



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 158 OF 2014**

**CHARI MWADIME & RACHEL NYASI MAKOKO KIMBIO**

**(Suing as the administrators of the estate of JANET M. MWADIME-Deceased).....PLAINTIFFS**

**VERSUS**

**WILLIAM MBUKULI NYENDE & PETER THOMAS NALIKA NYENDE**

**(Sued as the personal representatives of the estate of CALEB WAKALA NYENDE-Deceased).....DEFENDANTS**

**JUDGMENT**

1. The plaintiffs herein, being the administrators of the estate of Janet M. Mwadime (*“the deceased”*) instituted a suit against the defendants by way of the plaint dated 21<sup>st</sup> May, 2014 and amended on 3<sup>rd</sup> October, 2016 in which they sought for damages under the Fatal Accidents Act and the Law Reform Act, special damages in the sum of Kshs.221,050/ plus costs of the suit and interest thereon.
2. The defendants are sued in their capacities as personal representatives of the estate of Caleb Wakala Nyende (*“the deceased driver”*) who was at all material times the insured/beneficial owner of motor vehicle registration number KBM 830Z Toyota Caldina (*“the subject motor vehicle”*).
3. The plaintiffs pleaded in their plaint that sometime on or about 9<sup>th</sup> June, 2012 the deceased was travelling aboard the subject motor vehicle as a passenger at Lusaka Roundabout along Mombasa Road when the subject motor vehicle was involved in an accident resulting in the instant death of the deceased.
4. The plaintiffs attributed the accident to negligence on the part of the deceased driver and set out its particulars in the plaint.
5. It was also pleaded that at the time of her death, the deceased was a young and robust 30-year old woman who was the sole breadwinner of her family and has now left behind the following dependants:

i. SW	Daughter	8 years old
ii. LR	Daughter	3 years old
6. Upon being served with summons, the defendants entered appearance and filed their joint statement of defence on 7<sup>th</sup> December, 2016 to deny the claim.
7. The defendants denied the particulars of negligence pleaded in the plaint, averring instead that the accident was substantially or wholly the result of negligence of the deceased.
8. At the hearing, the plaintiffs summoned two (2) witnesses while the defence case was supported by the evidence of one (1) witness.
9. Upon close of the trial, this court gave directions for the parties to put in written submissions.
10. On liability, the plaintiffs submitted that the police officer who produced the police abstract gave evidence that the subject motor vehicle failed to properly negotiate the Lusaka Roundabout, instead heading to a renovation site and losing control before rolling. The plaintiffs argued that it is clear therefrom that the deceased driver was solely to blame for the accident.
11. It was also the plaintiffs’ contention that the defence witness was not an eye witness to the accident hence he could not give an accurate account of the events of the material date.

12. On damages for loss of dependency, the plaintiffs proposed a multiplier of 30 years on the premise that the deceased was 30 years old at the time of her death and would therefore have worked for another 30 years or so before attaining the retirement age. The plaintiffs referred this court to the case of **Loise Wairimu Mwangi & Another v Joseph Wambue Kamau [2006] eKLR** where the court applied a multiplier of 20 years in the instance of a 35-year old deceased person.

13. The plaintiffs further urged the court to apply a multiplicand of Kshs.87,359/ being the net income of the deceased as shown in a copy of her pay slip which was produced as evidence.

14. As concerns the dependency ratio, it was the plaintiffs' submission that the deceased left behind two (2) young children who depended on her entirely. Moreover, the 2<sup>nd</sup> plaintiff gave evidence that being the mother to the deceased, she equally depended on the deceased for financial assistance. In this regard, the plaintiffs were of the view that a ratio of 2/3 would suffice, hence tabulating the award for loss of dependency as follows:

$$\text{Kshs.87,359} \times 12 \times 30 \times \frac{2}{3} = \text{Kshs.20,966,160/=}$$

15. The plaintiffs urged this court to consider the authority of **Mary Wanjiru Watheka & another v Alice Wangui Ndungu & another [2015] eKLR** in which a multiplier of 20 years and a ratio of 2/3 were applied to a deceased aged 35 years, and **Jackson N. Mutyetumo t/a Paju Investments & another v Mary Menze Mathuku & Humprey Munene Kaburu & another [2009] eKLR** where a similar ratio was applied together with a multiplier of 23 years to a person who died at 30 years old.

16. On damages for loss of expectation of life, the plaintiffs suggested a conventional sum of Kshs.100,000/= on the basis that the deceased was a healthy, young woman with bright prospects in the future.

17. The plaintiffs further suggested a similar award of Kshs.100,000/ on pain and suffering by arguing that since the deceased was thrown out of the subject motor vehicle on impact, she likely suffered a great deal of pain and suffering.

18. On specials, the plaintiffs were of the view that they are entitled to the total sum of Kshs.221,050/= incurred on funeral expenses, costs in obtaining the police abstract; death certificate; letters of administration; autopsy report and the copy of records for the subject motor vehicle.

19. The defendants on their part argued that none of the plaintiffs' witnesses were able to state with certainty what caused the accident or who was to blame for the same, adding that the 2<sup>nd</sup> plaintiff who testified as PW2 did not actually witness the accident. On this note, the defendants also argued that the deceased driver was only held liable by virtue of him being the owner of the subject motor vehicle.

20. It was the defendants' further contention that the police officer who testified confirmed that the three (3) deceased persons were not wearing their safety belts at the time of the accident which would explain why they were thrown out of the subject motor vehicle on impact, thereby supporting their defence that the deceased's negligence led to her demise.

21. The defendants refuted the plaintiffs' case on the premise that the evidence tendered in court did not show who was driving the subject motor vehicle on the material date or ascertain causation of the accident, thus falling short of the burden of proof under **Section 107** of the **Evidence Act, Cap. 80 Laws of Kenya** which expresses that:

*“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”*

22. In reiteration of the above, the defendants cited the case of **Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR** where the court rendered that in the absence of eyewitnesses to explain how the accident occurred, the plaintiff never discharged the burden of proof under the above-referenced provision, for the burden to shift to the defendant.

23. On quantum, it was the defendants' submission that an award of Kshs.30,000/ would form sufficient damages for pain and suffering, while quoting *inter alia*, the authority of **Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased) [2015] eKLR** where an award of Kshs.20,000/ was made under this head.

24. On damages for loss of expectation of life, the defendants suggested an award of Kshs.80,000/= which award was similarly made in the case of **James Gakinya Karienyne & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR.**

25. The defendants addressed damages for loss of dependency by urging that a multiplier of 15 years be applied together with a multiplicand of Kshs.44,987.60 which was the deceased's net salary and a ratio of 2/3 similar to that proposed by the plaintiffs, resulting in the following award:

$$\text{Kshs.44,987.60} \times 15 \times 12 \times \frac{2}{3} = \text{Kshs.5,398,512/=}$$

26. The defendants finally submitted that the plaintiffs would only be entitled to the special damages proved by way of receipts.

27. I have considered the evidence on record, the rival submissions and the authorities relied upon. It is clear that the twin issues for

determination are liability and quantum.

28. On liability, P.C. Ann Njagi who was PW1 testified that the accident was self-involving and that the subject motor vehicle was being driven by the deceased driver on the material day and carrying two (2) passengers including the deceased.

29. The witness stated that the subject motor vehicle was being driven from Jomo Kenyatta International Airport at about 2.50 am and upon approaching the Lusaka Roundabout, it went over the island and rolled, killing all its occupants. The witness produced the police abstract and OB (Occurrence Book) report as P. Exh 1(a) and (b).

30. In cross examination, it was the evidence of PW1 that all the occupants were thrown out of the subject motor vehicle and there were no witnesses according to the OB report, mentioning that it was unclear who was driving the said vehicle.

31. The 2<sup>nd</sup> plaintiff in her evidence as PW2 stated that she was out of the country when the accident took place and only came to learn of it later on, further stating that the deceased and the deceased driver were work colleagues.

32. Peter Nyende testified as DW1 for the defence case, stating that the deceased driver is his brother and that he came to learn of the accident through his sister, though he has no information as to the manner in which the accident occurred.

33. On being cross-examined, it was DW1's testimony that the subject motor vehicle belonged to the deceased driver.

34. Upon my examination of the evidence on record, I established that none of the witnesses who were summoned witnessed the actual accident. The police abstract also shows that PW1 is not the officer who investigated the accident and whereas the witness indicated that no witnesses were listed in the OB, the police abstract listed the investigating officer as a witness though no explanation was given as to why he did not give evidence in the suit.

35. Suffice it to say that the evidence shows that the accident took place on the aforementioned date, thereby claiming the lives of three (3) persons including the two (2) deceased persons herein.

36. The police abstract produced as P. Exh 1(a) indicates the deceased driver as being the driver of the subject motor vehicle on the material date. Moreover, a copy of records produced as part of the plaintiffs' bundle of documents shows that the deceased driver was the owner of the subject motor vehicle and this position was restated by DW1.

37. I noted that the plaintiffs pleaded the doctrine of *res ipsa loquitur* in their plaint which I will consider in the circumstances.

38. The meaning encompassing the doctrine was aptly discussed in the case of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to a number of authorities, including the East African Court of Appeal's decision in **Embu Public Road Services Ltd. vs. Riimi [1968] EA 22** that:

***“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant.”***

39. The East African Court went on to reason thus:

***“The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”***

40. In the present scenario, I am satisfied that the plaintiffs have established on a balance of probabilities that the deceased driver was both the owner and driver of the subject motor vehicle at all material times.

41. Further to the foregoing, I am satisfied that the plaintiffs established that the accident occurred in a manner out of the ordinary hence discharging the burden of proof in line with the doctrine of *res ipsa loquitur*.

42. It therefore fell upon the defendants to either demonstrate that the deceased driver was not negligent or that the deceased through some degree of negligence on her part contributed to the accident and her demise. While I noted from the defendants' submission that the deceased was not wearing her safety belt, no evidence was presented to support such submission. In fact, contrary to their arguments on this issue, PW1 at no point in her evidence inferred that the occupants of the subject motor vehicle were not wearing any safety belts when they crashed.

43. In the premises, I am of the opinion that the defendants did not bring forth any evidence to convince me to apportion liability and I can only arrive at one finding which is that the deceased driver was wholly liable for the accident and by extension, the defendants being the personal representatives to his estate.

44. Having settled the first limb, I turn my attention to the second limb on quantum which the parties addressed under the four (4) heads

hereunder:-

**a) General damages**

**(i) Pain and suffering**

45. I have examined the evidence adduced before me in this regard, particularly the autopsy report dated 10<sup>th</sup> June, 2012 prepared by Dr. Oduor Johansen and which indicates that the deceased died on the spot. No rebutting evidence was produced on the time of death.

46. I have considered the awards proposed by the parties and I am of the view that the sum of Kshs.100,000/= suggested by the plaintiffs is on the higher side since there is no evidence to show that the deceased underwent any prolonged suffering. I have similarly considered the authorities cited by the defendants under this head and which I have already referenced hereinabove. In both those instances, the timelines in which the deceased persons passed on are consistent with those in the present instance, though the respective courts awarded lesser sums than the Kshs.30,000/= proposed by the defendants. In the circumstances, I will award a sum of Kshs.30,000/= under this head.

**(ii) Loss of expectation of life**

47. I have considered the differing sums suggested by the parties under this head. I have also taken into account the evidence to show that the deceased was aged 30 years and had her whole life ahead of her.

48. I am convinced that the conventional sum of Kshs.100,000/= would constitute adequate damages for loss of expectation of life.

**(iii) Loss of dependency**

49. In her evidence, PW2 testified that in the time leading up to her death, the deceased worked at KCB (Kenya Commercial Bank Limited) as an Assistant Manager and earning a gross monthly salary of Kshs.109,959/= which following statutory deductions amounts to a net salary of Kshs.48,978/= as shown in her pay slip for the month of May, 2012.

50. PW2 further testified that the deceased is survived by two (2) daughters and her mother.

51. In my analysis of the multiplier, I looked at copies of the certificate of death and certificate of birth for the deceased attached to the plaintiffs' list bundle of documents; the same are consistent in stating that the deceased died aged 30 years.

52. I have considered the authorities cited by the parties and I find the case of **Jackson N. Mutyetumo t/a Paju Investments & another v Mary Menze Mathuku & Humprey Munene Kaburu & another [2009] eKLR** which was cited by the plaintiffs to be most relevant in view of the similar ages of the deceased persons though I noted that the case was decided over 10 years ago.

53. I have therefore considered the more recent case of **Wilson Nyamai Ndeto & another v China Wu Yi Limited & another [2017] eKLR** where the court applied a multiplier of 27 years for a deceased who died at 30 years of age.

54. All things constant, the deceased would possibly have worked up to the formal retirement age of 60 years. However, taking into account the vagaries of life, I will apply a reasonable multiplier of 28 years.

55. On the question of the dependency ratio, it was my observation that the parties were in agreement on applying a ratio of 2/3. I have examined copies of the birth certificates for the deceased children and the relevant documentation showing that they are school-going children; in addition, I have examined the birth certificate of the deceased showing that she was a daughter of the 2<sup>nd</sup> plaintiff. I therefore find a ratio of 2/3 to be applicable herein.

56. This brings me to the multiplicand. The plaintiffs availed copies of a degree certificate and various correspondences to show that the deceased had attained a Master's degree of Science in Entrepreneurship and that she was an employee of KCB serving as an Assistant Manager-Customer Services preceding her demise.

57. The plaintiffs also availed a copy of the deceased's pay slip for the month of May, 2012. The same bears a gross consolidated salary of Kshs.109,989/=. The net salary comes to Kshs.44,987.60 though it is worth mentioning that the net salary ordinarily constitutes the gross salary less statutory deductions.

58. It is apparent that the deceased had taken out certain loans which she was repaying through her salary. In calculating the gross salary less statutory deductions alone, I have arrived at the sum of Kshs.87,359/ which was the sum proposed by the plaintiffs. I find this to constitute the appropriate multiplicand.

59. The tabulation of damages under this head is as follows:

$$\text{Kshs.87,359} \times 28 \times 12 \times 2/3 = \text{Kshs.19,568,416/=}$$

**b) Special damages**

60. Upon my assessment of the receipts produced by the plaintiffs, I find that the same total a sum of Kshs.218,130/ for special damages both

specifically pleaded and strictly proved.

61. Accordingly, I hereby enter judgment in favour of the plaintiffs and against the defendants follows:

<b>Liability</b>	<b>100%</b>
<b>a) General damages</b>	
<b>(i) Pain and suffering</b>	<b>Kshs.30,000/=</b>
<b>(ii) Loss of expectation of life</b>	<b>Kshs.100,000/=</b>
<b>(iii) Loss of dependency</b>	<b>Kshs.19,568,416/=</b>
<b>b) Special damages</b>	<b>Kshs. 218,130/=</b>
<b>TOTAL</b>	<b>Kshs.19,916,546/=</b>

The plaintiffs shall have cost of the suit and interest on special damages at court rates from the date of filing the suit and interest on general damages at court rates from the date of judgment until payment in full.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of February, 2020.**

.....

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendants