the determination of this court was the assessment of the quantum of damages to be paid to the plaintiff.

PW1, the plaintiff, testified that the deceased was her daughter. She was informed that the deceased had died in a road traffic accident at 5.00 p.m. on the 31st of December 2002. After the burial, PW1 applied for letters of administration to the deceased's estate (*letters of administration produced as plaintiff's exhibit No. 1*). The accident was reported at Gilgil Police Station. The plaintiff obtained a police abstract report from the said police station (*police abstract report produced as plaintiff's exhibit No. 2*). She was issued with a death certificate (*death certificate produced as plaintiff's exhibit No. 3*). She testified that the deceased used to work with Kencell Communications as a secretary. The contract of employment dated the 4th of November 2002 was produced as plaintiff's exhibit No. 4. She testified that the deceased had worked with Kencell Communications for two months before her death. She further testified that the deceased earned a gross salary of Kshs 38,767/=. Her net pay was however Kshs 28,732/= (*pay slip produced as plaintiff's exhibit No. 5*). After the death of the deceased, the plaintiff made burial arrangements. She paid Kshs 10,000/= to be allowed to bury the deceased at Nakuru North Cemetery (*receipt produced as plaintiff's exhibit No. 6*). She paid Kshs 2,200/= as mortuary fees (*receipt produced as plaintiff's exhibit No. 7*). She paid Kshs 605/= and Kshs 100/= respectively to the police to be issued with the police abstract report (*receipts produced as plaintiff's exhibit No. 8 and 9*). She testified that she used Kshs 17,500/= to transport the body of the deceased. The receipt was however marked for identification as plaintiff's MFI 10 but was not produced in evidence. She paid a further sum of Kshs 5,250/= as mortuary fees (*produced as plaintiff's exhibit No. 11*). She informed the public of the death of the deceased through a newspaper advertisement. She paid Kshs 12,000/= to the Nation Newspapers. She purchased the coffin for Kshs 10,000/=.

She testified that when the deceased died, she was twenty six years of age. Apart from the plaintiff, her other dependants were her three siblings; namely Caroline (*aged 27 years*), Truphosa (*aged 21 years*) and Hezron (*aged 17 years*). The plaintiff testified that the deceased used to assist them as a family as none of her three siblings were working. She stated that Caroline was a student at Mwangaza College whilst Truphosa was studying at Kibondeni College. Hezron was a Form 3 student at Menengai High School. The plaintiff testified that the deceased used to educate her siblings. The deceased also took care of the family needs as the plaintiff had been retrenched from employment. She urged the court to award her damages since the family relied solely on her. She further testified that at the time of her death, the deceased was not suffering from any health problems. The plaintiff stated that although she had a birth certificate of the deceased, she had not brought it to court so that she could produce it in evidence. She reiterated that the deceased was employed by Kencell Communications as a secretary at its Sales and Pool department and not as an accountant. She stated that the description in the death certificate that the deceased was an accountant was a mistake. She conceded that she got help from her relatives when the deceased died in the accident.

She further testified that she had used the money which the deceased had left her to pay school fees for her funeral. She testified that although she paid Kshs 12,000/= to the Nation Newspapers so that the death of the deceased could be advertised, she was not issued with a receipt. She also bought a coffin but was not issued with a receipt. She testified that the deceased was unmarried at the time of her death and had died before she could have any children. She conceded that the three dependants are the deceased's siblings and not the deceased's children. She stated that she was stopped from employment in 1999. She was retrenched by the Kenya Farmers Association (KFA) and had not been paid her terminal dues to date. She testified that she did not have any proof that the deceased used to pay the school fees for her siblings neither could she state a specific amount that she was paid by the deceased for the monthly family upkeep. She conceded that she did not have any documentary proof that the deceased was her daughter. Apart from the death certificate, she did not have any proof that the deceased was aged 26 years at the time of her death.

She insisted that the deceased supported her and her siblings during her lifetime as she was the only employed person in her family. She conceded that she did not have any documents to prove that the deceased sent her money for their support. She conceded that he deceased supported them on her own free will and was not obligated to support them. She further testified that the deceased lived alone at Nairobi – paid her house rent, bought food and clothing for herself.

The plaintiff reiterated that the deceased did not use the bulk of her salary to support herself. She further testified that although the receipt produced as plaintiff's exhibit No. 11 was in the name of one Job Nyangena, the said payment was paid on her behalf as she was mourning at the time. She further conceded that the receipt produced as plaintiff's exhibit No. 6 was not in her name. She stated that her relatives could have paid the said amount on her behalf. She denied that she was still in employment. She reiterated that she had been retrenched from employment in 1999.

She reiterated that the deceased worked as a secretary at the department of sales and general pool prior to her death. She stated that for the time being, she was doing a little business to support herself and her family. She stated that she could not specifically say the amount that was given to her by the deceased. She reiterated that the deceased used to support the family willingly. She testified that when she obtained the death certificate, she surrendered the deceased's identity card. The plaintiff stated that the funeral expenses were paid for by herself, her relatives and her friends. On her part, she used the money that the deceased had left her to pay the school fees for her siblings to pay for the funeral expenses. She stated that as a retrenchee from the Kenya Farmers Association, she had no hope that she could be paid her terminal dues.

As stated earlier in this judgment, the issue for determination by this court is the quantum of damages that is to be paid to the deceased's estate. The plaintiff adduced evidence that she is the administrator of the deceased's estate. She produced plaintiff's exhibit No. 1 as proof that she was issued with the said letters of administration. I have perused the said letters of administration and note that it was limited for the purposes of enabling the plaintiff to file suit on behalf of the deceased's estate. She will require to

obtain a full grant of letters of administration before she can administer the estate of the deceased. She testified that the deceased supported her and her other children namely Caroline (27 years), Truphosa (21 years) and Hezron (17 years). At the time the plaintiff testified in court, Caroline was a student at Mwangaza College, while Truphosa was a student at Kibondeni College. Hezron was then a Form three student at Menengai High School. All the siblings of the deceased are not employed. The plaintiff was retrenched by the Kenya Farmers Association Limited. She testified that she earned her living by undertaking a small business. She used to rely on the deceased to support her and her children. The evidence offered by the plaintiff was not controverted since the defendants called no witness to challenge the assertions made by the plaintiff.

I therefore hold that the plaintiff has proved on a balance of probability that the deceased used to support them. I note that the deceased had worked for only two months prior to her death. But from the evidence adduced by the plaintiff, it is clear that the deceased had already started supporting the plaintiff and her siblings by providing for her siblings' school fees. Although the **Fatal Accidents Act** does not recognize brothers and sisters of a deceased person as his dependants, I will apply the decision of Justice Nyarangi in **Sheikh Mushtaq Hassan –vs- Nathan Mwangi Kamau Transporters & Others (1982-88)1KAR 946** at page 953 where he held that:

“... In the context of Kenya, and that is the relevant context, 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 suffer 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 expenses 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.”

The plaintiff proved that the deceased was a conscientious daughter who had embarked on her social responsibility of taking care of her parents and her siblings. In this regard, I do not accept the proposition put forward by the defendants that the siblings of the deceased are not the dependants of the deceased for the purposes of compensation under the **Fatal Accidents Act**. There was evidence that the deceased used a considerable amount of her salary to provide for herself including paying rent and buying food and clothing. In that respect therefore, taking into consideration the evidence that was adduced by the plaintiff and the submissions made by the parties to this suit, I will apply a dependency ratio of $\frac{1}{2}$.

The deceased was aged 26 years at the time of her death. She had just been employed on a permanent basis by Kencell Communications as a secretary. Although at the time of her death she was still serving under probation, there is no evidence to suggest that her employment could have been terminated during the probationary period. I therefore accept that the deceased could have in all likelihood have been permanently employed. I therefore accept that she earned the sum of Kshs 28,732/= per month. This was her net salary. This sum shall be applied to calculate the amount that shall be payable to the deceased's estate.

The plaintiff has suggested that this court applies a multiplier of 34 years, being the years that the deceased could have worked until her retirement age. She has relied on the cases of **Charles Oginyo Aduda –vs- Kenya Bus Service Ltd Kericho HCCC No. 6 of 2004 (unreported)** and **Phillip Kithome Malonza –vs- Shamash Brothers Ltd Nakuru HCCC No. 452 of 1998 (unreported)**. The 3rd and 4th defendant have suggested a multiplier of 12 years. They have relied on the decision of **Maina Kaniaru & Anor –vs- Josephat Muriuki Wangondu CA Civil Appeal No. 14 of 1989 (Nairobi) (unreported)**. The 1st and 2nd defendants have similarly suggested a multiplier of 12 years.

I have carefully considered the said submissions made. The plaintiff testified that the deceased was healthy at the time of her death. The employment contract produced in evidence as plaintiff's exhibit No. 4 establishes that the deceased was examined by a doctor before she was employed and found to be medically fit. However this court is not oblivious of the fact that the average standard of living in Kenya

today has plummeted due to increased incidences of poverty, the HIV/AIDS pandemic and road traffic accidents. This has resulted in the reduction of the life expectancy of an average Kenyan. Doing the best I can in the circumstances of this case, I will apply a multiplier of 20 years. The damages that shall be paid to the deceased's estate under the **Fatal Accidents Act** shall therefore be:

Kshs 28,732/= x 20 x 12 x ½ = Kshs 3,447,840/=

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 & Anor –vs- A. M. Lubia & Anor (1982-88)1 KAR 727.**

On special damages, the plaintiff pleaded that she should be awarded the sum of Kshs 54,600/= as special damages. During the trial she produced the following receipts; Exhibit No. 6, Kshs 10,000/=, Exhibit No. 7, Kshs 2,200/=, Exhibit No. 8 Kshs 605/=, Exhibit No. 11 Kshs 5,250/=. In her evidence before court she testified that she purchased a coffin for Kshs 10,000/=. She however did not produce any receipt in support of her claim. I will however accept her testimony considering the fact that the deceased was actually buried in some coffin. The deceased died at Naivasha and was transported to Nakuru where she was buried. The plaintiff testified that she used the sum of Kshs 17,500/= as transport charges. Considering the distance between Naivasha and Nakuru, the amount of Kshs 17,500/= is not unreasonable. Although no receipts were produced, I will award the same. The special damages that will be awarded to the plaintiff that were proved is therefore Kshs 45,555/=.

The upshot of the above is that judgment is entered for the plaintiff against the defendants jointly and severally as hereunder:

(i) On Liability

Liability is apportioned as between the 1st and the 2nd defendant on the one hand and the 3rd and 4th defendants on the other, at the ratio of 50:50 as agreed by consent.

(ii) On Quantum

(a) General Damages.....Kshs 3,447,840/=

(b) Special DamagesKshs 45,555/=

Total Kshs 3,493,395/=

Apportioned between the defendants

1st and 2nd defendants (50%)..... Kshs 1,746,695.50/=

3rd and 4th defendants (50%)..... Kshs 1,746,695.50/=

(iii) Costs of the suit.

(iv) Interest on 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 NAKURU this 2nd day of June, 2006.

L. KIMARU

JUDGE