



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 339 of 1998

**BETTY NGATIA (ADMINISTRATOR OF THE ESTATE OF GLADYS
WAITHIRA NGATIA)PLAINTIFF**

VERSUS

SAMUEL KINUTHIA THUITA.....DEFENDANT

JUDGMENT

GLADYS WAITHIRA NGATIA (to be referred to in this judgment as “the deceased”) was, on 4th February, 1996 a lawful passenger in motor vehicle Registration No. KWB 637 owned by SAMUEL KINUTHIA THUITA (to be referred to as “the defendant” and which was being driven along Thika-Nairobi Road when, due to the negligence of the defendant, one of its wheels came off the said vehicle, causing him to lose control and roll. The deceased suffered fatal injuries. She died on the same day 4th February, 1996. A certificate of death produced in these proceedings as EXHIBIT NO.2 gives the cause of death as HAEMOTHORAX due to a tear of the lungs and multiple fractured ribs consistent with road traffic accident. A consent judgment on liability for this accident was recorded on 21st January, 1999 whereby judgment was entered for BETTY NGATIA (plaintiff and administratrix of the deceased’s estate) against the defendant at 100%. The case proceeded on assessment of damages.

On the 17th January, 1997 the plaintiff was granted a limited grant of Letters of Administration ad colligenda bona under section 67(1) of the Law of Succession Act for purposes of filing this suit. Pursuant thereto the plaintiff filed this suit through a plaint dated 20th January, 1997 drawn by the law firm of OMWENYO & COMPANY ADVOCATES, claiming general and special damages under both the Law Reform Act and Fatal Accidents Act. This is clearly brought out in paragraph one of the plaint which reads: -

The plaintiff is an adult of sound mind residing and working with Nakuru Municipal Council and is the mother and personal representative of the estate of GLADY WAITHAKA NGATIA (deceased) having been duly appointed as such in Nakuru High Court Succession Cause No.29 of 1997 and she brings this action for her own benefit and that of the estate of the deceased under the Law Reform Act and the FATAL ACCIDENTS ACT, and her address for purposes hereof is c/o OMWENYO & COMPANY ADVOCATES, GIBCON HOUSE P.O BOX 4031 NAKURU.

Throughout these proceedings the defendant was represented by Mr. Kagondou from the law firm of M/S KANGONDU & MUKUNY ADVOCATES.

I will first deal with damages under the Law Reform Act and then under the Fatal Accidents Act.

Damages under the Law Reform Act are payable for the benefit of the deceased's estate. In this particular case the claim for damages is maintainable because the suit was filed after the plaintiff obtained a limited grant of letters of administration.

Damages are payable under the Law Reform Act for pain and suffering of the deceased. In this connection the plaintiff gave evidence and told the court that the deceased was involved in the accident on 4th February, 1996 at 1.30 a.m. and she died at around 5.30 a.m. on the same day at Aga Khan Hospital Nairobi. This means that the deceased did not die instantly and must have suffered pain before she died. Miss Omwenyo proposed payment of shs. 40,000/- for pain and suffering. Mr. Kagundu proposed Shs. 10,000/-. There are numerous High Court decisions where Shs. 10,000/- has been awarded for pain and suffering, especially where death occurred on the same date of accident. See NAIROBI HCCC NO.1993 OF 1990 FREDERICK GATAKA MUNGAI VS GEORGE N. KIBUNYI & ANOTHER. A decision of Hon. Mr. Justice Mbogholi-Msagha delivered on 26th September 1991. There are many more.

In this case I will award the deceased's estate Shs. 10,000/- for pain and suffering of the deceased.

The claim for loss of expectation of life is also maintainable under the Law Reform Act. This claim is based on the principle that the deceased had been deprived of normal expectation of life due to the wrongful act of a tortfeasor, in this case, the defendant. Awards under this head of damages vary from one case to another, depending on the age of the deceased at the time of death. In my view the younger the deceased, the greater the award, e.g. in ZAKHARIA BOGONKO V. DHABIR DIARSHAMA & ANOTHER NAIROBI HCCC NO. 2377 OF 1991 Justice Githinji gave an award of Shs. 80,000/- where the deceased was aged 22 years at the time of death and in JONAH KARONJI V ABDALLAH TORO & ANOTHER HCCC NO. 5158 of 1989 Mr. Justice Mbogholi-Msagha awarded the estate of a 26 year old deceased shs. 75,000/-. There are more.

In the present case the deceased was a young girl of 19 years. I award her estate shs. 100,000/- for loss of expectation of life.

The other head of damages payable under the Law Reform Act is what has become known as the deceased's "lost years". This is the income that would have been earned by a deceased person if she/he had been alive and working after deducting his/her normal living expenses. This sum is payable to the estate of the deceased. It has been held to be so payable by the Court of Appeal in several cases wherever it had been proved to the satisfaction of the court that a deceased person had been employed, with a regular monthly income and would have been expected to continue living, working and earning that income for his estate but for his death. His estate would then be awarded damages for those "future lost years" income.

There are other cases where deceased persons who may have died young and before getting gaining employment had their estates awarded damages for lost years. Such cases are now common and in particular are filed by parents of those deceased young men and women, claiming income for lost years which would have been paid to them or used by their respective children to support them. It is now trite law that damages are payable to those parents who prove their claims to the satisfaction of the court. The Court of Appeal in SHEIK MUSHTAQ HASSAN VS. NATHAN MWANGI KAMAU TRANSPORTERS AND OTHERS (1982-1988) I K.A.R 946 gave the reasons for payments of damages for lost years to the estates of deceased persons for the benefit of their parents. Judge of Appeal J.O. Marangi (as he then was) had this to say: -

In the context of Kenya, and that is the relevant context, parents of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age, suffer real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided, is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education is lost, never to be redeemed. All the benefits that would accrue to the parents, where it applies, to younger brothers and sisters of the deceased as the deceased matured physically and materially are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could

never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the time is the assessment of a fair award in the circumstances of any one case.

Later on again Justice Nyarangi had this to say in the same judgment

In general, In Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya by both African and Asians.

This is the position most parents find themselves in here in Kenya. They take their children to school, paying school fees and for other school requirements for them, till the children complete school and take up training courses and other relevant studies to enable them to prepare themselves for a particular desired employment or career whether in the public sector or private sector. These parents feel that it is their responsibility to pay for their children's education so that these children may get gainful employment for their own financial support in this competitive life and also for the financial support of the parents in old age. Parents therefore do have hope in their children. After investing heavily in the education of their children, the parents expect these children to reciprocate and give them some financial support, assistance and care in their old age. Upon the death of that child a parent's hope and expectations are dimmed and that financial support is obliterated. It is for this reason that courts do condemn tortfeasors to pay the estate of such a child, for the benefit of his or her parents and other beneficiaries, money for lost years. That is money which such a child, if she or he had lived and worked, would have earned for the period that she or he would reasonably have been expected to be in the income-yielding employment.

This was also held by the Honourable Mr. Justice F.K. Apaloo (as he then was) in the case of S.F. MUKA V. VISHRANI RAMJI HALAI & ANOTHER HIGH COURT OF KENYA AT NAIROBI CIVIL CASE NO. 1870 OF 1994 when, in a well reasoned judgment delivered on 13th October 1986, he awarded Shs. 600,000/- for lost years to the estate of Stella Sally Awinja.

The deceased in the present case was aged 19 years at the time of her death. She had attended Kerugoya Girls High School where she sat for the Kenya Certificate of Secondary Education examination in 1994 and obtained a mean grade C- (minus). She scored B- in Home Science, B- in Kiswahili, C (plain) in Geography, History and Government, D+ in English and Biology and D- in Maths. She was therefore an average student. No doubt she would have continued with further studies. Her Kenya Certificate of Secondary Education was produced as EXHIBIT 3. The deceased decided to train as a secretary. She joined Valley Secretarial College Nairobi in May 1995 for a one year secretarial course. She was due to complete her course in March, 1996 but she died in this accident on 4th February, 1996.

Mr. Kagonde submitted that the deceased was not a good scholar, and her prospects were virtually non-existent; that she was only able to undertake a course suitable for school dropouts and that Valley Secretarial College could not be measured or compared with Kianda Secretarial College or Government Training Institute and that the deceased, if she had a sound educational background, would even have joined one of the Kenya Polytechnic colleges. Unfortunately no evidence was led to show how good and superior Kianda College, Government Training Institute are to Valley Secretarial College. Some of these colleges may only be good sounding in name only while offering substandard courses or training facilities. I accordingly reject Mr. Kagonde's submission.

The deceased was pursuing a secretarial course and would have graduated as either a copy typist, shorthand/audio typist. The plaintiff produced evidence from the Office of the President, National Youth Service Secretarial College through a letter dated 25th July, 1997 and signed by the Principal of that college a Mrs. M.D.M. Simiyu showing the current revised scheme of service for secretarial personnel and the grading of secretarial personnel and salary. (EXHIBIT 5). This letter was produced in evidence without objection from the defendant's counsel. According to Mrs. Simiyu the salary for a newly qualified copy typist II Job Group F is Kshs. 4,000/- - Kshs. 5035 per month, while that at Job Group G is

Kshs. 6,000/- - Kshs. 7,770/- per month.

It is therefore the plaintiff's case that the deceased would have completed her secretarial course at Valley Secretarial College and been employed as a copy typist II earning a monthly salary starting at Kshs. 4,000/-. As this evidence was not seriously contested I do make the same finding.

Miss Omwenyo advocate submitted that the deceased would have used part of this salary to look after herself, that there would have been the usual statutory deductions, leaving a net balance of Kshs.1,334/- per month for the purposes of this case. Mr. Kagundu stated that the net balance would have been only Kshs. 1,000/-. I will accept Miss Omwenyo's assessment because it means that the deceased would have been able to save a third of her salary and used the remaining two thirds inclusive of the statutory deductions. I will therefore use the multiplicand of shs. 1,334 but would round it to shs. 1,300/-.

If the deceased had joined the public sector, and there was a likely probability that she would, her retirement age would be 55 years. She had therefore 36 years to live at the time of her death. Miss Omwenyo proposed a multiplier of 28 years. Mr. Kagundu proposed a multiplier of 10 years, meaning the deceased would have worked only up to the age of 29 years. I have no hesitation in rejecting the ten years multiplier. I will however use the multiplier of 25 years. Under this heading I will award the deceased's estate for lost years the sum of shs. 390,000/- calculated on the basis of shs.1300 by 12 by 25.

I will now deal with the claim under the Fatal Accident Act for loss of dependency. I hold the view that the deceased's parents, sisters and brothers did not depend, for their livelihood, on the deceased who was throughout either a student at Kerugoya Girls High School or at Valley Secretarial College without any proved income. I reject the plaintiff's claim under the Fatal Accident's Act.

The plaintiff prayed for payment of general damages. It is trite law that special damages must be pleaded and specifically proved before they can be awarded. In this case the plaintiff produced a receipt Exh.6 for a coffin which she purchased at Shs. 8,000/-, a receipt Ex.7 for a police abstract for shs. 100/- receipt exhibit 8 for Death Certificate having paid shs. 140/-, receipt Ex.9 for shs. 6,000/- for a grave at North Cemetery Nakuru Municipality, receipt Exh.10 for shs.10,000/- transport charges; Ex.11 for shs. 17,000/- paid at Aga Khan Hospital Nairobi; Ex.12 for shs.1,500/- paid for legal fees and Ex.13 for another 5,000/- towards legal fees to institute succession cause. The total amount under this heading is shs. 61,240/-. I award this to the plaintiff.

In the final judgment therefore I award the plaintiff the following in this case: -

(a) Pain and suffering	Shs. 10,000/-
(b) Loss of expectation of life	Shs.100,000/-
(c) Lost years	Shs . 390,000/-
(d) Special damages	Shs. 61,240

Total	Shs. 561,240/-

I award the plaintiff the costs of this suit and interest at court rates. Interest on general damages under the Law Reform Act (shs. 500,000/-) will be calculated from the date of this judgment. Interest and special damages (shs.61,240/-) will be calculated from the date of filing this suit.

It is so ordered.

Dated and delivered at Nakuru this 29th January, 1999

A.G.A. ETYANG'

JUDGE