



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT NO 834 OF 1980

MONICA KAKIKIPLAINTIFF

VERSUS

WASUFE SHIRE ABDO

ALI SHIGO

HAITHAR HAJI ABDI.....DEFENDANT

JUDGMENT

At 1 am on 8th June, 1977 Ndavi Ndaya, then a driver of motor lorry registration No KMV 394, had parked his lorry by the roadside at Mtito Andei along the Mombasa-Nairobi road. Suddenly a Fiat tanker registration number KRR 498, pulling a trailer No ZA 3125 rammed into Ndavi Ndaya's lorry. Both vehicles were extensively damaged. Ndavi Ndaya, since deceased, was seriously injured. He was thereafter taken to Coast General Hospital where he died 21 days after admission. This suit for damages, special and general, was brought by the widow of the deceased pursuant to the provisions of the Law Reform Act and Fatal Accidents Act, caps 26 and 32, respectively, Laws of Kenya, for the benefit of the deceased's estate, her benefit and for the benefit of the deceased's 4 children who were then under age and dependent on him, and the deceased's 4 children who were then under age and dependent on him, and the deceased's parents. The named defendants are three; Wasufe Shire Abdo, who was the driver of the tanker; Ali Shigo and Haithar Haji Abdi, the owners of that tanker. The driver and Ali Shigo appeared and filed defence, but not Haithar Haji Abdi, the third defendant, against whom interlocutory judgment in default of defence was entered on 1st September, 1983. The judgment is only concerned with the assessment of damages against the 3rd defendant.

Damages under the Fatal Accidents Act and Law Reform Act are awardable under three heads; firstly for pain, suffering and loss of amenities; secondly, damages for loss of expectation of life; and damages for loss of future income or lost years.

On the first head the cause of action survived the deceased. After the accident he was admitted in hospital. He underwent treatment for about 21 days before he succumbed to death. During his stay in hospital we have evidence that he suffered immense pain, and was in distress throughout. He underwent amputation of one of his lower limbs and later contracted tetanus which later caused his death. For the pain and suffering he suffered his estate is entitled to an award.

In assessing damages on this head consideration must be given to the fact that the same principles for assessing damages for victims who survive do not apply. Damages are not intended to compensate the

deceased for the pain and suffering he succumbed to. They are more or less a windfall to his surviving relations. However, on the other side of the balance it should be borne in mind that a tortfeasor should not be permitted to benefit from his wrong doing merely because his victim died.

In *Mayur R Gurjar v Nairobi Deluxe Services Ltd & another* Civil Case No 437 of 1987, I awarded Kshs 75,000/- in a case where a 55 year old woman who had been injured in a traffic accident remained in hospital for 14 days undergoing treatment before she died. This was in October, 1988. The deceased in the instant remained alive for 21 days, had his leg amputated, and contracted tetanus infection. He must have really suffered. Bearing the facts of the case in mind, the authority cited and doing the best I can I assess damages on this head at Kshs 90,000/-.

On the head of loss of expectation of life, awards are normally of a conventional figure. Contrary to what Mr Pandya stated, viz that they range between Kshs 40,000/- and Kshs 60,000/-, presently, the awards have gone up to Kshs 70,000/- in some cases. In *John Mwaura Mwangi v Mwaura Thuku t/a Matunda Eldoret Line Services and Another* NR HCCC No 1473 of 1987, Bhandari J (as he then was) awarded Kshs 70,000/- in a case where the deceased was 28 years of age. The award was made either at the end of 1987 or early 1988. The award must have been influenced by the deceased's age. A reasonable figure in this case is Kshs 60,00/-, which I award the instant case, considering that the deceased was young, was in a well paying job and must have had great expectations in life. He was in good health and strong.

The last head is lost years otherwise called loss of dependency. The deceased had a wife, four children and his both parents who depended on him. He was aged 40 at the time of his death, was in good health and was in regular employment. He was earning a basic salary of Kshs 1190/- per month exclusive of house allowance. I consider that most of his income was being spent on his dependants. There may have been also services the deceased was rendering to his family but which no payments were made to him. No evidence was however led on that aspect. I do not therefore intend to fix a monetary figure to them.

The first stage in the assessment of dependency is to find the multiplicand. I take it that the deceased was spending most of his earnings on his dependants, say 2/3 of his income. On the basis of that fraction the multiplicand works out to Kshs 794/- per month or Kshs 9,528/- per annum. As for the multiplier there are several factors which affect it. Mr Pandya suggested 15 years. The deceased was 40 years of age. He would have perhaps worked for a further 15 years. However, his type of job entailed exposure to many risks. He was a driver of a lorry and at times would be required to drive along highways at night time. At the time of his accident on 8th June, 1977, he was in control of his lorry, the time having been 1 am. The deceased would have perhaps died in a road accident, from other causes or would have lost his job. There are several imponderables. There is also the fact that his children then depending on him were all at least 10 years and above. There is the fact that upon attaining majority age they would probably have ceased to be dependants. All of them are now adults, the last one having attained 18 years in November, 1988. Regard being had of all those, the fact that his wife and parents are still alive, a multiplier of 12 years will in my view be reasonable.

The principle in *Cookson v Knowles* [1978] 2 All ER 604, of working pre-trial loss and future loss of dependency will not work in the instance case, considering that there was a delay in the hearing of the case.

Consequently, the minimum monthly wage for truck drivers provided under the Regulation of Wages and Conditions of Employment Order made in May, 1989, is of no assistance to the plaintiff. Mr Pandya has submitted that I would apply it to work out the amount of dependency. That would have been applicable if I were to work out future dependency in the manner expounded in *Cookson v Knowles* (supra).

On the basis of a multiplicand of Kshs 9528/- and a multiplier of 12, the total dependency comes to Kshs 114,336/-. The plaintiff was paid Kshs 29,000/- under the Workmen's Compensation Act, by the deceased's employer. By dint of s24 of the Act it should be deducted. Mr Pandya suggested that the money be recovered from the tortfeasor and be paid over to the deceased's employers as indemnity. I think the suggestion is a novel one. I order that the money be recovered from the 3rd defendant and be paid over to Castico Roadways, Nairobi.

Then there is the issue of special damages. Kshs 7600/- was pleaded as having been incurred towards funeral expenses and expenses for transporting the body of the deceased from Mombasa to Machakos District. The plaintiff testified that she spent over Kshs 5,000/- on that head but she cannot now remember the exact figure. No documentary proof was tendered. However, regard being had of the stated purposes for which it was applied I consider the figure reasonable. I grant it in full.

The total, therefore, comes to:

- a) General damages for pain, suffering and loss of amenities Kshs 90,000.00
- b) Loss of expectation of life Kshs 60,000.00
- c) Loss of future income (dependency) Kshs 85,000.00
- d) Special damages Kshs 7,600.00

Kshs 242,936.00

I give judgment to the plaintiff in the sum of Kshs 242,936/- plus costs and interest and a further sum of Kshs 29,000/- to be paid over to the deceased's former employers by way of indemnity.

Dated and Delivered at Mombasa this 16th Day of March, 1990,

S.E.O BOSIRE

.....

JUDGE