



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 111 of 1999

SALOME ONYANGO OLUOCH.....PLAINTIFF

VERSUS

PHILIP MATHEKA NDUNDA..... 1st DEFENDANT

MUINDI MUSYIMI ALIAS MASUVA t/a SUNSET BUS SERVICES.....2nd DEFENDANT

JUDGEMENT

The plaintiff Salome Onyango Oluoch brought this case in her capacity as a widow and administrator of the Estate of Charles-Onyango Oluoch the deceased against the defendants Masuva t/a Sunset bus services. The action is for the benefit of the estate of the deceased and on her own behalf and that of the children as dependants.

The deceased was aged 35 years and employed as a driver earning Kshs.5, 500.00 per month. She herself is a housewife and she and the children were dependent on the deceased and by reason of his death they have suffered loss and damage and have lost support. In consequence thereof she claims general damages both under the law reform and fatal accidents acts and special damages of Kshs.67, 450.00.

Before filing the suit she obtained letters of administration and issued statutory notice to the insurers of the defendant's motor vehicle.

When the suit was filed the papers were served on the defendant but they filed no papers in response and the court being satisfied that they had due notice allowed the plaintiff to proceed by way of formal proof.

PW1 is the sole witness. She gave evidence that she was not at the scene but was informed of the accident shortly afterwards. She was officially married to the deceased as shown by exhibit 1. She took out the grant exhibit 2, obtained an abstract exhibit 3 which showed that the deceased died in the said accident. The deceased died at the age of 35 years as shown by the death certificate exhibit 4. A search was carried out at the registrar of motor vehicles registry and it showed that the registered owner of the vehicle is Philip Matheka Ndunda (m/v reg. No.KKT. 230 exhibit 8). The deceased was employed by Ring Auto Spares at a monthly salary of Kshs.5, 000.00 as shown by exhibit 6.

The deceased had four children with PW1 whom PW1 narrated in her evidence and produced their clinic cards exhibits 5(a), (b), (c), (d), the cards show that the deceased and PW1 are their parents. She incurred funeral expenses as shown by the receipts 7a-d.

It is further her testimony that the driver of the defendant was in the wrong as he was prosecuted vide Machakos Principal Magistrates Court case No.5 of 1996 where he was charged with causing death by dangerous driving in two counts and one count related to her late husband. The accused was Raphael Musa Nzioka who was an employee of the defendant. The vehicle driven by the accused collided with motor vehicle KTE 607 whose occupants were Charles Onyango Oluoch and James Munyaka. He was found guilty of both counts, convicted and sentenced to a fine of Kshs.6, 000.00 on count one and discharged under section 35(1) Criminal Procedure Code on count two. The proceedings and judgement were produced as exhibit 9. It is further her contention in paragraph 4 and 5 of the plaint that the driver was in the cause of his employment, which the accident occurred as a result of negligence on the part of the said driver. On the basis of the foregoing she pleads for damages as pleaded.

In her submissions to court counsel for the plaintiff submitted that evidence shows that the vehicle in which the deceased was, was stationery and there were clear signs or warnings on the road. The defendants' vehicle came at a speed and then hit the stationery vehicle and dragged it to a distance which evidence that the defendants motor vehicle was speeding. That this was confirmed by conviction of the driver in criminal proceedings. Further the proceedings are not contested that the driver was in the cause of his employment and so his action binds the employer who are vicariously liable for his torts and the court is urged to so find.

On special damages the court is urged to award what has been proved. As for loss of expectation of life they ask for Kshs.80,000.00.

As for loss of dependency they rely on the authorities cited and urge the court to use a multiplier of 20 years with a dependency ratio of 2/3 at a salary of Kshs.6, 000.00.

The court was referred to the case of Pauline Kulola Mwandime Versus Duncan Mwandayo Muikamba Nairobi H.C.C. No.2774/92 where the deceased was a passenger in the accident vehicle. He was aged 35 years at the time of death and the court used a multiplier of 20 years at a salary of 3,052 p.m. with a dependency ratio of 2/3.

The court was also referred to the case of Julius Kanya Kamau versus Njue Kiarie NRB HCCC. 5725/89 and another where the deceased died at the age of 21 years. He was not married. The dependency ratios for his parents were assessed at half the deceased's earnings against a multiplier of 25 years. For loss of expectation of life an award of Kshs.80, 000.00 was made and Kshs. 10,000.00 was awarded for pain and suffering before death as there was no evidence showing whether the deceased met his death during or after the accident.

On liability the court finds that the defendant is to bear the same at 100% because:-

- (a) His driver was in the cause of his employment and so the defendant is vicariously liable.
- (b) The search certificate shows first defendant is the owner of the vehicle.
- (c) The driver was tried found guilty, convicted and there is no evidence to show that he has appealed against that conviction.
- (d) They have not defended the proceedings and so in terms of order 6 rule 9 (1) of the Civil Procedure Rules they are deemed to have admitted all the allegations of the plaintiff as pertains to the particulars of negligence pleaded.
- (e) The Traffic proceedings exhibit 9 and the police abstract exhibit 3 show clearly that the deceased died in the accident complained of the defendant is vicariously liable for the torts of his agent and or driver at 100%.

Having assessed liability I now come to assess damages. Special damages are proved by production of exhibit 3, the abstract for Kshs. 150.00, funeral expenses by production of the receipts exhibit 7(a) to (d).

7(a) - Kshs.8,000.00, suit, 7(b) Kshs.2,800.00, for search certificate for motor vehicle 7(c) Kshs.200.00, hire of vehicle Kshs.35,000.00 7(d) they total Kshs.46,150.00 which I allow on general damages.

(a) Pain and suffering before death Kshs.5, 000.00 as it is not known whether he died instantly or shortly thereafter.

(b) For loss of expectation of life Kshs.80, 000.00.

(c) For loss of dependency the salary of Kshs.5, 000.00 suffered no deductions. He was 35 years and if he were to retire at 55 years he lost 20 years of his employment. The court has to take into consideration also death through natural consequences and the fact that he could have left the job on his own volition. I will therefore use a multiplier of 17 years.

PW1 said that she was a housewife and solely depended on the deceased and the children as well for support. Despite this it *can* not be said that the deceased spent all he earned on the family. He spent some on his own expenses and so the 2/3 ratio rule will be applied; loss of dependency would work out as Kshs.5, 000.00 x 12X17X2/3 which comes to Kshs.680, 000.00.

I left out using Kshs. 1,000.00 for over time because it was payable only when overtime is undertaken.

I, therefore, enter judgement for the plaintiff on the following terms.

1. Special damages of Kshs.46, 000.00 with interest at court rates from the date of filing till payment in full.

2. General damages:-

(i) Pain and suffering Kshs.5, 000.00.

(ii) Loss of expectation of life Kshs.80, 000.00.

(iii) Loss of dependency Kshs.680, 000.00. Total

General damages Kshs.765, 000.00 with interest at court rates from the date of judgement till payment in full.

3. Costs of the suit.

Apportionment

Grand total Kshs.811, 000.00.

1. To Salome Onyango Oluoch widow Kshs.511, 000.00.

2. To the minor children:-

(i) John Ochieng - 17 years,

(ii) Elizabeth Ongina - 16 years,

(iii) Vitalis Oluoch - 12 years,

(iv) Joan Onyango - 6 years.

Kshs.3000,000.00.

4. The minors share is to be invested in an interest earning account in any sound Financial Institution in the joint names of the Deputy Registrar of this court and the mother of the minors.
5. The amount so invested for the minors, is not to be withdrawn without an authority from the court.
6. Interest accrued on the minors account is to be withdrawn by the mother from time to time by order of the court and the same to be applied towards the educational and general maintenance needs of the minors.
7. The balance to be distributed to the minors when they all attain the age of majority.
8. There will be liberty to apply.

Dated, read and delivered at Machakos this 14th Day of November 2002.

R. NAMBUYE

JUDGE