



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 419 OF 2014

NIXON ASAVA MUKISA.....1ST PLAINTIFF

ROSELINE NAINI SARIKOKI.....2ND PLAINTIFF

(Suing as joint administrator and legal representative of Viora Seenoi Sarikori Deceased)

VERSUS

MICHAEL CHOMBA MBURU.....DEFENDANT

JUDGMENT

1. **Nixon Asava Mukisa** and **Roseline Naini Sarikoki** the plaintiffs herein who are the legal representatives of the estate of Viora Seenoi Sarikori (the deceased) lodged a suit against Michael Chomba (the defendant) by way of the plaint dated 21st October 2014. In it they sought for general damages under the Fatal Accidents Act and the Law Reform Act, special damages in the sum of KShs.952,037/40 together with costs of the suit and interest thereon.

2. The plaintiffs' claim against the defendant arises from a road accident which occurred on or about the 12th September 2012 along Mombasa Road. The defendant's motor vehicle registration number KAY 888U while being negligently driven lost control, knocked and ran over the deceased. She succumbed to the injuries suffered.

3. The defendant filed a defence dated 27th March 2015 and filed on 30th March 2015 denying all the allegations leveled against him by the plaintiff.

4. The parties complied with the pre-trial requirements under Order 11 of the Civil Procedure Rules and filed issues, witness statement and pre-trial questionnaires. On 25th September, 2019 the parties entered a consent on liability in the ratio of 60:40 in favour of the plaintiff, which was adopted by the court as its Judgment.

5. At the hearing of the suit the 1st plaintiff testified as the sole witness whereas the defendant closed his case without calling any witness.

6. PW1 (**Nixon Asava Mukisa**) is the husband of the deceased. He stated that they got married in 2003 and formalized their union in 2011. They have a daughter by the name Samantha aged 17 years. He adopted his witness statement dated 21st October 2014 and filed on 1st December 2014 as his evidence in chief.

7. He produced by consent the following documents as exhibits (PEXB 1a – n) namely:

- a) Police Abstract Report.
- b) Post mortem form
- c) Chief's letter
- d) Death Certificate
- e) Grant of letters of administration

- f) Motor vehicle search payment receipt
- g) Motor vehicle search copy of records
- h) Demand letter
- i) Funeral expenses receipts
- j) Hospital expenses receipts
- k) Pay slip
- l) Copy of marriage certificate
- m) Copies of first Plaintiff National Identity Card
- n) Copy of Samantha Neema birth certificate

8. He testified that on 12th September 2012 he went to pick his wife from Imara Daima and as he stood waiting for her along Mombasa road he saw her flying in the air. He ran to where she had fallen and rushed her to Mater Hospital where she succumbed to the injuries. She had been hit by a motor vehicle.

9. He further testified that his wife was a cashier at Boma Hotel, and was expectant with two weeks left to her delivery. He stated that she used to spend two thirds of her salary on the family. It was his evidence that the final invoice from Mater Hospital, mortuary cheques, funeral expenses and among other expenses amounted to KShs.952,037.40/-. This forms part of his claim.

10. In cross-examination by Mr. Mege counsel for the defendant, he stated that his wife worked at Boma Hotel in South C which is a sister hotel to Red Cot Hotels. Further that she began working in Red Cot before moving to Boma Hotel. It was his evidence that he needed to confirm with the employer why the payslips read Red Cot Hotel and not Boma Hotel. He explained that the invoices from Mater Hospital were addressed to Red Cot Hotel who paid the hospital bill through their insurance. He only paid KShs.26,436/- of the hospital bill and was not asked to refund what the insurance paid.

11. He stated that there were two invoices from the caterers, one for KShs.180,000/- and the other for Kshs.156, 000/= and that he did not have the receipts, for these invoices.

12. In re-examination by Mrs. Ndungu, he stated that the patient's name in the Mater Hospital invoice is his late wife's and that the two invoices from the caterers were paid for.

13. P. M. Ndungu & Compay advocates for the plaintiffs filed submissions dated 17th August 2021. Mrs. Ndungu for the plaintiff gave brief facts of the matter and identified three issues for determination which are as follows:

i. Apportionment of liability

ii. Quantum on general and special damages

iii. Who should bear costs of the suit.

14. On the first issue, counsel submitted that the parties had recorded a consent on liability before the court in the ratio of 60:40 in favour of the plaintiff against the defendant on 25th September, 2019.

15. On the issue of quantum of damages and in particular that of pain and suffering, counsel submitted that the plaintiff and the deceased were expecting their unborn child in less than two weeks from the date of accident. This was corroborated by the autopsy report. She submitted that the deceased while undergoing treatment with her unborn child must have suffered a lot of pain as efforts to resuscitate her were being made.

16. On this counsel relied on the case **Sukari Industries v Machimbo Juma HB HCCA No.68 of 2015 [2016] eKLR** where the court held that:-

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from KShs.10,000 to KShs.100,000 over the last 20 years hence I cannot say that that the sum of KShs. 50,000 awarded under this head is unreasonable.”

17. Counsel while relying on the case of **P B S & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 others (2016) eKLR**

urged the court to award Kshs.100,000/- for pain and suffering.

18. On loss of expectation of life, counsel cited the case of **Benham v Gambling (1941)AC 157** where the court observed that:-

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospect”

19. She submitted that the deceased was aged 36 years and was described to be of good nutritional status and would have probably lived a long happy life. She further submitted that the sum of Kshs.100,000/= under this head be awarded as guided by the decision in **James Wambura Nyikal & Another v Mumias Sugar Company [2011] eKLR** where the Plaintiff was awarded Kshs.100,000/= for loss of expectation of life.

20. On loss of consortium and companionship, counsel submitted that the 1st plaintiff lost his wife after two years of marriage therefore he lost his wife’s companionship while the daughter lost love, care and devotion of her mother. On this counsel relied on the case of **Salvatore De Luca v Abdullahi Hemedi Khalil & Another [1994] eKLR** where it was held that:

“So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife’s companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs.40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgement in the superior court until payment in full.”

21. Counsel further relied on the following authorities:

a) *Ruth Chepngeno Mutai v Patrick Wafero Oloo & Another (Kericho HCCC No.85 of 2000)*

b) *Paul Kioko v Samuel G Karinga & 2 Others [2012] eKLR*

c) *Rose Adisa Odari v Wilberforce Egesa Magoba [2009] eKLR*

d) *Micah Nyolei & Stanley Kiplagat Milgo v Bonventure Anthony Okumu & Another (Eldoret HCCC No. 183 of 2011).*

22. Counsel while relying on the case of **P B S & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016] eKLR** in which the plaintiff was awarded Kshs.800,000/- for loss of consortium, sought the same amount under this head.

23. On loss of dependency, she cited the case of **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another –Nairobi HCCC No.1638 of 1988** where it was held that:-

“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 dependents and the chances of life of the deceased and dependents. 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.”

24. Counsel therefore urged the court to use the multiplicand of KShs.20,319/-, the multiplier of 24 and the dependency ratio of 2/3 bringing the amount to KShs.3,901,248/- as the award for loss of dependency.

25. On special damages, she submitted that these must be both pleaded and proved before they can be awarded by the court. On this she relied on the case of **Hahn V Singh Civil Appeal No.42 of 1983 [1985] KLR 716** where the Court of Appeal held as follows:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

26. Referring to paragraph 5 of the plaint, counsel submitted that the plaintiff had confirmed the payments he made by annexing the individual receipts, copies of the invoices which amounted to KShs.952,037.40/- as specifically pleaded.

27. Counsel therefore submits that the award should be tabulated as follows:-

Special damagesKShs.952,037.40/-

General damages:

Pain and Suffering.....KShs.100,000/-

Loss of Expectation of life.....KShs.100,000/-

Loss of Consortium.....KShs.800,000/-

Loss of Dependency.....KShs.3,901,248/-

Total = KShs.5,853,285/-

Less Liability.....KShs.2,341,314/-

Total.....KShs.3,511,971.24/-

28. The firm of Muchui & Co. Advocates appearing for the defendants filed submissions dated 24th August 2021. Mr. Mege reiterated on the consent recorded in court on 25th September 2019 apportioning blame at the ratio of 60:40 in favour of the plaintiffs.

29. On the issue of loss of expectation of life, he proposed a conventional sum of KShs.100,000/- under this head. While on the issue of quantum of damages and in particular pain and suffering, counsel argued that the permit for burial and certificate of death indicated that the deceased died on 12th September 2012 the very day of the accident. It was however not clear how long it took after the accident before succumbing to her injuries. He therefore proposed a sum of KShs.20,000/- as general damages for pain and suffering.

30. On this counsel relied on the case **Simon Bogonko v Alfred Mongare Mecha & another [2019] eKLR** where the deceased died on the date of accident and the judge awarded KShs.20,000/- for pain and suffering.

31. On the issue of multiplicand, counsel relied on the following cases:

(i) Naomi Wanjiru Njuguna and another v Swan Carries Ltd [2004] eKLR.

(ii) Albert Muange Mwanthi & another v Dominic Muthama Muange & another [2019] eKLR.

He then submitted that the appropriate multiplicand should comprise the average of the net pay after statutory deductions reflected on the two pay slips which amounted to the sum of KShs.20,319/-.

32. Referring to the plaintiffs' submissions he pointed out that the plaintiffs had proposed the same amount and therefore urged the court to adopt a multiplicand of KShs.20,319/-. For the multiplier, counsel urged the court to reject the plaintiff's proposal and instead adopt 15 years.

33. On this he relied on the case of **Naomi Wanjiru Njuguna (supra)** where Justice Musinga (as he then was) adopted a multiplier of 15 years where the deceased was 36 years old. It is his further submission that the plaintiffs did not offer any evidence on actual dependency and that all that PW1 stated was that the deceased was of great help without specifying the nature of help. He relied on the case **Dickson Taabu Ogutu v Festus Akolo & another [2020] eKLR** where the Court of Appeal approved a similar ratio of 1/3 where the deceased's dependents were his child and aged parent.

34. He therefore proposed general damages for loss of dependency to work out to **KShs.1,219,080/-**.

35. On special damages, counsel contends that the total sum payable is KShs.114,261/- broken down as follows:

a) Police Abstract (Not Proved)..... Nil

b) Funeral expenses.....KShs.56,000/-

c) Medical expenses..... KShs.26,436/-

d) Death and funeral announcement.....KShs.4,000/-

e) Programme/Eulogy (not proved).....Nil

f) Tent, Table and seats (not proved).....Nil

- g) Transport (not proved).....Nil
- h) Refreshment and Food (Not proved).....Nil
- i) Mortuary and Post mortem.....KShs.21,300/-
- j) Motor vehicle search..... KShs.500/-
- k) Obtaining grant of letters of administration ... KShs.6,025/-

36. For loss of consortium, counsel submitted that this was not pleaded in the plaint or even alluded to either in PW's filed witness statement or testimony at trial. He therefore contends that the plaintiffs cannot be allowed to raise the same since it amounts to unfair ambush and should be rejected in its entirety.

37. He therefore urges the court to award net damages of KShs.872,004/60 made out as follows;

- a) General damages for loss of expectation of life... KShs.100,000/-
 - b) General damages for pain and suffering..... KShs.20,000/-
 - c) General damages for loss of dependency.... KShs.1,219,080/-
 - d) Special damages KShs.114,261/-
- TOTAL = KShs.1,453,341/-**
- e) Less 40% contribution..... Kshs.581,336.60/-
 - f) Balance..... Kshs.872,004.60/-

Analysis and Determination

38. I have carefully considered the plaint, the defence, the evidence on record including the exhibits, submissions and authorities by both counsel. I find the following to be the main issues for determination:

- i. *What quantum of damages should be made under the Fatal Accidents Act and under the Law Reform Act, if any*
- ii. *Who should bear the costs*

Issue no. (i) What quantum of damages should be made under the Fatal Accidents Act and under the Law Reform Act, if any.

Pain and suffering

39. Damages under the head of pain and suffering are awarded on the basis of how long the deceased suffered pain before her death. She died while undergoing treatment at the Mater hospital. The plaintiff stated that the deceased suffered a lot of pain together with her unborn child as efforts to resuscitate her were being made. The plaintiff sought KShs.100,000/- under this head. The defendant on the other hand proposed a sum of KShs.20,000/-.

40. I find relevance in the cases of:

- a) **Nancy Wanyonyi Maina v Stephen Thungu & another HCCC No. 487/99**
- b) **Alice Mboga v Samuel Mbuti Njoroge HCCC No.351/99 NKR**

41. Most courts have made awards ranging between KShs.30,000/- - KShs.150,000/- on this head depending on the circumstances of each case. The deceased died while receiving treatment and at the same time was heavily pregnant making the situation even worse. The baby was to be born in two weeks' time. The unborn baby also died through the accident. I find an award of KShs.120,000/- to be adequate compensation.

42. Both counsel in their submissions urged the court to award KShs.100,000/- under loss of expectation of life as a conventional sum.

43. In **Hyder Nthenya Musili & another v China Wu Yi Limited & another [2017] eKLR** the court awarded KShs.100,000/- as damages for loss of expectation of life. In **Put Sarajevo Gen. Eng. Co. Ltd v Esther W. Njeri & Johnson Mwangi Gucha (Suing as the Legal Representative of the Estate of Sylvester Muhia Gucha (Deceased))** the court awarded KShs.100,000/- as damages for loss of expectation of life. I have no reason to make me deviate from the proposal by both parties. I, therefore award the Plaintiffs ksh.100,000/- on this head.

Loss of dependency

44. There is no dispute that the deceased was a middle aged woman of 36 years and of good nutritional status and would have probably lived a long and happy life. Her husband (PW.1) testified that at the time of her death she was a hotelier employed by Red Court Hotel which is now known as Boma Hotel. She would consequently have worked as a hotelier to the common retirement age of 50 - 60 years. Based on this the plaintiff's counsel proposed a multiplier of 24 years in determining loss of dependency.

45. On the other hand counsel for the defendant suggested multiplier of 15 years and relied on the case of **Naomi Wanjiru Njuguna & another v Swan Carries Limited** (*supra*) in support.

46. I have considered both the plaintiffs and defendant counsel's submissions. The duty and province of the court is to apply the generally known period during or about which an employee in the deceased's occupation of a hotelier would remain in active work before retirement. That period was acknowledged to be 60 years.

47. In the case of **Beatrice Wangui Thairu** (*supra*), and referred to in **Rev. Fr. Leonard O. Ekisa & another vs. Major Birgen [2005] eKLR**, Ringera J (as he then was) said inter alia -

"... there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case ..."

"In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependents, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum (Hannah Wangaturi Moche & another Vs. Nelson Muya (Nairobi HCCC No. 4533/1993)."

48. The deceased was at the time of her death aged 36 years. The defendant adduced no evidence of the vicissitudes of life or other imponderables which would have shortened the deceased's working life by 15 years, or to 50 years before retirement from the hotel industry. Her salary from the two pay slips produced in court for March 2012 (a net income of KShs.18,505/-) and another for May 2012 (for KShs.22,133/-) gave an average of KShs.20,139/- which was adopted by both parties.

49. PW1 testified that his wife was of great help and spent 2/3 of her salary on the family. In cross-examination, he stated that he is employed at Serena Hotel with his own income which goes to show that he would have not been wholly or largely dependent on the deceased. As the deceased was 36 years of age at the time of the accident, she would, but for the accident, have worked for another 24 years. I would therefore give a multiplier of 20 years, on the basis of 2/3 expenditure to her family over her average salary of KShs.20,319/- per month. The calculation will be: -

$20,319/- \times 12 \times 20 \times 2/3 = \text{KShs.}3,251,040/-$ as the award for loss of dependency.

50. The principle is that special damages must be both pleaded and proved. That is why Lord Goddard C.J. in **Bonham Carter vs Hyde Park Ltd [1948] 64 TLR 177** said -

"... Plaintiffs must understand that, if they bring actions for damages it is not enough to write particulars and so to speak, throw them at the court, saying "this is what I have lost, I ask you to give these damages, and they have to be proved."

51. The plaintiff pleaded for a sum of KShs.952,037/- by way of special damages. The particulars of the special damages are at paragraph 5 of the plaint. Counsel for the defendant submitted that not all pleaded amounts have been strictly proved and some are not awardable. Counsel came up with a total of special damages payable at KShs.114,261/-.

52. I have gone through the receipts produced and the ones available are as follows:

- i. Funeral expenses KShs.56,000/-
- ii. Medical expenses KShs.294,436/-
- iii. Death and Funeral Announcement costs KShs.19,500/-
- iv. Mortuary and Post mortem KShs.21,300/-
- v. Motor Vehicle search KShs.500/-
- vi. Obtaining grant or letters of administration KShs.6,025/-
- vii. Refreshments and food KShs.180,800/-
- viii. Tents, tables and seats plus address system KShs.131,000/-
- ix. Transport KShs.25,000/-

Special damages total to KShs.734,561/-.

53. It is clear from the plaint and PW1's witness statement and testimony that he did not plead anything on loss of consortium or companionship. I will therefore not award anything on this head.

54. The following are the awards that this court will make:

i. Pain and suffering.....	KShs.120,000/-
ii. Loss of Expectation of life	KShs.100,000/-
iii. Loss of dependency	KShs.3,251,040/-
iv. Special damages	KShs.734,561/-
Total.....	KShs.4,205,601/-
Less Liability 40%	KShs.1,682,240/40
Balance	KShs.2,523,361/60

55. I therefore enter judgment for the plaintiff against the defendant in the sum of **KShs.2,523,361.60/-** (Two million, five hundred and twenty three thousand, three hundred and sixty one shillings and sixty cents only) plus interest and costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 16TH DAY OF DECEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT