



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 74 of 1996

MORANGA ABEL NYAKENYANYA.....PLAINTIFF

versus

JACKSON KICHWEN.....DEFENDANT

JUDGMENT

The plaintiff who is the father of the plaintiff in HCCC R. 73/96 and the deceased in HCCC R.74/96 filed these two suits as next friend for the minor son and on behalf of the estate of the deceased. In HCCC R.74/96 the plaintiff averred that on 14th December 1993 at about 5.30 p.m. the deceased was lawfully walking along Eldoret-Iten Road at the pedestrians walk near Kimumu centre when the third defendant negligently managed and or controlled the said vehicle and caused or permitted the same to hit the deceased as a consequence thereof the plaintiff sustained fatal injuries. The deceased thus lost the normal expectation of a happy and successful life. That the said collision was caused solely by the negligence of the defendant whose particulars are given.

In consequence thereof the plaintiff seeks special damages of Kshs 57,200/- and general damages, interest, costs and any other relief that the court may deem fit to grant.

The same averments goes for the injured minor whose particulars of the negligence and injuries are also given.

In consequence thereof the plaintiff claims special damages of Kshs 32,000/-, general damages, costs and interest.

The two were consolidated and heard together. The evidence was adduced through the father who said that the children were knocked while off the road, one died instantly while another was injured. The deceased was buried and they incurred expenses.

The plaintiff also relies on the prosecution's evidence in Traffic Case No 5920 of 1993 where the accident driver was prosecuted, found guilty, convicted and sentenced to a fine of Kshs 5,000/- in default 8 months imprisonment and there is no appeal. He produced the documents he relies on to prove the specials.

In his submissions counsel for the plaintiffs stated that there was no opposition and the assessment is for determining quantum of damages.

In respect of HCCC R.74/96 the deceased was 10 years in class 2 with a lot of expectation of good life more so as his performance in school was good. As a result of his death his estate has suffered loss and

the parents expected dependency. He urged the court to award a global sum of Kshs 350,000/- and under the Law Reform Act and Special Damages as proved.

2. Under the Fatal Accidents Counsel submitted that the deceased was an active boy with high chances of doing well in school and assisting the parents after school. His death has therefore deprived the parents of future expected dependency and they urged the court to award a global sum of Kshs 280,000 for loss of expected dependency.

In HCCC R. 73/96 counsel submitted that the plaintiff developed a kind of epilepsy which makes him to fall down and faint and has greatly reduced his ability to do well in class. He experiences frequent headaches. Though the injuries have substantially healed they have left ugly scars on the right parietal scalp, both legs, wrists and on the nose. The plaintiff had temporary physical disability of two months after the accident. That considering that the minor was only 6 years at the time of the accident counsel suggest Kshs 550,000/- being for pain and suffering, loss of expectation reduced life and future medical expenses. While the specials proved came to Kshs 16,640/-.

They suffered the court to the case of Marko Mwenda v Benard Mugambi and Another Nairobi HCCC No 2343/93 where the father of the deceased sought damages under the Law Reform Act Cap 26 and under the Fatal Accidents Act Cap 32. The deceased was aged 21 years but the death certificate read 17 years. The deceased used to assist the parents to do farming activities and she also used to cook for the family and by her death her dependants have lost support and so the plaintiff asks for damages.

The claim under the Law Report was rejected because the plaintiff did not have letters of administration to the estate of the deceased.

As for loss of expected dependency the court awarded Kshs 150,000/- as general damages.

The case of Sarah Wairimu Njau v Joseph Ndungu Mwangi Nairobi HCCC No 3983/91 where the plaintiff was involved in an accident and suffered a fracture of the pelvis (i.e. superior and inferior rami of the right pubis cuts on the forehead, forearm, right leg and right ankle joint. She was hospitalized for two weeks and after discharge she was followed up in the physiotherapy clinic and continued bed rest at home. Her complaints at the time of trial were pain at the waist when she bends, pain in the chest and also headaches. The court awarded Kshs 100,000/- as general damages.

On liability I find that the defendants filed no defence and in terms of order 6 rule 9(1) of the Civil Procedure Rules they are deemed to have admitted the allegations of the plaintiff save as to damages. Secondly there was no appeal to the traffic prosecutions and so I find that the defendants are 100% liable for the accident, caused damages and injuries to the survivor and fatally injured the deceased.

On the assessment of damages:-

HCCC R.74/96

2. The special damages have been proved vide exhibits No 1, 2 and 3 totaling Kshs 38,515/- which I allow.

2. General damages –

(a) Under the Law Reform none is awardable as plaintiff did not take out grant to enable him represent the interests of the deceased.

(b) Under the Fatal Accidents Act the deceased was a minor of 10 years. Although it cannot be said that the parents depended on the child it is evidently clear that had he lived and grown up he would have rendered services to his family and so the family has suffered by virtue of his death. I am aware no amount of money can replace his future expectations but it is a token of consolation. He had no income and so the multiplier rule cannot be involved here. I make a global assessment of Kshs 300,000/- as being

adequate.

I therefore enter judgment in HCC R.74/96 on the following terms against the defendants jointly and severally:-

1. Special damages of Kshs 38,515/- with interest at court rates from the date of filing until payment in full.
2. General damages for loss of future dependency Kshs 300,000/- with interest at court rates from the date of judgment until payment in full.
3. Costs of the suit.

Apportionment:

1. Father - Kshs 169,257.50
2. Mother - Kshs 169,257.50

For the plaintiff in HCCCR. 73/96

Special damages proved vide exhibits 6,8,4 and 9(b) which total Kshs 16,440/-.

On the general damages the discharge summary exhibit 10 lists the injuries as head injury. The medical report exhibit 9(a) lists the following injuries:-

1. Multiple deep laceration on the scalp with severe blood loss.
2. Laceration on the face with several blood loss and marked swelling of the face.
3. Laceration on the posterior aspects of the right hand and left hand.
4. Bruised right side of the abdomen and chest.
5. He had an initial loss of consciousness for about twelve hours.
6. Blunt trauma to the pelvis resulting into inability to walk properly for two months.

The complaints as at examination were he has been feeling frequent headaches. He has since been experiencing disabling pelvic pain especially on prolonged walking.

The findings on examination were two compigous and ugly scars on each of the frontal scalp; scar at the back of the right hand, scar at the back of the left hand, scar on the nose and scar on the right side of the face.

In the doctor's opinion the plaintiff experienced pain, blood loss and suffered prolonged periods of two months of temporary physical disability as a result of the injuries sustained in the accident. The scars as previously described especially those on the face are permanent embarrassing disfigurements on him. The other soft tissue injuries appear to have healed without complications.

There is nothing in the medical report to suggest that the boy has high chances of developing epilepsy or suffers from epilepsy. There is nothing to show that his mental capacity has suffered.

In the premises taking all the relevant factors into consideration and bearing in mind the fact that there is no mention of future medical care and the fact that the injuries have fairly healed, I assess Kshs 250,000/- as general damages for pain suffering and loss of amenities.

In the premises I enter judgment for the plaintiff on the following terms against the defendant jointly and severally:-

1. Special damages of Kshs16,440/- with interest at court rates from the date of filing until payment in full.
2. General damages for pain suffering and loss of amenities Kshs 250,000/- with interest at court rates from the date of judgment until payment in full.
3. Costs of the suit.

Apportionment:

1. Kshs 16,440/- to be paid to the father for payment out of expenses so far incurred on the minor.
2. Kshs 200,000/- to be invested in an interest earning account in the joint names of the minor's father and the deputy registrar of this court and the money so invested not to be withdrawn without prior authority from the court and the same to be paid out to the minor when he attains the age of majority.
3. Interest earned to be withdrawn from time to time by the father and the same to be applied towards the educational and general maintenance of the minor.
4. There will be liberty to apply.

Dated at Eldoret this 12th day of July 1999.

Read and delivered at Eldoret this 20th day of July 1999.

R NAMBUYE

JUDGE