



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.287 OF 1990

AWADH AHMED AWADH.....PLAINTIFF

=V E R S U S=

SHAKIL AHMED KHAN.....DEFENDANT

J U D G E M E N T

At about 8.05 a.m. on 12.05.1989, 60 year-old Mzee Ahmed Awadh Said (hereinafter the deceased) was lawfully crossing Jomo Kenyatta Avenue in Mombasa when he was knocked down by motor vehicle Registration No.KWW 605 which was owned by the Defendant. He was taken to the Coast General Hospital but succumbed to the fatal injuries sustained in the accident.

One of his sons obtained Letters of Administration for his Estate and commenced these proceedings claiming damages under both the Fatal Accidents Act, Cap.32 and the Law Reform Act, Cap.26 Laws of Kenya.

Although there is a defence on record denying liability there was a compromise recorded by consent of the parties on 24.9.96 wherein liability was apportioned as to 40% against the deceased and 60% against the Defendant. Any quantum of damages would thus be apportioned accordingly. There was also a further compromise on special damages which were agreed at Kshs.12,600/- and judgement therefor was entered on 15.05.2001. The case was then submitted to me for assessment of general damages on the strength of the evidence of three sons of the deceased and the following documents which were produced by consent as Exhibits 1 – 5.

- a) Police Abstract***
- b) Death Certificate of deceased.***
- c) Burial Certificate of deceased.***
- d) Certificate of confirmation of Grant.***
- e) Grant of Letters of Administration.***

The quantum to be assessed is in respect of:

- 1. Pain & suffering.***
- 2. Loss of expectation of life.***
- 3. Loss of dependency.***

On the first issue, it was submitted by learned counsel for the Defendant Mr. Gor that there was no evidence on whether the Plaintiff suffered any pain before death and that therefore nothing was awardable on that head. Counsel for the Plaintiff Mr. Swaleh however submitted that the Plaintiff had stated in evidence that the deceased was taken to hospital where he died later on the same day, and therefore suggested an award of Kshs.40,000/- under that head. He cited Msa. HCCC.482/93 **Mary Awino Adundo –vs- John K. Wambu t/a Kagema Bus Service**, (UR) where Kshs.20,000/- was awarded to a deceased who succumbed to death after a period of 12 hours.

It is indeed so that the Plaintiff here stated that the deceased was taken to hospital where he died. But the Plaintiff was not at the scene and could not therefore testify on the state of the deceased either upon being knocked down or on arrival at the hospital. His can only be hearsay evidence and poor one at that, because it leaves out details on when the deceased was knocked down or when he was collected from the scene or when he arrived at the Hospital and finally when he died. The only saving grace is the Death Certificate produced by consent as Exhibit 2 which shows the date of death was 12.05.1989 and the place of death was Coast Provincial General Hospital, the cause being multiple injuries due to Road Traffic Accident. In the absence of any specific evidence on the period taken before the deceased succumbed to the injuries, I find that he suffered momentarily from the injuries before he died. In such event I assess damages for pain and suffering at Kshs.10,000/-.

As for loss of expectation of life Mr. Swaleh called for an award of Kshs.150,000/- citing in aid Msa HCCC.795/92 Grace Sidi Matsila v. S.A. Khamis t/a Kaloleni Express Bus Services, where Mbaluto, J. stated that “under the Law Reform Act the Plaintiff’s Estate is entitled to Kshs.100,000/- for loss of expectation of life”. Mr. Gor had no serious objection to the figure of Kshs.100,000/- awarded. Indeed that figure has often times been awarded as a conventional one although it still remains the duty of the court in any one particular case to assess it depending on all the circumstances. I see no reason why I should not in this case award such figure and do award Kshs.100,000/- for loss of expectation of life. The more contentious matter was the claim under the Fatal Accidents Act.

The dependants listed in the Plaint are the deceased’s wife, 3 sons and 3 daughters of the deceased. It is also stated that he had a charcoal dealer’s business from which he earned a net income of Kshs.25,000/- per month. It is on that basis that learned counsel Mr. Swaleh called for an award of Kshs.2 million taking a dependency of 2/ 3 and a multiplier of 10.

The evidence given on that matter however is to say the least most unsatisfactory.

In the first place the information given in the Death Certificate Exhibit 2 is that the deceased had “No occupation”. The Plaintiff in his evidence however said he was selling charcoal and his brothers PW.2 and PW.3 supported that assertion. Other than so saying however none of them had anything to show for the details of such business. There were no Books of Accounts, any Bank Account, Income Tax Returns or any other document kept to show that the business existed or made the income stated. In contradictory fashion the Plaintiff said the deceased was selling 10 bags of charcoal per day making a profit of Kshs.18 per bag, that is Kshs.180 per day, while PW.2 said nothing about the deceased’s turnover or income save to compare it with his own similar business which he said sold 9-10 bags and made a profit of Kshs.150/- per day. His profit he said was Kshs.45,000/- per month. PW.2 did not however have anything to show for such figures. In cross-examination he said he quit that business in 1994 because there was too much competition and he was not making money. He became a transporter. Another son PW.3 said the deceased was selling 10 – 12 bags and made profits ranging from Kshs.150 – 180 per bag. He would make Kshs.30,00 – 35,000/- per month. Asked to explain the contradictions, PW.3 said the other brothers who testified were not staying with their father and therefore his evidence should be taken as more accurate. He too had nothing tangible to show for any income generated by his father. The problem is that all three were testifying on oath and purported to tell the truth and the whole truth in the matter. I am not therefore in a position to choose who was telling the better truth! In my finding I do not have any firm basis for determining the multiplicand even if the issue of dependency was answered in the affirmative. Was there any dependency?

On the evidence on record I highly doubt it. In the first place the Plaintiff testified that at the time of

their father's death only their mother was dependant on him. The mother died two years later aged 64 years. Her estate is not a party to these proceedings. According to Exhibits 6(a) – (f), the Birth Certificates all the children were married adults engaged in their own businesses. The Plaintiff himself was aged 40 years at the time of his father's death and had carried on the business of panel beating for 16 years. He is now 53. His sister, Bhukite was born in 1946 and is about 55 years old. She had her own family before her father's death. So were the two other sisters, Rehema and Saida now aged 46 and 44 years respectively. Both PW.2 and PW.3, the other two brothers are aged over 40 and had their families and businesses even before their father died. None of them gave any particulars of the dependency they had on the deceased save the bald statement that they were depending on him.

As neither dependency nor the earnings of the deceased are proved I award nothing for the claim made under the Fatal Accidents Act. There will thus be judgement for the Plaintiff in the sums stated above together with costs and interest.

Dated this 10th day of September, 2001.

P.N. WAKI

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