



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 229 of 2004

LOISE WAIRIMU MWANGI.....1ST PLAINTIFF

SAMUEL NDUNGU MUIRURI.....2ND PLAINTIFF

(Jointly suing as legal representatives of the estate of JAMES M. NDUNGU (deceased))

VERSUS

JOSEPH WAMBUE KAMAU.....DEFENDANT

JUDGMENT

The plaintiffs are the legal representatives of the estate of James M. Ndungu hereinafter referred to as “*the deceased*”. In their plaint filed on 5th August 2004, they stated that on 27th January 2004 the deceased was lawfully and carefully riding his motor cycles registration No. KAQ 702W along Kericho-Nakuru road near Kobil Petrol station when the defendant, his driver, agent and/or servant negligently drove, managed and/or controlled the defendant’s motor vehicle registration number KAM 309A by making an illegal U-turn thereby crashing into the deceased’s motor cycle from the rear side and thereby occasioning the deceased serious injuries from which he succumbed to, 43 days later.

The parties agreed by consent to apportion liability at **70% against the defendant** and **30% against the plaintiff**. Parties also agreed on production of various documents by consent, as I will state hereunder and by further consent agreed to file written submissions so that this court can proceed to determine the appropriate quantum of damages payable to the estate of the deceased. The documents that were produced by consent were as follows:-

- (a) Limited grant of letters of administration issued on 25th May 2004.
- (b) Police abstract dated 29th March 2004.
- (c) The deceased’s appointment letter dated 1st October 2003.
- (d) Five payslips issued to the defendant for the months of November and December 2003 and January, February and March 2004.
- (e) Certified copy of the deceased’s death certificate.
- (f) Receipts from Kenyatta National Hospital on account of the deceased’s treatment totaling to Kshs.374,557/-.

(g) Receipts from Kericho District Hospital on account of the deceased's treatment totaling to Kshs.2,850/-

(h) Receipts in respect of funeral expenses totaling to Kshs.39,925/-.

The parties also agreed that the cost of the death certificate was Kshs.150/- and the police abstract Kshs.200/-. In the plaint, the plaintiffs prayed for special damages amounting to Kshs.504,057/-. However, the only sum that was proved was Kshs.419,082/- and counsel for both parties agreed on the same.

The remaining task for this court is to assess the quantum of damages payable to the estate of the deceased under both the **Law Reform Act** and the **Fatal Accidents Act**. In their written submissions, counsel have brought out various facts that are not in dispute. First, it is not in dispute that the deceased was aged 35 years at the time of his death and was employed as a Sales Executive by Kentainers Ltd and his gross monthly salary was Kshs.22,000/-. He was also entitled to commission for products sold to specific segments in his area and on the average it was about 1.25% of the sales. Secondly, it was not in dispute that the deceased was hospitalised in various hospitals for 43 days from the time of the accident upto the time of his demise and during that long period of treatment he underwent various operations. Thirdly, it was agreed by both parties that the deceased was married with two minor children and that he was spending two thirds of his income on upkeep of his family.

Taking the above issues into consideration, I would assess damages payable to the estate as hereunder:-

1. Damages payable under the Law Reform Act:

(a) Pain and suffering:

The deceased must have suffered a lot of pain over the period of 43 days when he was in various hospitals. Damages under this heading are determined by the length of time that the deceased had to endure pain before death. Counsel for the plaintiff urged the court to award a sum of Kshs.1,000,000/-. She cited the case of **SANYA HASSAN & ANOTHER VS SOMA PROPERTIES LTD, HCCC No. 1517 of 2002** at Nairobi (unreported) where the deceased succumbed to gun shot wounds four months from the date of shooting during which period the deceased was hospitalised and underwent various operations. Angawa J awarded a sum of Kshs.1,000,000/- for pain and suffering. The plaintiff's counsel also cited **DAVID MUKII MEREKA VS RICHARD KANYAGO AND ANOTHER HCCC No. 78 of 2000** at Nairobi (unreported) where the deceased died after five days from the date of the accident. The court awarded a sum of Kshs.100,000/- for pain and suffering.

The defendant's counsel submitted that a sum of Kshs.20,000/- was reasonable under this heading. He cited several cases among them **JAMES MUHORO NDUNGU AND ANOTHER VS WILSON NZIOKA MUTISO HCCC No. 995 of 2001** at Nairobi (unreported) where the deceased died ten days after the date of an accident and the court awarded a sum of Kshs.60,000/-. Considering the length of time that the deceased spent in hospital when he was fully conscious, I accept that he suffered considerable pain and I will award a sum of Kshs.200,000/- under that heading.

(b) Loss of Expectation of Life:

The plaintiff's counsel urged the court to award a sum of Kshs.300,000/- whereas the defence counsel submitted that a sum of Kshs.70,000/- was reasonable. In the case of **SANYA HASSAN AND ANOTHER VS SOMA PROPERTIES** (supra) that was cited by the plaintiff, the court awarded a sum of Kshs.80,000/- for loss of expectation of life whereas in the case of **DAVID MUKII MEREKA VS RICHARD KANYAGO AND ANOTHER** (supra) the court awarded a sum of Kshs.70,000/-. The defence counsel cited the case of **NAJMA KASUO MIWA VS THOMAS WANYOIKE KARIUKI HCCC No.1393 of 1998** at Nairobi (unreported) where a sum of Kshs.70,000/- was awarded for loss of expectation of life. In **JAMES MUHORO NDUNGU AND ANOTHER VS WILSON NZIOKA MUTISO** (supra) the court also awarded a sum of Kshs.70,000/-. Doing the best I can and bearing in

mind the incident of inflation over the years, I assess damages for loss of expectation of life at Kshs.100,000/-. The total sum awarded herein under the **Law Reform Act** is Kshs.300,000/-.

2. Damages under the Fatal Accidents Act:

(a) Loss of Dependency:

The deceased was 35 years at the time of his death. Counsel for the plaintiff urged the court to adopt a multiplier of 25 years. On the other hand, the defence counsel urged the court to adopt a multiplier of 5 years, based on the argument that the deceased was engaged as a Sales Executive whose means of transport was a motor cycle and that implied a great risk and probably a very low life expectancy. He further submitted that the deceased would most likely have worked for another ten years but due to imponderables and vicissitudes of life a multiplier of 5 years was reasonable. Both counsel cited several authorities in support of their submissions. Taking into account the age of the deceased and his occupation, I would adopt a multiplier of 20 years. In my view, the deceased would have continued to be in active employment upto the age of 55 and possibly beyond. He would perhaps have been promoted beyond the position of a Sales Executive and his salary which was Kshs.22,000/- at the time of his death would perhaps have gone up to Kshs.25,000/- and above. The deceased was also entitled to commission on sales although no evidence was produced to show that any such commission had been earned. As stated earlier, both parties were in agreement that the deceased was married and had two children and that the three were depending on the deceased for their upkeep. It was further agreed that the deceased was spending two thirds of his income towards maintenance of his family. I will therefore compute the claim for loss of dependency as follows:-

$$25,000 \times 12 \times 20 \times \frac{2}{3} = 4,000,000$$

However, in view of the accelerated early income which the estate of the deceased will get, it is an accepted legal principle that the said award be discounted. I will discount a sum of Kshs.300,000/- leaving a net sum of Kshs.3,700,000/- payable for loss of dependency.

(b) Special Damages:

The agreed sum of special damages is Kshs.419,082/- and I award the same.

The total award of damages before deduction of the 30% contribution is as follows:-

Under Law Reform Act:

1. Pain and suffering - Kshs. 200,000/-
2. Loss of Expectation of life - Kshs. 100,000/-

Under Fatal Accidents Act:

3. Loss of dependency - Kshs.3,700,000/-
4. Special damages - Kshs. 419,082/-

TOTAL = Kshs.4,419,082/-

As was held by the Court of Appeal in ***KEMFRO AFRICA LTD VS A. M. LUBIA (1982-88) 1 KAR 727***, when the people entitled to the deceased's estate are the same persons for whose benefit the action under the **Fatal Accidents Act** is brought, the award for loss of expectation of life is deductible. I will therefore subtract a sum of Kshs.100,000/- from the aforesaid sum of Kshs.4,419,082/- leaving a balance of Kshs.4,319,082/-. Taking into account the consent on liability that was recorded by the parties herein, the aforesaid sum must be reduced by 30% leaving a balance of Kshs.3,023,357.40. I therefore enter

judgment for the plaintiffs against the defendant in the sum of Kshs.3,023,357.40 plus costs and interest at court rates. Lastly, I thank the advocates for the plaintiffs and the defendant, Ms Njeri Mburu and Mburu Njoroge respectively, for taking time to discuss and agree on the issue of apportionment of liability, special damages and most of the aspects that relate to assessment of damages under the **Law Reform Act** and the **Fatal Accidents Act**. As a result, they saved a considerable amount of this court's time.

DATED, SIGNED and DELIVERED at Nakuru this 12th day of October, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Kipkugei holding brief for Mr. Mburu Njoroge for the defendant and N/A for the plaintiff.

D. MUSINGA

JUDGE