



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 271 OF 2014**

**EUNICE WAIRIMU WAWERU.....PLAINTIFF**

**VERSUS**

**NOOR ABDIKADIR ABDILLE.....1<sup>ST</sup> DEFENDANT**

**KINYAE ISKA DAVID.....2<sup>ND</sup> DEFENDANT**

**FIDELIS NDOLO MUSYOKA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. In her plaint dated 28<sup>th</sup> August 2014, the plaintiff, *Eunice Wairimu Waweru* instituted suit against the three defendants herein on her own behalf and on behalf of the estate of her daughter, the late *Eve Nyambura Makumi*. She prayed for general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* as well as general damages for personal injuries sustained by her in a road traffic accident whose occurrence she blamed on the negligence of the third defendant.

2. According to the averments in the plaint, the accident occurred on 1<sup>st</sup> October 2011 along Kampala-Juja Road in the Republic of Uganda and was caused by the third defendant *Fidelis Ndolo Musyoka* who at the time was the agent or servant of the 1<sup>st</sup> defendant, *Noor Abdikadir Abdille* and the second defendant, *Kinyae Iska David*, who were the registered and beneficial owner of motor vehicle registration number KBJ 683Y.

3. The plaintiff averred that the 3<sup>rd</sup> defendant negligently drove and or controlled the aforesaid motor vehicle causing it to collide with motor vehicle registration number UAK 345 UU in which the plaintiff, her late daughter and other passengers were travelling in; that as a result of the accident, she sustained multiple soft tissue injuries but unfortunately, her daughter then aged 5 years lost her life.

4. Upon being served with summons, the defendants failed to enter appearance or to file a defence. Following a request by the plaintiff, interlocutory judgment was entered against each of the defendants on 28<sup>th</sup> September 2016. Hearing for formal proof subsequently proceeded before me on 18<sup>th</sup> November 2010. The plaintiff testified in support of the allegations pleaded in the plaint as the sole witness.

5. In her evidence, the plaintiff adopted her witness statement dated 28<sup>th</sup> August 2014 as part of her evidence in chief. In the statement, she narrated how the accident occurred. She blamed the accident on the negligence of the 3<sup>rd</sup> defendant who was allegedly driving motor vehicle registration number KBJ 683Y at very high speed as a result of which he lost control of the vehicle and crashed into bus registration number UAK 345 UU. All the passengers in the bus including her daughter died on the spot. She was the only survivor.

6. In support of her case, the plaintiff produced as exhibit a copy of records from the Registrar of Motor Vehicle's dated 16<sup>th</sup> May 2013 as proof of her claim that the 1<sup>st</sup> defendant was at the material time the registered owner of the vehicle which caused the accident. She also produced a copy of a police abstract issued by Lugazi Police Station confirming occurrence of the accident. Her allegation that the driver of motor vehicle registration number KBJ 683Y was the 1<sup>st</sup> defendant's agent or servant was not controverted by any pleading or evidence to the contrary since as stated earlier, the defendants did not file a defence to her claim and the suit was not defended.

7. In view of the foregoing, I find that the plaintiff has proved her claim against the 1<sup>st</sup> and 3<sup>rd</sup> defendants on a balance of probabilities but has failed to establish any claim against the 2<sup>nd</sup> defendant.

In the premises, I find the 3<sup>rd</sup> defendant directly liable and the 1<sup>st</sup> defendant vicariously liable for the negligence of the 3<sup>rd</sup> defendant. I thus enter judgment on liability in favour of the plaintiff against the 1<sup>st</sup> and 3<sup>rd</sup> defendants jointly and severally at 100%.

As the plaintiff failed to prove her claim against the 2<sup>nd</sup> defendant, the interlocutory judgment entered against the 2<sup>nd</sup> defendant is hereby set aside. The suit against the 2<sup>nd</sup> defendant is accordingly dismissed with no orders as to costs.

8. Having made my finding on liability, I now turn to consider the plaintiff's claim for damages. I will start by addressing the prayer for general damages for the personal injuries the plaintiff sustained in the accident before dealing with the prayer for damages under the *Law Reform Act* and the *Fatal Accidents Act*.

9. According to the plaintiff's evidence, she sustained the following injuries:

Ø Multiple deep cut wounds on the scalp, face and right thigh;

Ø Abrasion wounds on the arms and right leg;

Ø Severe psychological trauma.

She was admitted at the Nairobi hospital for treatment for four days. It is evident from the medical report prepared by *Dr. Kinuthia* (exhibit 3) that her injuries healed leaving visible scars on her face and right thigh which had some cosmetic significance.

10. In her written submissions, the plaintiff proposed an award of KShs.1,000,000 relying on the authority of *Catherine Wanjiru Kingori & 3 Others V Gibson Theuri Gichubi, [2005] eKLR* where one of the plaintiffs who had suffered multiple soft tissue injuries was awarded KShs.350,000.

11. I have considered the nature of the injuries sustained by the plaintiff including the psychological trauma she must have experienced on witnessing the death of her child and all the other passengers who died on the spot. The plaintiff was still undergoing treatment for the trauma at the time she was examined by *Dr. Kinuthia* slightly over three years after the accident.

12. I have read the authority cited by the plaintiff. I find that the same is not applicable to the present case as the injuries sustained by the plaintiff in that case are not comparable to the injuries sustained by the plaintiff in this case. Though in *Catherine Wanjiru Kingori & 3 Others V Gibson Theuri Gichubi [supra]* the plaintiff sustained multiple soft tissue injuries, she did not suffer any psychological trauma and there is no indication whether her injuries left her with visible scars on the face which to a lady, would be a source of constant discomfort.

13. The purpose of awards for general damages is not to pay the victim of an accident for the injuries sustained because as correctly stated by Lord Morris in *West (H) & Son Limited V Shephard, [1964] AC 326*:

***"... Money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is award sums which must be regarded as giving reasonable compensation. .... When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."***

14. Taking into account the injuries sustained by the plaintiff as shown above, I find the sum proposed by the plaintiff to be inordinately high. In my view, a sum of KShs.500,000 would be fair and reasonable compensation for the plaintiff's pain and suffering. I therefore award the plaintiff general damages in the sum of KShs.500,000.

15. Turning now to the damages claimed on behalf of the deceased's estate, the plaintiff proposed a sum of KShs.50,000 under the limb of pain and suffering before death but did not lay any basis to justify the proposed award. Damages for pain and suffering under the *Law Reform Act* are meant to compensate the deceased's estate for the pain and suffering the deceased endured before death. In this case, the evidence on record proves that the deceased died on the spot. This means that she probably did not experience any pain or suffering before she passed on. In the circumstances, I find a nominal award of KShs.10,000 sufficient under this head and the same is hereby awarded to her estate.

16. Regarding loss of expectation of life, courts over the years have been awarding conventional amounts of KShs.100,000 considering that in most cases, the administrators of estates also double up as the deceased's dependents who would, more often than not, be entitled to damages for loss of dependency. In the circumstances, awarding conservative amounts for lost years has been found necessary in order to avoid overcompensating the dependants. Considering the age of the deceased at the time of her death, I find the award of KShs.100,000 proposed by the plaintiff reasonable and the same is hereby awarded.

17. On the claim for loss of dependency, the plaintiff proposed a sum of KShs.1,000,000 relying on the authority of *Fredrick Bundi Rochia & Another V SMM (suing as the legal representative of the estate of JMM), [2019] eKLR* where the court awarded a global sum of KShs.800,000 where the deceased was five years old and the authority of *Daniel Mwangi Kimemi & 2 Others V JGM & Another (the personal representatives of the estate of NK (DCD), [2016] eKLR* where the court awarded KShs.1,000,000 to the parents of a deceased child aged nine years.

18. It is now settled law that in Kenya, parents of deceased children are entitled to compensation for loss of dependency if a child's life is cut short in a road traffic accident owing to the negligence of a defendant. This is because parents especially in the African communities raise and educate their children with the expectation that they will grow to become responsible citizens who would in turn provide for them in their old age.

19. The Court of Appeal in *Kenya Breweries Limited V SARO, [1991] eKLR* which was followed by *Gikonyo J* in *Daniel Mwangi Kimemi & 2 Others, [supra]* supported the above position and further gave guidance on the assessment of damages for loss of dependency in cases

involving minors. The court expressed itself as follows:

*“We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have “homes” for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a “home” while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase “being mindful of other people’s welfare...”.*

20. In this case, the deceased was five years old at the time of her death. She was a kindergarten pupil and though the plaintiff claimed that she was a bright student who aspired to be a doctor, it is my view that at that age, it would be difficult if not impossible to ascertain her full potential or abilities since they would not have clearly manifested themselves at such a tender age.

21. The above notwithstanding, I note that in the persuasive authority of *Fredrick Bundi Rochia, [supra]* which was recently decided in 2019, *Gikonyo J* awarded KShs.800,000 to parents of a deceased child of five years who like the deceased in this case was in nursery school at the time of his untimely death. Consequently, I am persuaded to find that the plaintiff in this case is also entitled to a similar award. The plaintiff is accordingly awarded KShs.800,000 for loss of dependency.

22. With regard to special damages, the plaintiff specifically pleaded KShs.299,200 being burial expenses and Advocates fees for obtaining letters of administration *ad litem*. As stated earlier, the law requires that special damages must be specifically pleaded and proved. In this case, out of the amount pleaded, the plaintiff strictly proved a sum of KShs.161,500 which is hereby allowed.

23. The upshot of this judgment is that judgment on liability is hereby entered in favour of the plaintiff against the 1<sup>st</sup> and 3<sup>rd</sup> defendants jointly and severally at 100%. The suit against the 2<sup>nd</sup> defendant is dismissed with no orders as to costs. On quantum, damages are awarded to the plaintiff against the 1<sup>st</sup> and 3<sup>rd</sup> defendants jointly and severally as follows:

Damages for the plaintiff’s pain and suffering -	KShs.500,000
Damages for deceased’s pain and suffering -	KShs.10,000
Damages for loss of expectation of life -	KShs.100,000
Damages for loss of dependency -	KShs.800,000
Special damages -	KShs.161,500
Total -	<u>KShs.1,571,500</u>

24. The award of general damages will attract interest at court rates from today’s date until payment in full. The award of special damages will earn interest at the same rate from date of filing of the suit until full payment.

25. As costs follow the event, the plaintiff is awarded costs of the suit.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this 18<sup>th</sup> day of June 2020.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms. Kangethe for the plaintiff

No appearance for the defendants

Ms. Mwinzi, Court Assistant