



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 221 OF 2011

STEVE TITO MWASYA

JACINTA NDINDA MUENDO (Both suing as legal representatives

of the Estate of Sherrina Koki Tito

(deceased).....PLAINTIFF

VERSUS

ROSEMARY

MWASYA.....DEFENDANT

JUDGEMENT

1. In the Complaint dated 20th June 2011, the Plaintiff sued the Defendant claiming for interalia, compensation following the fatal injuries **Sherrina Koki Tito**, deceased suffered on 11th December 2010 when the deceased was travelling aboard motor vehicle registration KBK 100B following an accident where the defendant allegedly drove the motor vehicle negligently such that it collided with motor vehicle registration number KBH 358 C.

2. The 2nd plaintiff testified in court where she stated that: She was travelling with the defendant, her son and the deceased aboard the motor vehicle registration KBK 100B to her rural home in Kitui. Upon reaching Mbondoni shopping centre, the defendant tried overtaking a motor vehicle that was ahead of her and she lost control of the vehicle and overturned, as a consequence, the deceased was thrown out where she suffered fatal injuries. She was issued with a police abstract and obtained a death certificate. She produced receipts that showed the costs she had incurred for the burial and for obtaining the limited grant. She produced documents in form of identity cards that proved that the deceased used to study in both the University of Nairobi and Strathmore University. Other documents adduced in evidence included a limited grant and a demand letter. She blamed the defendant whom she said was driving at a high speed. On cross-examination, she stated that they all had their safety belts on despite the fact that both her children were thrown out when the accident occurred.

3. The Defendant herein denied the allegations by the Plaintiff. She filed a defence dated 27th July 2011 wherein she denied the averments in the Complaint save for the fact that an accident did occur on the alleged day. She claimed that the accident solely caused by the negligence of the owner or agent of motor vehicle registration number KBH 358C, Hino Lorry. She however did not adduce any evidence in support of her case during the trial.

At the close of the evidence, learned counsels were invited to file and exchange written submissions plus authorities in support of their respective positions. I have considered the same. The parties filed the

following agreed issues:

- i. Whether the Plaintiffs are the legal representatives of the estate of Rosemary Mwasya(Deceased);**
- ii. Whether the Defendant is the owner of motor vehicle registration Number KBK 100B;**
- iii. Whether the Plaintiffs and or the deceased's estate have suffered any loss and damages;**
- iv. Whether an accident occurred on or about 11th December 2010 involving motor vehicle Registration Number KBK 100B and If so whether the said accident was caused by the negligence of the Defendant or whether the same was an inevitable accident due to circumstances beyond the Defendant's control;**
- v. Which among the drivers of the two vehicles KBK 100B and KBH 358C Hino Lorry was negligent?**
- vi. What quantum of damages should be made under the Fatal Accidents Act and under the Law Reform Act, if any?**
- vii. Whether a notice of intention to sue was given;**
- viii. Who should bear the cost of this suit.**

4. On the first and third issues, on whether the plaintiffs are the legal representatives of the estate of the deceased and whether they have suffered any loss and damage; the plaintiffs have produced a death certificate which proved that the deceased was their daughter who was aged 19 years old at the time of her death and was not married. They also produced a chief's letter which confirmed that they are the deceased parents. They further took out limited grant of letters of administration ad litem which authorised them to file this suit. On that basis they qualify as legal representatives of the estate of the deceased with capacity to sue. The plaintiffs further aver that the deceased was a student who studied at the University of Nairobi where she undertook a Bachelor's degree in Commerce and Strathmore University where she was studying Certificates in Accountancy. They assert that she was a promising student with a bright future ahead of her and her death has caused them loss and damage.

5. The second, fourth and five issues are interrelated and I will cover them together. The three seek to answer the questions whether the defendant is the owner of motor vehicle registration number KBK 100B, whether an accident did indeed occur on 11th December 2010 and if so, which of the two drivers was negligent or whether the accident was inevitable. The plaintiff averred that she was with her children, a son and the deceased when they were travelling aboard the defendant's, motor vehicle registration number KBK 100B. She was seated with them at the back seat. On reaching Mbondoni shopping centre along Thika Garissa Highway, the defendant was trying to overtake a lorry that was ahead of her. Upon overtaking it, she left inadequate space between the rear of her car and the front of the lorry causing the lorry to hit her on the rear. The impact caused the car to roll several times and eventually stopped on its wheels. Due to the force, her two children were thrown out of the car and she found them lying 2 meters away from the car. The deceased was bleeding from the mouth, they were rushed to Mwingi hospital where they received treatment including the deceased who later fell into comma and passed away at 8:00 p.m.

6. The defendant in her statement of defence did not deny that she is the owner of motor vehicle registration number KBK 100B. She also did not object that there was indeed an accident only that the same was not contributed by her but she attributed the accident to a third party motor vehicle registration KBH 358C whom she claimed was negligent as he rammed her from behind causing her to lose control of the vehicle. She averred that she would enjoin the owner of the vehicle as a third party.

7. A closer look at the evidence adduced. It is clear that there was an accident in which the deceased suffered fatal injuries. The plaintiff holds the defendant liable for the injuries suffered by the deceased

due to her negligence. The defendant has admitted in her pleadings that there was an accident and only claimed that the same was not caused by her own negligence but by the negligence of a third party whom she categorically stated she would enjoin but she did not do so. She also submitted that the 2nd plaintiff as the deceased guardian should have ensured that the deceased had tied her seat belt. The 2nd plaintiff on the other hand claims that indeed the deceased had tied her seat belt. Though the parties refer to the issue of seat belt, the same does not exonerate the defendant from negligence on her part. I find that the defendant was negligent and is wholly to blame for the accident.

8. Having found the defendant liable, I will consider the sixth issue that raises the matter of quantum; I will deal with the Plaintiff's claim for damages under the following heads:-

(a) Pain and suffering

Damages under this head are awarded on the basis of the time the deceased suffered pain before her death. The evidence shows that the deceased was rushed to hospital where she gained consciousness and was operated on and was later taken to the ward at 6:00 p.m. After half an hour, she fell into comma and passed way at 8:00 p.m. The Plaintiff sought Kshs. 20,000/= under this head .The defendant on the other hand urged the court to award Kshs. 10,000/= while referring to the case of **Salicio Mithika M' Rukunga vs Millicent Wairimu Kimani & another (2006)eKLR**, Lenaola J. where the learned Judge stated that, since no evidence was tendered to justify an award for pain and suffering he preferred to award a nominal sum of kshs 10,000/= for pain and suffering. In the present case, given that the deceased suffered for a couple of hours before her demise, I find that an award of Kshs. 20,000/= under this head is appropriate. In the case of **Kamau Mwangi & Another vs Grace Wangui Macharia [2006] eKLR** Koome J. held that: Considering the age of the deceased and that death was instantaneous, an assessment of Kshs. 20,000/- for pain and suffering was not on the higher side.

(b) Lost years

In determining the award under this head I will take into account the principles laid out by the Court of Appeal in the case of **Hassan vs Nathan Mwangi Kamau Transporters & 4 others [1986] KLR (457):-** In this Judgment of Kneller, JA and which Hancox and Nyarangi, JJA adopted, he took issue with the trial Judge adopting to tabulate expected earnings of the deceased with salary of a High Court Judge. The facts laid before the trial court were that the deceased who died aged seventeen (17) years had completed High School and had been admitted to the University of Nairobi to pursue architecture. Therefore he should have considered earnings of an architect as per evidence tendered before him.

In the present case, the Plaintiff testified that the deceased was 19 years old at the time of her death. She was not in employment but was a student at Strathmore University studying accounts and at the University of Nairobi where she studied Bachelor of Commerce. The plaintiff submitted that the court should base the future earnings of the deceased on the salary of a graduate like that of a magistrate or doctor, in this case a magistrate earns a salary that amounts to kshs 123,750/= per month while an accountant earns kshs 118,564/=. The defendant conversely, argued that a basic salary of kshs 10,000/= would be adequate. On the multiplier, it was the plaintiff's submission that the deceased would have worked until the retirement age of 60 years, if she would have started working at the age of 23 years and therefore urged the court to adopt a multiplier of 30 years. The Defendant relied on the decision of **Haniel Mugo Muriuki vs Morris Min Njaramba HCCC NO. 124 of 2005** where the deceased was a University student aged 24 years old and the court assessed damages for lost years using a multiplier of 25 years. The Defendants on the other hand proposed a multiplier of 25 years upon relying on the case of **Betty Ngatia vs Samuel Kinuthia Thuita, HCCC No. 339 of 1998**, where the court awarded kshs 390,000/= for lost years where the deceased was female student aged 19 years pursuing secretarial course in 1999.

It is now an established principle that the estate of the deceased is entitled to lost years, for the income that would have been earned by the deceased, less the living expenses, assuming that one lived and worked upto the age of retirement. It has been suggested that a salary of kshs 123,750 per month be used with a multiplicand of 30 years less living expenses of 1/3. The plaintiff did not tender any documentary

evidence to establish this point. However, the plaintiff has presented documents showing that the deceased undertook studies learning towards the study of accountancy or finance. I think the appropriate salary to use is that of an accountant or finance officer from the extract of the salary survey of Kenya presented by the plaintiff where such employees earn an approximate monthly salary of ksh.118,546/=. The deceased was aged 19 at the time of her death. I will presume that had she begun to work at the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years. Both the plaintiff's and the defendant agree that the dependency ration should be 1/3. On the head of lost years I make the award as follows:

$118,564 \times 30 \times \frac{1}{3} \times 12 = 14,227,680.$

(c) Loss of expectation of life

The deceased was young and healthy and would have probably lived a long and happy life. Under this head, the Plaintiff sought a figure of Kshs. 150,000/= upon relying on the case of **Zachary Achachi Nyakundi vs Kimilili Hauliers Limited Another (2013)eKLR**, where the court awarded kshs 150,000/= for loss of expectation of life for a lady aged 21 years. In the converse, the Defendant proposed Kshs. 100,000/=, after relying on the case of **Alice O. Alukwe vs Akamba Public Road Services ltd and 3 others (2013) eKLR**. Taking into consideration the authorities quoted, I award Kshs. 100,000/= as general damages under this head which I find to be fair.

(d) Special damages

The Plaintiff pleaded special damages of Kshs. 155,000/= which she proved vide adducing the receipts as follows:-

(a) cost of postmortem Kshs. 35,500/=

(b) Funeral expenses Kshs. 89,500/=

(c) Grant for letters of administration Kshs 30,000/=

Total **Kshs. 155,000/=**

In summary, I enter judgment on liability for the Plaintiff and against the Defendant. The Plaintiff is awarded damages as follows:

(a) *General damages for pain and suffering....* Kshs 20,000/=

(b) *General damages for lost years* ...Kshs. 14,227,680/=

(c) *General damages for loss of expectation of life* Kshs. 100,000 /=

(d) *Special damages* Kshs155,000/=

Total **ksh.14,502,680/=**

28. The plaintiff shall also have the costs of the suit.

Dated and delivered in open court this 6th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant