



**REPUBLIC OF KENYA
HIGH COURT AT ELDORET**

Civil Case 19 of 1997

MARY KHAYESI AWALO

**NICKSON VIELITHA (for and on behalf of the estate of the late Hudson Boruka Makani
(deceased).....PLAINTIFFS**

versus

1. MWILU MALUNGU

2. TRANS SPARES LIMITED.....DEFENDANTS

JUDGMENT

Judgment was entered on liability at 90% against the defendant and 10% against the plaintiff. The case proceeded by way of assessment of damages. The sum total of the evidence is that the deceased who was son of PW1 and brother to PW2 was a business man at Nangili owning a shop, butchery and the bar. He was assisted by his brother and employees. He went to Burnt forest to collect shop goods when he met his death. He was not married but he has four children from 3 different women namely:

- (1) Mildred Khavere daughter born on 25.11.93
- (2) Tabuley Khayetsi daughter born on 4.5.95
- (3) Oliver Tambo Buruka son born on 21.11.95
- (4) Lydia Imbosa daughter born on 17.2.95

It was alleged that he was a business man and he kept records but these were distorted by his employees when he died to hide the status of his business. There were no bank statements produced but it was just stated that he used to get a lot of money.

In his submissions to court counsel for the plaintiff suggested a figure of Kshs 100,000.00 as damages for loss of expectation of life, Kshs 15,000.00 as damages for pain and suffering Kshs 1,050,000.00 as damages for loss of dependency using an income of 6,000.00 per month using a multiplier of 22 years and applying the 2/3rds ratio to that income.

Counsel referred the court to the case of Alice Wanja Munene versus Wilson Mutegi Ngigi and another Nairobi HCCC No 3448 of 1989. Where the deceased was aged 39 years the court awarded Kshs 10,000.00 for pain and suffering 80,000.00 for loss of expectation of life and loss of dependency. Kshs 1,500,000.00 using a multiplier of 15 years and applying the 2/3 ratio rule.

Counsel for the defendant on the hand submitted that PW2 as a brother of the deceased is not a dependant of the deceased buy the other being the mother and his 4 children qualify as dependants.

2. That the deceased was alleged to have been a businessman owning a bar, shop, hotel and butchery but no evidence was adduced to prove his income neither was there evidence that any of the 5 people depended on the deceased at the time of his death as it is in evidence that the children were taken to PW1 after his death.

3. That the fact of being a mother and children does not entitle them to damages as there must be evidence of economic loss and since none was proved the claim under the Fatal Accidents Act must fail. In the alternative counsel submitted that should the court rule otherwise then he suggests a dependency rate of 800/- per month.

4. The deceaseds business was in the rural area where incomes are very low. He suggested a multiplier of 18 years.

5. That since it is pleaded that the deceased died instantly a claim for damages for pain and suffering is umerited.

6. He agrees that damages for loss of expectation of life could be assessed at Kshs 70,000.00

7. Damages for lost years at Kshs 172,800.00.

8. Special damages of Kshs 16,150.00 making a total award of Kshs 258,950.00

Counsel referred the court to the case of Davis versus Powell Duffryn Associated Collieries No (20(1942) AC 60. Njuguna versus Honourable Attorney General CA No 55 of 1977 Nairobi Jane Chelagat Bor versus Andrew Otieno Ondu and 2 others (1990)2 KAR 288.

The plaintiff pleaded for special damages, general damages under the law reform and Fatal Accidents Act. Having considered the evidence adduced and the submission of both parties I proceed to make assessment as hereunder.

(1) On special damages one receipt for the coffin exhibit 10 was produced being 16,000.00 which I allow.

2. Under general damages counsel for the plaintiff suggested a figure of Kshs 70,000.00. The trend of the courts is to award conventional figure under this head in the courts opinion and award of Kshs 80,000.00 will be appropriate.

(3) As regards pain and suffering indeed it was pleaded that he died instantly but the evidence of PW2 is that he died in hospital. He therefore suffered pain before death and an award of Kshs 10,000.00 under this head would be appropriate.

(4) On loss of dependency it is correct that only the mother and the children stand to benefit. The children are acknowledged to be for the deceased but they are from different women as he was not married.

It is correct that it is alleged that the deceased was a businessman. Indeed he was a businessman in a rural setting. It has been stated that the income in law books of account and licences were produced but as observed by counsel for the defence the details of income are not given as the records relied on are incomplete. It was alleged they were tampered with. It is however agreed that the deceased did some business which generated income whose extent is not ascertainable. Nonetheless the court can go ahead and assess loss of dependency if the same is proved. The defence says that the same is not proved probably because no figures were given. I do not understand what proof learned counsel wanted. From his own authority on Powell all that is required is how much the deceased earned, how much he spends on himself, and how much was available for the dependants, and for how long the dependency was to last. In normal everyday life one does not record on a day to day basis how much he spends on each of his dependants. It is a matter of estimation. The deceased herein was not expected to be different from the rest and so lack of records does not mean that the dependants were not dependent on him. His children indeed are from different mothers. Some children were with deceaseds mother before his death while some were brought after his death and one is said to be still staying with the mother because he is still small. Efforts to get the mothers of these children to court were fruitless. It has been alleged by the defence lawyer that they never received support from the deceased. There is no evidence to that effect. The fact that some children were not staying with the deceased does not mean that he never supported them. The deceaseds mother and brother would not have known where they were and they would not have been brought to his home. Leaving that aside had he lived he would have been called upon to maintain and educate the children and meet their daily needs. The children on the other hand would have had a right to approach him for help.

I do not think the rule of dependency takes such a narrow stand. It is wide enough to cover children of the deceased who are not in his custody but are maintained by him. The mother and brother of the deceased stated that the deceased maintained his children and the court is satisfied with that evidence. The children

have lost his support. As noted in respect of the deceaseds mother it is not normal for a person to make a daily recording of his support for the children. For the reasons given I am satisfied that the mother and children of the deceased depended on him and have lost his support by virtue of his death.

As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books. See the case of Sheikh M Hassan versus Kamau Transporters and 10 others (1982-88) 1 KAR 946.

The deceased was aged 28 years and a business man, a young man full of life and the accident cut his lift short. No amount of damages can replace the life lost or what the deceased would have managed to acquire for himself for the benefit of the family.

I would therefore make a lumpsum assessment of Kshs 650,000.00 as damages for loss of dependence. This will be reduced by a figure of 200,000 representing what would have reasonably been spent on himself leaving the balance to be spent on the mother and his children being Kshs 450,000.00.

I therefore enter judgment for the plaintiff on the following terms:

(1) Special damages of Kshs 16,000.00 with interest at court rates from the date of filing until payments in full less 10% contribution of Kshs 1,600.00 leaving a balance of Kshs 14,400.00.

(2) General damages:

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|---------------------------------|----------------|
| (a) Pain and suffering | Kshs 10,000.00 |
| (b) Loss of expectation of life | Kshs 80,000.00 |
| (c) Loss of dependency | Kshs 450.00.00 |

Total Kshs 540,000.00 five hundred and forty thousand only. Less 10% contribution of Kshs 54,000.00 Fifty four thousand leaving a balance of Kshs 486,600.00 Four hundred and eighty six thousand only.

Apportionment:

(1) Mary Khayesi Analo adult mother of the deceased Kshs 286,000.00 Two hundred and eighty six thousand only.

- (2) Mildred Khavere – daughter born on 25.11.93 aged 5 years and 2 months Kshs 50,000.00 Fifty thousand shillings only.
- (3) Lydia Imbosa a daughter born on 17.2.95 now aged 4 years on 17.2.99 Kshs 50,000.00 Fifty thousand shillings only.
- (4) Tabley Khayesi born on 4.5.95 now aged 3 years 8 months Kshs 50,000.00 Fifty thousand only.
- (5) Dira Oliver Tambo Buruka born on 21.11.95 now aged 3 years and 2 months Kshs 50,000.00 Fifty thousand shilling only.
- (6) The adult shares to be paid out forthwith.
- (7) The shares of the minors to be invested in an interest earning account in the joint names of the grandmother and the deputy registrar of this court.
- (8) The amount so invested not to be withdrawn without prior authority from the court and the same to be paid out to the minors when they attain the age of majority.
- (9) Interest accrued to be withdrawn from time to time whenever need arises and the same to be applied towards the educational and other maintenance needs of the minors.
- (10) There will be liberty to apply.

Dated at Eldoret this 22nd day of January 1999.

R Nambuye

Judge

22.1.99

Read and delivered at Eldoret this 4th day of October 1999.

R Nambuye

Judge