



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI(MILIMANI LAW COURTS)

CIVIL CASE 1202 OF 1992

KINYOSI KITUNGI..... PLAINTIFF

VERSUS

SIMON OKOTH OBOK & ANOTHER.....DEFENDANTS

JUDGMENT

This suit was filed in this High Court of Kenya Nairobi on the 4th of March 1992 by M/s J.K. Kinyanjui and Co. advocate. It is a suit against Simon Okoth Obok an agent and or servant of M/s Nyao Bus Service Corporation, the 1st and 2nd defendants respectively.

On the 2.1.91 Nthenya Kinyesi, a 16th year old daughter of Kinyosi Kitungu (the plaintiff herein) was involved in a traffic accident whereby the 1st defendant had lost control of a bus when it lost control and rolled along the Nunguni/salama road. As a result of the said accident Nthenya Kinyosi sustained fatal injuries.

A) DELAY OF CASE AND JURISDICTION

The defendants entered appearance and filed defence through M/s Onyancha Bwo'mote Congo & Co. Advocates. Between 1993 (when summons for direction were taken up) and the year 2000 no action on this file was taken. In the year 2000 M/s Agina and Associates Advocates came on record by a notice of change of advocates (21.11.00). The 2nd defendant went into liquidation. The official receiver did not officially come on record until November 2003. It is imperative that there be filed a notice of change of advocate when this occurs. Order III CPR requires to be complied with when they take over the cases to ensure that the correct representation is reflected.

On the 15.10.03 the suit came up for hearing before Ouna J. who had been assigned temporary duties as the judge handling the running down cause. He heard the evidence of the plaintiff and directed that the parties file written submission.

Justice Ouna was not available to further proceed with this matter. The then duty judge (Nyamu, J) placed this matter before me on submission on quantum. I am permitted to hear this case under order 17 r 10 CPR.

B) LIABILITY

When the matter was placed before me I realised that the issue of liability had in fact not been noted by the parties in the file. The parties nonetheless had agreed on liability at 100% against the defendants — jointly and severally. Judgment was accordingly entered.

B) QUANTUM

The issue left for determination is that of quantum. The parties had entered into agreed issues on 14.7.03 and filed the same on 28.7.03. The earlier issues of 21.11.00 were not agreed to.

The issues left for determination concerning quantum are:-

No.4. What was the age of the deceased prior to her demise?

No.5. How much money was the deceased earning per month?

No.6. Who are the dependants of the deceased?

No.8 Has the estate and dependants of the deceased suffered loss, injuries and damages?

No. 10. Which party is to bear the costs of this suit?

I: Fatal Accidents Act Claim Issue No.4. What was the age of the deceased prior to her demise?

The evidence before the court was that at the time of demise the deceased was aged 16 years old. I would indeed accept this as the correct age as per the death certificate. The plaintiff put her age at 17 years old.

Issue No. 5

The plaintiff stated that the deceased was looking for a job. There is therefore no evidence that the deceased was employed. She had attained a level of education up to Std. 8.

Issues No.6

This issue deals with the dependants of the deceased.

It is therefore a claim under the Fatal Accidents Act. Under this claim no letters of grant is required in order to file suit. The law requires that a dependant (described under section 4 of the Fatal Accidents Act) as a child, spouse, or parents may sue for compensation.

In this case the plaintiff sued under this act Section 8 though requires that the dependents must be particularized in the plaint. No particulars are disclosed save the words "to be furnished later". No amendments were done to reflect who the dependents are. I would dismiss this claim as not having been pleaded and particularised in the plaint.

I am required to give a possible award by law.

At the age of 16 — 17 years old a minor is not a person to have dependents. I nonetheless recognize a parent's expectation of their children as expressed by Nyarangi JA in the case of -Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & others (supra)

The plaintiff was to prove the issue of dependency. The deceased was unemployed. I therefore have no multiplicand. I could have used the minimum wage of Ksh.3, 000/- per month. She being 16 years say 17 years would have later gotten married and worked perhaps to the age of 55 years old. The multiplier (55 - 17 years = 38 say 35 years) Thus $12 \times 35 \times 3,000/- \times \frac{2}{3}^{\text{rd}}$ Ksh.840.000/-

I would have discounted Ksh.40, 000/- being accelerated lumpsum payment. The total being Ksh.800,000/- that I would have possibly awarded under the Fatal Accidents Act. The claim stands dismissed.

||: The Law Reform Act

Issue No. 8

Before a claim under the Law Reform Act is entertained there must be locus to sue on the part of a plaintiff. In the case law of:-

Troustik Union international & another v Jane Mbeyu & another CA Apaloo C.J, Kwach, Cockar the court of appeal Omolo, Tunoi, and JJA.

Set out the law that a suit by an estate of a deceased person must ensure before filing suit that the plaintiff holds letters of grant or letters of administration intestate.

In this case, the plaintiff filed suit in 1992. He produced during the trial the Limited Grant of Letters of Administration an litem dated the 26.4.01.

This is indeed fatal to the suit. Namely: the letters were to be taken out before the suit was filed and not after. It thus means that this court had no jurisdiction to entertain the suit and as such the claim be and is hereby struck out. What the plaintiff should have done is to have withdrawn the claim and filed a fresh claim after obtaining leave of the court to file the suit out of time and after obtaining the said Limited Letters of Grant.

The law requires that I state what would have been my possible award.

I Law Reform Act.

i) Pain and suffering I would not have awarded any award under this head. The reason being is that the deceased died "instantaneously" see the evidence of PW1.

ii) Loss of expectation of life. I would have awarded a conventional sum of Ksh.70, 000/-.

ii) Lost years This is the correct claim to be made for a minor. The case of: -Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & Others (supra) Deals with this in depth.

The Plaintiff required to bring evidence of a career Person who is able to describe what the deceased would have embarked in future. Did she want to be a teacher? A doctor? A pilot? Then the respective career persons would come to give evidence to be able to know how much she required to earn in future.

As it stands the deceased was unemployed. The lost years would have been based on the minimum wage (which is not really an ideal situation to deal with due to the lack of evidence) Thus $3,000 \times 12 \times 35 \times \frac{2}{3} =$ Ksh.840, 000/-

If the two claims under the Law Reform and Fatal Accidents are awarded the sum is taken into account. The higher sum only is awarded and not both. I struck out this claim.

III: Special Damages

The parties agreed to Special Damages of Ksh.5,120/- which is accordingly awarded as prayed.

Obiter Dictum

The documents produced in this trial were not the original. It is noted that as far as possible the original documents ought to be produced. Where the original is not available an explanation by a witness must be given. The copies are to be certified as a true document of the original.

In this case the advocate of plaintiff stated his former advocate had closed his office and is out of the country. This is not evidence but a statement from the bar.

I enter judgment on the proved claims.

In Summary:

- i) Female minor aged 16-17 years old in 1991.
- ii) Bus passenger - road traffic accident
- iii) Injuries- Fatal
- iv) Liability (agreed) 100% against the two defendants jointly and severally. The 2nd defendant being vicariously liable,v) Quantum

A) Law Reform Act: - NilPossible award:-

- i) Pain and suffering - Nil
- ii) Lost years

Ksh.3, 000/- x 12 x 35 x 2/3rd Ksh.840, 000/-iii) Loss of expectation of life Ksh.70, 000/-

B) Fatal Accidents Act NilPossible Award

Loss of dependency

Ksh.3, 000/- x 12 x 35 x 2/3rd Ksh.340, 000/-

Less discounted Ksh. 40.000/-

Ksh.800,000/-

Subject to apportionment

B) Special Damages

(agreed) Ksh. 5.120/-

Total Ksh. 5 1?0/-

I award the costs of this suit to the plaintiff; I award interest on Special Damages from the date of filing suit at court rates. Dated this 19th day of November, 2003 at Nairobi.

M.A. ANG'AWA

JUDGE

Agina & Associates advocates for the plaintiff

Tabitha Mwaniki Official Receiver & Provisional Liquidator for the defendant