



REPUBLIC OF KENYA



Kapya & another v Bonfide Clearing & Forwarding Co. Ltd & another (Civil Case 138 of 2015) [2023] KEHC 21549 (KLR) (Civ) (18 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 138 OF 2015

AN ONGERI, J

AUGUST 18, 2023

BETWEEN

VIOLET YUNGE KAPYA 1ST PLAINTIFF

DAVID JOSEPH MIYEYE KAPYA 2ND PLAINTIFF

AND

BONFIDE CLEARING & FORWARDING CO. LTD 1ST DEFENDANT

DAVID LAWRENCE KIGERA GICHUKI 2ND DEFENDANT

JUDGMENT

1. The two plaintiffs Violet Yunge Kapya and David Joseph Miyeye Kapya are the mother and father of Nsanya Otis Kapya (deceased) who died from injuries sustained in a road traffic accident that occurred on April 15, 2012 along James Gichuru Road in Nairobi.
2. The plaintiffs in the amended plaint dated October 24, 2022 are seeking for compensation for the fatal injuries sustained by the deceased while he was lawfully travelling in motor vehicle registration no KAxX xxY when it was involved in an accident with motor vehicle registration no KBxx xxx belonging to the 1st defendant which was being driven by the 2nd defendant. The plaintiffs allege that the accident was due to the negligence of the defendants. The plaintiffs are seeking the following remedies
 - i. Special damages of 6,712,048
 - ii. General damages under the Fatal Accident Act and the *Law Reform Act*.
 - iii. Costs of this suit
 - iv. Interest at court rates.



3. The defendants filed a joint statement of defence which was amended on February 9, 2023 and denied the plaintiffs' claim.
4. The issue of liability was determined at 100% in HCCC no.0 192 of 2012 – Tijan Kisili vs Bonfinde Clearing & Forwarding Co Ltd & Another.
5. The issue of liability having been settled in HCCC No 192 of 2012 which was the last unit in a series of cases filed against the defendants, this court's duty is to assess quantum of damages.
6. I have considered the submission filed by the parties as follows; the plaintiffs submitted on special damages that the deceased was hospitalized at Nairobi hospital from April 15, 2012 to April 21, 2012 when he succumbed from his injuries. They provided an itemized bill from the hospital and the costs of the funeral.
7. The plaintiffs argued that PW2 took out an insurance cover and as a policy holder is entitled to recover costs paid by his insurer. The plaintiff further argued that a life or accident cover is not subject to the doctrine of subrogation and in support cited the case of *Forwarding Company Limited & another v Kisilu; Gladwell (Third Party) Civil Appeal 344 of 2018* where the court of appeal held the same.
8. The plaintiff further submitted that the cost of legal representation of the plaintiffs through their advocates on record in the traffic case are proximate damages to the negligence of the 2nd defendant who caused the accident and the cost is justifiable. The amount in question is reasonable given the 11 years that the said traffic case has taken.
9. On general damages under the *Fatal Accidents Act* and *Law Reform Act*, the plaintiffs argued that the deceased was 26 years old at the time of death, studying a bachelor of science at USIU and at the time of death in robust health without any known ailments. The plaintiffs therefore proposed an award of Kshs 300,000 as damages on loss of life expectation.
10. On pain and suffering they proposed an award of Kshs 350,000. On Loss of dependency the plaintiffs submitted that the deceased would have most likely secured employment at 30 years with prospects of promotions and salary increments beyond the conventional retirement age of 60 years. They proposed a multiplier of 30 years, a gross salary of Kshs 118,546 per month less statutory deduction and a dependence ration of 2/3.
11. The defendants on the other hand submitted that the plaintiff have prayed for special damages to the tune of Kshs. 6,712,648 and have exhibited several receipts in support of the same. However, a total of Kshs 3,251,307 was paid by third parties including the plaintiffs' insurance company. The defendants argued that the doctrine of subrogation is not applicable herein and therefore the payments are not refundable loans to the plaintiffs.
12. On general damages under the *Fatal Accidents Act* the defendants submitted that there is no evidence of the expected earnings of the deceased had he completed the business administration course and for how long he would have worked considering the vagaries of life. The defendants on this head consequently suggested the global award approach in determining the same and proposed a global award of Kshs 1,500,000.
13. On damages for pain and suffering the defendants submitted that the deceased endured pain and suffering prior his death for six days and proposed the sum of Kshs 100,000 as general damages and



in support cited *Hyder Nthenya Musili & another v China Wu Yi Limited & another [2017] eKLR*, the court stated as follows;

' As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...

The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.'

14. On general damages for loss of expectation of life the defendants proposed an award of Kshs 100,000 as general damages and in support the cited *Antony Njoroge Ng'anga (Legal representative of the Estate of the late Fred Nganag Njoroge aka Fred Nganga Njoroge) v James Kinyanjui Mwangi & 2 others [2022] eKLR* where the substituted an award of Kshs 50,000 for loss of expectation of life with an award of kshs 100,000.
15. I have considered the rival submissions filed by the parties on the issue of quantum of damages. I find that liability was already settled in the test suit at 100%.
16. The issues for determination in this case are as follows;
 - i. Whether the plaintiffs proved the special damages
 - ii. What general damages are payable in this case?
 - iii. Who pays the costs of this suit?
17. On the issue as to Whether the plaintiffs proved the special damages I find that the special damages pleaded are as follows;
 - a. Hospital bill ksh 1,304,887
 - b. Doctors fees ksh 940,000
 - c. Neurosurgery clinics ksh 2,000
 - d. Cost of autopsy ksh 65,000
 - e. Mortuary charges in Kenya ksh 351,360
 - f. Cost of obituary advertisement ksh 49,000
 - g. Cost of feeding mourners in Nairobi ksh 100,000
 - h. Cost of travel(air, bus& taxi) ksh 2,065,455
 - i. Mortuary & funeral expenses in Tanzania ksh 300,000
 - j. Police abstract ksh 500
 - k. Search of records of motor vehicle Kxx 1xxE ksh. 500
 - l. Cost of legal representation in the traffic case & obtaining letters of administration ksh 1,266,345



- m. Cost of printing funeral program ksh 18,000
 - n. Cost of air transport & handling of the body of deceased ksh 34,208
 - o. Cost of hotel accommodation of the 1st & 2nd plaintiffs while in Kenya ksh 214,793
- Total ksh 6,712,048

18. The defendants submitted that a total of Kshs 3,251,307 was admittedly paid by 3rd parties. I find that the special damages were pleaded and proved and the Defendants are bound to pay the same.

19. In the case of *Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288* the court observed as follows:

' It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.'

20. I find that the that the plaintiffs proved the special damages pleaded and I award the same.

21. On the issue of general damages under the fatal accident Act, the defendants submitted that there is no evidence of the expected earnings of the deceased had he completed the business administration course and for how long he would have worked considering the vagaries of life.

22. The defendants on this head consequently suggested the global award approach in determining the same and proposed a global award of Kshs 1,500,000.

23. The Defendants submitted that should the court adopt the multiplier approach, then the court should adopt a multiplicand of Kshs 25,000 and a multiplier of 25 years being the estimated number of years the deceased would have worked.

24. The plaintiffs proposed a multiplicand of Kshs 70,000 and a multiplier of 25 years.

25. The general damages are awarded as follows;

26. On loss of life expectation, I award ksh 100,000/=.

27. On the heading of pain and suffering, the deceased died after 6 days. I award kshs 300,000.

28. On the heading 'lost years', the deceased was 26 years and a 2nd year university student of USUI doing a Bachelor of Science degree. He would have secured a job probably at the age of 30 years and worked upto the age of 60 years. I adopt a gross salary of Kshs 45,000 a multiplicand of 30 years.

29. The deceased had five siblings and I adopt a dependency ratio of 2/3.

30. The award of lost years is therefore awarded as follows $45,000 \times 12 \times 30 \times \frac{2}{3} = 10,800,000$.

31. The total award is as follows;

- i. Special damages 6,712,048
- ii. Pain & suffering 300,000
- iii. Lost years 10,800,000
- iv. Less loss of expectation of life 100,000 Total 17,712,048



32. Judgment be and is hereby entered in favour of the plaintiff against the defendant in the sum of ksh 17,712,048/= together with costs of this suit and interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

