



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 116 OF 2003

NAOMI WANJIRU NJUGUNA AND

ALICE WAITHIRA NJUGUNA (the personal

representatives and administrators of the estate of

JOEL MAINA KAMAU – Deceased)..... PLAINTIFFS

VERSUS

SWAN CARRIERS LTD.....DEFENDANT

JUDGMENT

The plaintiffs, as personal representatives and administrators of the estate of Joel Maina Kamau (herein after referred to as “*the deceased*”) filed a suit against the Defendant on 5th December, 2001.

They averred that on or about 9th December, 1998 the deceased was lawfully driving his motor vehicle registration number KAC 229H along Nakuru- Naivasha Road near State House, Nakuru when the Defendant’s authorised driver so negligently drove motor vehicle registration number KAH 938J, owned by the Defendant, that he caused the same to violently collide with the deceased’s said motor vehicle as a result of which the deceased sustained fatal injuries.

The plaintiffs listed down the particulars of negligence of the Defendant’s authorised driver or agent which were, inter alia, driving motor vehicle registration number KAH 938J at an excessive speed in the circumstances and failing to maintain any or any proper and/or effective control of the said motor vehicle.

The plaintiffs claimed special damages of Kshs.1,800/- made up as hereunder:-

- (a) Police Abstract - Kshs. 100
 - (b) Death Certificate - Kshs. 50
 - (c) Petition for a Limited Grant - Kshs.1,650
- TOTAL - Kshs.1,800

The plaintiffs further stated that the first Plaintiff and the estate of the deceased had suffered loss and damage upon the death of the deceased as they had lost their anticipated means of livelihood and support. In their claim under the Fatal Accidents and the Law Reform Act they stated that at the time of the deceased’s death, the deceased was aged 36 years old and was in good health. He was an Electrical

Engineer working with Kenya Power & Lighting Company Limited earning a net salary of Kshs.84,807/- per month, a substantial portion of which he used to support his dependants, the first plaintiff as his wife who was then aged 37 years and Edwin Kamau, his son aged 14 years at the time of his demise. By reason of the deceased's death, the said dependants had lost the means of support and had suffered loss and damage, it was stated.

The plaintiffs therefore prayed for general damages under the Fatal Accidents Act and the Law Reform Act as well as special damages of Kshs.1,800/- plus costs of the suit and interest.

The Defendant filed a statement of defence dated 24th January, 2002 and put the plaintiffs to strict proof of their assertion that they were the personal representatives and administrators of the deceased's estate. The Defendant also denied that it was the registered owner of motor vehicle registration number KAH 938J. It also denied all the particulars of negligence attributed to the Defendant and stated that the accident was wholly and/or substantially caused by the deceased's negligence.

However, on 6th November, 2002 a consent order was recorded whereby judgment on liability was entered on the ratio 70:30 in favour of the plaintiffs. The hearing therefore proceeded before this court for assessment of damages.

The first plaintiff testified that she was married to the deceased prior to his death under Kikuyu Customary Laws and they had one child, **Edwin Kamau Maina** who was born on 22/5/1986. She produced a copy of an affidavit (P. Exh.1) which was sworn by the deceased on 28th October, 1986 to the effect that they had legally married under Kikuyu customary law, having undergone all the pre-requisite ceremonies. She also produced a birth certificate of their son (P. Exhibit 2) which showed that the deceased was the father to Edwin Kamau Maina. She also produced a letter dated 20/11/2001 from the Chief of the area where she was residing in Nairobi, Kariokor Location. The Chief has stated therein that he knew her well together with her late husband and their son.

The first Plaintiff also produced a Limited Grant of Letters of Administration ad Litem (P.Exh. 3) issued on 27th November, 2001 which showed that Alice Waithira Njuguna and herself were the personal representatives of the deceased's estate.

Regarding her claim for loss of dependency, she testified that she was 40 years old and was working as a secretary with Gateway Insurance Company Limited in Nairobi, earning Kshs.12,000/- per month, and her son was in Form IV at Light Academy, Nairobi and the deceased used to pay his school fees of Kshs.9,000/- per term. The house rent for their Kariokor house was Kshs.12,000/- and the deceased used to pay the same.

She testified that her husband used to give her about Kshs.15,000/- monthly for the house upkeep.

The deceased was an Electrical Engineer working for Kenya Power & Lighting Company Ltd, having graduated from the University in 1986. He was initially employed as a Trainee Electrical Engineer in 1987. On 5th March, 1997 he was promoted to a first Assistant Engineer and on 22nd October, 1997 he was again promoted to the post of Senior Area Technical Services Engineer, West Kenya and his salary was adjusted from K?29,346 per annum to K?36,585 per annum and a house allowance of Kshs.20,000/- per month. A performance review for 1997 was done and his performance was rated as very good and consequently his salary was adjusted to K?45,872/- per annum with effect from 1st January, 1998. The witness produced the deceased's payslips for the period June to December 1998 which showed that his basic monthly salary was Kshs.76,453.33 plus General Availability allowance of Kshs.4,013.80, mileage claim of Kshs.10,359.40 and house allowance of Kshs.20,000/- making his gross earnings to be Kshs.110,826.50. The statutory deductions were as follows:-

P.A.Y.E. - Kshs.26,022

N.H.I.F. - Kshs. 320

There were other non-statutory deductions which varied from month to month.

The first Plaintiff also testified that her husband was a member of Stima SACCO Society Limited and upon his death, his shares contribution amounting to Kshs.86,141/- was paid to her as the registered next of kin.

She produced the Refund Advice as P. Exhibit 10.

After the close of the Plaintiff's case, the defence did not call any evidence.

On behalf of the plaintiffs, Mr. Chege submitted that the first Plaintiff had locus standi to bring the action on behalf of the deceased's estate and on her own behalf since she had obtained Limited Grant of Letters of Administration ad Litem and also as a widow of the deceased. Her marriage to the deceased had been proved through her testimony and the affidavit which had been sworn by the deceased, (P. Exhibit 1) and the letter from the Chief of Kariokor Location, P. Exhibit 6. Their son's birth certificate also showed the deceased as the father of their only son who was also named after the deceased's father in accordance with Kikuyu Customary Law, he submitted. Counsel also submitted that the fact that PW1 was nominated by the deceased as his next of kin was a further pointer that she was the deceased's lawful wife.

Mr. Okundi for the Defendant submitted that the first plaintiff had failed to prove on a balance of probabilities that she was the deceased's wife saying that the affidavit which had been sworn by the deceased (P. Exhibit 1) and the letter from the Chief of Kariokor Location (P. Exhibit 6) were not sufficient proof. He submitted that there was no evidence adduced to prove that the said affidavit had been executed by the deceased since the specimen signature of the deceased was not shown. And in any event, he submitted, it was only a photocopy of the affidavit and no evidence had been led to show where the original affidavit was.

Mr. Okundi also took issue with the letter from the Chief of Kariokor, (P. Exh.6), saying that it was only a copy and since PW1 had in cross examination stated that their marriage under Kikuyu customary law took place in Gatanga Division, only the Chief of Gatanga could confidently testify that the deceased had married the first Plaintiff.

On this issue, I am of the view that the first plaintiff adduced sufficient evidence which, on a balance of probabilities, proved that she was married to the deceased. It has to be borne in mind that no marriage certificates are issued when people marry customarily and such marriages can only be proved orally and by taking into consideration factors like observance of the customs of the tribe under which the marriage took place for example payment of dowry, naming of children of the alleged marriage, the conduct of the parties, etc. Apart from the affidavit which was sworn by the deceased, the first Plaintiff and the deceased had a child together and his birth certificate was produced in court. The child was named after the deceased's father. There was evidence that the two had cohabited since 1986 to 1998. The Chief of the area where they had a home knew them as a husband and wife. At Stima Sacco Society Ltd. the deceased had registered the first Plaintiff as his next of kin. In the absence of any evidence to controvert that of the first Plaintiff, I hold that she was the deceased's wife.

Regarding quantum of damages, under the heading of **Pain and Suffering**, evidence was adduced that the deceased died a few hours after the accident.

Under the Law Reform Act, damages are awardable for pain and suffering.

The sum awarded is determined by the amount of time that the deceased suffered pain from the time of the accident to the time when he died. I will award **Kshs.10,000/-** for pain and suffering.

For loss of expectation of life, the deceased was 36 years old. Counsel for the plaintiffs urged the court to award Kshs.100,000/-. He relied on the case of **RABECCA SAVETHI MWANGI VS EASTERN BUS**

SERVICES LTD & ANOTHER HCCC No. 275 of 1998 (unreported) where the deceased was 36 years old and the court awarded Kshs.100,000/- under that heading. The defence submitted that a sum of Kshs.70,000/- was reasonable and he relied on HCCC No. 2005 of 1999 **MARGARET WANGUI KIOKO VS MUUS KENYA LTD** where the deceased was 39 years old and a sum of Kshs.70,000/- was awarded. I will award a sum of Kshs. 80,000/- for loss of expectation of life.

I now turn to the claim for **Loss of Dependency** under the Fatal Accidents Act.

Loss of dependency is a question of fact which must be proved. The first Plaintiff testified that herself and her son were dependent on the deceased.

Even though she was employed and earning Kshs.12,000/- per month and used to assist in financing the home budget, her testimony was to the effect that the deceased used to pay the house rent of Kshs.12,000/- and pay school fees for his son amounting to Kshs.9,000/- per month. He also used to give her about Kshs.12,000/- per month for the house upkeep.

The deceased's gross salary and allowances was approximately 110,000/- and his average net salary was about Kshs.48,000/-. This average net salary was after taking into account the average of all the monthly deductions and subtracting that sum from the gross earnings.

Since school fees is not payable every month, it can reasonably be said that he was spending about half of his income on his family. I will therefore adopt that to be the dependency ratio. The deceased was progressing very well in his career and judging from the successive promotions and salary increments which he was getting in the last few years of his short working life he was destined for greater things. This is a factor which the court can take into consideration in assessing general damages for loss of dependency as was held by the Court of Appeal in **ATTORNEY GENERAL VS WAIYERA [1983] KLR 97**. If he had lived to work upto 55 years, no doubt his salary would have increased considerably. In my view, an average net salary of Kshs.60,000/- would be reasonable.

Regarding the multiplier, the deceased was 36 years old and would probably have worked until he attained the retirement age of 55 years and possibly as a professional he would have worked for a much longer period barring the unforeseeable mishaps and events in life. If he worked until he was 55 years, he would have had another 19 years before retirement. But because of the so called contingencies of life, I will scale down the multiplier from 19 to 15 years.

I therefore tabulate the claim for loss of dependency as follows:-

$$60,000 \times 12 \times 15 \times \frac{1}{2} = 5,400,000/-.$$

With regard to special damages, the same were not proved and so I disallow the claim of Kshs.1,800/-.

The total claim is therefore tabulated as hereunder:-

DAMAGES UNDER LAW REFORM:

(a) Pain and Suffering - Kshs. 10,000/-

(b) Loss of Expectation of life - Kshs. 80,000/-

DAMAGES UNDER FATAL ACCIDENTS ACT:

(c) Loss of Dependency - Kshs.5,400,000/-

TOTAL - Kshs.5,490,000/-

It is a principle of law in assessment of damages that where a claimant is awarded damages both under the

Law Reform Act and the Fatal Accidents, the former should be deducted from the latter, see **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE, GATHOGO KANINI VS A. M. LUBIA & OLVER LUBIA (1982 -88) 1 KAR 727** . I would therefore subtract Kshs.90,000/- from Kshs.5,400,000/- which will bring the figure to Kshs.5,310,000/-.

In terms of the consent on liability which was recorded by the parties, the Defendant will pay 70% of the aforesaid sum which comes to Kshs.3,717,000/-.

Judgment is therefore entered for the plaintiffs against the Defendant for Kshs.3,717,000/- plus costs and interest.

DATED at Nakuru this 4th day of October 2004.

DANIEL MUSINGA

AG. JUDGE

4/10/2004