



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET**

Civil Case R. 2 of 2003

REV. FR. LEONARD O. EKISA 1ST PLAINTIFF

JANE ACHIENG EKISA 2ND PLAINTIFF

VERSUS

MAJOR K. BIRGEN DEFENDANT

JUDGEMENT

This is a suit filed by the two plaintiffs as personal representatives to the estate of the late William Sebastian Ekisa.

In terms of the plaint dated 10th January 2003 the plaintiffs were granted letters of administration on 7th January 2003 vide Eldoret Probate and Administration Cause number 236 of 2002. It is averred in the plaint that the deceased was killed in a road accident on or about 30th September 2002 on the Nakuru Eldoret road near the Kenya Pipeline Company offices in Nakuru, when he was a lawful fare paying passenger in a vehicle registration number KAL 445P. That the defendant was the driver of motor vehicle registration number KAP 727W, which he controlled and drove so negligently as to cause it to collide with motor vehicle registration KAL 445P. The deceased was fatally injured and he later died.

The suit was therefore brought under the Fatal Accidents Act (Cap.32) and the Law Reform Act (Cap.26). It was brought on behalf of the dependants under the Fatal Accidents Act (Cap.32) and on behalf of the estate of the deceased under the Law Reform Act (Cap.26).

In the plaint, the dependants were listed as –

- 1) Jane Achieng Ekisa - Widow
- 2) M A{minor} - Daughter aged 12 years
- 3) L I{minor} - Daughter aged 9 years
- 4) J P M E{minor} - Son aged 7 years
- 5) E E{minor} - Son aged 5 years
- 6) L E{minor} - Father of deceased aged 72 years
- 7) Phelomena Idonyi - Mother of deceased aged approximately 65 years

The plaintiffs prayed for general damages under the Fatal Accidents Act (Cap.32) and the Law Reform Act (Cap.26). They also prayed for special damages of Kshs.265,519/=. They further prayed for costs and interest.

The defendant filed a defence. He denied the allegations in the plaint. He denied the particulars of negligence attributed to him. He alleged that the driver of the vehicle was negligent. He provided particulars of contributory negligence of the other driver. The plaintiffs also filed a reply to defence.

At the hearing of the case, the plaintiffs called four witnesses. It was in evidence of PW2 Leonard Ekisa that three of the listed dependants had died during the pendency of the case. The listed dependants who are now deceased are M A (daughter), Lawrence Ekisa (father) and Phelomena Idionyi (mother) of the deceased.

After the close of the plaintiffs' case the parties' counsel filed a consent on liability signed on 11th March 2005 and filed on the same date. In terms of the consent on liability the defendant accepted 80% liability while the plaintiffs took 20% liability. In view of the consent on liability recorded by the parties, I am not called upon to make a decision on liability. My decisions will therefore be restricted to proof, entitlement and quantum of damages. In making those decisions on damages, I will have to take into account the evidence on record, the submissions of both counsel which were done by way of written submissions, and the law applicable

The counsel for the parties quoted several case authorities for their propositions on the damages awardable under the Fatal Accident Act (Cap.32); the Law Reform Act (Cap.26); and special damages and costs. I will refer to the relevant authorities as I go into determining the damages awardable.

I will start by considering damages awardable under the Fatal Accidents Act (Cap.32). Damages awardable under this Act are for loss of dependency. Therefore there has to be proof of dependants and evidence of dependency. In the plaint, the plaintiffs averred that the deceased who was working at Egerton University had seven dependants –

- 1) Jane Achieng Ekisa - Widow
- 2) M A{minor} - Daughter aged 12 years
- 3) L I{minor} - Daughter aged 9 years
- 4) J P M E{minor} - Son aged 7 years
- 5) E E{minor} - Son aged 5 years
- 6) Lawrence Ekisa - Father of deceased aged 72 years
- 7) Phelomena Idonyi - Mother of deceased aged approximately 65 years

At the hearing of the case Leonard Ekisa PW2 was recalled. He testified that before the case was concluded, M A{minor} , a daughter; Lawrence Ekisa, the father; and Phelomena Idionyi the mother for the deceased, had passed away. In effect therefore the dependants were reduced to five.

PW3 Mary Chepkemboi Kandie an Assistant Registrar with Egerton University testified that the deceased was employed as a teaching staff at the university from the year 2000. She produced a letter of appointment and a letter of confirmation in the service. She also produced some copies of pay slips. Her evidence was that the deceased could retire at 55 years of age voluntarily. However he could continue to work up to 60 years of age which was the compulsory retirement age. She did not produce any documentary evidence relating to the retirement age.

On salary and allowances, she testified and supported her testimony with the copies of pay slips, which

she produced. She testified that the deceased was entitled to an automatic annual increment of salary in July of 2002. However that increment for the year 2002 had not been effected at the time that he died.

According to the information from the pay slips produced, which was not controverted, and especially the pay slip for the month of September 2002 produced as P Exhibit 6(d), his salary particulars were as follows –

Earnings -

Basic Salary	- 18,115.00
House Allowance	- 24,000.00
Medial Allowance	- 2,000.00
Comm/Car Allowance	- 1,500.00
Total Earnings	- 45,615.00

Deductions

PAYE	- 7,370.00
NHIF	- 320.00
Pension Self	- 452.90
ECCOSACS Amount	- 12,504.00
Medicare EU – Sacco	- 5,000.00
Debtors Recovery	- 1,300.00
Total Deductions	- 26,947.40
Net pay	- 18,667.60

Counsel for the parties have argued in submissions on what constitutes the net pay.

Counsel for the plaintiffs has argued that the net pay is the gross pay less statutory deductions, while counsel for the defendant has argued that the net pay to be taken into account is the gross pay less all deductions. In his view the net pay should be Kshs.18,667.60. According to the plaintiffs’ counsel, the net pay was Kshs.38,245/= which was the gross income, less the statutory tax element.

Though the defendant’s counsel submitted that the net pay was Kshs.18,667.50, he did not cite any authority for guidance on how to determine the net pay. Mr. Gicheru for the plaintiff on the other hand cited two cases, that is the case of **Radhakrishen M. Khenmaney –vs- Mrs. Lochaba Murlidhar [1958] EA 268, and the case of Constance Kanyorola Ngugi –vs- Coast Bus Company Limited and Another – Nairobi HCCC. No.3344 of 1994 (unreported).**

I have perused both decisions. In the case of **Radhakrishen M. Khenmaney –vs- Mrs. Lochaba Murlidhar [1958] EA 268, at page 269** Sir Owen Corrie Ag. J. A. cited with approval the principles applied by the Chief Justice of Kenya in the case of **Peggy Frances Hayes & Others –vs- Chunibhai J. Patel & Another Civil Case No.173 of 1956**, in which the Chief Justice stated –

“The court should find the age and expectation of working life of the deceased, and consider

the wages and expectations of the deceased, (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants”.

In the case of **Constance Kanyorota Ngugi –vs- Coast Bus Company Limited and Another – Nairobi HCCC. No.3344 of 1994 (unreported)**, Mulwa .J. stated –

“This income was based on the invoice which he had compiled. He said this figure did not take into account the tax element. The figures given represented the gross income of the deceased per month. I note that it is difficult to get the correct figure of income from the records as they were and doing the best one can do in the circumstances, I would take the deceased’s income to be Kshs.20,000/= per month, the tax would be Kshs.6,000/=”

It is obvious from the above two cases, that the courts have been defining net income to mean gross income less tax element. In our present case the deductions for pay as you earn (PAYE) was Kshs.7,370/= per month.. In this regard therefore I am in agreement with Mr. Gicheru that the net income of the deceased was Kshs.38,245/= per month.

I now turn to the actual issue of dependency. In our present case the respondent’s counsel has argued that only one person, the deceased’s widow has proved dependency. That dependency can be taken to be Kshs.7,000/= a month. In his view, there is no evidence of dependency of he children and mother of the deceased. The widow is also a teacher earning Kshs.17,720.00 a month. Therefore there was no need for using the 1/3 or 2/3 dependency formula.

With regard to dependency, I have to rely on the case of **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, in which Ringera J. as he then was, held at page 248-

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

The learned Judge went further to state on the same page that -

“I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in **Bor –vs- Onduu [1982- 1992] 2 K.A.R. 288”**

In my view, the above case states the correct position of the law for assessment of damages under the Fatal Accidents Act. It also states that the correct legal position with regard to determining dependency. I have already found that the net income of the deceased is his gross income less tax. Therefore the net income of the deceased after tax was Kshs.38,245/= per month. This therefore becomes the multiplicand. The multiplier is determined by the years of expectation of earning life of the deceased and the dependency of the dependants.

The deceased was a lecturer aged 45 years. He was on permanent terms of service at Egerton University. Though evidence was tendered that the compulsory retirement age was 60 years, no document was produced to support the same. In this country the general retirement age for public officers is 55 years of age. I take judicial notice of the retirement age in the public service being 55 years of age. There are some public officers who retire at an age above 55 years of age. However, that depends on the proof of facts tendered in court. I do not see what was difficult in producing a circular or other document to show that 65 years of age was the compulsory retirement age for the deceased. In those circumstances, I will go by the general norm of retirement from public service at 55 years of age. It is my finding that the deceased would have retired at 55 years of age.

The surviving dependants are a wife, 3 children, who in 2003 were aged between 9 years and 5 years. The elder child who was aged 12 years died before the case was finalized. The father who was aged 72 years also died before the case was finalized. His mother who was aged more than 65 years of age also died before the case was finalized.

Though Mr. Magare for the defendant has argued that dependency was proved on only one person, that was the wife of the deceased, I differ from his contention. Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.

The evidence of PW2 was that he was a priest and was not getting an income to support his parents. The fact that the deceased's wife was working does not remove her dependency on her late husband. The evidence was that the deceased used to pay for expenses of housing, school fees, food and other items for upkeep of the children. I find that there was dependency by all who were listed in the plaint and that that dependency would have been therefor up to 52 years of age, which would translate to 7 years from the time of death. However, currently the surviving dependants are only the wife and three children.

I find that part of the income of the deceased used to be tied to voluntary contributions. However, those contributions be they for health insurance, cooperative society etc can broadly be taken to be also for the benefit of the dependants. It is therefore my view that the dependency established was 2/3 of the net monthly income of Kshs.38,245 per month which works out as Kshs.25,490/=.

Therefore, in my view, the loss of dependency is $Kshs.25,490/= \times 12 \times 7 = Kshs.2,141,160.00$. These are the damages awardable under the Fatal Accidents Act (Cap. 32).

I now turn to damages under the Law Reform Act (Cap.26). On pain and suffering, it is not disputed that the deceased was injured on 30th September 2002 and died on 1st October 2002. The plaintiff's counsel has asked for damages for pain and suffering of Kshs.300,000/=. The defendant's counsel has asked for damages for pain and suffering of Kshs.15,000/=.

In the case of **Marieta K. Kaleli –vs- Mistry Mulji Nareen Construction Co. Ltd. – Mombasa HCCC. No.66 of 1997**, Kassim Shah (Commissioner of Assize) in 2000 awarded damages under this head of Kshs.300,000/=. In that case the deceased survived for 8 months and 15 days. The learned Commissioner of Assize in assessing the award observed –

“It must have been an excruciating 18 months 15 days for the deceased.”

Consequently he applied a similar award for similar injuries and history as those awarded by Bosire .J., as he then was, in 1990 in the case of **Theresia Emmanuel Kainju –vs- Peris Wanjiku – HCCC. No.171 of 1988**.

In our present case the deceased died after one day. The defendant's counsel has requested this court to award an amount of Kshs.15,000/= as damages for pain, suffering and loss of amenities. He has relied on the cases of **William Juma –vs- Kenya Breweries Limited – Nairobi HCCC.No.3514 of 1995**; the

case of Ali Elmi & Another –vs- Mohamed Bakari & Another – Nairobi HCCC.No.2225 of 1997; the case of Richard Namin –vs- Securicor Security Services Limited – Kericho HCCC. No.17 of 2003. He also cited the case of James Kisomo –vs- Bernard Musyoka Machakos HCCC. No.156 of 1998.

I have considered all the cases cited before me. The case relied upon by the plaintiffs’ counsel, that is the case of **Marieta K. Kaleli –vs- Mistry Mulji Nareen Construction Co. Ltd. – Mombasa HCCC. No.66 of 1997**, was a case in which the deceased survived for 18 months 15 days before he died. In our present case the deceased died one day after the accident. Considering the period that the deceased survived the accident and doing the best I can, I am of the view that a figure of Kshs.30,000/= is adequate damages for pain and suffering.

I now turn to loss of life expectancy. The deceased was 45 years of age when he died. The evidence is that he was of good health. There is no evidence that he was ailing. He was in the middle of his life. The cases cited and relied on relate to deceased persons who were relatively younger. The oldest being in his thirties. The plaintiff’s counsel has asked for a figure of Kshs.100,000/=. Considering that the deceased was in the middle years of his life and doing the best I can, I award a figure of Kshs.30,000/= under this head.

The next item is on funeral expenses. During the hearing, several receipts were identified. The said receipts were not formally produced in court. PW2 Leonard Ekisa after being recalled testified that the receipts dated 2003 were not for funeral expenses. However, receipts for 2nd October 2002 to 16th October 2002 were for funeral expenses.

Counsel for the plaintiff asked for a figure of Kshs.262, 399/= for funeral expenses. The receipts were not produced. However, he submitted that the amount covered cost of transport from Nakuru to Teso, cost of two bulls bought locally without receipts, foodstuff, hire of photographers, cement purchased, candles and bulbs for use during the funeral, and announcements on radio and in newspapers.

It is trite that as these are expenses specifically incurred, they have to be proved. However, in the absence of specific proof courts have held that it can be presumed that there will generally be funeral expenses to be incurred – see the case of **Petrolla Ojiambo Odori –vs- Peedle Building Limited – Mombasa HCCC. No.561 of 1990 (both unreported)**.

I consider that funeral expenses were incurred and I have to make an award for reasonable funeral expenses incurred. In the case of **Petrolla Ojiambo Odori –vs- Peedle Building Limited – Mombasa HCCC. No.561 of 1990 (both unreported)**, the court awarded Kshs.23,000/= being reasonable funeral expenses for a death which occurred in Mombasa and burial was in Busia. The decision was more than 13 years ago.

In our present case the death was at Nakuru and burial was at Teso. The distance is less than half of the distance from Mombasa to Busia. However, there is the element of loss of value of the Kenya shilling and rising costs of items and services. I consider that an award of Kshs.50,000/= for funeral expenses is a reasonable award.

On special damages counsel for the plaintiff referred to Exhibit No. 10 being a search form from the Registrar of Motor Vehicles and receipt for Kshs.500/= for the search with the Registrar of Motor Vehicles. This was not pleaded in the plaint. What was pleaded was cost of police abstract.

It is trite law that special damages have to be pleaded and proved. It is not possible to prove what has not been pleaded. Therefore I decline to award the Kshs.500/= claimed as special damages.

In the result I enter judgement for the plaintiffs as follows –

Fatal Accidents Act Loss of dependencyKshs.2,141,160.00 Law Reform Act

(a) Pain and SufferingKshs.30,000.00

(b) Loss of Expectation of LifeKshs.30,000.00

(c) Funeral ExpensesKshs.50,000.00

Grand Total Kshs.2,251,160.00

Less 20% Kshs.450,230.0 0

Total Kshs.1,800,930.00

I have to distribute the award among the surviving dependants. Therefore I distribute the amount among the surviving dependants as follows –

1. Jane Achieng Ekisa - Widow - Kshs.450,200.00
2. L I{minor} - Daughter - Kshs.450,200.00
3. J P M {minor} - Son - Kshs.450.200.00
4. E E{minor} - Son - Kshs.450.200.00

The three children that is L I{minor} i, J P M E{minor} and E E{minor} have not yet reached the age of majority that is 18 years of age. Therefore I order that the shares of Loraine Indionyi, L I{minor} i, J P M E{minor} and E E{minor} be invested in an interest earning account with Housing Finance Company of Kenya Limited or any other suitable financial institution in the joint names of the plaintiffs until the respective dependants attain the age of majority.

The plaintiffs will be at liberty to withdraw the interest earned for the maintenance, education and advancement of the minor dependants. The principal amounts for the minors not to be withdrawn unless there is an order from this court.

The defendant's counsel has argued that costs should not be awarded to the plaintiffs, as no notice of intention to sue was served. I would have been persuaded by that argument if the defendants admitted liability when they were sued. However, the defendants filed a defence and made the plaintiff go through the entire process of having witnesses testify up to the close of the plaintiff's case. It was after that that the defendant admitted liability to the tune of 80%.

I find no basis of denying the plaintiffs' costs in this case. I therefore award costs and interest to the plaintiffs.

Dated and delivered at Eldoret this 6th day of July 2005.

George Dulu

Ag. Judge

In the Presence of: Mr.Mwinamo for plaintiffs

Mr. Nyachiro for the defendant