

REPUBLIC OF KENYA

IN THE COURT OF APPEAL KENYA AT NYERI

CIVIL DIVISION

CIVIL MISC APPL 270 OF 2000

GRACE KANINI MUTHINI.....PLAINTIFF

VERSUS

KENYA BUS SERVICE LTD & ANOTHER.....DEFENDANT

JUDGMENT

GRACE KANINI MUTHINI, is the widow of the late Muthini Ndunda who passed away on 15.5.88. she brings this suit on behalf of the estate of the deceased under the Law Reform Act, Cap. 26 Laws of Kenya and on her own behalf and other named dependants of the deceased under the provisions of the Fatal Accidents Act, Cap. 32.

In a plaint filed on 17.10.89, the plaintiff described herself as the widow and administratrix of the estate of the deceased. She alleges that on or about 15.5.88 the plaintiff was lawfully travelling as a passenger in the 1st defendant's motor vehicle KVZ 919 when the 2nd defendant so carelessly and negligently drove and controlled and/or managed the said motor vehicle that the deceased fell of the buss and died. A defence was filed on 24.1.90. the capacity of the plaintiff to institute the suit was denied on the basis that she was not the legal representative of the estate of the deceased. The accident was admitted, but negligence on the part of the 2nd defendant was denied. It was alleged that the accident was solely caused or substantially contributed by the negligence of the deceased in that he rode in the said vehicle in a dangerous position, he jumped off a moving motor vehicle, he failed to take care of his own safety, and he caused or permitted the said accident.

The issues framed for trial were essentially whether the plaintiff was the legal representative of the deceased and accordingly whether or not she could institute the suit, whether the accident occurred due to the negligence of the 2nd defendant, or the negligence of the deceased, or whether both contributed to the accident, and whether the deceased's dependants were entitled to damages under the Law Reform Act and the Fatal Accidents Act.

At the commencement of the trial, Mr. Muthusi, the plaintiff's advocate, abandoned the claim for damages under the Law Reform Act because the plaintiff had no letters of administrations to the estate of the deceased at the commencement of the suit or at all and accordingly the claim was incompetent. The Court therefore proceeded to try the claim under the Fatal Accidents Act.

On liability, the plaintiff did not adduce any evidence beyond stating that the accident was reported to Police. She produced in evidence a Police Abstract of the accident. This document indicated that on 15.8.88 at 2.20 p.m. an accident occurred on 1st Avenue, Eastleigh and General Waruinge junction involving motor vehicle KVZ 919 owned by the first defendant and driven by the second defendant and one Muthini Ndunda, the deceased. The said Muthini Ndunda is described therein as a pedestrian and the injuries are said to have been fatal. This document does not improve the case of the plaintiff. All that is recorded therein is the fact of an accident involving the deceased and the 1st defendant's motor vehicle which was being driven by the 2nd defendant.

To return to the facts of this case, I can say from the pleadings that the following facts are undisputed. First, the deceased was a passenger in the defendant's motor vehicle. Secondly he suffered

the injuries he did in the course of his travelling in the said motor vehicle. What is disputed is whether he sustained the fatal injuries as a result of his own negligence or as a result of the negligence of the driver, or partly as a result of his negligence and partly as a result of the driver's negligence. The plaintiff's evidence does not shed any light on this dispute fact. And the defendant preferred no to offer any evidence. If the defendant had the burden of proof, I would have unhesitatingly presumed some adverse fact against him. But he did not bear the burden of proof. It was on the plaintiff and she had to prove her case on a balance of probabilities. On the undisputed fact, it is entirely probable that the accident was caused by the negligence of the second defendant. It is equally probable that it was caused by the negligence of the defendant. And it is also equally probable that it was caused partly by the negligence of the deceased. Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, I must, not without a little anguish, dismiss the plaintiff's suit on the ground that fault has not been established against the defendants, be that as it may. I am enjoined to assess the damages I would have awarded had I found liability against the defendants.

The plaintiff's evidence was that the deceased was a butcher. He was 52 years old. He used to earn an income of Kshs. 7000/= per month from the business. The business collapsed some time after his death. He used to support her and the children. The plaintiff did not testify on how much support she received from her husband. I assume that this is because like many households, the household of the deceased and his wife did not keep accounts of income and expenditure. Mr. Billing urged me to disallow the claim of loss of dependency on the basis that the widow did not adduce any evidence as to how much the deceased gave her, that there was no documentary proof of income, and that loss of support was not pleaded. Mr. Muthusi, urged me to apply what he called the conventional one third as loss of dependency. He suggested a multiplier of 13. In the final analysis Mr. Muthusi submitted that an award of Shs. 312,000/= as damages for loss of dependency would be reasonable. I pause here to restate the principles that should guide a court in the assessment damages under the Fatal Accidents Act.

The court must find out as a fact what the annual loss of dependency is. In doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fraction to be applied. Each case must depend on its own facts. When a court adopts any fraction, that must be taken as its finding of fact in the particular case. The annual loss of dependency must be multiplied by a figure representing a reasonable number of years purchase. In considering that reasonable figure, commonly known as the multiplier, regard must be had to the personal circumstances of both the deceased and the dependants such as the deceased's age, his expectation of working years, the ages of the dependants, and length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and, if wisely invested, good returns can be expected.

Bearing the above principles in mind and the evidence on records as well as the submissions of counsel I am of the view that there is no documentary proof of the loss of dependency. But I am satisfied that the plaintiff and her children were being supported by the deceased. I cannot penalize the plaintiff because she did not keep accounts of what passed from the deceased to her, or for keeping records of what the deceased spent on his children. That I refuse to do. No amount of eloquence would move me to do so. I estimate that the deceased spent about Kshs. 3000/= on his wife and children. That will be the monthly multiplicand in this case. A multiplier of ten (10) would in my opinion be reasonable. The capital sum I arrive at is the Kshs. 360,000/= (i.e. $3000 * 12 * 10$). I would then discount it by nearly one fifth thereof to allow for the contingencies I mentioned in the recitation of the guiding principles. In the result, I would have awarded the plaintiff Kshs. 290, 000/= as general damages under the Fatal Accident Act.

As regards special damages, the law is settled that they must not only be specifically pleaded but they must also be strictly proved. If they are not pleaded, any evidence thereon is inadmissible and ought to be

excluded from the record (see COAST BUS SERVICE LTD vs E. MURUNGA NDANYI & ANOTHERS, Civil Appeal No. 192 of 1992, court of Appeal). In the instant case the plaintiff did not plead with particularity the special damages. She contended herself, or rather her legal advisor was content to state that they would be supplied later. She must suffer for that inadequacy of pleading. Her evidence on special damages is accordingly excluded and I award nothing.

In the ultimate, the judgment of this Court is that the plaintiff's suit is dismissed with costs for want of proof of negligence against the defendants.

Dated and delivered at Nairobi this 29th day of November, 1994.

A.G. RINGERA
JUDGE