



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. R.67 OF 1999

VIRGINIA WANJIKU KAIRU PLAINTIFF

-VERSUS-

HOSEA KIPKEMBOI SAMBU DEFENDANT

JUDGEMENT

This suit was heard and evidence for both the plaintiff and defence was tendered before Justice Omondi Tunya. The Judge reserved the judgement, which he did not write and deliver before he retired. The parties placed the matter before me for mention, and signed a consent letter that I should write and deliver the judgement based on the evidence on record. I therefore agreed to proceed with the matter from where it had stopped in accordance with the provisions of Order XVII rule 10 of the Civil Procedure Rules.

The case was filed by Virginia Wanjiru Kairu as widow and personal representative of the estate of Ibrahim Kairu Macharia. The plaintiff alleges that an accident occurred on 1st May 1997 along Eldoret-Kapsabet road involving vehicle registration No. KAG 496B Toyota pickup, and the deceased, wherein the deceased was fatally injured. It alleged negligence on the part of the defendant. Particulars of negligence were given. Particulars of 12 dependants were also given, which include two grand-daughters. As well, particulars of special damages were given in the plaintiff. The defendant filed a defence denying that the plaintiff is the legal representative in the suit. The alleged negligence and particulars of negligence were also denied. The particulars of dependants were denied. In the alternative the defendant pleaded contributory negligence on the part of the deceased. Particulars of negligence of the deceased were listed in the defence. The special damages and particulars of special damages were also denied. A reply to defence was filed denying the particulars of contributory negligence alleged against the defendant.

Before the suit came up for hearing the parties filed an agreed statement of issues as follows:-

1. Whether the plaintiff is the legal representative of the deceased.
2. Whether or not an accident occurred on 1st May 1997 involving the deceased and the plaintiff's motor vehicle registration number KAG 496B.
3. If the answer to 2 above is in the affirmative, whether or not the deceased was lawfully walking off the road at the time of the accident.
4. If the accident did occur, was it occasioned by negligence on the part of the defendant as alleged at paragraph 4 of the plaintiff or was it due to negligence on the part of the deceased as alleged at paragraph 5 of the defence or was it contributed to by both.

5. Are the dependants of the deceased pursuant to statute as stated at paragraph 4 of the plaint or not. If so, have they suffered any loss as a result of the deceased's death.
6. Is the plaintiff and the persons listed at paragraph 4 of the plaint entitled to the reliefs sought.
7. Who is to be condemned to pay costs of the suit.

At the hearing of the suit the plaintiff testified as PW1 and called two other witnesses. The defendant testified in his own defence and did not call any other witnesses. The plaintiff produced three exhibits. These were the Certificate of Grant of letters of administration, the police abstract for the accident; and the death certificate of the deceased. The defendant produced one exhibit, which was the record of the inquest proceedings before a magistrate relating to the subject accident.. At the close of the case, the plaintiff filed written submissions but no submissions were filed on behalf of the defendant.

In summary the evidence on record is that plaintiff Virginia Wairimu Kairu (PW1) is the wife of the deceased. The deceased died in a road traffic accident. She used to rely on the deceased who used to cater for her daily financial needs by giving her Kshs.500/= to Kshs.700/= for buying food. She cannot state how much she used to be given per month. The deceased used to trade in hides and skins and she did not know the net worth of that business. Before she commenced the suit, she obtained the required letters of administration as required under the Law Reform Act. The evidence of Musa Lukwawi (PW2) is that on 1st May 1997 he was walking along Eldoret-Kapsabet road at about 6.00 pm. He saw a vehicle coming from Kisumu direction. That vehicle veered suddenly off the tarmac and knocked a pedestrian on the murram verge of the road that is used by pedestrians. The vehicle did not stop and he did not record its registration number but it was a Toyota pick up, blue in colour. The vehicle was moving at high speed. It had rained and the road was wet. The vehicle had full lights on and was driven in a zigzag manner. The pedestrian who was hit by the vehicle was an old man. Daniel Kuria Kairo (PW3) testified that he was a son of the deceased. He stated that the deceased used to take care of the plaintiff who was the mother of this witness. The deceased used to entrust to him Kshs.6,800/- to Kshs.8,000 every month. This amount was net of expenditure by the deceased. The deceased was 87 years old. All the children of the deceased were adults and self-reliant. He took over taking care of the plaintiff after the deceased's death.

The defendant in his defence stated that he was a manager of Kabiyet Saw Mills in Eldoret. He has 10 years driving experience. On 1st May 1997 he was driving motor vehicle KAG 496B which is a Toyota pick up. It was at 5.30 pm at the corner of Racecourse Inn when he saw a lorry suddenly appear with full lights. He saw a pedestrian on the edge of the road. He hooted and swerved to avoid colliding with the lorry and hit the pedestrian. He did not stop at the scene of accident due to fear, but reported to the police the next day. He was driving at 60kpmh, though he knew that the place was within Eldoret town and the speed limit is 50 kph. He slowed down and applied brakes, but was not able to avoid hitting the pedestrian. He stated that the cause of the accident was the lorry, and that he did not take note of the registration number of the lorry. He produced as exhibit the proceedings in Eldoret Senior Principal Magistrate's Inquest No.65 of 1997 – which was an inquest on the same accident.

On the basis of the evidence on record, the submissions and the law, I have to consider each of the agreed issues and come to a decision on the same. The first issue is whether the plaintiff is the legal representative of the deceased. The plaintiff at the hearing produced the grant of letters of administration issued on 12th May 1999. It was P Exhibit 1. No objection was raised on the same. She was appointed the administrator of the estate on 11th March 1999. On that basis, I find that the plaintiff is the legal representative of the deceased and properly brought this suit in that capacity. This disposes of that issue.

On the issue as to whether the accident did occur on 1st May 1997, the plaintiff's witnesses state so. PW2 Musa Lukwawi was an eyewitness to the accident, and he gave evidence to that effect in court. He did not record the registration number of the vehicle but he stated that it was a Toyota pickup which was blue in colour. The defendant in his own evidence testified that the accident did occur, though he did not stop at the scene due to fear of mob justice. He also produced the inquest proceedings in Eldoret SPM Inquest No.65 of 1997. John Kamau Njoroge (PW6 in the inquest) stated that he witnessed the accident and the

vehicle was a Toyota KAG 496B. On that basis, I find that the accident did occur on 1st May 1997 involving the deceased and motor vehicle registration number KAG 496B.

On the issue whether the deceased was lawfully walking off the road, the evidence of PW2 Musa Lukwawi was that the deceased was walking on the side of the road and the vehicle swerved and hit him. John Kamau Njoroge (PW6 in the inquest) also stated that the “old man” was walking off the road. The defendant himself also stated in his defence that he swerved to avoid another vehicle and hit the deceased. I find that the deceased was walking off the road when he was hit by the Toyota pick up. Both the deceased as a pedestrian, and the defendant who was the motor vehicle driver, were lawful users of the road. Therefore I find that the deceased was lawfully walking off the road, when he was hit by the motor vehicle.

The next issue is whether the accident was occasioned by negligence on the part of the defendant as alleged in paragraph 4 of the plaint or was due to the negligence on the part of the deceased as alleged in paragraph 5 of the defence or it was contributed to by both. I have considered the evidence on record. Musa Lukwawi PW2 gave an account of how the accident occurred. The deceased was on the side of the road when the vehicle veered and hit him. It was raining and the road was slippery. John Kamau Njoroge (PW6 in the inquest) corroborates this evidence. The defendant in his defence blames a lorry which he was trying to avoid, thus he swerved and hit the deceased. He testified that he was driving at 60kph within Eldoret town, when he knew the lawful speed limit is 50kph. He tried to apply brakes and slow down, but could not stop before hitting the deceased. Though he stated that he hooted, the eyewitness stated that he did not hoot. Though the defendant produced the record of an inquest that was held on the accident in Eldoret SPM Inquest Case No.65 of 1997, the evidence in that inquest does not assist him. John Kamau Njoroge (PW6 in the inquest) clearly puts the blame on the defendant. This witness was driving behind the defendant. He testified that there was no lorry as alleged by the defendant. The magistrate in the inquest also found that the defendant hit the deceased on the side of the road. In those circumstances I find that the defendant is wholly to blame for the accident. I find him 100% negligent for the accident. The deceased did not contribute to the occurrence of the accident in any way. On whether the dependants of the deceased listed in paragraph 4 of the plaint are recognized dependants per statute, and whether they have suffered any loss as a result of the deceased’s death, I observe that other than the plaintiff the other dependants are described as children and grandchildren of the deceased. Section 2(1) of the Fatal Accidents Act (Cap.32) defines child and parent as follows, with respect to persons who can benefit from a cause of action following death - “2(1) In this Act, except where the contest otherwise requires – “child” means a son, daughter, grandson, grand-daughter, stepson or stepdaughter. “parent” means a father, mother, grandfather, grandmother, stepfather and stepmother.”

Section 4(1) of the Act provides that any action brought shall be for the benefit of the wife, husband, parent or child of the person whose death was caused. Section 3(3) of the Law Reform Act (Cap.26) defines child and parent as defined in the Fatal Accidents Act. Therefore, broadly speaking, all the persons listed in the plaint are entitled to benefit from the suit brought herein, since they are described as children and grandchildren. As to whether each of them has suffered any loss following the deceased’s death that is a matter of evidence. From the evidence on record, only the plaintiff was said to be a dependant of the deceased. She is therefore the only one who can possibly claim for loss of dependency.

On whether the plaintiff and the persons listed in paragraph 4 of the plaint are entitled to the reliefs sought, my view is that this issue goes to the damages that may be awardable. I have already held that the defendant is 100% liable in negligence for the death of the deceased. However the damages awardable are governed by provisions of law as follows: -

- i) The Law Reform Act (Cap.26)
- ii) The Fatal Accidents Act (Cap.32)
- iii) Special damages.

Under the Law Reform Act, the plaintiff has asked for Kshs.120,000.00 general damages for pain and

suffering in his submissions. The evidence on record is that the deceased died instantly. General damages for pain and suffering are only awarded if the deceased did not die immediately after the accident. That is when he can be said to have suffered pain. In this case he died instantly, so I find no basis for awarding anything under the heading of pain and suffering. On loss of expectation of life, the deceased is said to have been 87 years of age and of good health. In my view, he was lucky to have lived up to that age. In am of the view that he would have lived healthy and active for another 5 years, if he was not killed in the accident. Counsel for the plaintiff has asked for an amount of Kshs.100,000.00 for loss of expectation of life. I consider that amount to be reasonable. I award Kshs.100,000/= under this head.

On loss of earnings (loss of dependency) under the Fatal Accidents Act (Cap.32) the evidence from the plaintiff is that the deceased used to give her Kshs.500/= to Kshs.700/- per day, but she did not know the total per month. In submissions, the plaintiff's counsel takes an average income of Kshs.8,000/= for 10 years less 1/3. No documentary proof was given. I was referred to the case of **Harrison Matheka –vs- George Thiongo Njuguna, Nairobi HCCC.No.1887 of 1992** – in which Justice Gacheche held that even in the absence of documentary proof the court may assess probable income. I have perused that case. In that case, the court applied a figure of Kshs.1,000/= as monthly income, as that amount was pleaded in the plaint. In our case, however, the plaint does not mention any amount nor were documents produced to prove same. Surely, at the time of filing suit the plaintiff should have known the amount she was being given monthly by the deceased. The income of the deceased from his business per month is also not stated in the plaint. I decline to give an award on this.

No proof was given of funeral expenses. These expenses are only recoverable if they were incurred by the dependants. The plaintiffs in submissions asked for Kshs.15,000.00 as funeral expenses. This amount was also pleaded in the plaint. Also claimed as special damages in the plaint are the police abstract (Kshs.100/=); death certificate (Kshs.50/=) and obtaining letters of administration (Kshs.12,000/=). No receipts were produced in court for the expenses.. I was referred to the case of Jane Katumbu **Mwanza – vs- T. M. Mwanzui & another – Nairobi HCCC. No.3177 of 1997** in which Justice Visram awarded an amount of Kshs.100,000/= for funeral expenses, though no receipts were produced. It is trite law that special damages have not only to be specifically pleaded but also proved. I would be persuaded by the decision in that case on funeral expenses only, if the plaintiff at least testified to those expenses verbally in the evidence. As things are, apart from the pleadings in the plaint there is no evidence tendered on the special damages, that is funeral expenses, police abstract, death certificate, and costs incurred in obtaining letters of administration. In the circumstances of this case, I decline to grant the special damages, as they have not been proved.

In the result I enter judgement for the plaintiff against the defendant for: -

Loss of Expectation of Life - Kshs.100,000.00

Total - Kshs.100,000.00

This amount is given wholly to the plaintiff who was wife of the deceased, as the others though being statutory beneficiaries, are self-reliant.

I award interest at court rates from the date of judgement till payment in full. Costs are to the plaintiff.

Dated and Delivered at Eldoret this 14th Day of April 2005

George Dulu

Ag. Judge

In the Presence of:

Cheruiyot for the defendant.

No appearance for the plaintiff.