



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 587 OF 2003

ROSEMARY K. KASINA PLAINTIFF

VERSUS

KENBLEST LIMITED DEFENDANT

JUDGMENT

On the fateful day of the 10th of March 2001, the deceased, the late Fredrick Kasema Musembi was standing off the road on the Mombasa Nairobi road. This was near the area known as Lukenya-Machakos/Nairobi road. A motor vehicle driven by John Ndichu and owned by Kenblest Ltd knocked the late F.K. Musembi thereby causing him fatal injuries.

His widow, Rosemary Kasina filed suit against the said owner and driver of the vehicle seeking compensation for the wrongful death of her husband. I pause to state that the correct title of a suit filed on behalf of our estate or depending ought to be as follows:-

Rosemary Kavuu Kasina and Veronica Kiniu (suing as administratrix of the estate of the late Fredrick Kasema

Musembi) Plaintiffs

vs

Kenblest Ltd 1st defendant

John Ndichu 2nd defendant

(It is hoped in future that such correct titles to suits are sued).

The defendants entered appearance and filed defence. They attributed negligence on the part of the deceased.

1) LIABILITY

When the suit came up for hearing on the 24th of November 2004 the parties conceded to the issue of liability and judgment on liability was accordingly entered in favour of the plaintiff against the defendant at 80% to a ratio of 20%. The parties are not able to agree on quantum. They asked this court to determine the same.

2) QUANTUM

1) Law Reform Act Cap.26

Laws of Kenya

In order for a suit to be filed under this head, the plaintiff parties must hold letters of administration intestate where no will was left.

In this case the plaintiff holds letters of administration with another but when she filed suit she filed it in her personal capacity not mentioning her co-administratrix. The effect of this is that she is not entitled to the claims under the Law Reform Act. I would accordingly dismiss the claim.

The law requires that I compute my award that I would have given if this claim had been successful.

i) Pain and suffering

No evidence had been led from any eye witness to show how long the deceased was alive after he was knocked down. The death certificate reflects death being on the said Lukeya-Machakos-Nairobi road. I would in the event not have made an award under this head.

b) Loss of expectation of life

I noted that the deceased was a successful business and progressive. I would have given a conventional sum of Ksh.70,000/- under this head.

II) Fatal Accidents Act

Loss of dependency

The deceased was a director together with his wife the plaintiff of Las Airfreight Ltd – certificate of registration produced Ext P8. This business was very successful and the senior management he had would earn a commissioner on the business bright in. His widow wife – the plaintiff herein would get a fixed sum from the business of Ksh.100,000/- per annum.

The business was audited by M/s Kosieyo and Partners Ltd between 1998, 1999 and 2000. PW2 John Elly Otiende – an auditor who has had accounting experience since 1971, having started as an account clerk, gave a detailed description of the business which dealt with the clearing and forwarding business. He produced income tax receipts from the Kenya Revenue Authorities that reflected payments of income tax to the government of Kenya.

The business as it stood at the time this case when for trial is no longer in existence because the workers and senior management left to start their own business similar to that of the deceased and took with them all the customers thus contributing to the down fall of the business.

This court is required to determine from the evidence what the dependency ratio the multiplier and the multiplicand would be.

a) Dependency ratio

The plaintiff stated that she and the deceased married in 1986. They lived in the Umoja area of Nairobi and had 4 issues of the marriage. The deceased had brother, sisters and parents. Her relationship with them was not very good. In 1994, they began the Las Air Freight company. It seems that the said company was wholly run by the deceased whilst the plaintiff was a sleeping partner. She confirmed to court that she and her children were dependent on the deceased. I would accordingly take the 2/3rd dependency ratio.

b) Multiplier

The deceased was aged 49 years old at the time of his death. What would be the multiplier?

The advocate for the plaintiff relied on the case law of:

i) Constance Kanyorota Ngungi

V

Coast Bus Co. Ltd & Another

Hccc 3344/94 Kasanga Mulwa

Where the plaintiff's late husband who died as a result of a road traffic accident passenger sustained fatal injuries. He was a farmer aged 51 years old (a certified accountant had been called to prove the deceased's earning). The court awarded a multiplier of 14 years reflecting that the deceased would have retired at the age of 65 years old.

The advocate recommended I give a multiplier of 16 years. The advocate for the defendant on the other hand found 10 years to be adequate. He brought to this court's attention the authorities of:-

c) Mary Wahu Mwaura

V

Warsano Omar Farah

Hcc815/00, Ang'awa,J

Where the plaintiff's late husband was travelling in a motor vehicle along the Nairobi-Naivasha highway as a passenger and met his death in a road traffic accident (29.5.97). The deceased was aged 45 years old and a multiplier of 10 years was awarded. A second case of:-

d) Patricia Nzila Wambua

V

Christopher Ngara Kabogo

Hcc336/98, Ang'awa,J

Where the plaintiff's late husband died as a result of a road traffic accident whilst driving a motor vehicle that collided with a matatu public serviced vehicle. The deceased was 39 years old employed at a bank.

This court applied 16 years as multiplier.

not have a pension when he retired. As a person who is a businessman would work longer than a formally employed person, I would agree that a multiplier of 10 years would be appropriate.

c) Multiplicand

An award is arrived at from the evidence that is tendered by the plaintiff. She called a qualified auditor who tabled the accounts and which he stated that the deceased would take home Ksh.80,000/- per month.

The advocate for the plaintiff stated that he concedes the income of the deceased was Ksh.80,000/- but because the two were directors this be divided equally to 90,000/- per annum.

Thus in a month a sum of Ksh.7,500/- be awarded Thus a multiplicand (an awards of Ksh.7,500/- x 10 x 12 x 2/3 = Ksh.675,000/-.

It is difficult to understand this reasoning. The income tax per annum was itself Ksh.67,141 what therefore remains to be seen is that a sum of Ksh.75,00/- could in effect not reflect what the audited accounts showed the deceased earned.

There was an allowance given to the widow (recently began) but she confirms receiving men from the deceased but most certainly not Ksh 7,500/-. I note the very well document evidence of the auditor. I would accept Ksh.70,000/- as recommended by plaintiff and taking into consideration the audited accounts.

Thus the award under the Fatal Accidents act be as follows:-

$$\text{Ksh.70,000/-} \times 10 \text{ years} \times 12 \times \frac{2}{3} = \text{Ksh.5.600,000/-}$$

Under the Fatal Accidents act I am required to apportion this sum amongst the dependants and to discount it. Being a woman, the possibility of an early remarriage and lump sum payment maybe there.

I require to discount this figure which I do by Ksh.50,000/-.

This gives a figure of Ksh.5.550,000/-.

The plaintiff was able to prove that she had 4 issues with the deceased who are all minor.

I accordingly apportion and make award as follows;-

1) Rosemary Kavuu Kasina – widow Ksh.1.150,000/-

Farida Kalondu

3) Daughter born 28.2.87

Daughter born 10.1.88 Ksh.1.100,000/-

4) Anne Nzula

Daughter born 7.5.90 Ksh.1.100,000/-

5) Ernest Musembi

Son born 6.2.92 Ksh.1.100,000/-

Ksh.5,550,000/-

The children are still minors now aged 17 years,16,14 and 12 years respectively as of this year.

I hereby order that the sum of Ksh.4.4 million due to the children be invested in an interest earning account with the East African Building society. That it be deposited in the name of the Registrar of the High court of Kenya, the plaintiff and a second administrator/adminisitrix (That the said to reflect the requirements of Seciton 58 of the resulting trustee as provided under the law of Succession Act).

All said sum should not be withdrawn until the children attain the age of majority. Parties be at liberty to apply.

Special Damages There was no proof for police abstract receipt nor did the plaintiff speak of it. The

reference to a claim of funeral expenses of “to be supplied” is unacceptable. Special damages must be pleaded and particularized.

In Summary

I enter judgment for the plaintiff for the proved sum.

1) Pedestrian motor vehicle collision

2) Male adult aged 49 years in 2001

3) Injuries:-

Fatal

4) Liability (agreed)

80% against the defendant

20% against the plaintiff

5) QUANTUM

1) Law Reform Act Nil

Cap 26 Laws of Kenya

Possible award

a) Pain and suffering Nil

b) Loss of expectation of life Ksh.70,000/-

Where the title of a suit does not disclose the plaintiff is an administratrix nor the names of a co-administratrix the plaintiff is not entitled to the sum claimed under the Law Reform Act.

II) Fatal Accidents Act

Cap.34 Laws of Kenya

a) Loss of dependency

Ksh.70,000/- x 10 x 12 x 2/3rd Ksh.5,600,000/-

Discounted Ksh. 50,000/-

Total Ksh.5,550,000/-

As per the apportionment

III: Special Damages

a) Police abstract 100/- with no

evidence called

b) Funeral expenses

“to be supplied” unacceptable to court Special damages must be pleaded and particularized

Final total Ksh.5,550,000/-

I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this suit.

Dated this 7th day of December, 2004 at Nairobi.

M.A. ANG’AWA

JUDGE

Kibatia & Co. Advocates for the plaintiff

Anil Joshi & Co. Advocates for the defendant