



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 198 OF 1991

CYRUS MUTHENYA KINGORI PLAINTIFF

- VERSUS -

SHANTABEN PATEL DEFENDANT

J U D G E M E N T

The plaintiff filed suit on 14.3.1991 claiming Damages arising as a result of a Fatal accident involving his elder brother Moses Mwangi Kingori (deceased).

On the 26th January, 1985 at around 6.00 p.m. the deceased was repairing a broken bicycle at a pavement along Kiponda Road, Nairobi when the Defendant drove her car Registration No. KVE 814 causing it to collide with him causing fatal injuries. The plaintiff filed suit after obtaining leave to file the same out of time.

In the said suit he attributes the accident to the negligent manner in which the Defendant drove, handled or managed her said motor vehicle. At the hearing, he produced the proceeding in the Traffic Case No.18035 of 1986, Nairobi which the defendant was convicted after a full trial and fined Kshs.7,000/=.

Two witnesses testified for the plaintiff's case, that is the plaintiff himself who said the deceased was a charcoal dealer and that the time of the accident he was a student and the deceased used to pay his School fees of about Kshs.6,000/= per Term. The second witness was John Kito Kiboy who was a charcoal dealer and operated his business next to that of the deceased. He testified how on the material day he saw the defendant's motor driving fast and hit the cabway causing it to loose control and swerved onto the pavement where it hit the deceased. He took him to hospital but was pronounced dead. He also testified that at the time he used to earn between Shs.10,00/= - 12,000/= per month from his charcoal business and the deceased used to earn around the same amount. In cross-examination he admitted they didn't pay income tax and that once in a while they would have a drink and a good meal.

For unexplained reasons, the case took about 7 years after the taking of the plaintiff's case to continue. At the hearing, the defendant was absent and so was her Counsel. An Affidavit of service and a hearing Notice were filed and the plaintiff having satisfied the court that service of hearing Notice was effected the case did proceed. The plaintiff decided to close their case and submit. The plaintiff's evidence on both liability and quantum is therefore unchallenged.

On liability, I do find the defendant 100% liable and this is given strength by the conviction in the traffic case in which she was Charged with Causing Death by Dangerous driving.

On Damages, Mr. Naban Swaleh submitted that an award of Kshs.100,000/= for pain and suffering should be awarded. However I note that no evidence was adduced to show how long the deceased was

alive before succumbing to the injuries. In the circumstances, I will make an award of Kshs.70,000/=. On loss of expectation of life, the deceased was 31 years of age and Mr. Naban submitted a multiplier of 23 years would be adequate. He relied on the case law in RUTH M. MASHA –VS- JOHN M. NCIDINGA, HCC.300 (1998 (UR) MSA; and RACHAEL I. IGUNZA –VS- NYENJERI KAMAU, HCC.340/93 MSA. (UR).

The deceased is said to have been earning between Kshs.10,000/= - 12,000/= per month. However this amount has not taken into account his capital expenditure. And also in the absence of any documentary evidence, I will take a figure of Kshs.5,000/= to be his net income and a multiplier of 23 years, i.e. $(23 \times 1/3 \times 5,000 \times 12)$ giving an amount of Kshs.460,000/=.

On special Damages I will not make an award as this was not pleaded. The final result is that the plaintiff will have Damages as follows:-

a) pain and suffering	- 70,000.00
b) Loss of expectation o life $(23 \times 5,000 \times 12 \times 1/3)$	- <u>460,000.00</u>
Total	- <u>530,000.00</u>

The plaintiff shall also have costs of the suit.

Dated and Delivered at Mombasa this 28th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE