



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 127 of 1997

- 1. MARY NDUKU PETER.....1ST PLAINTIFF**
- 2. FRANCIS MUTUKU.....2ND PLAINTIFF**

VERSUS

PETER NDOLO NZAVI..... DEFENDANT

Coram: J. W. Mwera J.

Muoki Advocate for plaintiffs

Mungata Advocate for defendant

C.C. Muli

JUDGEMENT

The 1st plaintiff is the widow of the late Peter Kiamba. Along with the 2nd plaintiff they sued the defendant in damages for the loss and damage to the estate of the late Kiamba under the Law Reform and Fatal Accident Act (for 1st Plaintiff) and pain and suffering etc. for the 2nd plaintiff. It was pleaded that the deceased and the 2nd plaintiff were fare-paying passengers on the defendant's motor vehicle reg. No. KAE 340 L Matatu on 22.7.96. This was on Mombasa - Nairobi Road. That the defendant or his agent/servant drove that motor vehicle at such a high speed in the circumstances without due attention or control that he let it be involved in accident that left Kiamba fatally injured and the 2nd plaintiff personally injured.²

The plaintiff claimed that the late Kiamba's wife the Plaintiff and 4 children (only 2 were below 17 years at the time of the suit) lost dependency while his estate suffered loss and damage. At the hearing the plaintiff was amended by consent to state that the 2nd plaintiff sustained bruises on the head, the skull, the right leg and a fracture of the right pelvic rami.

A defence filed on 19.11.97 stated that the accident was not caused by any negligence or otherwise vicarious. Or that if it was so caused, it was an inevitable accident caused by factors beyond the control of the defendant's driver or agent. It was further denied that the deceased and the 2nd plaintiff were passengers on motor vehicle KAE 340L. This defence was filed by M/s A.G. N. Kamau and Company Advocates Nairobi.

On 28.11.97 another defence filed by M/s Mwaura and Mwaura Wahiga and Company Advocates Nairobi appeared on the file. It denied liability and added that it lay solely with a 3rd party, owner of motor vehicle

reg. No. KAD 653 A who drove his motorvehicle so carelessly and recklessly that he failed to take in regard the presence of thedefendant's motor vehicle on the road and so the accident in issue occurred.

Agreed issues filed were signed by the plaintiff's lawyers M/s Muoki Obae and Company Advocates and M/s A.G.N. Kamau for the defendant.

When the trial opened on 21.4.99 Mr. Muoki was present for the plaintiff whileMr. Mungata was for the defendant.

The plaintiff Mary Nduku Peter (P.W.I) told the court that she only heard of herhusband's death in a road accident on 22.7.96. He died on the spot. She produced adeath certificate (Exh.P.I). The two had 4 children and copies of their birth certificateswere produced (Exh.P 2A -D).

She obtained a grant to administer the late Kiamba's estate (Exh.P3). A police abstract showed that Kiamba was fatally injured in the accident (Exh.P4). The deceasedwas employed as a laboratory technician earning net salary of Shs, 6297/= (Exh.P5). Thathe also ran private businesses but no documents were provided at this point of the businessM/s DECADE 1989 ENTERPRISES.

The court then heard Francis Mutuku (P. W.2) (2nd Plaintiff). He was on thedefendant's motor vehicle on the day in issue with the deceased whom he learnt later is thesubject represented by the 1st plaintiff. They were traveling to Nairobi on motor vehicleKAE 340L which was being driven at a high speed. At a fly over near Nairobi the mataturammed into the rear of a bus. The deceased died at the scene. P. W.2 fractured his pelvis. He produced a medical report plus x-ray from Kenyatta National Hospital (Exh.P6). Ondischarge P. W.2 was bedridden for 5 weeks. He retained marks of stitches on the face anda cut on the left leg below the knee. This injury necessitated further admission in hospitalbefore discharge. He produced a P.3 form (Exh.P7) and an abstract (Exh.P.8). Two medical reports were also exhibited (by consent Exh. PGA-B). Attributing the accident tothe high speed driving P. W.2 asked for damages costs and interest, saying that he was notfully healed in the pelvis.

The parties later reopened the case of the 1st plaintiff for an auditor to testify aboutthe business that the deceased ran before his death in the road accident Michael Wambua (P.W.3) did this. He did auditing for the late Kiambas business firm M/s Decade 1989Enterprises. The witness produced a report ending 31.12.95 (Exh.10) while the 1stPlaintiff was recalled to tender in evidence the source books and materials on which thereport was based (Exh.P.II). P.W.3 told the court that the deceased earned Shs.21,750/-per month in 1994 from his business and Shs.25, 393/- per month in 1995. The nature ofthe business was stated as repairing hydraulic machines at 2 shops - Nairobi and Machakos. In cross examination the court heard that the deceased paid income tax although it was not provided for in the audited accounts. But if that was taken in regard the 1995 monthly income would be Shs. 21924/=.On the resumed hearing on 23.6.99 parties agreed on liability apportioned on a 90-10 ratio.

Only the plaintiff's side submitted. It referred to benefits the Fatal AccidentsAct noting that the deceased drew a salary on a laboratory technician and had incomefrom his business. The total monthly income was put at Shs. 31,297/=.

Then came the damages under the LawReform Act under the subheads: Loss of expectation of life, pain and suffering and lost years plus special damages. This was in respect of the 1st plaintiff and gross award came to shs.6.0 m.

As for the 2nd plaintiff shs.350, 000/= was considered suitable for pain and suffering. In both cases authorities were cited and contributory negligence of 10% repeated.

Beginning with the 1st plaintiff this court is of the view that the approach taken looking at the benefits under the Law Reform Act is the proper one. Under that Act a claimant is entitled to loss of expectation of life, pain and suffering and "lost years". For this see Kemp and Kemp: The Quantum of Damages (Vol. 1).

"22-006. If a dependant receives the benefit of sums awarded to the deceased's estate under the Law Reform Act for pain and suffering and for loss of expectation of life or for loss of earnings during the "lost years" such benefit will be deducted in full from the award to the dependants."

Accordingly under the Law Reform Act this court gives the following awards:

Loss of Expectation of Life - Shs. 70,000/= Pain and Suffering Shs. 20,000/-
Shs. 90,000/=

Next is the award for "Lost years." Evidence had it that the deceased earned Shs. 6297/= in August 1996 from the University of Nairobi where he was employed. After taxation as at the end of December 1995, the audited report showed and Mr. Wambua told the court that net income from the deceased's business was Shs. 21,924/=. The combined income therefore is Shs. 28221/- per month. The deceased was aged 44 years at the time of his death. A multiple of 16 was proposed. However one of 11 is adopted as it may not be desirable or convenient and practical to work separately on the salaried employment business income in this aspect. This court is minded to say that the deceased earned that combined salary and spent two thirds thereof on himself and on his business and or that he saved part of this income to benefit his estate. A multiplier of 11 is adopted. Therefore a sum for "lost years" is set at Shs 2, 373,560/= (28221 x 12 x 11 x two thirds) The award in the Law Reform Act is:

Lost years Shs. 2,373,360/=

Loss of Expectation of life plus Pain and Suffering Shs. 90,000/=
Shs. 2,463,360/-

Working out the loss of dependency takes more or less a similar pattern but with a factor of one third. The sum arrived at under the Fatal Accidents Act is Shs, 1, 241,680/= Special damages for a police abstract and death certificate came to Shs. 150/-. The award under this Act is: Loss of Dependency Shs. 1,241,680/=

Special Damages Shs. 150/-

Shs. 1,241,830/=

Under the 2 Acts the grant total is:

Under the Law Reform Act - Shs. 2,463,360/= Under the Fatal Accidents Act Shs. 1,241,830/=
3,705,190/=

As noted from Kemp and Kemp above since the beneficiaries are the same under the 2 Acts, the award under the Law Reform Act ought to be deducted from the whole award. That leaves Shs. 1,241,830/= due to the 1st plaintiff, Taking in consideration 10% contribution, the net award is Shs. 1,097, 647/- (Shillings One Million and Ninety Seven thousand six hundred forty seven only)

The 1st plaintiff also gets costs and interest.

As for the 2nd plaintiff Shs. 350, 000/= was proposed for pain and suffering. On 25.4.98 - about 2 years after the accident Dr. Kibore, observed mild pains within the pelvic girdle occurring during the cold weather. There were superficial scars on the left forehead and right leg shin. These were billed as soft tissue injuries and except for mild pains in the pelvis the 2nd plaintiff had healed well. On account of this the 2nd plaintiff is awarded Shs. 80,000/= for pain and suffering. He also gets Shs 1000/= for medical report. In all Shs. 81,000/-.

In sum, the 1st plaintiff is awarded Shs. 1,097,647/- while the 2nd plaintiff gets Shs.81, 000/=.

Costs to the plaintiffs.

Judgment accordingly.

Delivered on 28th July 1999.

J. W. MWERA

JUDGE