



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO,S1288 & 1239 of 1984

1.L.L

2.P.M.....PLAINTIFFS

VERSUS

1.JARED.A.AYUKU

2.KIPLANGAT ARAP CHEPKUL.....DEFENDANTS

JUDGMENT

These two cases were consolidated and this judgment will relate to the two suits. The action was brought by a man and his infant daughter. Both claim damages as a result of a motor accident which occurred at the Kericho-Kitale Road at dawn on May 6, 1981. As a result of that accident, the adult plaintiff lost his wife and an infant daughter while the infant plaintiff lost her mother and younger sister. I will refer to them in this judgment as the adult and the infant respectively.

The adult was born in 1938. He did not have a great deal of formal education. He said he went to school upto standard three and left at that grade in 1949. He was married to a woman by name J M M. They were both of the same age. Unlike the adult plaintiff, she never stepped in school. Her husband described her as illiterate. But the evidence shows she was better off than her husband financially.

In May 1981, the adult plaintiff was employed by the Nairobi City Council as a sanitary labourer. He was in receipt of salary at the rate of Shs 550 per month. At that date, his wife had borne him nine children who were all then alive and well. With his meagre salary, he would be hard put to it to feed, clothe and educate the children. But he was lucky in having a hard-working wife who although disadvantaged by her lack of formal education, was industrious enough to help maintain the children. He told me and I believe him, that the wife sold beans, vegetables and other farm produce and from these she earned enough to supplement the family income. He estimates her monthly income as between Shs 800 to Shs 1000.

The adult plaintiff and his wife hail from Kakamega. I think their family circumstances was such that the adult plaintiff and his family could not live together here in Nairobi. The plaintiff alone lived here while his wife and family lived at their home in Kakamega. From her income, she buys clothes and school uniforms for the children. Sometimes, she even paid their school fees. In May 1981, the plaintiff's wife was nursing a baby 1 month and 2 days old. She was called S I.

At about 4 am on the morning of May 6, 1981, his wife was travelling together with the infant plaintiff and the baby in a lorry owned by the 1st defendant and driven by his servant and agent the 2nd defendant. They were fare paying passengers. The lorry overturned and both the plaintiff's wife and baby sustained serious injuries. Both died the same day. The infant plaintiff fortunately, survived the accident but

sustained serious injuries. Both plaintiffs say, the accident occurred because the 1st defendant's driver drove negligently. So both claim damages. Although the defendants were served, neither entered appearance. Accordingly, on October 17, 1984, the Registrar, sitting in chambers, entered judgment against them for the special damages claimed and also gave interlocutory judgments for damages. It is this that I am about to assess.

I will take the case of the infant plaintiff first. She is L L. At the date of the accident, she was attending school and was aged eleven. She suffered serious injuries and was taken to hospital unconscious. She apparently regained consciousness at the hospital. She remained on admission for one week. Her injuries interfered with her schooling. She could not attend school for some time. She has resumed school now but how long the accident kept her at home, is unclear.

On April 12, 1984, she was seen by Dr W M Wokabi, a consultant surgeon who gave evidence before me. I think her father's difficult financial circumstance was reflected in her appearance. On the day the doctor saw her, she was shabily dressed, she was in tattered clothes according to the doctor. She sustained multiple soft tissue injuries to the head, right forearm and right leg. The injury to the head must have affected her mind because she struck the doctor as having less than average intelligence for her age.

She also had multiple scars on the head, back, right forearm and right leg. The doctor considered that these scars disfigured her permanently. The doctor described this in technical language, as aesthetically uncosmetic. In the opinion of the doctor, the loss of her mother will cause this little girl physycological trauma and this will, in turn, affect her mental development. There is little doubt that the accident from which the infant plaintiff suffered such serious injuries, would have caused her considerable pain and suffering. She is entitled to be compensated for all these. The question is what will be a fair and reasonable compensation to award this little girl who suffered so much by this accident? Mr Munura advocate for the plaintiffs has helpfully referred me to a number of locally decided cases, most of which are unreported. I have looked at such cases as *Kanabar v The AG* High Court No 1022 of 1979 in which Shs 30,000 damages was awarded for injuries no less severe than the infant plaintiff's. I have also had and considered the award made in *Kimani v Kamau* High Court No 396 of 1978, in Civil Suit No 3003 of 1984 entitled *Outu v Makairo 3 Br Trading Company*, and a few others which I do not trouble to recite in this judgment. Having considered all these awards, I cannot say that there is a pattern. The awards varied with various judges. This only shows that award of compensation for pain and suffering is, by and large, a matter of impression and common sense. Doing the best I can, and taking the seriousness of the injuries into consideration the permanent deformity, the shock of her mother's loss and the probable effect her mother's death would result to her, I assess damages in favour of the infant plaintiff in the sum of Shs 55,000.

The adult plaintiff also claims damages for loss of dependency on behalf of six of his infant children. Their names and ages were given in the plaintiff as follows:

1. J aged 17 years
2. O aged 15 years
3. B aged 13 years
4. L (infant plaintiff) aged 11 years
5. H aged 9 years
6. J aged 7 years

The maintenance, education and upkeep of these children are the primary responsibility of the plaintiff, their father. But I have already related his difficult financial circumstances. The result was that a great load for their upkeep fell on their deceased mother. It is plain to me that these children are entitled to be compensated for their loss of dependency. The question is, how much in terms of money, have they lost

by the death of their mother?

The evidence satisfies me that all these children lived with her at Kakamega, she clothed and fed them and on occasions paid their school fees. That testimony is inherently credible and I accept it. The plaintiff swore that she was making on the average between Shs 800 to 1000 per month. I bear in mind, there is a tendency to exaggerate in estimates of this sort which cannot be backed by any verifiable evidence. In paragraph 4 of the plaint, her monthly income was put at Shs 2000. I am not satisfied that on this issue, the plaintiff is entirely reliable. I would, from the nature of her activity and the meagre sum of Shs 1000 which she died possessed of, assess her monthly income between Shs 600 to Shs 800. She spent a considerable portion of it on the children. Accuracy is not possible in these matters but I estimate she spent no less than Shs 500 per month on the children. So I reckon the loss of dependency of the children as Shs 6000 per year.

The next logical question, is how long would she have continued to provide for the children if her life had not been cut short by this accident? To this, no certain answer can be given. It is, on this aspect of the law, a matter of doubt and speculation. For a healthy and active woman and an industrious one at that, I think she would have continued to work and provide for her children until she attained the age of 60. She was born in 1938 and died in 1981. That shows that she was 43 years at the date of her death. I reckon therefore that her working life was cut short by 17 years. I think that would be a reasonable multiplier to take in this case. Accordingly, if my arithmetic is reliable, the aggregate sum which her dependents lost by her death, works out at Shs 102,000. I propose to award that sum by way of damages for loss of dependency. The statute enjoins me to apportion this sum among the children and this, I am soon to do.

But before doing this, I must deal with another head of damage sought by the adult plaintiff. As administrator of the estates of his wife J and his baby daughter S, he claims compensation for their shortened expectation of lives for the benefit of their estates. The plaintiff is entitled to damages under this head by virtue of section 2 of the Law Reform Act (cap 26). I think it was laid down in the older authorities that the thing to be valued, is not the prospect of the length of days, but of a predominantly happy life. In *Kampala Aerated Water Co v Kassam* [1961] EA 291 (c) 301 the Court of appeal for Eastern Africa said:

“Damages for loss of expectation of a happy life are never substantial”

In *Khimji & Others v Bakare and Others* Harris J sitting in this court awarded Shs 8,000 to the estate of a deceased whose expectation of life was 40 years. That has become the conventional figure. But this assessment was made in 1965, ie 21 years ago. Since then there has been considerable erosion in the value of the shillings. I estimated J's working life as 17. But this is not synonymous with her natural life. In all the circumstances, a healthy and active woman as the evidence shows J to be and not an unhappy mother, I think she would have lived till she attained the age of, at least 68 years. She therefore had, on my reckoning, an expectation of life of 25 years. A more realistic figure to award to day, taking into account the present day decline in the value of money ie Shs 12,000. I propose to award that sum to the estate for loss of expectation of the life of the deceased J.

Then there is her daughter S. She lived on this earth for just a month and her prospects of a future happy life are less certain than her mother's. But no one knows what she may become. There is no reason to suppose that she would grow up to be an unhappy woman. In this very uncertain area, I think she should have, for the benefit of her estate, 2/3 of the award of her mother. That works out at Shs 8,000. Accordingly, I propose to award to the plaintiff as administrator of the estates of J and her daughter S. Under the Law Reform Act, an aggregate sum of Shs 20,000.

I must now apportion the damages to the six dependants of the late J M.

In *Kassam v Kampala Aerated Water Co Ltd* [1965] EA 587 the Privy Council considered that the usual method of assessing damages for loss of dependency is to estimate the total dependency in a lump sum and thereafter apportion it among the various dependants. Although this is the method that commended itself to the board, it did not lay down any guidance how the apportionment is to be made. I must

therefore rely on my own resources. I have computed the deceased's expectations of working life as 17 years and arrived at the total loss of dependency on that basis. But the ages of the dependants vary from 7 to 17 years and it seems to me the younger children would sustain greater loss by the death of their mother than the older ones, many of whom may be self supporting within the 17 years. They ought to have more than the older ones. I apportion the damages commencing from the youngest to the eldest as follows:

J 7 years	Shs 25,000
H 9 years	Shs 21,000
L 11 years	Shs 18,000
B 13 years	Shs 16,000
O 15 years	Shs 12,000
J 17 year	<u>Shs 10,000</u>
Total	Shs 102,000

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I think it would not be right to conclude this judgment without acknowledging the great assistance Mr Munura rendered me and the very helpful decisions to which he has referred me. He put me in his debt.

In the result, in Suit No 1288, I give judgment for the infant Plaintiff against the Defendants jointly and severally for the sum of Shs 55,000 with interest at the normal Court rate from the date of plaint to the date of payment with costs to be taxed.

In Suit No 1289, I give judgment for the Plaintiff against the defendants jointly and severally for Shs 122,000 of which Shs 20,00 represents damages for loss of expectation of life and Shs 102,000 being damages under the Fatal Accidents Act (cap 32) with interest at the normal Court rate from the date of the plaint to the date of payment with costs to be taxed.

Dated and Delivered in Nairobi this 20th day of May 1986.

F.K.APALLO

JUDGE