



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 676 OF 2009**

**VIOLET JEPTUM RAHEDI..... PLAINTIFF**

**VERSUS**

**ALBERT KUBAI MBOGORI..... DEFENDANT**

**J U D G M E N T**

1. The Plaintiff's claim against the Defendant is for general and special damages arising from the death of her husband, EDWARD BENJAMIN RAHEDI (hereinafter called the **Deceased**). The Deceased died while undergoing treatment for a gunshot wound to his head inflicted by the Defendant on 1<sup>st</sup> December, 2007 in an incident which occurred along Lang'ata Road, Nairobi. The death occurred on 26<sup>th</sup> January 2008.
2. The Plaintiff is one of the administrators of the Deceased's estate. Damages are sought under the **Fatal Accidents Act, Cap 32** on her own behalf and also on behalf of the their children **Ian Rahedi** (who is the co-administrator) and **Ivy Nafula**, the Deceased's father **Esau Ogali Rahedi**, his mother-in-law **Rael Rono**, his brother-in-law **Julius Kipng'etich**, and the daughter of Julius, **Jepkosgei Rono**. Damages are also sought under the **Law Reform Act, Cap 26** for the benefit of his estate.
3. The Plaintiff's case is that the Deceased was hit by a bullet negligently and dangerously fired by the Defendant with intent to kill or cause grievous harm to somebody. Particulars of negligence have been pleaded.
4. The Defendant was convicted of the manslaughter of the Deceased and sentenced to 14 months imprisonment vide **High Court Criminal Case No. 8 of 2008**. He had been charged with his murder.
5. The Defendant denied the Plaintiff's claim in his **statement of defence dated 9<sup>th</sup> March 2010**. While admitting the events that led to the Deceased's death, he pleaded that he had shot him accidentally in self-defence after he was violently attacked by a group of youths following a traffic accident. He denied the particulars of negligence pleaded by Plaintiff and pleaded an inevitable accident. He also denied the particulars of loss and damage pleaded, including special damages which he averred were exaggerated. He sought dismissal of the Plaintiff's suit.

6. At the hearing of the suit the Plaintiff testified and adopted as her testimony-in-chief her witness statement filed on 30<sup>th</sup> May 2011 she called one other witness, **Paul Otieno** (PW2). The Plaintiff's documents were admitted in evidence as **Exhibits A and B**. Exhibit A consists of various documents, including the Deceased's hospital summary, children birth certificate, financial statements, bank statements and many other documents. Exhibit B consists of the proceedings and judgment in the criminal case against the Defendant. The Defendant did not call or lead any evidence.

7. I have considered the testimonies of the Plaintiff and PW2 and the documents produced in evidence. The parties filed written submissions which I have also considered. The submissions are well presented. I am grateful to the learned counsels for the same.

8. I will deal with the issue of liability at the outset. There is no dispute that the Defendant was criminally convicted of the manslaughter of the Deceased. He did not plead that there was any appeal pending against that conviction.

9. **Section 47A** of the **Evidence Act, Cap 80** provides –

**"A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment, or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

10. Criminal liability requires a heavier burden of proof (**beyond reasonable doubt**) than civil liability (**balance of probability**). Having been criminally convicted, the Defendant's civil liability for unlawfully killing the Deceased cannot be in doubt, particularly in light of the provisions of **section 3** of the Fatal Accidents Act, which reads –

**"3. Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death was caused under such circumstances as amount in law to felony."**

11. The Defendant did not tender any evidence before the Court to show that the Deceased contributed in any way to his being shot. The criminal proceedings against the Defendant and the judgment thereon are before this court (Exhibit B). The evidence before the criminal court (which was the High Court) was that there was a minor accident involving the Defendant's motor vehicle and the motor vehicle of another person. A totally unnecessary quarrel then ensued between the two. There was evidence that the Defendant had been drinking alcohol just before the incident. The criminal court attributed the quarrel to the foolishness of both the Defendant and the other motorist.

12. There was evidence that at some point the Defendant drove off from the scene but after some 50 metres or so he turned round and came back to the scene. He then re-engaged the other motorist and a further quarrel ensued. The criminal court accepted that in the process the Defendant may have been threatened or attacked by colleagues or friends of the other motorist.

13. It is worth mentioning at this juncture that this incident occurred at a police road-block within the immediate proximity of police officers who were armed. The police officers, from the evidence placed before the criminal court, did not intervene in any way to cool down the quarrelling motorists. They just looked on. Anyway, after the Defendant had come back to the scene and re-engaged the other motorist he fired a shot from his handgun which unfortunately hit an innocent motorist who was in his car waiting to proceed home. That innocent motorist was the Deceased.

14. The Deceased was not involved in any way in the quarrel between the Defendant and the other motorist. Indeed the Defendant did not know the Deceased and could not have had any malice towards him. But all that does not matter. One is equally liable for transferred malice in civil as well as criminal law. The criminal court found that there was absolutely no cause for the Defendant to fire his gun. The injury to the Deceased and his subsequent death were totally unnecessary and, as far as this case is concerned, caused entirely by the negligence of the Defendant. On liability I find for the Plaintiff at 100 per cent.

15. The main issue in this case is damages, which have been claimed under the Law Reform Act and the Fatal Accidents Act. I will now consider that issue.

### Under the Law Reform Act

16. The damages to be awarded under this statute are for pain and suffering, and loss of expectation of life. There are also funeral expenses which are normally awarded as special damages.

(i) Pain and Suffering: The Deceased was in hospital from 1<sup>st</sup> December 2007 when he was shot to 26 6t January 2008 when he died, a period of 56 days. The evidence before the court was that during this entire period the Deceased was mainly comatose. He was not conscious. There will be no obvious suffering in a person who is unconscious, but that is not to lessen the distressful circumstances of his condition. A case has been cited in the Plaintiff's submissions where KShs 1 million for pain and suffering was awarded. The Plaintiff's advocates suggest KShs 3.5 million under this head. I cannot think of any juridical justification for such awards under this head. I will award KShs 100,000/00 for pain and suffering.

(ii) Loss of Expectation of Life: The Deceased was aged 44 years and of good health when he died. He was at the prime of his life. Everything being equal, he had many more productive years ahead of him. But nothing is ever equal in this life. I will award KShs 150,000/00 for loss of expectation of life.

### Under the Fatal Accidents Act

17. Damages under this statute must be for the benefit only of the wife, husband, parent and child of the deceased person. See **section 4(1)** of the Act. In the present case therefore, the claims made for the Deceased's mother-in-law, brother-in-law and niece-in-law must be disregarded.

18. In order to assess damages under the Fatal Accidents Act, I must first determine the Deceased's **income**, the extent of his dependants' **dependency** and the **multiplier** to be used.

19. As for income, the Deceased was a businessman running a wines and spirits business from his house, but with a small store at *Nairobi West*. From the Plaintiff's testimony, the business appears to have been the Deceased's full-time occupation. PW2 was called by the Plaintiff to testify as to the Deceased's income from his wines and spirits business. The witness had prepared what he called financial statements of the business for the years 2002 and 2003. He testified that he prepared the statements at the request of the Deceased. He prepared them from documents provided by the Deceased which included receipts, invoices etc. The business was a sole proprietorship called *Raran Agencies*.

20. The expertise of PW2 was an issue. He was not registered with the *Institute of Certified and Public Accountants* the body that licences auditors and practicing accountant in the country. He said that his qualifications were: member of the *Institute of Financial Managers*; member of the *Institute of Cost and Executive Accountant*; and associate member of the *Kenya Institute of Management*. He said that to become a member of these organisations one has to be an accountant. He did not have any document in support of his qualifications, but it is not the usual practice for expert witnesses to bring to court their certificates, etc.

21. PW2 further stated that he worked for 13 years with a leading firm of accountants and auditors in Kenya and that he had trained there in accounts, leaving as a supervisor in consultancy and audit. He did

not say what he was consulting in but surely if he was a qualified accountant and auditor, would he not have registered himself with the Institute of Certified Accountants?

22. PW2 testified that he prepared three financial statements. They appear at pages 189, 193 and 200 of Exhibit "A". Each report runs to 5 to 6 pages. The financial statement at page 193 is for the year ended on 31<sup>st</sup> December 2002. It discloses a profit for the year of KShs 2,233,495/00. The profit for the previous year, 2001 is given as KShs 1,566,780/00. The financial statement at page 193 is also for the year ended 31<sup>st</sup> December 2002. It is an exact copy of the financial statement at page 189 which contains the very same figures as the previous statement.

23. The financial statement at page 200 is for the year ended 31<sup>st</sup> December 2003. This one gives the profit for the year as KShs 39,939/00. The profit for the previous year (2002) is given as KShs 19,799/00.

24. PW2's explanation during his testimony-in-chief for the discrepancies in the profit declared for the year 2002 was that the profit shown in the year 2003 financial statement was purely for tax purposes, though, he explained further, the declared profit was supported by the documents given to him by the Deceased. In cross-examination he said that the books of accounts given to him by the Deceased for preparation of the financial statement for the year 2003 were not correct and could not tally with the books given to him for preparation of the financial statement of the previous year 2002. He denied any collusion with the Deceased to defraud the Government of any tax. He also stated that he never himself submitted any accounts to the taxman on behalf of the Deceased's business.

25. The Plaintiff herself testified that the Deceased's income from his business was about KShs 350,000/00 per month. That would translate to KShs 4.2 million per year. That income is not supported by any evidence placed before the court. The financial statements prepared by PW2, if he was qualified to prepare them, are themselves contradictory. One financial statement declares a profit of KShs 2,233,495/00 for the year 2002 while the other statement declares a profit for the same year of KShs 39,939/00. If the smaller figures were not true and were meant only to deceive the taxman and thus deprive the Government of tax lawfully due to it, it is something that the court will not condone. It also puts into doubt the larger profit declared for the same year. Why should it not be equally false and designed only for a particular purpose?

26. But the Plaintiff placed before the court anecdotal evidence of the Deceased's and his family's life-style that tended to indicate a very large income. These included the very expensive sport of tennis pursued by their two children and the expensive schools they attended. There is evidence that the children regularly attended tennis tournament not only locally but also abroad at considerable expense to their parents, not to mention coaching fees, etc. There was also evidence that the Deceased was servicing a modest mortgage as well as a bank loan. The Deceased himself was driving a modest Nissan sunny car; there was no evidence that the Plaintiff had a personal car at the time of the Deceased death.

27. The Deceased's family's life style is indicative of a fairly high income. Legitimate income is ordinarily declared and due tax paid upon it. There are no income tax declarations of the Deceased placed before the court. As already seen, there are also no proper books of accounts placed before the court. Why wasn't the Deceased income, apparently high as it was, duly declared? If it was not declared because of defrauding the exchequer of income tax, is this something the court should reward?

28. The court should not reward any illegality. The evidence of Deceased income placed before the court is totally unreliable. But in equity I cannot shut my eyes to the fact that the Deceased had some income, albeit not fully declared. I am satisfied from the material placed before the court that the Deceased operated a wine and spirit business from his house from which he derived an income sufficient to take care of his wife and two children and his father, and generally lead a good life-style. The stock of the business that the Deceased left was sold off by the Plaintiff in order to repay the mortgage. That stock was worth KShs 1.6 million. It was therefore a sizable wines and spirits business.

29. Doing the best that I can and from the material now before the court I am satisfied that the Deceased

net income was in the region of KShs 100,000/00 per month after payment of tax and business expenses.

30. As for dependency, with a wife, two children and a father to take care of, the Deceased could not have used less than two-thirds ( $\frac{2}{3}$ ) of income on his dependants. I will award a **dependency ratio of  $\frac{2}{3}$**  of his income

31. The Deceased was aged 44 years at the time of his death. A private business, especially run from the home as the Deceased's was conducting, cannot be limited by any formal retirement age. If he had lived and decided that his wines and spirit would be his life business, and everything being equal, he should have been able to carry on the business probably into his late 60's/early 70's. But due allowance must be given for the vagaries and uncertainties of life. I will award a **multiplier of 15 years**. In arriving at that figure I have considered the various cases cited in the written submissions filed on behalf of the parties.

32. Damages under the Fatal Accidents Act will work out thus –

$$\text{KShs } 100,000/00 \times 12 \times 15 \times \frac{2}{3} = 12,000,000/00$$

### **Special Damages**

33. KShs 4,935,000/00 was claimed. These include KShs 4,200,000/00 for hospital charges that were paid by the Deceased's insurers. The Plaintiff did not incur this expense and cannot claim it. It is not pleaded that the claim has been made on behalf of the insurance company with a view to handing it over once recovered. This claim must be rejected.

34. The other special claims set out in paragraph 9 of the plaint all relate to the funeral of the Deceased. They include mortuary expenses, coffin, transport, tent hire, media announcements, photos and videos, grave digging, flowers etc. Special damages must not only be particularly pleaded, they must also be strictly proved. That is the law. Of all the other special claims, only KShs 61,401.08 has been strictly proved by way of receipts which are in Exhibit A. I will award only that sum.

35. In summary I will enter judgment for the plaintiff against the defendant as follows –

i. Pain and suffering .....	KShs 100,000/00
ii. Loss of expectation of life .....	150,000/00
iii. Under the Fatal Accidents Act .....	12,000,000/00
iv. Special damages .....	61,401/08

36. The general damages will carry interest at court rates from the date of judgment until payment in full while the special will carry interest from the date of filing suit until payment in full.

37. One more thing remains to be done, and that is to apportion the damages awarded under the Fatal Accidents Act as required by the Statute. Those damages are KShs 12,000,000/00. I will apportion the same as follows –

(i) Plaintiff	-	Kshs 7,500,000/00
(ii) Ian Ogali Rahedi	-	2,000,000/00
(iii) Ivy Nafula Rahedi	-	2,000,000/00
(iv) Esau Ogali Rahedi	-	<u>500,000/00</u>
	<b>Total</b>	<b>12,000,000/00</b>

39. For the avoidance of doubt the Plaintiff shall pay the Advocate's costs; the other dependants shall not be responsible for advocates or other costs of the suit. Those are the orders of the court.

38. The Plaintiff will have costs of the suit and interest thereon at court rates.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF OCTOBER 2013**

**H P G WAWERU**

**JUDGE**