



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 539 OF 1994

MWALILIPLAINTIFF

VERSUS

EDWARD & ANOTHER.....DEFENDANTS

JUDGMENT

The plaintiff herein is the father and administrator of the estate of one Anjeline Kasyoka Mwalili who died as a result of a road traffic accident. By an amended plaint filed with leave of court on 30.1.96 he pleaded the following cause of action.

“On or about 2nd June, 1993, at about 2.10 pm the deceased was lawfully standing off the Mombasa- Malindi Road when the first defendant drove the second defendant’s said motor vehicle registration No KAA 848V along the said Mombasa-Malindi Road so negligently and recklessly that near the junction of the said road at Bamburi Portland Cement Co Limited, he caused or permitted the said motor vehicle to lose control veer off the road and violently collide with the deceased and knocked down the deceased causing/ inflicting her with serious fatal injuries as a result of which she died on the spot.”

He lay the entire blame on the 1st defendant and gave particulars thereof.

Damages are sought both under the Law Reform Act for the benefit of the estate and under the Fatal Accidents Act for the benefit of dependants who are listed as the two parents, three brothers and a sister. Special damages are also pleaded and particularised at Shs 55,406.

The defendants filed their defence admitting only the fact of the accident on the day and time stated but denying liability for any negligence. On the contrary they averred that it was the deceased who caused her own death through negligent crossing of a busy road.

Eight issues were agreed on for determination, that is:

1. Was the accident referred to in paragraph 4 of the amended plaint caused by the negligence of the first defendant as alleged in paragraph 4 and 5 of the amended plaint or was the said accident caused or contributed to by the negligence of the late Anjeline Kasyoka Mwalili (hereinafter referred to as the deceased) as alleged in paragraph 6 of the defence. If contributed, what was the deceased’s contribution?
2. Did the accident occur in the circumstances and manner as alleged in paragraph 4 of the

amended plaint?

3. What was the age of the deceased and the condition of her health and in what economic activity was she engaged in at the time of her death?
4. Has the plaintiff as the father, been appointed the administrator of the estate of the deceased by virtue of the grant of letters of administration issued by the High Court of Kenya at Mombasa in Succession Cause Number 111 of 1994, and is he entitled to bring this action under the Law Reform Act for the benefit of the estate of the deceased?
5. Is the plaintiff entitled to bring this action on behalf of the dependants of the deceased under the provisions of the Fatal Accidents Act and if so who are the deceased's dependants?
6. What are the funeral expenses and costs for obtaining grant of letters of administration incurred by the plaintiff to bring this action?
7. Are the defendants liable for damages under the Fatal Accidents Act and the Law Reform Act and if so what is the order as to special and general damages?
8. What is the order as to costs?

I will now examine them through the evidence on record. The only evidence on record come from two witnesses of the plaintiff who were cross examined. That is the father of the deceased (PW1) and an eye witness to the accident (PW2). Despite various opportunities being given to the defendants to avail witnesses they did not do so and thus offered no evidence before closing their case. Submissions were made by both Mr Tindika, counsel for the plaintiff and Mr M Njoroge, counsel instructed by M/S Gikandi & Co for the defendants. Mr Njoroge raised an unpleaded issue relating to the liability of the 2nd defendant stating that there was no pleading that the 2nd defendant was vicariously liable for the negligence of the 1st defendant. In the first place I am not at liberty to discuss an unpleaded issue. In the second place I see no merit in raising it since there was no denial, and it is indeed expressly admitted, that the 2nd defendant was the owner of the offending motor vehicle and that it was driven by the 1st defendant. Nothing is said in the defence about lack of authority of the 1st defendant to drive the vehicle. It is therefore non-issue.

As for the first agreed issue there is eye-witness account from PW2 on what transpired on that fateful day. He was a machine operator at Bamburi Portland Cement Factory and was walking to work at about 2.10 pm. He was walking along the Mombasa/Malindi Road toward Malindi direction. On the same side of the road he saw the deceased walking beside the road towards Mombasa direction. Just then the offending car which was travelling fast towards Malindi from Mombasa direction left its side of the road and headed for the deceased on the other side of the road knocking her down and carrying her for 6 metres before stopping 100 metres away. There were no other vehicles on the road at the time the road was straight, and visibility was clear. He rushed to where the deceased was but found her already dead. The witness denied in cross examination that the deceased was crossing the road and emphatically stated that she was already on the other side of the road walking off and beside it towards the bus stage when she was knocked down. He was also emphatic that the car was being driven at high speed and could not be stopped immediately.

There was no other version of eye witness account subjected to cross examination or at all. I see no reason to disbelieve the eye witness on the events he narrated and I accept it. I find on a balance of probability that the 1st defendant was negligent in that he drove at an excessive speed and without due care and attention. The ten acts of negligence alleged in the plaint have not been controverted in evidence and there has been no evidence to support the allegations of negligence against the deceased as pleaded in the defence. I do not find such negligence proved. That answers the first issue.

Issue No 2 is also partly answered above. The only discrepancy which counsel for the defendant made an issue of was that the deceased was in motion when she was hit and not stationary as pleaded under that paragraph. It matters not however whether she was in motion or stationary if, as I have found on the

evidence on record, she was off the road and that it was the defendant's car which veered from the road and hit her. The answer to the issue is therefore in the affirmative.

Issue No 3 arises from paragraph 7 of the amended plaint. It was expounded on by the father of the deceased who testified as PW 1. He was working as an attendant in the burning section of Bamburi Portland Cement Factory and was residing with the deceased at the time. He is now retired.

There was no birth certificate produced as proof of the deceased's age. Only a death certificate No 203543 (exhibit 2) issued on 13.7.93 indicating that the deceased died on 2.6.93 aged 21 years. The father (PW1) had no documents to show her schooling records. He said they were lost in the accident. But he testified that she had attended Kithumula Primary and Mbitini Secondary Schools, both in Kitui. She finished form four in a year he could not remember but she came to Mombasa to join a secretarial college and had been attending that college for over 1 year before she met with death. She had four months to finish.

On the evidence that the deceased had finished form IV, I take judicial notice that she was over 18 years old and I further accept the age stated in her death certificate as 21 when she died. I have no evidence to find that she was not in good health prior to her death. She was heading for her college at the time. That answers the issue.

The straight answer to issues No 4 is that a limited grant of letters of administration was issued to the plaintiff by this Court on 4.5.1994. It is exhibit 3. That was before the filing of the suit and therefore I find the plaintiff was entitled in law to bring the action under the Law Reform Act for the benefit of the deceased's estate.

The persons listed as the deceased's dependants are the two parents, one sister and one brother who have attained majority age and another brother, at the time aged 12 years. Strictly these cannot be said to have been the deceased's dependants as she had no income to share with them for their livelihood. What they would be entitled to as part of the "lost years" of the deceased will be discussed under issue No 7. I reject the claim under the Fatal Accidents Act.

Funeral expenses and costs for obtaining letters of administration are pleaded as special damages and framed as issue No 6. The funeral expenses pleaded amount to Shs 47,260 while costs of the letters of administration is Shs 8,040. Another item of special damage pleaded is the police abstract which was produced in evidence as exhibit 1. I accept the sum of Shs 100 as proved. Having been specifically pleaded, the law requires that the special damages should be strictly proved.

The evidence tendered by PW1 in form of receipts issued for expenses incurred. Exhibit 4 was for Shs 1,500 being mortuary fee for 15 days. Exhibit 5 was for a coffin at Shs 4,000. Exhibit 6 was for transportation of the body from Mombasa to Kitui at Shs 20,000. There was however a similar payment of Shs 20,000 for the same item in exhibit 7. That document was challenged by the defendant's counsel as a duplication. The explanation by PW 1 was that he paid for two vehicles in order to transport mourners to the funeral. With respect I think it was an unnecessary expense. Mourners should, if they wish to attend any funeral be able to pay their way to the funeral. That expense cannot be visited on a tortfeasor. I decline to grant the amount of Shs 20,000.

Exhibit 9 is a fee note from M/s Kiambo & Co Advocates for Shs 8,046.60. In his evidence PW 1 said he had paid the advocate some Shs 18,000 to obtain the grant letters of administration but he had nothing to show for it. I accept that the advocates were paid their fees before releasing the file to the plaintiff and I accept as proved the figure of Shs 8,040. Special damages thus proved are

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| (a) Police abstract Shs | 100.00 |
| (b) Funeral expenses Shs | 25,500.00 |
| (c) Grant of letters of administration | 8,040.00 |

Finally issue No 7 on general damages. I have already discounted damages under the Fatal Accidents Act.

It is conceded that the deceased died on the same day of the accident but is entitled to an award for pain and suffering. It is suggested on both sides that a sum of Shs 10,000 would be adequate in the circumstances of this case and I agree. I award that sum.

Mr Njoroge for the defendants submitted that awards for loss of expectation of life range from Shs 5,000 to 100,000 and suggested an award of Shs 80,000 here, while Mr Tindika suggested Shs 100,000. As I stated in HCCC 164/94 *Yahya Hussein vs Mwawira Charo & another* (UR) on the authority of *Mueni Nzioka vs Kerai* CA 154/155 of 1996 (UR) awards for loss of expectation of life are not conventional and that question has to be decided by the judge on the merits of each case. In this case where the deceased was aged 21 I assess damages for loss of expectation of life at Shs 100,000.

The final award is in respect of what the Courts have come to recognize as a special feature in African families. It was eloquently propounded by Sir Udo Udomma CJ in *Muwanga - vs- Jiwan* [1964] EA 171 at page 177.

“I think it is right also that the Court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense involving more often than not great personal sacrifice. Such children are naturally in turn expected to assist in domestic work while at school and after school, on gaining employment, to make a contribution toward the maintenance of the family, the family being used here, not in the European sense, but in the African sense, which anthropologists usually refer to as the kindred or extended family.”

Some judicial opinions expressed thereafter however favoured evidence proving that by the death of the deceased the plaintiff has lost a reasonable probability, and not merely a speculative possibility of pecuniary advantage. That would put a stop to speculative claims. There was no question however that the services of the child as expected by the parent are compensable to an extent in damages.

The Kenyan context was ably defended by Nyarangi JA in *Sheikh M Hassan –vs- Kamau Transporters* [1982 – 88] 1 KAR 946 when the Court of Appeal enhanced an award for lost years and he stated:

“The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education is lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, to younger brothers and sisters of the deceased as the deceased matured physically and materially, are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the time is the assessment of a fair award in the circumstances of any one case.”

The plaintiff in this case testified that the deceased had finished form IV and was training to be a secretary. She would have been employed at the same place of work where he was since he had already made enquiries and the personnel officer there had promised to look into the matter of employment when the deceased had finished her college and qualified. In his evidence she would then be earning Shs 18,000 per month which was the salary for secretaries in that company. Shs 10,000 of this could have assisted her parents and brothers and sisters if she was not married. Mr Tindika submitted in the circumstances that a multiplicand of Shs 6,000 be adopted and a multiplier of 28 applied. A dependency of 2/3 would then be taken to leave a figure of Shs 1,509, 406 in general damages.

Mr Njoroge however thought all this was all speculative. In the first place there was no evidence or basis for concluding that the deceased was a bright student and would therefore qualify to be a secretary. The plaintiff had nothing to show for her school records and testified that he was never told whether she

qualified in her form IV examinations and if so how. There were no records to show how well, if at all, she was doing in her secretarial training. All there was were three receipts (exhibits 8(a) (b) and (c) for paying "Typing fee" monthly at Shs 350 at Rifkins Business College. The plaintiff said she was only going in the afternoons. There was nothing to show that she would be employed at Bamburi Portland Cement Co and if so at what salary.

In those circumstances Mr Njoroge submitted that the best approach was that adopted by the Court in *Betty Ngatia vs Samwel Kinuthia Thuita*, Nakuru HCCC 339/98. The Court there relied on a scheme of service for secretarial personnel in Government whose salaries was in evidence. A newly qualified copy typist's salary was adopted at Shs 4,000 and a multiplicand of Shs 1,334 was arrived at after deducting the deceased's expenditure and other statutory deductions. A multiplier of 25 was adopted for the deceased, a young girl aged 19. Mr Njoroge proposed a multiplicand of Shs 1,300 and a multiplier of 20 for an award of Shs 104,000 in this case.

I have considerable sympathies for Mr Njoroge's submissions as I do find the plaintiff's evidence on this aspect rather speculative. In this case I think a fair award in lost years would be a net multiplicand of Shs 1,300 /= and a multiplier of 22. That makes a figure of Shs 343,200 (1400 x 25 x 12) which I now award.

Judgment shall be entered accordingly for the various amounts found due to the plaintiff in the matter. The plaintiff shall also have costs of the suit.

Dated and Delivered at Mombasa this 9th day of May 2000.

P.N.WAKI

JUDGE