



) Civil Practice And Procedure 2) Application For Settlement And Appointment Of The Dependents. 3) Held: The Amount Under The Fatal Accidents Act Giving To The Dependents Is Not Permitted To Be Available To The Creditors. 4) Fatal Accident Act 5) Case Law - Nil 6) Advocates: Kituki Holding Brief For F. Mwangagi Advocate For The Plaintiff O.agina Holding Brief For M. Masika Advocate For The 1st And 2 Defendant 7) Note For File: Suit Against 3 Rd Defendant Discontinued 8.05.05. **Republic Of Kenya**

**In The High Court Of Kenya At Nairobi**

**Civil Case 3063 Of 1997**

**J M M (Suing As Personal Representative Of R M M (Deceased) .....Plaintiff**

**Versus**

**Mohamemd Ismael Jin.....1st Defendant**

**Pembe Flour Mills.....2nd Defendant**

**Citi Bank N.a. Ltd.....3rd Defendant**

**Ruling**

This suit is a running down cause whereby the deceased Rodah Muueni Mulani was run down by a motor vehicle belonging to the 2nd defendant and driven by the 1st defendant on the 9.6.95 along the Lunga Lunga Road Industrial Area.

The parties kindly settled this suit on liability at a ratio of 80% against the two defendants jointly and severally.

The deceased to bear 20% .

An award under the Law Reform Act, the Fatal Accidents Act and special damages was given.

This ruling concerns the award under the Fatal Accidents Act. The parties agreed that the loss of dependancy be  $(3,000/= \times 16 \times 12 \times 2/3)$  Ksh.384,000/=. After apportionment this sum comes to Khs.307,200/=.

The law required that the sum of Khs.307,200/- be apportioned amongst the dependants and where there are minors, then be thereafter apportioned between them and duly invested.

The advocate for the plaintiffs applicant filed such application for investment of the apportionment of the sums between the parties dated 24..2.05

Namely:

“1. Ksh.130,000/= be discounted from the said sum of K.Shs.307,200/= which in addition to Ksh.66,200/- awarded under the Law Reform (Mis provis) act) will cater for the minors Immediate needs and costs of the suit and the balance of Ksh.177,200/= be approved as follows:-

- a) K M 1stapplicant, mother Ksh.15,000/=
- b) M M son aged 21 years Khs.20,000/=
- c) M M daughter aged 17 years Khs30,000/=
- d) N M daughter aged 14 years Khs50,000/=
- e) K M daughter aged 9 years Khs62,000/=”

“That the 1st applicant and Muendo Mulani the son be paid their share.

The shares of the mother deposited in the an interest earning account with the Cooperative Bank of Kenya and the applicants to run the said account in trust and inter alia withdraw the interest”

The said application has in fact deducted Kshs.130,000/= to provide for the expenses and or fees incurred. In Kenya we do not have contingency fees. This means, that an advocate can take on a case first before he is paid. The law in Kenya provides that fees are to be paid to an advocate then the work is done.

Because of the poor litigants who come to court, most advocate would work on credit and expect the award money given by court would reimburse the expenses that they have incurred. This though occurs in countries such as United States of America but not in Kenya. It is however practiced in Kenya.

In this particular settlement the law under the Fatal Accidents Act Cap.32 Laws of Kenya clearly states that where an award is made under the act the whole total amount must be paid to the dependants and as such no creditors are permitted to be paid this sum.

The actions are brought for the benefit of the family of the deceased. Section 4(1) reads.

“Every action brought by virtue of the powers of this act SHALL be for the benefit of the wife, husband, parent and child of the person whose death was so caused . . . and the court may award such damages as it may think proportion to the injury resulting from the death . . . and the amount so recovered, after deducting the rest NOT recovered from the defendant SHALL be divided amongst these persons in such shares as the court shall find and direct.”

I would therefore rule that the plaintiff herein cannot apply to apportion the sum of money to “cater for minor immediate needs and other expenses.” When infact it really means, as admitted by her advocate this sum of Ksh.130,000/- goes to the advocate to off set his expenses. Unless this law is changed, an advocate cannot off set his expenses or credit against the award.

Further, because this claim is under the Fatal Accidents Act, the said sum is not available to any one but the dependants family.

I therefore decline to accept the given suggested apportionment and rule as follows on the issue of apportionment:-

- 1) K M- Mother Ksh.57,200/-
- 2) M M son aged 21 years Ksh.50,000/-
- 3) M M daughter aged 17 years Ksh.50,000/-

4) N M daughter aged 14 years Ksh.75,000/-

5) K M daughter aged 9 years Ksh.75,000/-

I accordingly enter judgment on the above apportionments.

Dated this 12th Day of May 2005 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

Mwangagi & Co. Advocates for the plaintiff

M. Masika & Co. Advocates for the 1st and 2nd defendants

Njoroge Regeru & Co. advocates for the 3rd defendant