



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 106 OF 2003

SANJIT SING SURI (Suing as Administrators of the Estate of

KULDIP SING SURI).....**PLAINTIFF**

VERSUS

1. SILVIA EGGMAN

2. DEREK MUSA CORNEL).....**RESPONDENTS**

JUDGMENT

1. The only determination the parties await in the matter is the assessment of damages, it being that the parties did by consent settle the question of liability on the 21/10/2015. By that consent parties agreed that the liability be shared at 90:10% in favour of the plaintiff.

2. That being the position, the task of the court has been eased considerably and will I go straight to that task. The only detour one needs to take is the evidence led because that will establish the foundation upon which to assess damages.

3. No oral evidence was led but parties did file agreed bundle of documents and agreed that the same be treated as exhibits duly produced and the only evidence to be employed by the court in making is determination. That bundle of documents is dated 17/10/2017 and contains some 8 documents. What I find to be of relevant for the purposes of this determination are the copies of tax returns for the period between January 1999 and December 2000. From those documents there is not much to reveal what the age of the deceased was upon death, just like there is nothing to help determine how long the deceased survived between the time of accident and his death. That short fall notwithstanding, the court shall endeavor to assess general damages under the Fatal Accidents Act as well as Law Reform Act under the usual heads of damages.

Pains and Suffering

4. There being no evidence to support the pleading at paragraph 4 of the plaint, that the deceased died the same day of the accident, I do find nothing to assist the court appreciate how long the deceased endured the pain resulting for being knelled by the defendants motor vehicle. However, there was also no assertion or evidence that the deceased died instantly.

5. That being the case, and having noted that the plaintiff has proposed a sum of Kshs.125,000/= while the defendant has proposed a sum of Kshs.10,000/=, thus both parties agreeing that damages under this head are due and payable, I do award to the plaintiff a sum of Kshs.80,000/=. In coming to this award, I have taken into account the ages of the cases cited by both parties.

Loss of expectation of life

6. Under this heading the plaintiff proposed a sum of Kshs.150,000/= while under-scoring the fact that such an award was made from the first time a Kenyan in the year 1986 in the sum of Kshs.100,000/=. To the contrary the defendant urged that a sum of Kshs.70,000/= would be sufficient.

7. To this court the purpose of general damages is compensatory and intended to be reasonable in that regard. Being so minded, the courts takes the view that a sum that was reasonable some 10 years ago, when subjected to realities of economics like inflation and its effects on the value of money, may not continue to be so reasonable.

8. The court further takes the view that no firm legal basis has laid to have any sum established as a conventional sum for damages under this had. Every time, therefore the court sets out to assess damages under this head, it employs its judicial discretion that must be geared to

serve the interests of justice of the particular case as informed by evidence and circumstances. Taking all into consideration, I do find as my brother, Mativo J, found in **David Kahuruka vs Namay Ann Wathithi [2016] eKLR** that a sum of Kshs.150,000/= would suffice to compensate the plaintiff for the loss of expectation of life of the deceased.

Special damages

9. The plaintiff did plead and pray for a sum of Kshs.20, 000/= being funeral expenses but no iota of evidence was led to support and prove such claim. The law remains that special damages must not only be specifically pleaded but be strictly proved. Here there was no proof and no sum is thus awardable. It is not enough that the court deems it usual that funeral expenses are met as of course.

Loss of dependency/lost years

10. The evidence available from the income tax returns is to the net effect that the deceased as a director of two companies earned a salary of Kshs.55,000, per month and rental income of some 91,500 (gross) per month. It then follows that since the building upon which rent was earned did not just dissipate with the death of the deceased, no loss is envisaged for that source of income. It remains what was then lost was the salary income from the employer Hardware & General Stores Ltd. That sum is consistently shown as Kshs.55,000 per month in all the returns.

11. On it, self-declarations were made and taxes paid. There is no challenge that such was the actual and true income of the deceased. That income was indeed lost upon death. The question to pose and answer is whether that loss is to the estate as it is to the widower as a dependant? The law was settled that dependency is a matter of fact to be proved by evidence^[1], save in cases of minor children where there is emergent jurisprudence that in African and Asian family setups, parent legitimately expect to be supported by their children when the children become of age^[2]

12. Based on such appreciation, and there being no evidence on the extent to which the plaintiff depended upon the deceased, I do find that the damages due for assessment are the best viewed as lost years rather than loss of dependency. That being the case, and taking into account the age of the deceased pleaded to have been 67 years, without challenge, I do consider that the period lost for which damages ought to be grounded upon is 5 years. I say five (5) years taking into account that the employer even, though a family outfit, at some stage the deceased would ordinarily be expected to retire. I therefore consider that even for a family business to retire as age 72 is not too early but reasonable.

13. Accordingly, I would adopt 5 years as the multiplier and multiply the same with the disclosed monthly net takings after tax. In doing so, I have taken regard of the fact that there was tax of Kshs.12,211/= due from the deceased on monthly basis leaving a net of Kshs.32,789/=. Therefore the sum due under this heading works out as follows:-

$$5 \times 12 \times 32,789 = 1,967,340$$

Rendition

14. Judgment is thus entered for the plaintiff as follows:-

Pains and suffering	-	80,000.00
Loss of expectation of life	-	150,000.00
Lost years	-	1,967,340.00
Total	-	2,197,340.00
Less 10% contribution	-	<u>219,334.00</u>
Net due		1,977,606.00

15. On the damages awarded, the plaintiff gets interest at court rates from the date of the judgment till payment in full. The plaintiff equally gets the costs of the suit to be paid by the defendant.

Dated and delivered at **Mombasa** this **20th** day of **September 2019**.

P.J.O. OTIENO

JUDGE

[1] Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013] eKLR

[2] Leonard O. Ekisa & Another vs Major K. Birgen (2005) eKLR,

