



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 148 OF 2010

SUSAN WARIMA MUTHEE

MARY MAMBUI MUTHEE (LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE)

PHILIP MATHENGE NJUREPLAINTIFF

VERSUS

SAMUEL NG'ANG'A MBUGUADEFENDANT

J U D G M E N T

Precis

1. The parties in this suit agreed by consent that judgment on liability be entered and apportioned at the ratio of 70:30 in favour of the plaintiff. This judgment therefore is limited to the assessment of damages only.

Facts and Pleadings

2. By a plaint dated 29/4/2010 and amended on the 18/5/2011, the plaintiff sought against the defendant not only special damages in the sum of Kshs.39,500.00 but also general damages under both the Law Reform Act and Fatal accidents Act together with costs of the suit and interests.

3. Having recorded the consent on liability only the plaintiff gave evidence and produced the documents filed as exhibits. The parties also agreed before hand that for purposes of the assessment of damages, the income of the deceased was Kshs.34,669.15 per month.

4. The evidence led by adoption of witness statement dated 29/8/2016 And the bundle of documents attached thereto showed that the accident occurred on 25/12/2009 and the deceased died on 25/5/2010, some 5 months thereafter. During that duration, the plaintiff gave evidence, the deceased was mobilized by his injuries and complained of pain all the time.

5. The evidence and documents also show that as at the date of his death the deceased was aged 45 years and left behind a widow and three children. The plaintiff gave evidence that prior to his death she and the children were wholly dependant upon the deceased who paid their monthly rent of Kshs.20,000.00 and gave to the plaintiff Kshs.25,000.00 for subsistence and upkeep of herself and the children.

6. While the death certificate indicated the deceased age at 45, the marriage certificate put it at 46 and a

medical report by Dr. Ndegwa put his age when he was examined at 47. The payslip however show that the deceased was aged 46 in November 2009 and was due to turn 47 the year he died. I choose to be guided by the payslip which to me must have captured the true date of birth from primary documents like birth certificate and identification card ordinarily demanded on employment.

Submissions by the Parties

7. In their submissions, the parties concur that the plaintiff is entitled to damages under both Law Reform Act as well as Fatal Accident Act. The only born of contention can be seen to be age of the deceased which I have decided upon above, and the precise measure of damages. That is the duty of court in this judgment to assess and ascertain the damages payable.

Damages under Law Reform Act

Special damages

8. The plaintiff pleaded and sought to recover the sum of Kshs.39,500.00 as special damages. The law is that such damages must not only be specifically pleaded but equally strictly proved. The evidence tendered by way of receipts is Kshs.3,000.00 being the sum paid to Dr. Ndegwa to prepare the medical report. However, I take notice that a police abstract is obtainable at a fee of Kshs.100 and a death certificate is charged at Kshs.300. These are factors within public knowledge and therefore pass as matters of public notoriety the court is entitled to take judicial notice of. The other particulars given as special damages are the costs incurred for transport, coffin and obtaining grant of letters of administration, all add to just about Kshs.33,500. This court proceeds from the understanding that strict proof cannot and does not mean proof by production of receipts only. The court appreciates that to get a grant, one has to pay court fees and have the petition gazetted. Those are also costs regulated by law and deemed knowledge of public knowledge and the court takes judicial notice of the same. Additionally being guided by the court of Appeal decision in *Jacob Ayiga Waruja vs Simeon Abayo [2005] eKLR*, I do not find the claim for special damages to have been exaggerated save for the costs of medical report pleaded at Kshs.5000 but a receipt produced for Kshs.3000.00. I therefore deduct Kshs.2000.00 from the total sum claimed and award to the plaintiff the sum of Kshs.37,500.00

Pains and suffering

9. There is no doubt that the deceased lived for some five (5) months after the accident while wholly immobilized and was unable to undertake basic tasks for himself including attending to calls of nature. Noting that he was a police officer, an engagement that demand constant physical activity and movement all the time I do not doubt that the deceased must have not only suffered physical pain but mental trauma. In the words of Dr. Ndegwa in the medical report compiled some four (4) months after the accident **he was violent if not heavily sedated thus requiring caretake all the time**. The doctor further observed and enumerated several and very severe and extensive injuries all over the body. Taking into account the length of period the plaintiff endured the debilitating injuries prior to death and while noting that the plaintiff herein was at times with him and that there are other heads of damages that I consider awarding to the plaintiff, I assess damages under this had at Kshs.500,000.00.

Loss of expectation of life

10. Damages under the heading are due and are awarded as of course where a death has occurred out of the wrong doing by another. While some courts have given a figure called a convational award, I do not subscribe to that school of thought. I consider damages and assessment of hereof to be at the discretion of the court unshuckeled by any structrues even if those be seen to emerge from decided cases. No two cases are similar on all fours so as to come with a conventional award. In any event other variable would effect was would reasonable today not to be reasonable tomorrow.

11. To the court damages under this head are awarded and aimed at assuaging the bereaved family for the loss of a loved one. Based on such consideration, I award to the plaintiff the sum of Kshs.120,000.00.

Loss of dependency

12. Both side agree that the plaintiff is entitled to an award of damages for lost dependency as the plaintiff and her children remained dependant's of the deceased which dependency has now been lost due to the death. The parties have equally agreed on the multiplicand of Kshs.34,669.15 and that it is the multiplier formular which is best suited for application to assess and calculate such damages. The major contention however is the multiplier or otherwise called the number of years to be purchased.

13. Having determined that the deceased was aged 47 years at death and regard being had to the fact that he was a civil servant engaged as a police officer due to retire at 60 years, all factors remaining constant and being aware and cognizant of the preponderables and vicissitudes, of life and that this is a lumpsum payment made in advance; I adopt a multiplier of 10 years. I also adopt a dependency ratio of 2/3 and work out the damages as follows:-

$$34,669.15 \times 12 \times \frac{2}{3} \times 10 = \mathbf{2,773,532.00}$$

14. In summary, the damages due and payable to the plaintiff by the defendant works out as follows:-

Special damages	37,500.00
Loss of expectation of life	120,000.00
Pains and suffering	500,000.00
Loss of dependency	<u>2,773,532.00</u>
Total	<u>3,431,032.00</u>
Less 30% contribution	1,489,559.00
Net due	1,941,473.00

15. I award to the plaintiff the costs of the suit to be agreed or taxed. On interest, the plaintiff shall get interest at court rates on special damages from the date of filling the suit while the general damages attract interest from the date of this judgment.

16. It is so ordered.

Dated and Delivered at Mombasa this **21st** day of **July 2017**.

P. J. O. OTIENO

JUDGE

21/07/2017