



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 226 OF 1998

DAVID BORE.....PLAINTIFF

VERSUS

JOHNSON MASIKA.....DEFENDANT

JUDGMENT

The Plaintiff, David Bore, has filed this suit on behalf of the estate of Joel Kipchumba Bore (hereinafter referred to as deceased) against the Defendants claiming for special damages and general damages under the Fatal Accidents Act and the Law Reform Act. The Plaintiff's claim arose out of the road traffic accident that occurred on the 29th of April 1997 involving the collision of motor vehicle registration number KAH 714B and motor vehicle registration number TZ 40880/TDM 94 along Turbo-Webuye road which resulted in the deceased sustaining fatal injuries. According to the Plaintiff, the said accident was attributable to the negligence of the drivers of the two motor vehicles which were being driven carelessly and at an excessive speed in the circumstances and further were not being driven or controlled in a safe manner and were so negligently driven that caused the two motor vehicles to violently collide and thus causing the death of the deceased. The 1st and 2nd Defendants filed a defence denying that their motor vehicle cause the said accident. The 1st and 2nd Defendants blamed the driver of the motor vehicle owned by the 3rd Defendant. The 3rd Defendant on his part filed a defence blaming the driver of motor vehicle owned by the 1st and 2nd Defendant for the said Accident.

The preliminary issues having been concluded, including settlement of issues and discovery, this case was fixed for hearing. At the hearing of the case, the Plaintiff called two witnesses. The Plaintiff, David Bore (PW 1) testified that on the 30th of April 1997 he was asleep in his house when he was woken up and informed that his brother, the deceased, had been involved in a road traffic accident as a result of which his brother had sustained fatal injuries. He was informed that the accident occurred along Kipkarren-Webuye road. The Plaintiff went to Webuye District Hospital Mortuary where he saw the deceased's body. He had the body transported to Eldoret where a post mortem was conducted at the Moi Teaching and Referral Hospital. He paid a total sum of Kshs 10,800/= for the said post mortem to be undertaken. The post mortem report and the receipts for the money paid were produced as Plaintiff's Exhibit No. 1 and 2(a) (b) & (c).

After the post mortem, the Plaintiff obtained a burial permit (produced as Plaintiff's Exhibit No. 3) and thereafter the deceased was buried at his home. The Plaintiff testified that they incurred a further sum of Kshs 7,800/= which he paid to the Kenya Broadcasting Corporation so that the death of the deceased could be announced. The receipts were produced as Plaintiff's Exhibit No. 4. The transport and funeral expenses amounted to about Kshs. 30,000/=. The Plaintiff reported the matter to the police and was duly issued with a police abstract report (Plaintiff's Exhibit No. 6). He paid Kshs 100 for the said abstract (Plaintiff's Exhibit No. 6). The Plaintiff later obtained the death certificate of the deceased (Plaintiff's Exhibit No. 7). The cause of death of the deceased was stated to have been caused by the fracture of his skull as a result of the accident. The Plaintiff obtained letters of administration before filing this suit (Plaintiff's Exhibit No. 8).

The Plaintiff testified that the deceased at the time of his death was 62 years of age. He was married and was blessed with nine children. The birth certificates of the children were produced as Plaintiff's Exhibit No. 9(a) – (f). The Plaintiff testified that the deceased was a farmer and a businessman. It was his testimony that the deceased used to earn about Kshs 24,000/= per month. His income was used to educate his children, five of whom were still in school when the deceased passed away. At the time of the hearing, three of the deceased's children were still in school – two were at the University and one a Form Four candidate at a local Secondary School. The Plaintiff testified that the family had had difficulty in educating the children and have been sometimes forced to rely on Harambee contributions. The Plaintiff further testified that the deceased wife was not working but was a housewife.

The Plaintiff further testified that the deceased three bank accounts at Eldoret and Kapsabet. The statements of the three accounts were produced as Plaintiff's Exhibits No. 10, 11 & 12. The Plaintiff testified that the life of the deceased's family had become difficult since the death of the deceased. The Plaintiff however admitted that the deceased's family still relied on farming activities on their thirty-acre farm. He also admitted that four of the deceased's children were married while two other sons were employed. One of the sons of the deceased was a student in America and was not relying on the family for his education and upkeep. The Plaintiff further testified that the auctioneering business that the deceased was engaged in had collapsed after his death. It was the Plaintiff's testimony that after the death of the deceased the burden of taking care of his children fell on his brothers, including the Plaintiff.

PW 2 Moses Chirchir testified that on the 29th of April 1997 he boarded motor vehicle registration number KAH 714B Peugeot 505 at Eldoret. He was travelling to Uganda in the company of the deceased. The deceased sat at the back of the vehicle while PW 2 sat at the front. PW 2 testified that the said motor vehicle was being driven at a very high speed. It was drizzling on the day and the road was therefore slippery. Visibility was poor. PW 2 testified that when the said motor vehicle reached Kipkarren, the driver of the said motor vehicle attempted to overtake a lorry but was confronted with an oncoming vehicle. The driver of the said motor vehicle swerved towards the lorry therefore colliding with it. It was the evidence of PW 2 that all the passenger in the said motor vehicle including the driver died except him. He was the sole survivor. He further testified that at the time the accident occurred the driver of the said motor was driving at a speed of about 118-120 km/h. Visibility was poor. It was his evidence that it was not safe for the driver to overtake.

After calling two witnesses, the Plaintiff closed his case. The Defence did not offer any evidence. By consent of the parties it was agreed that written submissions would be presented to the Court for its consideration before delivering its judgment. I have considered the evidence that was adduced in this case. I have also read the submissions filed by the parties in this case. The issue for determination is who is to blame for the accident that resulted in the death of the deceased. The other issue for determination is what quantum, if any, should be paid as to damages to the Plaintiff on behalf of the deceased's estate. According to PW 2, the deceased, himself and six others were travelling in motor vehicle registration number KAH 714B from Eldoret to Malaba. The said motor vehicle was being driven at a very high speed. According to his evidence, the said motor vehicle was being driven at between 110 to 120 km/h. Visibility was poor due to the fact that it was drizzling. PW 2 testified that the driver of the said motor vehicle attempted to overtake a lorry when the said motor vehicle reached a place called Kipkarren. There was an oncoming vehicle. The driver of the said motor vehicle then swerved into the lorry that he was attempting to overtake resulting a collision. It was PW 2's evidence that all the passengers in the said motor vehicle died except PW 2. He was the sole survive.

On evaluating the evidence adduced, I do find that the accident was solely cause by the negligence of the driver of motor vehicle registration number KAH 714B. He was driving the said motor vehicle at a very high speed in the circumstances. He attempted to overtake another motor vehicle when it was not safe so to overtake. Further he was driving at a very high speed when the road condition were not conducive for high speeds. There was evidence that it was drizzling and further that the visibility was poor. In such circumstances the driver ought to have exercised caution by driving the said motor vehicle as an appropriately low speed. Due to poor visibility and the fact that the said motor vehicle was being driven at a very high speed, it can be stated that the said accident which could be prevented became inevitable. In the circumstances therefore I do find the 1st and 2nd Defendants solely liable in negligence

for the said accident. The 1st and 2nd Defendants shall therefore bear 100% liability for negligence to the estate of the deceased.

On quantum, in his further amended Plaintiff amended defence, the Plaintiff claimed the following amounts as special damages:

- (a) Police abstract Kshs. 100/=
- (b) Death certificate Kshs. 100/=
- (c) Postmortem report Kshs. 100/=
- (d) Funeral expenses Kshs. 13,410/=

The Plaintiff in his evidence produced receipts for the Police abstract report, the funeral radio announcement by K.B.C. and the money paid for post mortem and the preservation of the body of the deceased at Moi Teaching and Referral Hospital prior to his burial. I have perused the said documentary evidence produced by the Plaintiff. I am satisfied that the Plaintiff has proved the special damages as pleaded in his plaint. I therefore award the Plaintiff Kshs. 13,710/= being the proved special damages. I will also award the Plaintiff the sum of Kshs 30,000/= being funeral expenses. Even though the Plaintiff has not produced any receipts to support the funeral expenses, I do take the view that when someone dies, especially from the community that the deceased came from, a coffin had to be purchased and the mourners fed. Further the body had to be transported from Webuye to Eldoret and then to the deceased's home for burial. The award of Kshs 30,000/= as funeral expenses in the circumstances of this case would not be unreasonable.

At the time of his death, the deceased was 62 years. He was a farmer cum businessman. He had thirty acres of land which he farmed. He was also an auctioneer. He used to sell cattle in auctions. At the time of his death five of his children were still in school. At the time of the hearing of this case, three of his said children were still school – two at the university and one in secondary school. His family was still undertaking farming activities in their thirty-acre farm. All his children are now over the age of eighteen years. Four of his children are married. Two of his sons are employed. His wife depends from the proceeds of the farm. In the circumstances of this case, I do find that the only dependants of the deceased estate are his wife and the three children who are still schooling.

The Plaintiff has submitted that the Plaintiff earned Kshs. 24,000/= per month from his farming and business activities. I have carefully perused the statements produced by the Plaintiff in this case and it is my considered view that the figure of Kshs. 24,000/= is on the higher side. The deceased's average income was lower. Doing the best I can in the circumstances of this case and after scrutinising the bank statements produced as documentary evidence I will assess the average sum of Kshs. 15,000/= as the monthly earning of the deceased for the purposes of computing the amount to be paid to the deceased's estate. The Plaintiff has suggested a multiplier of ten years to be applied in computing the damages to be paid to the deceased estate. I have considered the said submission. While there was a possibility that the deceased could have lived to a ripe old age, the possibility that he could have been affected by geriatric diseases which would have caused him to die prematurely cannot be ruled out. Other vagaries and vicissitudes of life such as other diseases, road traffic accidents and the general decline of the standard of living in Kenya cannot be overlooked by this Court. In the circumstances of this case I will apply the multiplier of five years.

The Plaintiff has submitted that the dependency ratio to be applied ought to be the ratio of 2/3. No evidence was adduced to support this fact. There is no proof that the deceased used 2/3 of his income to support his family. The law is quite clear in this respect. Dependency has to be proved in evidence. Evidence was adduced that the deceased's family is still farming on the land which belonged to the deceased. The farming activities undertaken by the deceased's family on the said land would still go on even with the death of the deceased. In the circumstances of this case I will apply the dependency ratio of 2/5.

The decision of Nairobi HCCC No. 3113 of 1990 Mboi Gathua Kaburo – versus- John Waruthi Mwangi (unreported) is applicable in this case on the multiplicand to be applied. The deceased in the said case was aged 63 years. A multiplicand of 6 years was applied.

In the premises therefore I do enter judgment for the Plaintiff against the 1st and 2nd Defendants jointly and severally for:

(i) *Special damages* Kshs 13,710/00

(ii) *Funeral expenses* Kshs 30,000/00

(iii) *General damages to be paid under*

the Fatal Accidents Act

Kshs 15000/= (average monthly income)

x 5 years (multiplicand) x 12 months

x 2/5 (dependency ratio) = Kshs 360,000/00

TOTAL = Kshs 403,710/00

Since an award has been made under the Fatal Accidents Act, I will not make an award under the Law Reform Act as it would amount to a duplication of awards. (See Kemfro Africa Ltd t/a Meru Express Services, Gathogo Kanini –versus- A M Lubia & Oliver Lubia 1982-8811 KAR 727). The Plaintiff shall have the costs of the suit. Interest shall be applied on the special damages from the date of the filing of the suit whilst interest of the General damages awarded shall be applied from the date of this judgment.

DATED at NAKURU this 22nd day of October, 2004.

L. KIMARU

AG. JUDGE