



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL SUIT NO. 112 OF 2011

JOSEPHINE NYAWIRA KARANI &

LYDIA WANGUI KARIMI (*the legal representative and*

administrators of the estate of **PETER MURAGE**

MWAI - DECEASED **PLAINTIFF**

VERSUS

JOHN NDIRANGU..... **1ST DEFENDANT**

ISAAC MWANIKI MWANGI **2ND DEFENDANT**

JAMES WANJAU GITABI **3RD DEFENDANT**

JUDGMENT

1. **Josephine Nyawira Karani** and **Lydia Wangui Karimi** have filed this suit as legal representative and administrators of the estate of **Peter Murage Mwai** the deceased. They have filed the suit under the **Law Reform Act** and the **Fatal Accidents' Act**. The suit against the 1st defendant was withdrawn vide a notice of withdrawal dated **18th January, 2012** and filed on **19th January, 2012**

2. They claim for special and general damages following the death of the deceased who was aged 33 years at the time of death. He was also a husband to the 1st plaintiff and a father of three children namely;

- *Cynthia B. Nyakio*
- *Callistus Mwai*
- *Clotilda Muthoni*

3. They have pleaded that the 2nd defendant was the beneficial owner of the motor vehicle registration number KRX 419 while the 3rd defendant was the registered and beneficial owner of motor vehicle registration number KAU 008N. That on **2nd October, 2010** the deceased was a passenger in the 3rd defendant's motor vehicle when the 2nd defendant's motor vehicle was negligently driven and collided with the motor vehicle in which the deceased was a passenger. They have enumerated the particulars of the negligence in paragraph 6 of the Plaintiff.

4. They claim that as a result of the accident the deceased suffered fatal injuries and died on **9th October, 2010**. They incurred various expenses which are outlined in paragraph 7c of the Plaintiff.

5. The 3rd defendant was served with the Plaint but he did not file any defence. An interlocutory judgment was entered against him on **1st March, 2012**. The 2nd defendant filed a defence on **27th October, 2011** denying the plaintiffs' claims. He blamed the driver of motor vehicle KAU 008N for the accident. He also stated that the deceased was not a lawful passenger in that vehicle. He gives the particulars of the negligence of the driver of KAU 008N in paragraph 4 of his defence.

6. The parties filed agreed issues dated **24th December, 2012**.

They are as follows;

i) whether or not the deceased was traveling in motor vehicle KAU 008N when the accident occurred.

ii) if the answer to 1 above is in the affirmative, whether or not the deceased sustained severe injuries from which he succumbed later.

iii) who was to blame for the accident., as between the drivers of the 2nd defendant and the 3rd defendant and to what extent, OR was the accident inevitable.

iv) have the dependants and estate of the deceased suffered any loss and damages as a result of the stated accident and if so, how much.

v) did the plaintiffs serve or cause to be served any Demand Notice or Notice of Intention to sue upon the defendants prior to the institution of this suit.

vi) who shall bear the costs of this suit.

7. Two witnesses testified on behalf of the plaintiffs. PW1 (Monica Niambi Gitau) was an eye witness. She said she was a passenger together with the deceased in motor vehicle registration number KAU 0008N which was a private vehicle. She boarded this motor vehicle at a place called Samson Corner. In the said vehicle she found the driver (Charles Njogu), the deceased and **Kinyua Gichori**. She sat in the front passenger seat.

8. As they were travelling towards Embu she saw a cream pickup registration number KRX 419 driving from the opposite direction. The pickup drove into their lane as it avoided a cyclist it was overtaking. The driver of KAU 008N swerved to the left but it was too late and they were hit on the right side. PW1 and the deceased were injured and rushed to hospital. The deceased later succumbed to the injuries. The accident occurred at 10.30a.m.

9. She blamed the driver of the pickup for overtaking without ensuring that the road was clear. The said driver called Isaack was charged in Kianyaga court. She testified before that court. The said driver was convicted for causing death by dangerous driving.

10. The 1st plaintiff who is the widow of the deceased testified. She said the deceased suffered a head injury and fracture of the leg as a result of the accident. She was expecting their third child when he died. Copies of their birth certificates were produced as (PEXB 7a-c). She also produced a Limited *grant ad litem* (PEXB1); Police abstract (PEXB2); Postmortem report. (PEXB3); Letter from Smec International (PEXB4) to show the deceased's salary; Death certificate (PEXB5); The last three (3) payslips of the deceased (PEXB 6a-c); searches of both motor vehicles (PEXB 8 and 9) Receipt for Letters of administration (PEXB10); Hospital bill payment by the 2nd plaintiff for Shs. 110,000/= (PEXB 11); Receipts for other expenses (PEXB 12); Demand notices on the defendants (PEXB13).

11. In cross-examination she explained that the family entirely relied on the deceased as she was not employed. Currently she plucks her tea and works on farms to sustain her and the children. The children are school going. Tea from her farm gives her Shs. 3,000/= per month. As shown by PEXB 4 and 6 a-c

the deceased used to earn a gross salary of Shs. 100,000/= and a net Shs. 73,000/=.

12. The 2nd defendant closed his case without calling any witness. Counsel however mentioned that both vehicles were insured by the same insurance company. Both counsels agreed to file written submissions. **M/S A.K. Macharia** for the plaintiff filed her submissions on **21st July, 2014**. In her summary of the evidence she asked the court to find that both defendants are to blame for the accident. She did not however suggest the degree of blame.

i. For loss of expectation of life she suggested an award of Shs. 150,000/= while relying on the case of **WANGARI MAINA (suing as a representative of ONESMOS MAINA NDUNGU - Deceased) VS STEPHEN KIRAGU & ANOR - NAKURU HCCC.NO. 487 OF 1998**.

ii. For pain and suffering she suggested an award of Shs. 200,000/= as the deceased had been admitted for one week after the accident and went through a lot of pain before succumbing to the injuries. For this she relied on **MAURICE ODIWOUR OGANDA (suing as personal representative of JANE DOROTHY ONYANGO) VS JOHN JUMA OBUNGA & ANOR) KISUMU HCCC NO. 375 of 1999**

iii. She submitted that the deceased net pay of Shs. 75,809/= be used as the Multiplicand, while 26 years be the multiplier. She considered the age of the deceased and how long he could have worked before retirement. She cited the cases of-

(a) **JOSEPH K. MWEGA VS SELINA F. OKUNE NAKURU - CA NO. 150 OF 1995** where a multiplier of 12 years was used in a case where the deceased was 48 years.

(b) **LOISE WAIRIMU MWANGI & ANOR (suing as a legal representative of the estate of JAMES M. NDUNGU - deceased) VS JOSEPH WAMBUE KAMAU NAKURU HCCC NO. 229 OF 2004** where a multiplier of 20 years was used where the deceased died at 35 years.

She further submitted that the dependency ratio should be 2/3 as the deceased was a family man. She urged the court to allow the special damages pleaded as per the bundle of receipts produced (PEXB12).

13. Counsel for the 2nd defendant did file written submissions saying that the driver of motor vehicle KAU 008N was largely to blame for the accident as he was speeding and was unable to control his vehicle. And that the allegations by the witness(PW1) that the driver of motor vehicle KRX 419 was charged with a traffic offence was incredible as there was no evidence to support it.

Under the **Fatal Accidents Act** he suggested a multiplicand of shs. 70,000/= with a multiplier of 15 years.

On this submission he cited the cases of;

i. **Meshack Njema Odongo Vs West Kenya Sugar Co. Ltd HCCA NO. 18 OF 2009** where the court adopted a multiplier of 15 years where the deceased was aged 31 years.

ii. **Elizabeth Njeri Mwangi Vs Catholic Diocese of Embu (2007) eKLR** where the court adopted a multiplier of 15 years for a 30 years old deceased person.

He suggested a dependency ratio of 1/2 as the deceased appeared to spend most of his money on himself.

14. For pain and suffering he proposed shs. 30,000/=. For loss of expectation he suggested Shs. 100,000/= which he however stated should not be awarded as the plaintiff and dependants would benefit twice. For this submission he relied on the cases of;

i) **Loise Wairimu Mwangi Vs Samuel Ndungu Muiruri Nakuru HCCA No. 229 of 2004.**

ii) *Kemfro Africa Ltd vs A.M. Lubia (1982-88) 1 KAR 727.*

He further submitted that though the plaintiff pleaded Shs. 175,713/= as special damages and the bundle of receipts produced only proved shs. 137,500/= which is the sum awardable.

15. I will first of all deal with the issue of liability, against the 2nd defendant. One eye witness was called by the plaintiffs herein. She testified as PW1. It was her evidence that the accident in issue involved two vehicles KAU 008N in which she rode and the pickup KRX which knocked them. Her evidence was that the pickup which was overtaking a motor bike moved in the lane of the motor vehicle KAU 008N. It was her further evidence that had the driver of KAU 0008N acted in good time the accident may not have been that serious. In her own words she said "our driver swerved when it was too late"

16. I also note that none of the drivers of the two vehicles testified as a witness. The 2nd defendant had in his defence placed so much blame on the driver of KAU 008N but he did not avail his own driver or a witness to explain what had transpired. A police abstract (PEXB2) produced herein showed that the driver of KRX 419 was one Isaack Mwangi Kago. The 2nd defendant is **Isaack Mwaniki Mwangi**, who is the owner of the said vehicle. Its also not clear whether he is the one who was driving the said vehicle, at the time of the accident.

17. The police abstract (PEXB2) confirms that the accident which occurred resulted in the death of the deceased herein and injuries to PW1. The death certificate (PEXB5) and the. Postmortem report PEXB3 show the cause of death as multiple injuries and multiple organ failure which are consistent with a Road Traffic Accident.

18. The evidence of PW1 is clear and to the point. She sat in the co-driver's seat of the motor vehicle KAU 008N and was therefore able to see what was happening. Each driver had a duty to keep to his/her side of the road. Evidence has been adduced to show that indeed the driver of KRX 419 left his lane to overtake a motor bike when it was not safe to do so. It was not safe because the motor vehicle KAU 008N was on coming.

19. The best the driver of KAU 008N would have done would have been to swerve to his left to avoid being hit by the overtaking vehicle. He did swerve albeit belatedly. Had he swerved in time the impact may not have been as severe. The 2nd defendant's counsel has submitted that the driver of the motor vehicle KAU 008N was overspeeding and hence unable to control his vehicle and swerve to the left. With all due respect to counsel there is no evidence on record to support this submission. This issue of speed was also never put to the witness (PW1) in cross-examination.

20. The witness (PW1) had stated that the driver of the motor vehicle KRX 419 was charged and convicted in Kiangai court for the offence of dangerous driving. And that she even testified. There was no evidence or document produced to support this allegation. A copy of the charge sheet and court proceedings would have been sufficient.

21. The evidence presented to this court by PW1 on how the accident occurred has not been challenged, at all. From my assessment I find both drivers to blame for the accident but in different proportions. would therefore apportion liability as follows:

i) The driver of KRX 419 to bear 80%.

ii) The driver of KAU 008N to bear 20%

The 2nd and 3rd defendants are or were the owners of the said vehicles and hence the employers of the said respective drivers. They are therefore found to be vicariously liable, accordingly.

22. The next issue would be to determine quantum. The counsel for the 2nd defendant had raised in court an issue about the ceiling of what the insurance companies could pay under the amended **CAP 405**. First

and foremost the accident in issue occurred on **2nd October, 2010**. The amendment to the said Act was done in **2012**. The Law **does not** apply retroactively unless otherwise clearly stated. And in any event the ceiling created by the revised **Cap 405** is meant to curb what insurance companies can pay to the insured in case of an accident. It is not to curb the powers of the courts in awarding damages, in such cases.

23. DAMAGES UNDER THE LAW REFORM ACT

Loss of Expectation of Life

The deceased died at the age of 33 years. He was a young man with high expectations. Counsel for the plaintiffs suggested a sum of Shs. 150,000/= on this head. She relied on the case of **Wangari Maina (supra)**. Counsel for the 2nd defendant suggested a sum of shs. 100,000/= He relied on the case of **Loise Wairimu Mwangi Vs Samwel Ndungu Muiruri (supra)**.

The award under this head varies depending on the age of the deceased and his/her station in life. In the case of **Loise Wairimu Mwangi & Anor Nakuru HCCC No. 229 of 2004** the court awarded Shs. 100,000/= under this head for a 35 years old. And in **Maurice Odiwuor Ogada Vs John Juma Obungu & Another HCCC.NO. 375 of 1999** the court on **10th February, 2006** awarded Shs. 140,000/= this head for a 41 year old.

I will award a sum of shs. 100,000/= under this head.

24. Pain and suffering

From the pleadings, receipts (PEXB12) and death certificate PEXB5 and the evidence of the plaintiff, the deceased died seven (7) days after the accident. He obviously underwent a lot of pain as a result of the injuries. Considering the authorities cited, I find an award of Shs. 100,000/= to be sufficient.

FATAL ACCIDENTS ACT

Loss of DeDendency

Multiplicand

From the payslips produced herein (PEXB 6a-c) the deceased earned a net salary of Shs. 72,049/20 as at **25th September, 2010**. That will be the multiplicand.

25. Multiplier

The deceased was aged 33 years. It is true the retirement age is 60 years. When arriving at the multiplier care must be taken to ensure that vicissitudes and hardships of life which have reduced the life expectancy of Kenyans are considered. I have considered all the authorities cited by both counsels on this. The same have been very useful. The counsel for the plaintiff' suggested a multiplier of 26 year while the one for 2nd defendant proposed one of 15 years. I find a multiplier of 18 years to be adequate.

26. Dependency ratio

At the time of his death the deceased was married to the 1st plaintiff and had two children while the third child was being expected. She was born on **27th October, 2010**. The plaintiff said the family entirely relied on the deceased for their subsistence. She used to tend to their tea farm which she has continued to do to sustain them. The thread running through the authorities cited like;

i) **Elizabeth Njeri Mwangi Vs Catholic Diocese (supra)**

ii) **Loise Wairimu Mwangi & Another Vs Joseph Wambue Kamau (supra)** is that where a

deceased had dependants the dependency ratio is 2/3 . It has been proved that the deceased had dependants on whom he spent an amount of his salary. The children were not school going then, and he was also not living with his family. A dependency ratio of ½ will be adopted

Loss of dependency will therefore be calculated as follows;

$$72^{049} \times 18 \times 12 \times \frac{1}{2} = \text{Shs. } 7,781,292/=$$

27. Special damages

The Law is that special damages must be specifically pleaded and proved. The plaintiff pleaded Shs. 175,513/= as special damages. The receipts PEXB8(500/=) PEXB9(500/=) Bundle of receipts PEXB12 for shs. 110,000/=, 8,500/=;27,088/=; 5,500/=; 12,500/=; 10,000/= all total kshs. 175,513/=.

28. In the case of **Kemfro Africa ltd Vs A.M. Lubia** (*supra*) it was held that when the people entitled to the deceased's estate are the same persons from whose benefit the action under the **Fatal Accidents Act** is brought the award of Loss of expectation of Life is deductible. In this case, I find that to be the position. I will therefore deduct the award for Loss of expectation of life.

29. The awards shall therefore be as follows:

Loss of life expectation	- Shs. 100,000/=
Pain and suffering	- Shs. 100,000/=
Special damages	- Shs. 175,513/=
Loss: of dependency	<u>Shs. 7,781,292/=</u>
TOTAL	<u>Shs. 8,156,805/=</u>
Less Loss of expectationof life	<u>Shs. 100,000/=</u>
Balance	Shs. 8,056,805/=

30. Judgment is entered for the plaintiffs in the sum of shs. 8,056,805 (eight million, fifty six thousand, eight hundred and five shillings only).

The 2nd defendant bears 80% (6,545,444/=) while the 3rd defendant bears 20% (Kshs. 1,511,361/=).

31. Costs shall be borne by both defendants in the ratio of their liability.

DATED AND SIGNED AT KERICHO THIS 15TH DAY OF DECEMBER 2014

H.I. ONG'UDI

JUDGE

DELIVERED AT EMBU THIS 10TH DAY OF FEBRUARY 2015

F.MUCHEMI

JUDGE