



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 519 OF 2013

MMG

(Administrator of the estate of

ZG, Deceased).....PLAINTIFF

VERSUS

MUCHEMI TERESA.....DEFENDANT

J U D G M E N T

1. This suit is a claim for damages in negligence on account of the death of the Deceased **NG** who died as a result of a road traffic accident on 12/03/2012 along **Mbagathi Way** in Nairobi. The Plaintiff is the Deceased's mother and the administrator of his estate. Damages are sought under the **Law Reform Act, Cap 26** for the benefit of the estate of the Deceased and also under the **Fatal Accidents Act, Cap 32** for the benefit of the Deceased's dependants named at paragraph 4 of the plaint. Special damages are also sought.

2. The Deceased was walking home from school when he was knocked down by motor vehicle registration number **KAD 047P**. He suffered severe injuries and was rushed to hospital. He died the following day while undergoing treatment. It is the Plaintiffs' case that the vehicle was owned by the Defendant and driven by him or his agent, and further, that the accident occurred due to the sole negligence of the Defendant or his agent. Particulars of negligence have been pleaded.

3. In his defence, the Defendant denied liability and put the Plaintiff to strict proof of all the allegations made in the plaint. He denied the Plaintiff's *locus* to bring the suit; that he was the registered owner of the accident motor vehicle; that an accident occurred as pleaded; or that the Deceased sustained fatal injuries in the accident. In the alternative and without prejudice the Defendant pleaded that the accident occurred due to the negligence of the Deceased and also the Plaintiff. Particulars of negligence were pleaded.

4. At the hearing, the Plaintiff's list and bundle of documents dated 23/10/2012 and 16/11/2012 were admitted in evidence as **Exhibit P1** without the necessity of calling makers thereof. The Plaintiff relied on her testimony together with that of an eye-witness. Both witnesses adopted their witness statements filed in court as their testimonies-in-chief. The Defendant did not testify or call a witness although he participated in the proceedings through counsel.

5. The parties filed written submissions. The Plaintiff's submissions were filed on 26/09/2014 while the Defendant's were filed on 01/10/2014. I have considered those submissions, including the cases cited.

The Plaintiff's *locus* to bring this suit is not in contention. She is the administrator of the Deceased's estate. She exhibited documents to that effect. She has also brought the suit in her own behalf as the Deceased's dependant.

Liability

6. The Plaintiff contends that the Defendant's vehicle caused the accident. She produced a copy of the records kept by the **Registrar of Motor Vehicles** which shows that the vehicle was owned by the Defendant. The police abstract further indicates that it was the Defendant's motor vehicle that was involved in the accident in which the Deceased was killed.

7. PW2 testified that the Deceased was on the pedestrian path when the Defendant's vehicle hit him. His testimony was that he was pedal-cycling on the left side of the road while the Deceased and other children were walking on a pedestrian walk-way on the left side of the road. The Defendant's motor vehicle first hit a fellow pedal-cyclist who was behind PW2, then it hit PW2 before it veered onto the pavement and un down the Decease. The Defendant never testified and did not call any witness to explain how the accident might have occurred. Although it is the Plaintiff's duty to establish the Defendant's negligence on a balance of probabilities, the Defendant had a duty, at least to himself, to explain how the accident occurred. Accidents do not just happen; they are usually caused. The testimony of PW2 remained unchallenged. I accept that testimony as to how the accident occurred. On liability I find for the Plaintiff at 100%.

What damages are due to the Plaintiff?

Under the Law Reform Act

8. Under this statute there will be damages for pain and suffering, and also for loss of expectation of life. I have looked at the various cases cited by the parties. The accident that killed the Deceased happened at around 5.00 p.m. on 12/03/2012. He was rushed to hospital with serious injuries which included broken legs. He died on the evening of the following day at about 8.00 p.m. The evidence before the court does not indicate whether or not he was conscious the 27 hours or so but he remained alive after the accident. He must have suffered a lot before he finally succumbed. I will award KShs 20,000/00 for pain and suffering.

9. The Deceased was aged 12 years when he died. He had his whole life before him. All human life is precious, but when a young life is snuffed out as the Deceased's was there is that much more pain and loss felt. It would not have been the same as, for instance, the loss of a 70-year old person who has had nearly his full natural life. I will award KShs 150,000/00 for loss of expectation of life.

Under The Fatal Accident Act

10. A claim has been made by the Plaintiff for lost years/lost dependency. It is her case that had the Deceased lived he would have grown to become a doctor and earn a good living with which he would have maintained her. This claim has been vigorously resisted by the Defendant. The Defendant argues that at 12 years of age the Deceased was too young, and that it is therefore not possible to know with certainty what he would have become in his adult life, thus rendering the claim for lost years highly speculative.

11. I have read the cases cited by the learned counsels for the parties in support of their respective positions on this point. In the cases cited by the Plaintiff the deceased persons were variously aged 5, 12, 16, 17 and 24 years. The case where the deceased was 5 years old was an appeal, **Kakamega HCCA No.107/2007, Joseph K. Chemuren -vs- Alfred A. Mureve**. Liability had been agreed in the trial court and the appeal was against quantum only. The appeal was dismissed.

12. The case where the deceased was aged 12 years was also an appeal, **Nakuru HCCA No 133/2003**. The trial magistrate had awarded KShs 720,000/00 for loss of dependency. The High Court (*Mugo, J*)

dismissed the appeal and increased the award for loss of dependency to KShs 900,000/00. In doing so the learned judge stated as follows -

“The deceased herein was aged 12 years old. He was a bright and confident child, as is demonstrated by the fact he would personally take interest in an Agricultural Show and attend the same unaccompanied. His father testified that he was a clever and respectful boy. Clearly therefore, his future prospects can be said to have been quite good. He would probably complete his education at 22 years if he proceeded to University and probably become gainfully employed at 24 years. Being a Kenyan, he would be expected to contribute towards his parents’ welfare and probably share his earnings with his siblings as well.”

13. The Deceased in our case is described as having been academically bright. He was attending a school of repute, and the testimony of his mother was that he had hopes and expectations of becoming a medical doctor when he grows up. The Plaintiff says that those hopes and expectations, given his brightness in school, were not far-fetched and would probably have been realised had the Deceased lived to grow to maturity.

14. In our Kenyan society parents regularly invest in their children, sometimes denying themselves not only luxuries but also some necessities of life in order that they may attend good schools and attain necessary qualifications in order eventually to secure good jobs through which such children may maintain them in their old age. It is not an unreasonable expectation for a Kenyan parent to have. The Deceased was 12 years old and the Plaintiff was already investing in his education by taking him to a good school in the expectation that her own hopes in him would be realised.

15. I do not accept that the Deceased at 12 years of age was too young for the expectations of his adult life to be purely speculative without hope of realization. He may not have become a doctor or some other high profile professional; but he appeared endowed with sufficient intelligence to at least attain a first general degree in college which would have enabled him to secure a reasonable job that would have probably earned him a monthly salary (less statutory deductions) of about KShs 45,000/00. By the time he would have secured employment he would probably be 25 years old. His and the Plaintiff’s expectations he would have been that he would have a full working life to about 60 years of age. But the vagaries and uncertainty of life must be factored into the equation; we live in an imperfect and sometimes dangerous world full of disease, accidents, civil strife and war.

16. There is also the issue of the Plaintiff’s age as we are essentially considering her loss of dependency upon the Deceased. Although she did not give her age when testifying, she appeared about 40 years as I recall. A **multiplier of 20 years** would be just, and I award the same.

17. I assess the Plaintiff’s dependency upon the Deceased would have been about one-third (1/3) of his net earnings. I will therefore award KShs 3,600,000/00 for lost years/lost dependency calculated as follows -

$$\text{KShs } 45,000/00 \times 12 \times 20 \div 3 = \text{KShs } 3,600,000/00$$

18. The Plaintiff claimed special damages of KShs 635,010/00, The same was proved by production of receipts. I will therefore award the special damages as claimed.

19. In summary, there will be judgment for the Plaintiff against the Defendant as follows –0

- (i) For pain and suffering.....KShs 20,000/00
- (ii) For loss of expectation of life.....KShs 150,000/00
- (iii) For lost years/loss of dependency...KShs 3,600,000/00
- (iv) Special damages.....KShs 635,010/00

The general damages will carry interest at court rates from the date of judgment. The special damages will carry similar interest from the date of filing suit. The Plaintiff shall have costs of the suit. There shall be orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MURANG'A THIS 8TH DAY OF MAY 2015

H.P. G WAWERU

JUDGE

.