

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 812 OF 1991

JOSIAH MAKORI OKOTI PLAINTIFF

VERSUS

PETER NGUYU &

AZIM KASSAM DEFENDANTS

JUDGEMENT

The plaintiff by amended plaint of 18/11/98 sued the defendants on 29.10.91 on account of a road accident that occurred along Mombasa-Lunga Lunga Road. It was claimed that on the said day when the 2nd defendant was driving the 1st defendant's motor vehicle Reg. No. KWN 056 on the said road he did so so negligently that he let it go off the road to a nearby pedestrian path where the plaintiff's wife was. It knocked her down fatally. The liability was agreed and apportioned and so it required no setting out of the particulars of negligence since its proof is thus obviated. So it was averred that the death above did result in loss and damage to the deceased's estate and that the deceased's (Queen Nyakeno Makori) dependants i.e. the plaintiff and their 3 children suffered loss of support. Thus the plaintiff sought damages both under the Law Reform and Fatal Accidents Acts. There was a defence but with liability apportioned at 30% to the plaintiff and 70% to the defendants, we proceed straight to the assessment of damages.

The plaintiff (PW.1) who once worked for the Ministry of Water married Queen (the deceased) in 1979. While he lived away from the rural home on duty earning about Sh.3000/- p.m., the deceased remained in the village in Kisii tilling the plaintiff's 6 acre plot, raising crops and tending to his 4 head of cattle. The couple had 3 children. The eldest Nancy who was 18 years at the time of suing has since married while the 2nd died. That the plaintiff now remained with the 3rd born Nyambane who is aged about 17 years and completing form 4. He told the court that his late wife received an income of between Sh.7,000/- and 10,000/- from farming activities. That she applied this money mostly to pay the 2 farm hands they employed, cater for all domestic expenses and maintain the farm. That when the plaintiff occasionally went home he only supplemented to cover what his wife had financially done. There was as usual no evidence to support this claim of the deceased's income. It was added in evidence that Queen died in Mombasa (Exh. P1) and the plaintiff spent well over Sh.50,000/- in funeral expenses to see that she was buried in the far off Kisii. The amended plaint however spoke of Sh.18,391/- for which again receipts were not availed.

After evidence and cross examination Mr. Gikandi urged the court to adopt a multiplier of 20 on an income of Sh.7,000/- p.m., less one third what the deceased used as her own expenses. The case of BENJAMIN MWILOLE VS. SAID & CO. MBA H.C.C.C. 4/85 was cited to support the above position. As for loss of expectation of life this court was told to award Sh.150,000/- plus Sh.20,000/- for pain and suffering. Queen died on the spot. Mr. Gor's position was that there was nothing pleaded about pain and suffering (but this bit finds its way in any claim laid under the Law Reform Act as is the case here) and that the plaintiff had not exhibited any grant of administration/probate to show that he was the deceased's legal representative with authority to properly claim anything for the estate of the deceased. This is a valid point. Before one claims on behalf of a deceased's estate one had to obtain a grant in respect of that estate (see **TROUISTIK UNION INTERNATIONAL & ANR VS. JANE MBEYU & ANR. C.A. 145/1990 C.A.**)

Mr. Gor then submitted that there was nothing to show that in 1991 the rural income of the deceased fluctuated between Sh.7000/- and Sh.10,000/- when the plaintiff's urban income was a mere Sh.3,000/-. He could only consider Sh.1500/- p.m. if the court found that even if not pleaded the deceased enjoyed some income. The defence disputed Sh.18,000/- for funeral expenses as not proved and only conceded Sh.7-10,000/-. A multiplier of 12 to 15 was considered reasonable. With the plaintiff not having exhibited a grant permitting him to administer his deceased's wife estate, such a grant being obtained before suing, this court is unable to entertain the plaintiff's claim under the Law Reform Act.

As for the award under the Fatal Accidents Act and on the paucity of evidence regarding the deceased's monthly income, this court is inclined to adopt a sum of Sh.1,500/- p.m. over a multiplier of 18, Queen having died at age 29. That sounds reasonable in the circumstances. Accordingly loss of dependency is worked at Sh.216,000/- (1500 x 12 x 18 x two thirds) Considering the above sum five (5%) is to be knocked off for accelerated payment and the balance apportioned and paid according to the agreed ratio of liability. The plaintiff gets costs at the lower court rates.

Judgement accordingly delivered on 19th May, 2004.

J.W. MWERA

JUDGE