



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 1222 OF 2004

PAULINA CHEPNGETICH.....1ST PLAINTIFF

SIMON KIPYEGON.....2ND PLAINTIFF

VERSUS

SAMUEL KIPLANGAT BORE.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

By a plaint dated 10th November 2004 the plaintiffs being the administrators of the estate of the Late David Kibii Terer sued the defendants seeking for judgment against the defendants jointly and severally for Kshs 109,000/= as special damages ,Damages under the Fatal Accidents Act, Damages under the Law Reform Act and Costs of this suit. The plaintiffs aver that the 1st defendant being an agent of the 2nd defendant having been employed to drive motor vehicle Isuzu Trooper registration No. GK P871 under the department of police in the office of the president. That on or about the 25th of December 2003, the deceased was lawfully sitting with his friends 20 meters off the main Kericho-Kisumu highway when the 1st defendant negligently, carelessly or recklessly drove or managed the said motor vehicle registration No. GKP871 that caused it to veer off the road knocking the deceased and subsequently causing him fatal injuries.

Judgment on liability was entered for the plaintiff against the defendant jointly and severally in the ratio of 80:20 in court on the 28/05/2013.

Parties filed their submissions in court which I have carefully read and considered. The plaintiffs submitted that at the time of his death, the deceased used to earn an income of over 30,000/=per and relied on the deceased wage inventory cash book which was attached to the bundle of documents to the 1st plaintiffs witness statement.

They further submitted that at the time of his death, the deceased was assisting the 1st plaintiff and other members of the family. He educated his children and took care of the family needs during his lifetime as he was the only employed person in the family. That he was no suffering from any health problems and would continue to support his family with financial, general support and upkeep if he would have lived his full time. They urged the court to adopt the multiplier of 17 years in determining loss of dependency .They relied on the case of **Benedata Wanjiku Kimani Vs Changwon Cheboi & another (2013)e KLR** where Anyara Emukule J used a multiplier of 16 years in determining loss of dependency of a middle aged man who was 44 years at the time of his death on the basis that the defendant adduced

no evidence of the vicissitudes of life and other imponderables which would have shortened the deceased life to 6 years of the 50 years. They further submitted that the court should use the dependency ratio of 2/3 as the deceased wife and children were fully dependent on him and that in the circumstance the deceased could not have used less than two thirds of his net income on his dependents. In **Benedeta Wanjiku Kimanis case** the dependency ratio of two thirds was used because the circumstances of the case pointed to the fact that two thirds of the deceased income went to expenses of this family such as shelter, education, clothing and food for his wife and four children, who were at school at the time of his death. Similarly in this case, it is not in dispute that the deceased used to provide for his wife and children with food, shelter and clothing and education. It is also not in dispute that all the deceased children were in school at the time of his death. On the Loss of expectation of life, they submitted that since the deceased was healthy, active and industrious he would have continued to work and provide for his family, it was submitted that an award of Kshs 100,000/= would be reasonable. On Pain and suffering the plaintiffs submitted that the deceased died on the date of the accident therefore an award of 50,000/= was reasonable under this head.

The defendants submitted that where liability is apportioned, a claim for damages should be reasonable. On quantum they submitted on special damages that the plaintiffs did not produce receipts to prove the Kshs 109, 000/= highlighted as special damages. They also opined that the Kshs 20,000/= that was used for the coffin is excessive and should have been Kshs 7,000/=. On pain and suffering, the defendants submitted that the evidence presented before the court showed that the deceased died instantly and proposed an award of Kshs10, 000/= .They relied on the case of **Lucy Kambe Mlaghe &another vs Kanyota Transporters (2011) e KLR** and on Loss of expectation of life the defendants submitted that an award of Kshs 100,000/= would be sufficient. On the limb of Loss of dependency, the defendants submitted that according to the plaintiffs, the deceased was aged 43 years. Though the plaintiff claimed that the deceased worked as a carpenter with Yussuf company, no evidence was produced to prove the allegation. No pay slip was produced to show that the deceased earned what amount per month, no letter of appointment was produced to prove his appointment. There was no evidence on record to show that the deceased ever worked or operated his own business. The plaintiff did not also indicate how much he used to get from the deceased. There are no authenticated documents on record to prove loss of business or employment stating that dependency was a question of fact which must be proved. Since the plaintiff failed to prove how much exactly the deceased used to earn per month, they do submitted that should the court find the defendants liable, then it should adopt Kshs 2,000/= this being the minimum wage as at the time the deceased died 10 years ago. They also submitted that the multiplier if 15 years would be reasonable and computed the loss of dependency Kshs 120,000/=.

To properly assess damages under the Fatal Accidents Act, it is necessary to determine the deceased income, dependency ratio and the multiplier to be used. Sec (4) of the Act also states only his wife and children are entitled under proof of dependency. The maintenance, education and upkeep of these children were primarily the responsibility of the deceased. They are therefore entitled to compensation and an amount of 2/3 as dependency ratio. The evidence by the plaintiff is that the deceased, a mason, earned Kshs 7,200/= in March 2003 and Ksh 30,000 in June 2003 and asked this court to use Kshs 30,000/= to compute the claim for loss of dependency. I bear in mind that there is a tendency of exaggeration in the estimate of the amounts of monies the deceased earns which has not been backed by evidence. I say so because as much as the plaintiffs' claims that he was a mason who relied on availability of work and did not work in a company. I would therefore award loss of dependency as Kshs 10,000/= per month. The deceased was 43 years at the time he met his death. He was a healthy and industrious man and would have done so until he attained an age of 60 years therefore his working life was cut short by 17 years which would be reasonable multiplier in this case. My calculation under this head will thus be:

Kshs $10,000 \times 17 \times 12 \times \frac{2}{3} = 1,360,000/=$ and this sum will be reduced by 20% under the Fatal Accidents Act.

On pain and suffering, the evidence presented suggests that the deceased did not die instantly. This means his suffering took too long, the court would therefore award Kshs 50,000/=.

On loss of dependency, I will apportion Kshs 100,000/=.

The total award would be as follows;

Under Law Reform Act

- i. Pain and suffering Kshs 50,000/=
- ii. Loss of dependency Kshs 100,000/=

Total Ksh 150,000/= less 20% =Kshs 120,000/=

Under Fatal Accidents Act

Kshs 1,360,000/= less 20% = Kshs 1,088,000/=

Special damages

Kshs 109,000/= less 20% = Kshs. 87,200/=

Total Kshs 1,295,200/=.

Judgment is therefore entered against the defendant in the sum of Kshs. 1,295,200/= with interests at court rate from the date of judgment while the specials will attract interest from the date of filing suit.

Orders accordingly.

Dated, signed and delivered this **6TH** day of **March** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk