



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT MACHAKOS
CIVIL CASE NO. 76 OF 2000**

JAMES OKOTH NYARERO :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

MOHAMED SHEIKH OMAR BIN

DAHMAN T/A MALINDI BUS SERVICES ::::::::::: DEFENDANT

**10 Coram: J. W. Mwera J.
Ochieng Advocate for Plaintiff
N/A advocate for Defendant
C.C. Muli**

J U D G E M E N T

On 20.4.2000 the plaintiff sued on behalf of himself as a dependant and also as legal representative of the estate of his son Podho Okoth who died in a road accident on 21.4.97 along Mombasa – Nairobi road. The suit was therefore brought under the Law Reform and the Fatal Accidents Acts

. It was pleaded that on the date aforesaid when the deceased Okoth was travelling as a lawful passenger on the defendant’s bus Reg. KAC 126 U, the same was driven so negligently that at a place called Crescent Construction Company, the driver lost control of the said bus. It went off the road and overturned; Okoth was fatally injured. That the bus was being driven at an unreasonably high speed in the circumstances yet without proper control thereof. That that bus was driven recklessly and dangerously and that its driver did not observe the Highway Code at all.

A brief defence filed by the defendant himself on 29.9.2000 denied that the said accident took place or that there was any loss or damage occasioned by it.

Further, that if the accident occurred at all, it was inevitable.

A reply to the defence was filed on 18.10.2000.

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On 19.7.2001 an affidavit of service was filed here to the effect that the defendant was served with a hearing notice for this suit on 9.1.2001 for 19.7.2001 but he declined to accept service. The trial thus went on ex parte.

The plaintiff (P.W.1) told this court that he learnt of his son’s death on the road, on 21.4.97. He

traveled to the scene and saw the bus had fallen to the right of the road as one proceeded from Mombasa to Nairobi. P.W.1 learnt that in that bus his son had been travelling from Mombasa to Nairobi.

P.W.1 made funeral and burial arrangements for Okoth costing some Sh. 20 34,269/= (Exh.P1). He followed that with obtaining a grant to administer the estate of his son (Exh.P.2). The plaintiff also got a police abstract which C.I. Onyancha (P.W.2) produced (Exh.P.5). That Okoth who was not married was aged 24 years (Exh.P.4) and he worked with M/s Victoria Bank. That he earned Sh. 25,443/75 as per the March 1997 payslip (Exh.P.3) of which he gave his father Sh.5,000/= to support himself and assist the other of deceased's siblings. That the plaintiff worked in Kisumu with the Lake Basin Development Authority as an administrative officer. P.W.1 told the court that the driver of the offending motor vehicle was charged in a traffic case at Machakos courts but he jumped bail and so P.W.1 never came to testify in the traffic court.

P.W.2 brought to court the police file concerning the accident in issue. That the bus driver one Salim Mbarak Omar of Malindi Bus Company, owned by one Omar Bin Dahamani was charged with the traffic offence in issue, which P.W.2 described as self-caused. This meant that there was no cause responsible for the fall 10 of the bus save its driver's own act. That Salim jumped bail but a warrant of arrest was still in force for him. The bus landed on the right of the road as one came from Mombasa direction to Nairobi.

The plaintiff's side submitted that the defendant take full liability in this matter and this court agrees. It was not rebutted or explained how the accident occurred when the defendant's bus travelling from Mombasa left the road and overturned on the right of that road. Without such rebuttal or explanation it shall be considered that the accident took place due to the negligent driving by the defendant himself or his agent/servant.

A sum of Sh.120,000/= was proposed for loss of expectation of life citing the cases of :

JONAH KARONJI VS. TORO & ANOTHER NRI HCCC 5198/89 LEONARD BONDO VS. MURUNGU & ANOTHER HCCC 4125/88.

In both cases deceased persons aged 26 years had Sh. 75,000/= awarded to their estates for loss of expectation of life. A sum of Sh. 20,000/= was considered adequate for pain and suffering and again two cases were cited to guide the court:

LABAN WAINAINA VS. KINGORI & ANOTHER NRI HCCC 4148/89

and

FREDRICK MUNGANI VS. KIBUNYI & ANOTHER

10 NRI HCCC 1993/90

. In considering award under the Law Reform Act the plaintiff gets: Loss of Expectation of Life - Sh. 70,000/= Pain and Suffering - Sh. 20,000/= Sh. 90,000/=

Under the Fatal Accidents Act, it was submitted that the deceased's basic salary was Sh. 16,500/= but his gross earnings came to Sh. 25,000/=. Even with Sh. 20 5,000/= P.W.1 said that the deceased used to give him per month, this court was urged to spare one third of the income and adopt a multiplier of 35. This worked at Sh. 3.5 m. loss of dependency. A sum of Sh. 49,419/= was thought adequate for special damages even when the plaintiff did not prove some Sh. 15,000/= of it. Under this Act the following is the award to give: Special damages of Sh. 34,419/= were proved by way of receipts and are awarded.

As for loss of dependency, Okoth died at age 25. As at March 1997 Okoth's net salary at M/s Victoria Commercial Bank Ltd. was Sh. 19,765/95. He was unmarried and his father said that the deceased would give him at least Sh.5,000/= per month as family financial support. No doubt if and when Okoth married such support would reduce as he focussed on his own family. Taking the vicissitudes of life in regard, this

court adopts a multiplier of 15 and awards as loss of dependency

Sh. 540,000/= (5000 x 15 x 12)

And the total award under the Fatal Accidents Act is

: Loss of Dependency Sh. 540,000/=

Special Damages Sh. 34,419/=

Sh. 574,419/=

Accordingly the grant award is under:

Law Reform Act Sh. 90,000/=

Fatal Accidents Act Sh. 574,419/=

Total Sh. 664,419/=

In this nature of cases where the same applicant gets awards under both the Acts as above the award under Law Reform Act should be kept in mind when the award under the Fatal Accidents Act is worked out to avoid double payment to the same applicant. And this is by way of deduction so to speak. (See Kemp and Kemp: The Quantum of Damages).

Having done the foregoing, the net award available to the plaintiff is Sh. 574,419/=. (Five Hundred Seventy Four Hundred Four Hundred Nineteen Shillings) He also gets costs and interest. Judgement accordingly.

Delivered on 27th September 2001.

J. W. MWERA

JUDGE