



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 33 OF 2014

**BIRTHY ATIENO OMBEWA (suing as administrator of the Estate
of FRED OWOKO OKONGO (Deceased)) PLAINTIFF**

VERSUS

ASL CREDIT LIMITED 1ST DEFENDANT

VARSANI MERCHANDISE LIMITED 2ND DEFENDANT

JUDGMENT

1. By a Complaint dated 28/05/2014, the Plaintiff herein sued the Defendants jointly and severally for special damages amounting to Kshs. 176,000/- (as particularized); general damages; and costs of the suit and interests on the damages and costs.
2. The suit arose from a road traffic accident that occurred on 28/05/2011 along the Eldoret-Nakuru Road. It involved Motor Vehicle Registration No. KAU 583Y – a Nissan Pick-Up and motor vehicle registration no. KAZ 830X – a Mercedes Benz Prime Mover. The Plaintiff's husband, on behalf of whose estate she has brought the suit, was abode the Nissan Pick-up when the accident occurred. He sustained fatal injuries as a result of the accident.
3. The issue of liability was earlier settled in a test suit in which liability was assigned at 100% in favour of the Plaintiff and against the Defendants.
4. The only issue for determination before me, therefore, was quantum of damages awardable to the Plaintiff. Towards this, the parties agreed to have a hearing. The Plaintiff testified and closed her case. The Defendant called no witnesses. The parties' advocates then filed written submissions.
5. In her testimony, the Plaintiff adopted her witness statement. She testified that she and her husband had four children: Zahriah Emurak (born in 1992); Yunia Nyarondo (born in 2004); Terry Amani (born in 2006); and Rachel Ajwang (born in 2008). She told the Court that her husband was the sole bread winner of the family. She testified that before he met his death through the road traffic accident, the husband worked at Interglobal Resources Limited. She said that he earned a salary of Kshs. 600,000/- per month.
6. The Plaintiff said that after the accident, the Police issued her with an abstract, which was admitted to evidence. She also produced a copy of the Post mortem form and a record of the vehicle as well as a receipt for the search. She told the Court that they had to tow the vehicle and that they paid towing charges for which she produced a receipt. She also paid for embalment and storage charges of Kshs. 7,000/- as well as transport charges for the coffin at Kshs. 100,000/-. She produced these receipts. The coffin was bought at Kshs. 50,000/-. She also produced a receipt.
7. All these documents were admitted without objection. However, the Defendant's counsel strenuously objected to the production of what the Plaintiff said was the pay slip for the Deceased. The Defendant insisted that an official of the company that allegedly issued the pay slip -- Interglobal Resources Limited -- should come and produce it. In other words, the Defendant doubted the authenticity of the pay slip. The Plaintiff's counsel asked for an adjournment to call an official of the Company. On the date appointed for further hearing, however, the Plaintiff's counsel informed the Court that they wished to close the Plaintiff's case. As such, the Plaintiff closed her case before the purported pay slip was admitted to evidence.
8. It is true that the pay slip was marked for identification. However, it was not admitted to evidence. That document, therefore, never became part of the evidence. As the Court of Appeal held in *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others [2015] eKLR*:

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

9. I will, therefore, not rely on the purported payslip which was marked as “MFI12” However, all the other documents in support of the liquidated damages were duly marked and produced as evidence without objection from the Defendant’s Counsel and are deemed to have proved the claims for liquidated damages. In particular, the following liquidated damages were proved:

a. Copy of record	Kshs. 1,000/-
b. Coffin	Kshs. 50,000/-
c. Transport	Kshs. 100,000/-
d. Embalment charges	Kshs. 7,000/-
e. Towing charges	Kshs. 18,000/-
Total	Kshs. 176,000/-

10. Under the heading pain and suffering, the Plaintiff has proposed Kshs. 80,000/- (relying on *Premier Dairy Limited v Amarjit Singh Sagoo & Another [2013] eKLR*). The Defendants have suggested a sum of Kshs. 10,000/- (relying on *Re Estate of Fred Gekonge (HCCC No. 95 of 2009 at Kisii)* and *Patrick Jacob Ouma v Tawfiq Bus Services (HCCC No. 41 of 1998 at Mombasa)*). In the present case, it would seem from the Death Certificate produced that the Deceased died on the spot of head injuries sustained during the road accident. It would seem to me, going by recent trends, an award of Kshs. 50,000/- for pain and suffering is a reasonable sum.

11. On the loss of expectation of life, the Plaintiff’s counsel suggests an award of Kshs. 100,000/- given that the Deceased was 46 years old. He relies on *Chelangat Silvia v Nyanchwa Adventist College [2016] eKLR* where Kshs. 100,000/- was awarded. The Defendant’s counsel suggested an award of Kshs. 70,000/-. The trend in our Courts is to award Kshs. 100,000/- for middle-aged victims under this heading. I will stick with the trend.

12. There is much controversy on how to compute for loss of dependency. The Plaintiff submitted that the Deceased was 46 years old and of good health and that he was employed as an Accountant with Interglobal Resources Limited earning a salary of Kshs. 600,000/-. As held above, the pay slip presented was not admitted to evidence and cannot, therefore, be the basis for determining the wages earned by the Deceased.

13. The question that remains is whether the Court can use that same figure on the basis of the oral evidence of the Plaintiff. The Plaintiff’s counsel urged me to do so. He cited the reasoning in *Jacob Ayiga Maruja & Another v Simeone Obayo [2005] eKLR*. In particular, counsel referred me to the passage where the Court reasoned thus:

We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.

14. In that case, the Plaintiff had testified that his brother (the Deceased) was a carpenter who used to earn about Kshs. 5,000/- per month. He had no receipts, income tax statements, books of accounts or any other documents to prove that fact. The Court of Appeal decided that the oral testimony given by the Plaintiff and the widow of the Deceased was enough to establish the fact that the Deceased did, in fact, earn that much.

15. Can we say there is enough evidence on record to establish that the Deceased used to earn Kshs. 600,000/- per month? I do not think so. All we have is the bald statement of the Plaintiff. We do not have any bank statements to even give an inkling of how much money was going to his account. The Deceased was allegedly in a formal employment, yet we have no other documents to substantiate his earnings. We do not even have an employment offer letter or contract. We do not even have any documents to show that he was a qualified or practicing accountant. The Plaintiff testified that the Deceased had a diploma from the Kenya Institute of Management. However, KIM does not offer diplomas in accounting.

16. What, then, should the Court do? I am unpersuaded that the Deceased’s income to be used to estimate the loss of dependency should be Kshs. 600,000/- as suggested by the Plaintiff. We must, however, recall that the multiplier method is only a method not a dogma (see *Albert Odawa V Gichimu Gichenji Nakuru HCCA 15/2003 [2007] eKLR*). **As I stated in an earlier decision, the aim is to approximate what loss the estate of the Deceased has suffered following the wrongful death of the Deceased. It is, of course, not possible to come up with a precise figure for the loss. The Court merely tries to use all available evidence to come up with a figure which is fair and**

reasonable in the specific circumstances of the case. Where that is absolutely not possible, the Court resorts to the minimum wage as a last resort.

17. In the present case, the bottom line is that the Deceased was a family man and the bread winner of his family at the time of his death. Most of his income went to supporting his family. This evidence was not contested in Court. It was also not contested that he supported his wife and children. It was not contested that the Deceased was in formal employment in the financial sector with Interglobal Resources Limited. To do justice to the case, I will use an average salary of Kshs. 60,000/- as the monthly salary earned by the Deceased. I plucked this figure from that which is given as the average salary for Accounts Assistants by Corporate Staffing Services, a leading Human Resources Staffing firm in Kenya. See: <https://www.corporatestaffing.co.ke/2017/03/salary-advice-what-is-the-average-salary-of-an-accountant/>. I have used this figure in a bid to do justice in the case and out of the realization that many husbands in Kenya do not share the details of their employment and other financial dealings with their wives. It would, therefore, be to impose too severe a penalty on such a spouse when claiming compensation for the estate of the departed spouse. Where there is a basis for an educated estimate of earnings, the Court should use it to avoid injustice.

18. I will, therefore, use monthly earnings of Kshs. 60,000/- and assume that husbands generally spend about two-thirds of their salaries (or Kshs. 40,000/-) on their families. This will mean that the loss of dependency for the estate of the Deceased is Kshs. 40,000/-.

19. The calculation for loss of dependency will then work out as follows: Kshs. 40,000/- x 12 months x 14 years = Kshs. 6,720,000/-. This is the amount I will award to the estate of the Deceased for loss of dependency. In making this calculation, I accepted the multiplier of 14 years as reasonable given that the Deceased was 46 years old. As the Plaintiff argues, it is reasonable to expect that he would have led a healthy productive life until he turned at least 60 years old.

20. There is one other issue which was not directly by the parties but I wish to touch on. The Plaintiff seeks damages under both headings of “loss of expectation of life” and “loss of dependency”. While there have been some suggestions in Kenya that it is improper to do so because it leads to a double award to the Plaintiffs since the persons benefitting from the estate of the Deceased are the same, the correct position is that enunciated in *Kemfro v A.M. Lubia & Another [1982-1988] KAR 727* thus:

The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

21. In this same case, in a separate concurring opinion, Chesoni Ag JA (as he then was) held that “*to be taken into account and to be deducted are two different things [and that] the words used in Section 4(2) of the Fatal Accidents Act are ‘taken into account’.*” However, the position taken by our Courts is that absent special circumstances a Court will demonstrate that it has “taken into account” by deducting the amount awarded under the Law Reform Act from the award for loss of dependency under the Fatal Accidents Act. I have suggested before that where the multiplier method has been used, unless the Trial Court expressly explains that it has chosen a lower figure to use as a multiplicand, multiplier or ratio pursuant to the statutory admonition under section 4(2) of the Fatal Accidents Act, it would be assumed that it did not “take into account” the award under the Law Reform Act.

22. In the circumstances of this case, I think the amount awarded under the Law Reform Act should not be deducted from the award under the loss of dependency. This is because even though there was evidence that the Deceased was employed by Interglobal Resources Limited, there was no concrete way to establish his actual income hence the resort to an educated guess.

23. The upshot, then, is that judgment shall be entered against the Defendants jointly and severally for the following sums:

- a. Special Damages – Kshs. 176,000/-**
- b. General Damages for Pain and suffering – Kshs. 50,000/-**
- c. General Damages for loss of life – Kshs. 100,000/-**
- d. Loss of Dependency – Kshs. 6,720,000/-**

Total – Kshs. 7,046,000/-

24. Orders accordingly.

Dated and delivered at Nakuru this 27th day of January, 2020.

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JOEL NGUGI

JUDGE