



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO.133 OF 2008

LESIIT, J.

V.K.M (suing as legal representative of

.....
PLAINTIFF

Versus

ALFONZO MUTERIA.....

.....**1ST DEFENDANT**

COUNTY COUNCIL OF

THARAKA.....

.....**2ND**
DEFENDANT

JUDGMENT

The Plaintiff in this case has sued the defendants in her capacity as the Administratrix of the estate of **JOSPETER MUTEGI MUSEE** and on her own behalf and on behalf of three children of the deceased as dependants of the deceased. The claim has been brought under the Law Reform Act and the Fatal Accidents Act. The Plaintiff is seeking special and general damages with interest and costs of the suit. The parties have agreed on liability at 50%/50% basis against each party. There is therefore no need to go into the facts of the case except to mention that the deceased was involved in an accident with a vehicle driven by the 1st defendant and belonging to the 2nd defendant. He died six days after the accident while undergoing treatment.

The court has to determine the quantum of damages thereof.

The deceased was a primary school teacher earning a gross salary of Kshs.23, 737/= and a basic salary of kshs.13, 980/=. He is also said to have been running a Hotel at Kamarandi shopping center where on average he earned Kshs.3000/= per day. At the time of his death the Plaintiff was not working and therefore the family was wholly dependent on the deceased for their maintenance, food, clothing and shelter and also for school fees for the children. The Plaintiff produced the birth certificates of the children as evidence in this case. These certificates are proof that the deceased was the father of the children. The Plaintiff has also produced evidence to show that after the accident, the deceased was first treated at St. Orsola Hospital before being transferred to Chogoria PCEA Hospital where he was admitted. He died six days after the accident.

The Plaintiff has produced receipts for payment made at Chogoria PCEA Hospital in the sum of Kshs.29, 909/= and at St. Orsola Hospital in the sum of Kshs.2, 910/= for the treatment costs of the deceased. She produced a receipt for payment made towards the cost of hiring an ambulance to transport the deceased from St. Orsola to Chogoria Hospital in the sum of Kshs.3, 000/=. She also produced a receipt for the purchase of a coffin in the sum of Ksh.7, 000/=. The Plaintiff has also produced a receipts of payment for vehicles hired to transport people during the burial in the sum of Ksh.20, 000/=.

Mr. Murango Mwenda for the Plaintiff filed submissions and also highlighted them in court. The learned counsel for the Plaintiff has urged the court to adopt of multiplier of 20 years on the basis the deceased was only 43 years at the time of death and expected to work until he was 60 years. Counsel suggested that from the gross earning of the deceased, the court should discount only the Statutory deductions in the form of taxes, which stood at kshs.2968/= at the time of death, leaving a net balance of kshs.20, 769/=.

Mr. Mwenda urged the court of apply the two thirds rule in arriving at the loss of dependency for the wife and the children which brings the figure to Kshs.3, 323,040/=.

Under the Law Reform Act Mr. Mwenda urged the court to award kshs.100, 000 for loss of expectation of life In respect of pain and suffering Mr. Mwenda urged the court to award Kshs.20, 000/= in view of the fact that the deceased died 6 days after the accident and that therefore he must have suffered pain and agony during the six days. In respect of Special Damages Mr. Mwenda urged the court to award Kshs.57, 904/= which was the sum proved and supported by receipts.

Mr. Akwalu for the Defendant also filed written submissions and highlighted them in court. In regard to loss of dependency Mr. Akwalu urged the court to adopt a multiplier of 10 years urging that at the time of the deceased's death, he was 43 years old and that the retirement age at that time was 55 years as it had not been raised to 60 years by then. Mr. Akwalu urged that the deceased should not benefit from the enhanced retirement age. In regard to the deceased's salary Mr. Akwalu urged the court to deduct not only the statutory taxes but also the allowances from the gross salary because in his submissions the hardship allowance the deceased was earning was temporary allowance as he could be posted out of hardship area at any time. Mr. Akwalu also urged the court to deduct house, medical and commuter allowances from the salary arguing that those were personal to the deceased for his own personal benefit. Mr. Akwalu urged that out of all those deductions the net salary available for the use by the deceased and his family was Kshs.12, 794/80. Mr. Akwalu urged the court to use a multiplicand of Kshs.10, 000/= against ten years dividend by two thirds which brings the total to kshs.800, 000/=. Mr. Akwalu also suggested for pain and suffering the court should award Kshs.10, 000/=. In respect of the loss of expectation of life Mr. Akwalu suggested the sum of Kshs. 70,000/=.

I have carefully considered submissions by both counsel in this case and the evidence adduced by the plaintiff herein and I have come to the following decision on quantum.

The special damages were proved as pleaded at Khs.57,944/= and I allow it for loss of expectation of live, the cases cited by each counsel are considered. The case cited by defendant's counsel **Maina-v Cutuka HCCC No.3723 of 1990**, the judge awarded Kshs.70,000/= for loss of expectation of life. It was a 1995 decision. The case cited by the plaintiff's **Onami-v-Ngure & others HCC 301/2002** the judge awarded 100,000/= for a similar claim. It was decided in 2005, 10 years after case cited by the defendant's counsel. I am persuaded by both cited cases that an award of users 100,000/= is conventional and fair under this head.

In regard to Pain and Suffering, the deceased died six days after the accident. I find that Kshs.20,000/= suggested by the Plaintiff's advocate is fair as the deceased must have suffered pain during the six days before his death.

In regard and to loss of dependency the deceased was 43 years old and a school teacher. His work was not hazardous and he was expected to live long. The multiplier of 10 suggested by the defendant's advocate is too low and the reasoning wrong. The deceased was going to benefit from the enhanced retirement age and could have worked for a further 17 years. I will adopt a multiplier of 17 years.

In regard to the multiplicand I accept that statutory deductions should be deducted. I do not however buy the suggestion by the defendant's advocate that all other allowances should be deducted on the basis they were personal to him and or were temporary. The fact part of the salary will be for the deceased use is the reason a two thirds rule is applied. I will adopt a multiplicand of 20,769/= which is the salary less the statutory taxes. The loss of dependency rolls out as follows;

$$20,769 \times 12 \times 17 \times 2/3 = 2,824,584 / = 2,824,584 / =$$

In the result I enter judgment for the plaintiff against the defendants jointly and severally as follows;

- (a) Loss of dependency.....2,824,584
- (b) Pain and suffering..... 20,000
- (c) Loss of Expectation of life.....100,000
- (d) Special damages.....57,944

Total **3,002,528**

Less 50% liability against Plaintiff 1,501,264

1,501,264

I also grant the plaintiff interest on the award of

damages at court rates and costs of the suit.

Dated at Meru this 9th day of December 2010.

LESIIT, J.

JUDGE

9TH December 2010

Coram:

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KIRIMI/MWONJARU.....COURT CLERKS

MWENDA.....FOR PLAINTIFF

AKWALU.....FOR DEFENDANT

Judgment read, signed and delivered in open court this 9th day of December 2010.

LESIIT

JUDGE



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