



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE NO. 56 OF 2014

**BEATRICE MUKULU KANG'UTA and
ZAKAYO MWAKA MUTHOKA (Suing as**

Administrators of the estate of PHILIP

MUSYOKA MUTHOKA.....PLAINTIFFS

VERSUS

SILVERSTONE QUARRY LIMITED 1ST DEFENDANT

MANJI HIRJI CHHBHANDIYA.....2ND DEFENDANT

JUDGMENT

The Pleadings

On the 9th August 2012 at about 6.00am, Philip Musyoka Muthoka, since deceased (hereinafter referred to as “the Deceased”), was crossing Mombasa Road when he was hit by a motor vehicle registration number KAQ 413R belonging to the 1st Defendant, and which was being driven by the 2nd Defendant. The Deceased suffered fatal injuries and died on the same day.

On 9th December 2014, the Plaintiffs, who are the administrators of the estate of the Deceased, filed this suit by way of a Plaint dated 5th December 2014. They allege that the said motor vehicle was negligently driven, managed and/or controlled by the 2nd Defendant who was an agent of the 1st Defendant, and gave the particulars of the Defendants’ negligence as follows:

- a) Driving at a speed that was too fast in the circumstances.
- b) Failing to keep any proper look out or have any sufficient regard for traffic on the road.
- c) Failing to stop, slow down, to swerve or in any other way to so manage or control of the said motor vehicle and avoid the accident.
- d) Driving without due care and attention.
- e) Failing to have any due regard for other road users.

f) Driving recklessly and carelessly.

g) Losing control of the vehicle so that it hit the deceased causing him fatal injuries.

The Plaintiffs also relied on the doctrine of *res ipsa loquitor*.

The claim by the Plaintiffs is that the Deceased's dependants and estate have suffered loss and damage, and they claimed damages under the Law Reform Act and the Fatal Accidents Act. It is stated that at the time of his death, the deceased was aged 48 years, enjoyed good health and was working as a mason earning a monthly wage of Ksh 16,000/= and also earned Kshs 10,000/= monthly from his work as a pastor. The Deceased's dependants who it was averred wholly depended on him were specified as the Deceased's widow aged 45 years, two daughters aged 25 and 15 years respectively, and three sons aged 22, 20 and 17 years respectively.

The Plaintiff therefore sought general damages for loss of expectation of life and pain and suffering under the Law Reform Act, general damages under the Fatal Accidents Act for loss of dependency, special damages of Kshs 36,370/= for funeral related expenses, interest on the damages and costs of the suit.

The Defendants on their part did admit that the accident did take place and

that the 1st Defendant was the registered owner of the said motor vehicle registration number KAQ 413R. Pursuant to a defence filed in Court dated 20th January 2015, the Defendants denied that the accident was caused by the alleged negligence on the part of the 2nd Defendant, and contended that the said accident was caused by, or substantially contributed to by negligence on the part of the deceased.

The particulars of this negligence were itemized as follows:

- a) Crossing the road without keeping proper lookout of motor vehicles reasonably expected on the road particularly motor vehicle registration number KAQ 413R.
- b) Standing on the path of motor vehicle registration number KAQ 413R.
- c) Failing to give way to the said motor vehicle registration number KAQ 413R.
- d) Failing to absence adequate precautions for his personal safety as expected under the circumstances.
- e) Failing to give due regard to other road users.
- f) Causing and/or permitting the said accident.

The Defendants also denied that the Plaintiffs and dependants of the deceased suffered loss and damage as alleged and also denied the particulars of special damages.

The Evidence

During trial, the Plaintiffs called four (4) witness to testify, while the Defendant called one (1) witness. The first witness was the 1st Plaintiff, Beatrice Mukulu Kanguta. She testified that the deceased was her husband and narrated the events of 9th August 2014 when she received the news of his accident and death from one Aaron Muthoka, the deceased's brother. She also testified as to the funeral arrangements for the deceased who was buried on 17th August 2014, and produced documents including receipts for funeral expenses.

According to PW1 and her statement filed in Court on 24th October 2014 which she asked the Court to

adopt as her evidence, the deceased who was working in Nairobi as a mason was the family's sole breadwinner, and would come home at the end of every month with money for school fees, food and basic household expenses. Further, that her eldest child who had joined college has had to drop out due to lack of school fees, and she is unable to raise the school fees for her second born son to join college.

Lastly, PW1 testified that after the deceased's death, she approached her advocates who took out letters of administration and conducted a vehicle search with the Registrar of Motor Vehicles, which showed that the 1st Defendant was the registered owner of motor vehicle registration number KAQ 413R, and wrote a demand to the Defendants to admit liability. The witness produced as evidence various documents in support of her claim.

The second witness who testified on behalf of the Plaintiffs was Joseph Masai (PW2), a hotelier by profession, who relied on his statement filed in court on 24th October 2014. His evidence was that on or about 9th August, 2012, at about 6.00 am, he was a fare-paying passenger in a *matatu* plying the Mombasa Road route on his way to work, and that when they got to the area around KAPA stage along Mombasa Road, he heard tyres screeching followed by a huge bang, and later saw a car speeding off towards Mlolongo as a man was flung through the air. Further, that they demanded that the *matatu* stops so that they could assist the man who was now lying in a ditch, writhing and crying in pain. PW2 stated that the man was bleeding profusely from the head and his leg and arm were broken.

He further stated that one of the people who was walking along the road took the registration number of the motor vehicle that sped off and that they stayed until an ambulance arrived about 30 minutes later. PW2 also stated that one of the persons took the telephone of the deceased, and found his brother's number which he called. The brother named Aaron then came to the scene of the accident, and requested PW2 to report the accident to the police station on his behalf. PW2 went to Mlolongo police base later that day to do so, and was referred to Athi River Police Station where he reported the accident the next day.

PW3 was Aaron Muthoka, a brother of the deceased, who works as a pastor at the Redeemed Gospel Church in Kangundo. He also relied on his witness statement filed in Court on 24th October 2014, wherein he stated that on 9th August 2012, he was on his way to Nairobi when someone called him using his brother's phone and told him that the owner of the phone had been involved in an accident at a place called Kapa stage. PW3 then headed for the place, and when he arrived at the scene of the accident, the person who had called him handed over his brother's phone. However, that he could not talk much with his brother who was under a lot of pain. After five minutes, an ambulance came, and took him and his brother to Kenyatta hospital where his brother was then put under a life supporting machine at around 10:30 am. At around 11:40 am the same day, he was informed by the hospital attendants that his brother had passed on, and that he immediately informed his family members about the death and left the hospital and went home.

The last witness for the Plaintiffs was Zakayo Mwaka Muthoka (PW4) who testified that on 17th August 2012 he witnessed the postmortem conducted on the deceased who was his brother.

The sole witness for the Defence was Manji Hirji Chhabhadiya (DW1) who relied on his witness statement filed in Court on 23rd January 2015. He stated therein that he is an employee with Silverstone Quarry Limited working as a mechanic since April 2007, and that on 9th August, 2012 he left his residence at Nairobi West and drove to his place of work at Mlolongo. Further, that he was driving his employer's vehicle registration number KAQ 413 R, a Toyota Land Cruiser which he normally used in the course of his duties.

According to DW1, while he was driving along Mombasa road on the right lane of the dual carriageway at an estimated speed of 60KPH, he suddenly saw a pedestrian jump into the lane he was driving on at a very short distance. He applied brakes but the distance was too short and the pedestrian was hit by the right side of the front bull bar of the vehicle DW1 was driving. DW1 stated that he stopped the vehicle, but that since a crowd was gathering he drove to Athi River Police Station where he reported the accident and recorded a statement, and then drove back to the scene of the accident in the company of the police

who took the necessary details. Further, that he then drove back to the station where the vehicle was inspected. It was DW1's evidence that at the time of the accident the sun had not risen and he was using the vehicles lights.

The Issues

Since the 1st Defendant in its defence admitted that it was the registered owner of the motor vehicle registration number KAQ 413R, and the 2nd Defendant testified that he was its employee, the substantive issues in this suit are only two. Firstly, who as between the deceased and the 2nd Defendant was to blame for the accident that occurred on 9th August 2012 and secondly, what is the quantum of damages if any, payable to the Plaintiffs.

The Plaintiffs' learned counsel, Muma & Kanjama Advocates addressed these two issues in submissions filed in Court dated 9th March 2016, while the Defendant's learned counsel, Morara Apiemi & Nyang'ito Advocates, filed submissions dated 21st April 2016.

The Plaintiffs submitted that the admission of liability on the part of the 2nd Defendant that he hit a pedestrian on the fateful morning serves to put the occurrence of the event, the vehicle involved and the question of liability to rest. The Defendant on the other hand urged that it is trite law that he who alleges must prove, and that it was thus incumbent upon the Plaintiffs to prove the alleged negligence as against the 2nd Defendant. Further, that the only witness called by the Plaintiffs who came close to explaining how the accident occurred was one Joseph Masai, and that the other witnesses were not at the scene of the accident and thus could not testify as to the occurrence of the accident.

It was contended that the said witness stated at the hearing that he only heard brakes but did not witness the accident, and that he confirmed that he saw the deceased after the accident. Further, that he did not make any report to the police on the accident. It was contended that it is therefore clear that the Plaintiff failed to prove any negligence on the part of the 2nd Defendant, and reliance was placed on the holdings that there was no negligence proved where witnesses did not witness the accidents in **Daniel Kimani Njoroge vs James K. Kihara & Another, HCCA No. 92 of 2009**, and **Lilian Birir & Another vs Ambrose Leamon, Nakuru HCCA No. 116 of 2013**.

On the issue of damages, the Plaintiffs submitted that Kshs 300,000/= be awarded as damages for loss of expectation of life under the Law Reform Act, as the deceased was aged 48 years at the time of his death. Reliance was placed on the decisions in **Betty Ngatia (Administrator of the estate of Gladys Waithira Ngatia) vs. Samuel Kinuthia Thuita, [1999] eKLR** where the Court awarded the estate of 19 years old deceased Kshs. 100,000/-. The Plaintiffs argued that the said case was decided long ago, and that the rates of inflation have most definitely changed the amount of money that is payable to an estate for the loss of life. Further, that in **George Moga vs Nairobi Women's Hospital & 3 others, [2015] eKLR**, the deceased was 41 years of age and the court awarded 150, 000/=. However, that in this case, the deceased died out of medical negligence and since the circumstances are different, the abrupt manner of death by way of reckless driving ought to be incentive for the court to award higher a quantum of damages.

Also relied on by the Plaintiffs were the decisions in **Transpares Kenya Limited & another vs S M M (Suing as Legal Representative for and on behalf of the Estate of E M M (Deceased), (2015) eKLR**, where the court awarded damages for Ksh. 120, 000/= for the estate of the deceased aged 5 years; and **Kitampan Lockorir vs Kadenga Kenya & The Attorney General, Mombasa HCCC No. 478 of 1994** where the deceased was aged 45 years at the time of death and general damages for loss of expectation of life were assessed at Kshs. 150,000/=.

As regards the damages for pain and suffering, it was submitted that the accident occurred at 6:00 am in the morning and the deceased received medical attention starting at 10:30 am and passed on at 11:40 a.m. Therefore, that the deceased ought to be granted Kshs 150,000/= for the excruciating pain suffered post the said accident. Reliance was placed on the cases of **General Motors East Africa Limited v Eunice Alila Ndeswa & Another, [2015] eKLR** where the Court of Appeal awarded Kshs. 150,000/= for death that was caused by the negligence of the Appellants, and **George Moga v Nairobi Women's Hospital &**

3 others, [2015] eKLR where the court awarded Kshs. 100,000/= under this head.

As regards the damages under the Fatal Accidents Act, the Plaintiffs submitted under the head of loss of dependency, that the deceased was a robust man aged 48 at the time of his death and employed as a stone mason with Italbuild Limited, where earned a daily wage of Kshs. 800/= for 6 days a week and a salary of Kshs 10,000/=. Further, that the deceased was also a pastor earning Kshs 10,000/= per month. Therefore, that he was earning a total of Kshs 26,000/= per month, which should be adopted by the Court as the multiplicand. It was also submitted that being 48 years, the court should consider that deceased would work to the age of sixty if not more, and the relevant period of time for which he would continue working would be 12 years.

According to the Plaintiffs, the amount due as damages for loss of dependency would be 17 multiplied by 12 multiplied by 12 multiplied by 26,000 which equals to Kshs. 5,304,000/=. Moreover, assuming that the deceased spent 2/3 of his money on his family, the dependency ratio of 2/3 scales down the damages to Kshs.3,536,000/=. Lastly, on the issue of special damages, the Plaintiff submitted that they pleaded and proved the special damages of Kshs 36,370/= they seek to recover.

The Defendants on the other hand submitted that dependency is a question of fact that must be proved in order for a claimant to be entitled to any award under this head as held in **Multiple Hauliers Co. Ltd Vs David Lusa, Machakos HCCA No 94 of 2010**. However, that in the present case the Plaintiffs did not adduce any evidence to prove the deceased earnings, and the Court was in this regard urged to apply a figure of Kshs. 10,000/= which is approximately the minimum wage.

In addition, that the deceased was aged 48 years and had a possible working life of 12 years to retirement. Further, that the court should also take into consideration that the award is being made in a lumpsum and the estate of the deceased can immediately invest the money and start earning profits. The Defendants submitted that in the circumstances a multiplier of 7 years and a dependency ration of 2/3 would suffice. The award would thus work out as follows: $7 \times 12 \times 10,000 \times \frac{2}{3} = \text{Kshs.}560,000$

As regards damages for loss of expectation of life, the Defendants relied on the decision in **Put Sarajevo General Eng. Co. Ltd vs Esther W. Njeri & John Mangi Gucha & Others, (2014) e KLR** where the High Court upheld an award of Kshs. 100,000/=:, and that a similar sum would adequately compensate the Plaintiffs. However, that any amount awarded under this head should be taken into account while awarding damage under loss of dependency, and reliance in this regard was placed on the case of **ASAL vs Muge & Another, Civil Appeal No. 49 of 2000**

On the award of damages for pain and suffering, it was the Defendants contention that the deceased died the same day, a few hours after the accident, and that a sum of Kshs. 10,000 would sufficiently compensate the Plaintiff under this head. Lastly, the Defendants conceded that special damages were agreed at Kshs. 36,370 subject to liability:

The Determination

I have considered the arguments made by the parties as regards the issues of liability and quantum of damages.

On the issue of liability, it is not disputed by the Defendants that an accident occurred on 9th August 2012 involving motor vehicle registration number KAQ 413R, belonging to the 1st Defendant which was being driven by the 2nd Defendant, and the deceased, as a result of which the deceased suffered fatal injuries. PW2 testified that he heard the screeching of tyres and saw the deceased thrown in the air, and then saw the said motor vehicle driving away at speed. He was therefore present at the scene and at the time of the accident. The decisions relied on by the Defendants **Daniel Kimani Njoroge vs James K. Kihara & Another, (2011) e KLR**, and **Lilian Birir & Another vs Ambrose Leamon, (2016) e KLR** are distinguished on this ground, as the witnesses in the said cases were not at the scene of the accident at the time it occurred and were only informed of the said accident after the fact. In addition DW1 admitted that he did hit the deceased with the said motor vehicle.

The accident was accordingly proved, and the real issue therefore is who was liable for the accident. The Plaintiffs allege that the 2nd Defendant drove at a fast speed, failed to keep a proper look out, brake or swerve to avoid the accident. The Defendants on the other hand allege that the deceased crossed the road without a proper look out and put himself in the way of the said motor vehicle, and failing to take precautions for his own safety.

DW1 testified that the accident took place at 6 am and it was dark. This evidence is however contradicted by that of PW2 who testified that he saw the deceased flying through the air, and by DW1's own evidence that he had headlights on, and therefore ought to have seen the deceased on the road. In addition the evidence of PW2 that he heard the screeching of tyres and the fact that DW1 was not able to brake in time to avoid hitting the deceased, is indicative that DW1 was driving at greater speed than the 60 km per hour that he testified he was driving at. To this extent, the Defendants must take a larger share of the blame for the accident. However, the deceased also contributed to the accident by crossing the road when it had traffic, and I accordingly apportion 30% liability to the deceased, and 70% liability to the Defendants.

As regards the damages under the Law Reform Act for loss of expectation of life and pain and suffering, I note that the most comparable and recent judicial authority relied upon by the Plaintiffs was that of **George Moga vs Nairobi Women's Hospital & 3 others, [2015] eKLR**, where the deceased was 41 years of age and the court awarded 150, 000/= for loss of expectation of life. A sum of Kshs 150,000/= would therefore in my view be reasonable as damages for loss of expectation of life.

As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason.

To properly assess damages under the Fatal Accidents Act it is necessary to determine the deceased's income, the dependency ratio of his dependants and the multiplier to be used. This Court is guided by the manner of assessment of damages for loss of dependency as aptly explained by Ringera J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows;

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

In addition, only the deceased's wife, children and parents are entitled under upon proof of dependency under section 4(1) of the Fatal Accidents Act, and the Plaintiffs in this regard provided particulars of the deceased wife and five children in the Plaint, and the birth certificates of some of the children were produced in evidence. The deceased's wife, PW1, in addition testified as to her dependency and that of her children on the deceased, and the effect the deceased's death has had on her children's education.

An attempt by the Plaintiffs to produce a letter from the deceased's employer showing his monthly pay was disallowed by the Court, as the maker was not called to produce the same. In addition no evidence of the income that the deceased was alleged to earn as a pastor was produced. There is therefore no evidence on the record to show that the Plaintiff earned a net salary of Kshs 26,000/= as alleged by the Plaintiffs. The Defendants proposed that a minimum salary of Kshs 10,000/= be used in this regard. No basis for this proposal was also availed by the Defendants.

PW1 gave evidence that was not disputed that the deceased was employed as a mason. The salary that was alleged to have been earned was a net pay of Kshs 800 per day for six days a week. I find this figure to be reasonable pay for a mason and will use it to calculate his salary per month. I will therefore award an income of Kshs 19,200/= per month. As regards the dependency ratio, I am satisfied from the evidence before the court that the Deceased's wife (1st Plaintiff) and their five children who were all still in school were fully dependent upon him. In these circumstances the Deceased could not have used less than two-thirds of his net income on his dependants. I will award a dependency ratio of two-thirds (2/3).

Lastly, on the multiplier, the deceased was aged 48 years when he died. Everything being equal he would have worked to the official retirement age of 60 years. But due allowance must be given for the vagaries, vicissitudes and uncertainties of life, and due regard must also be had of the fact that the payment under this head is also being made in a lump sum. The Plaintiffs' advocates propose a multiplier of 12 years while the Defendant's advocates propose 7 years. I will award a multiplier of 10 years. Damages under the Fatal Accidents Act will thus work out at KShs 19,200 X 12 X 10 X 2/3 – KShs 1,536,000/=.

This sum will be reduced by 30% to take into account the contributory negligence of the deceased.

Lastly, the special damages pleaded of Kshs 36,370/- was proved by production of receipts of the payment of the bill hospital bill at Kenyatta National Hospital of Kshs 4229/=, of payment for preservation of the body at Kenyatta National Hospital of Kshs 5150/=, and transport of the body of Kshs 27000/=.

I accordingly enter judgment for the Plaintiffs against the Defendants as follows –

1. The Defendants are found 70% liable for the accident with contributory negligence by the deceased of 30%.

2. The damages awarded are as follows:

Damages awarded under the Law Reform Act.....	KShs 350,000/=
Damages awarded under Fatal Accidents Act.....	KShs 1,536,000/=
Special damages.....	KShs 36,370/=
Sub total.....	KShs 1,922,370/=
Less 30% contributory negligence.....	KShs 576,711/=
Total Award.....	KShs1,345,679/=

3. I apportion the damages under the Fatal Accidents Act (Kshs 1536,000/= less 30% = Kshs 1,075,200/-) as follows: –

(i) Beatrice Mukulu Kanguta	KShs 575,200/=
(ii) Elizabeth Nzilani Musyoka.....	KShs 100,000/=
(iii) Mbindyo Musyoka.....	KShs 100,000/=
(iv) Musembi Musyoka.....	KShs 100,000/=
(v) Kiio Musyoka.....	KShs 100,000/=
(vi) Muendi Musyoka.....	KShs 100,000/=

4. The general damages will carry interest at court rates from the date of judgment while the special damages will attract similar interest from the date of filing suit.

5. The Plaintiffs shall have costs of the suit subject to a reduction by 30% in respect of the deceased's contributory negligence.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 26th day of September 2016.

P. NYAMWEYA

JUDGE