



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 182 OF 2003

JOSEPH NJUGUNA MWAURA (Suing in his capacity

as the personal representative of ANN NDUTA).....PLAINTIFF

VERSUS

BUILDERS DEN LIMITED.....DEFENDANT

ANWARALI BROTHERS LTD.....THIRD PARTY

JUDGMENT

This suit relates to a fatal road accident which occurred on 9/11/2000 involving motor vehicles registration No. KAM 163H DAF Lorry (belonging to the Defendant) and motor vehicle registration No. KAL 481V/ZB 7949 Nissan UD Trailer (owned by the third party). As a result of the accident, Ann Nduta (hereinafter referred as “the deceased” sustained fatal injuries.

After obtaining letters of administration in respect of the estate of the deceased (PEX 5), the plaintiff (Joseph Njuguna Mwaura) filed this suit seeking special and general damages occasioned on him and the estate of the deceased. The Plaintiff also seeks costs of the suit and interest.

The question of liability in this suit was settled on 15th April, 2008 when the parties recorded a consent apportioning liability at 70% against the third party and 30% against the plaintiff. By that consent, the defendant was absolved from any blame.

When the matter came up for hearing, on 20th September 2011, the plaintiff led evidence to the effect that at the time of her death (on 9/11/2000) the deceased was 35 years old and that she was survived by himself and their three children namely, Margaret Wambui Njuguna, Martin Mwaura Njuguna And Monica Kiringa Njuguna aged 30, 28 and 18 years respectively (as at the time the matter came up for hearing). To prove these facts the plaintiff produced a certificate of death (PEX 1) and the children's birth certificates (PEX 2 (a), (b) and (c) respectively).

It was the plaintiff's case that before her death, the deceased was a businesslady, buying and selling maize to different millers like Kunguru Food Complex, Unga Ltd and Maizena and that from that business she used to earn at least Kshs.30,000/= per month. To prove those facts the plaintiff produced a bundle of bank deposit slips (PEX 3). The bundle which has a total of eleven (11) deposit slips reveals that the deceased in the month of September 2000 alone had made 9 deposits with a total value of Kshs.1, 277,800/=. In the month of October, 2000 the deceased is shown as having made three (3) deposits with a total value of Kshs.447,000/=.

The plaintiff informed the court that although all the children listed in the plaint, including himself,

depended on the deceased before she died, only the last born (Monicah Kiringa Njuguna) is currently depending on him.

The third party called no witnesses.

At the close of the case, the parties filed written submissions which I have read and considered.

Submissions by the plaintiff

In the submissions filed on behalf of the plaintiff the fact of liability having been settled by way of the consent referred to hereinabove is acknowledged.

As concerns the damages payable to the plaintiff, the following suggestions are made:-

Loss of expectation of life.....	Kshs. 100,000/=
Pain and suffering	Kshs. 100,000/=
Lost years.....	Kshs. 7, 200,000/=
Special damages.....	<u>Kshs. 85,000/=</u>
Total	Kshs. 7, 485, 000/=
Less 30% contribution	<u>Kshs. 2, 245, 500/=</u>
Total	<u>Kshs. 5, 239, 500/=</u>

In support of the above suggestions, it submitted that the proposed award for Loss of expectation of life is the conventional figure awarded by courts these days in cases of this nature.

As for the proposed award for pain and suffering, although no evidence was led to show how much time the deceased took before she died, it is submitted that she did not die instantly or immediately. Relying on **Jennifer Odhiambo and Another** v. **Elizabeth Mbuka Acham & Another** and **Meneza Adhiambo** v. **Agnes Susan Wairimu & others** where Kshs.20,000/= and 30,000/= respectively was awarded more than 10 years ago in respect of persons who died instantly, it is submitted that taking into account inflation over the time the said authorities were decided and the peculiar circumstances of this case, the proposed amount of Kshs.100,000/= is reasonable.

With regard to the claim for loss of dependency/Lost years, it is submitted that the deceased was self employed and in good health and that there are authorities to the effect that self employed people in good health, like the deceased was, holding all other visitudes of life constant, can continue with their business upto 70 years. For that reason, it is submitted that a multiplier of 30 years in the circumstances of this case, where the deceased was a business lady aged 35 years is appropriate.

As for the multiplicand, it is submitted that the evidence adduced in court proved that the deceased earned more that the pleaded monthly income of Kshs.30,000/= per month. The court is urged to adopt the proposed **multiplicand** of Kshs.30,000/=. Since the deceased had dependants, a dependency ratio of two thirds (2/3) is proposed.

As for the claim for special damages, although the plaintiff had no documentary proof of some of the pleaded special damages, the court is urged to take note that in claims of this nature, receipts are not normally issued in respect of all expenses. In this regard, reliance is made on the decision in **Gauntencia Atieno Amimo** v. **Akamba Public Road Services Ltd** Kisumu HCCC No. 173 of 2001 where Warsame J., (as he then was) observed:-

“On funeral expenses, the plaintiff stated that she bought a coffin for 20,000/= and generally incurred a sum of Kshs.70,000/= to send off her husband. Such expenses cannot, in my view, be categorized as ones which must be strictly pleaded and proved. I am aware and cannot shut my eyes to what has assumed cultural and social practices.” (emphasis supplied).

Submissions by third party

In the submissions filed on behalf of the third party, apportionment of liability is acknowledged.

On quantum, it is submitted that an award of Kshs. 70,000/= for Loss of expectation to life suffices. In this regard, reliance is made on **Lucy M. Njeri v. Fredrick Mbuthia** (2006) eKLR where Ksh.70,000/= was awarded on 23/5/2006 under this head of damages.

As concerns the award for pain and suffering, based on the case of **Awadh Ahmed v. Shakil Ahmed Khan** Mombasa HCCC No. 287 of 1990 where Kshs. 10,000/= was awarded in respect of a deceased who died on the date of accident, it is submitted that there being no evidence on the time taken before the deceased died, the court should award a similar amount (Kshs. 10,000/=) under this head.

As for the claim for loss of dependancy or lost years. Reference is made to the case of **Boru v. Onduu** (1988-1992) KAR 291 where Hancox C.J (as he then was) stated:-

“the extent to which the family is being supported must depend on the circumstances of each case and that to ascertain it the judge will analyse the available evidence as to how much deceased earned and how much he spent on his wife and family and further that there can be no rule or principle of law in such a situation”

The judge also argued that, in our jurisdiction, what is a reasonable multiplier in fatal accident claims is a question of fact to be determined from the peculiar circumstances of each case. In this case, where at the time of hearing, the deceased had only one child under the age of majority, and where dependancy of the plaintiff is said not to have been proven, the court is urged to take one third as the ratio of dependancy.

In reply to the suggestions in the plaintiff's submissions that the court should adopt a ratio of two thirds, it is contended that in the circumstances of this case, a two thirds dependancy ratio cannot be adopted because proof of dependancy was only established in respect of one dependant. In support of that contention, the third party referred to **Chetunda Moraa Nyamwamu v. Philip Kikemboi Chelule & Another** Kisii HCCC No.393 of 1998 where the ratio of 2/3 was adopted in favour a deceased who was survived by 6 dependants and to **Anastacia Tengecha & Another v. Kenya Power & Lighting Company** Nairobi HCCC No. 441 of 2007 where a ratio of half (1/2) was adopted in favour of a plaintiff who had her own share of income and two dependants and a third one yet to be born.

As for the multiplier applicable, based on decision in the case of **Ann Njoki Njenga Umoja Floor Mills v. Water Bosire** Nakuru HCCC No. 149 of 2003, where a multiplier of 14 years was applied in favour of dependants of a deceased who died at the age of 36, it is submitted that a multiplier of 15 years is reasonable.

Concerning the multiplicand suggested by the plaintiff (of Kshs.30,000/=), although the plaintiff produced banking slips (PEX 3) demonstrating that the deceased had a source of income, it is submitted that the deceased's actual earnings/income cannot be determined on the basis of those documents. It is contended that to prove the deceased's income the plaintiff should have produced books of accounts or income tax returns. In that regard, reference was made to **Nyamwate & others v. United Millers Ltd & 2 others** Kisumu HCCC 153 and 154 of 2004 where it was observed:-

“.....It was not proved by accounts or other means that sarah earned Kshs. 100,000/=. A transfer bank slip for Kshs.60,000/=:, could not be proof of income. Proof of income is basic to a claim of loss of dependancy under the fatal accidents act because one can only be supported financially by what was earned in hard pounds and cents. If income is not proved

then no award of dependancy can issue....In the absence of books of accounting showing how much the deceased earned from her farming business, how much she spent on herself and how much on her family from her earnings employing the figure given in the plaint as the working figure would be mere conjecture.”

Although in the above cited authority the court was of the view that no award for loss of dependancy should be awarded, based on the decision in **Ann Njoki Njenga Umoja Floor Mills v. Walter Bosire** (*supra*) where it was found that a global sum may be awarded, lack of proof of earnings notwithstanding, this court is urged to adopt a multiplier of Kshs. 5,000/= as was done in the case of **Ann Njoki Njenga** above.

As for the claim for special damages it is submitted that despite having pleaded for Kshs.85,000/=, the plaintiff was only able to strictly prove Kshs.21,770/= as by law required. The rest of the claim was either said to have been not specifically pleaded or not to have been strictly proved as by law required.

Concerning the plaintiff's contention that some expenses incurred during funeral ceremonies need not be specifically pleaded and strictly proved, the third party cited the decisions in: **Idi Ayub Omari v. City Council of Nairobi** (1985) 1 KAR 681; **Iddi Omollo & Another v. George Otieno Odira** Kisii High Court No. 123 of 2009; **Savannah development Company Development Company Ltd v. Posts & Telecommunication employees, Housing cooperative Society Limited** Civil Appeal No.160 of 1991 (UR) all of which emphasize the need for special damages to be specifically pleaded and strictly proved.

Analysis and final determination

From the pleadings herein, the evidence adduced in support thereof and the submissions by the respective parties, the sole issue for determination is what quantum of damages should be awarded.

Damages under the Law Reform Act

Under this regime of law, the plaintiff has suggested a total of Kshs.200,000/= made up as follows:- Kshs.100,000/= in respect of Loss of expectation to life and a further Kshs.100,000/= in respect of pain and suffering.

The third party, on the other hand, has suggested a total of Kshs.80,000/= made up as follows:- Kshs.70,000/= in respect of loss of expectation of life and Kshs.10,000/= in respect of pain and suffering.

Having read and considered the submissions by the respective parties and the decisions cited in support thereof, and taking note of the peculiar circumstances of this case, I hold the view that an award of Kshs.100,000/= in respect of loss of expectation to life and Kshs.30,000/= in respect of pain and suffering is fair. In making these awards I have taken note of the general trend in awarding damages in comparable cases. See **Awadh Ahmed** (*Supra*) where it was stated:-

“Indeed that figure has often times been awarded as a conventional one although it still remains the duty of the court in any one particular case to assess it depending on all circumstances. I see no reason why i should not in this case award such figure and do this case award such figure and do award Kshs. 100,000/= for loss of expectation of life;”

and the decision in **Meneza Adhiambo** (*supra*) where Kshs.20,000/= was awarded for pain and suffering in favour of the estate of a deceased who had died on the spot. The decision in Meneza was made on 28th April, 2005 (about 10 years ago). Having considered the inflationary trends over the stated time, I hold the view that an award of Kshs. 30,000/= in the circumstances of this case is fair, I do award the same.

Loss of dependancy/lost years

under this head, it is not in dispute that the deceased had dependants. It is also not in dispute that she had a source of income. The only dispute is in respect of the actual income of the deceased and the extent of

dependency.

Since the plaintiff did not produce accounts or tax returns, which the third party contends, could have helped ascertain the deceased actual income, this court is urged to adopt a multiplicand of Kshs.5000/=; and that since the deceased had only one dependant to adopt a multiplier of one third as pointed out herein above, the third party also suggested a multiplier of 15 years.

On his part, the plaintiff suggested a multiplicand of Kshs.30,000/=, a dependency ratio of two thirds and a multiplier of 30 years.

Although no books of accounts or tax returns were tendered to give a fair view of the deceased's earnings, this court cannot shut its eyes to the evidence tendered in court (PEX 3) which showed that in the month of September, 2000 alone, the deceased deposited Kshs.1, 277, 800/=. In October, 2000 she made 3 deposits of Kshs.30,000/=, 200,000/= and 217,000/= on 2nd, 12th 18th October, 2000 respectively. Certainly, that evidence cannot help this court ascertain what the deceased's income was but, in my view, it forms a good basis for making an estimate of what the deceased's income was. In my view, although it is not possible to determine whether the amounts the deceased deposited formed part of her returns on investment or capital, it would not be unreasonable to expect that with such deposits she was making not less that Kshs.25,000/= per month. The court also takes note of the fact that in some of these oneman small businesses, people ordinarily do not keep books of accounts. That being the case I consider a multiplicand of Kshs.25,000/= to be appropriate in the circumstances of this case.

As of the time of deceased's death in 2000, the children were aged 18, 16 and 6 years respectively. I believe all of them still depended on the deceased. It is not disclosed if the plaintiff did any work to earn a living but even if he did the children totally depended on the deceased as their mother and i would find the ratio of dependency to be 2/3.

As concerns the rate of dependency, since the deceased had dependants and there being no evidence that she had committed her income as was the case in **Anastacia Tengecha** (*supra*), I am not persuaded that this court should deviate from the practice where a dependency ratio of two thirds is adopted where the deceased was survived by dependants.

As for the multiplier, having reviewed the decisions in **Lycy M. Njeri**, **Anastacia Tengecha**, and **Jennifer Odhiambo** where multipliers of 20, 17 and 15 were adopted in respect of deceased persons who died at the age of 29, 35 and 39 years respectively, I am of the view that a multiplier of 17 years suffices.

The plaintiff's entitlement under this head, therefore works out as follows:-

$2/3 \times 12 \times 25,000 \times 17 = 3,400,000/=$.

As for special damages only Kshs.21, 770/= was strictly proved as by law required. The same is awarded under this head.

To avoid the plaintiff benefitting twice, the damages under the Law Reform act must be discounted from the total sum.

Consequently the plaintiff will have judgment against the Interested Party as follows:-

Loss of dependency -Kshs.3,400,000.00

Less

(Loss of expectation to life, pain & suffering)-Kshs. 130,000.00

-Kshs.3,270,000.00

Special damages	- <u>Kshs. 21,770.00</u>
	- Kshs.3,291,770.00
Less 30% contribution	- <u>Kshs. 987,531.00</u>
	= <u>Kshs.2,354,239.00</u>

The plaintiff will also have costs of the suit and interest.

DATED and DELIVERED this 3rd day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mwaura for the plaintiff

N/A for the defendant

Mr. Tombe for the 3rd Party

Kennedy – Court Assistant