



REPUBLIC OF KENYA

High Court at Kisumu

Civil Suit 105 of 1995

JOHN FRED ODUORPLAINTIFF

VERSUS

WELLINGTON NJOROGEDEFENDANT

J U D G E M E N T

By a plaint dated 14th March, 1995 the plaintiff **JOHN FRED ODUOR**

moved the court describing himself as the administrator of the estate of **JOHN MORRIS ODUOR** claiming as against the defendant as a result of the accident that occurred on the 20th of June, 1992.

It is the plaintiff's case that on the 26th of June, 1992 he was traveling together with his deceased father along Muhoroni-Awasi road in the defendant's motor vehicle registration No.KWY 364 an Isuzu matatu, in the process of alighting the driver of the said vehicle did not allow the deceased to alight, he started off the vehicle at which point the deceased fell and the vehicle ran over him occasioning him serious injuries out of which the deceased died.

He sought for General and Special damages, costs and interest.

In a defence dated the 15th May, 1995 the defendant denied the allegations of negligence and/or in the alternative he blamed the deceased for negligence, he further attributed contributory negligence on the part of the deceased.

On the 19th of August, 1996 the plaintiff's counsel crafted issues as follows:

- 1. Is the plaintiff the son and personal representative of the deceased?**
- 2. Was the accident caused by the negligence of the defendant or his agent or was it caused by the negligence of the deceased?**
- 3. Did the deceased contribute to the accident?**
- 4. Are the particulars pursuant to statute contained in paragraph 5 & 7 of the plaint correct?**
- 5. Did the dependants of the deceased suffer any damages?**
- 6. Is the defendant liable to pay the plaintiff?**
- 7. Who pays the costs?**

The hearing of this case after commenced on the 16th December, 2010 after a long delay. The plaintiff was the only witness. There was no witness called by the defence although the counsel on record filed submissions.

PW1 JOHN ODUOR – an accountant by profession and a son of the deceased testified that his father died as a result of a road traffic accident on the 27th of July, 2012. He produced a death certificate and a post-mortem report. It was his evidence that on the 26th of June, 1992 together with his father they were fare paying passengers in motor vehicle registration No. KWJ 364. They decided to alight at Muhoroni, when the vehicle stopped he alighted first but before his father did, the driver started the vehicle and his father fell, the driver reversed the vehicle and his father who was lying at the edge of the tarmac was ran over by the said vehicle. His father was admitted at the Aga-Khan Hospital Kisumu as a result later referred to Nairobi Hospital for sometime but due to high hospital costs he was transferred to Kenyatta Hospital where he later died.

He informed the court further that at the time of death his father was 58 years. Had 3 wives and several children, he was a retired agricultural officer earning a pension of Kshs.4,492/=. He had two farms and earned Kshs.8,000/= a month from the same. He took care of the family.

In his written submissions the plaintiff's counsel sought for damages under the following heading under the Law Reform Act:

- | | |
|---------------------------------------|------------------------|
| 1. Pain & Suffering | Kshs.350,000/=. |
| 2. Loss of Expectation of Life | Kshs.150,000/=. |

Under the Fatal Accident's Act:

- | | |
|------------------------------|------------------------|
| 1. Loss of dependency | Kshs.960,000/=. |
|------------------------------|------------------------|

Using a sum of Kshs.8000/= and a multiplier of 15 years the total sum came to Kshs.1,460,000/=.

As alluded earlier in this judgment although the defence did not call any witness, counsel filed submissions.

In his submissions the defence counsel urged the court to find contributory negligence on the part of the deceased and proposed 20% negligence. Counsel further submitted that the grant of letters of administration on record was issued to another person other than the plaintiff in which case the plaintiff did not have capacity to file a claim under the Law Reforms Act.

Further that the income earned was never pleaded and cannot therefore be awarded. The defendant urged the court to rely on the pension based on a multiplier of 6 less 20% contribution and award Kshs.172,000/=.

The plaintiff in his plaint described himself as the eldest son and personal representative of the estate of the deceased. On the 11th of September, 1999 the defendant's counsel requested for details of the succession cause which granted the plaintiff status of a personal representative and a copy of the grant of representation. On 29th September, 1999 a formal application seeking for the same documents was filed. There is no indication whether the said application was prosecuted.

The grant of letters of administration were not produced as proof of the same. The law on claims brought under the Law Reform is settled. Unless a plaintiff has capacity and has acquired the said letters before filing suit damages cannot be awarded. See **EVANS MUTHAITA NDIRA VERSUS FATHER RINO MENGHELLO & ANOTHER HCCC NO.1319 OF 1992**. This therefore follows that the claim under the Law Reform cannot be sustained.

The only claim left is under the Fatal Accident Act. The deceased was 54 years and retired from the

service of the Ugandan Government. He enjoyed a pension. He is said to have been a farmer with an income of Kshs.8,000/=. No proof of this sum was produced, not even a bank statement. The court would therefore have no basis for awarding the sum. Secondly this income was not even pleaded.

In this regard I am inclined to agree with the defence counsel that the only income would be from Exhibit 7 Uganda shs.4,485. Since the deceased was 54 a multiplier of 6 years to the age of 60 is reasonable. I take the ratio of 2/3 as is usual.

4,482x2/3x12x6= Uganda shs.172,109/=

which should be translated into Kenyan currency at current rate. I will not consider contributory negligence as clearly the defendant's driver was to blame.

I also award costs to the plaintiff in any event.

DATED AND DELIVERED THIS 6th DAY OF November 2012

**ALI-ARONI
J U D G E**

In the presence of:

.....Counsel for the plaintiff

.....Counsel for the defendant