



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 444 OF 2008

VIRGINIA SIMPANO MUKAMI [suing as the legal

representative of the estate of William Lasiti

Mungai Ole Kure [Deceased].....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

SOLOMON TOROREI.....2ND DEFENDANT

JUDGMENT

1. *Virginia Simpamo Mukami*, the widow of the late *William Lasiti Mungai Ole Kure* instituted suit against the *Hon. Attorney General* and *Solomon Tororei* in her capacity as the legal representative of her late husband's estate. She prayed for general and special damages on behalf of the deceased's estate and on behalf of his dependants under both *The Law Reform Act* and the *Fatal Accidents Act*.
2. The 1st defendant was sued on behalf of the Office of the President which owned motor vehicle registration number GK A 264C (Land Rover) which was involved in the road traffic accident the subject matter of this suit.
3. In her plaint dated 3rd April 2003, the plaintiff averred that on 15th December 2000, the 2nd defendant who was the 1st defendant's agent negligently drove motor vehicle registration GKA 264C (hereinafter the GK vehicle) and caused it to collide with motor vehicle registration KXU 183 (Isuzu Canter) which was being driven by the deceased as a result of which the deceased sustained fatal injuries. The particulars of the 2nd defendant's negligence are pleaded in paragraph 4 of the plaint.
4. In their brief joint statement of defence, the defendants denied *in toto* all the allegations of negligence attributed to the 2nd defendant and put the plaintiff to strict proof thereof.
5. At the hearing, the plaintiff testified and called an additional witness who was an eye witness to the accident. In her evidence, the plaintiff admitted that she did not witness the accident but was aware that the driver of the GK vehicle was later charged with the offence of causing the deceased's death by dangerous driving and was convicted of the offence and fined KShs.20,000. She produced the proceedings and judgment in Naivasha Traffic Case No. 19 of 2002 as *Pexhibit 7 (a) and (b)*. She also gave evidence in support of her claim for loss of dependency and the claim made on behalf of the deceased's estate under the *Law Reform Act*.
6. Her witness, *Samuel Memusi Kusero (PW 2)* testified that he was being conveyed as a passenger in the deceased's motor vehicle at the material time. He was seated at the rear of the vehicle just behind the driver's cabin. He recalled that the deceased was driving towards Nakuru along the Nairobi Nakuru road and as he was turning to join a junction on the right side of the road, the 2nd defendant who had been driving a GK Land Rover approached at high speed and instead of stopping to wait for the deceased to complete the turn, he drove on and rammed into the front right side of the deceased's vehicle. The collision was on the driver's cabin and its impact caused the deceased fatal injuries. He died on the spot. PW 2 testified that he sustained some injuries and was rushed to Naivasha Hospital for treatment.
7. The defendants who were represented during the hearing by learned state counsel *Ms Gathoga* elected not to call any evidence in support of their case.
8. After the parties closed their respective cases, their advocates on record filed written submissions. Those of the plaintiff were filed on 25th March 2019 while those of the defendants were filed on 27th March 2019.
9. After considering the pleadings, the evidence adduced by the plaintiff and the parties' rival submissions, I find that it is not disputed that

an accident occurred on the material date involving motor vehicle registration number KXU 183 which was being driven by the deceased and motor vehicle registration number GKA 264C which was being driven by the 2nd defendant as an agent of the Office of the President which is represented by the 1st defendant in this suit. It is also not disputed that the deceased died on the spot. What is disputed is the plaintiff's claim that the accident was caused by the negligence of the 2nd defendant as alleged in the plaint.

10. The issues that then arise for my determination in this case are the twin issues of liability and quantum.

11. On liability, PW 2 who witnessed the accident narrated how the 2nd defendant rammed into the deceased's vehicle as it was turning to join a junction on the right side of the road despite the fact that the deceased had warned other road users of his intention to join the junction by switching on his vehicle's right indicators. PW 2 recalled that the GK vehicle was on the overtaking lane and was being driven at very high speed. He had been seated at the rear of the Isuzu canter and since the accident occurred at around 8am in the morning, it cannot be disputed that he was able to see how the 2nd defendant was driving the GK vehicle prior to the accident and how the accident occurred.

12. It is pertinent to note that PW 2's evidence was not controverted by any evidence to the contrary since the defendants did not offer any evidence during the trial. The defendants did not also dispute the claim that the 2nd defendant was subsequently charged and convicted of the offence of causing the deceased's death by dangerous driving and was fined KShs.20,000 for the offence.

13. Given the foregoing, it is my finding that the plaintiff has proved on a balance of probabilities that the 2nd defendant caused the accident in which the deceased lost his life by recklessly driving the GK vehicle at high speed in utter disregard of the safety of other road users. In the premises, I find the 2nd defendant directly liable and the 1st defendant vicariously liable for the negligence of the 2nd defendant. The defendants are thus jointly and severally held liable for the accident at 100%.

14. On quantum, I wish to start with the damages claimed under the *Law Reform Act*. The *Law Reform Act* provides that estates of persons who die as a result of fatal injuries sustained in road accidents are entitled to damages for the pain and suffering the deceased endured before death; for loss of expectation of life and special damages for funeral expenses.

15. In her submissions, the plaintiff proposed an award of KShs.100,000 for pain and suffering relying on the authorities of *Francis Wainaina Kurungu (suing as the personal representative of the estate of John Karanja Wainaina [Deceased]) V Elijah Oketh Adella, [2015] eKLR* and *Alice O. Alukwa V Akamba Public Road Services Limited & 3 Others, [2013] eKLR* where the court awarded the plaintiffs KShs.50,000 under that head.

16. The defendants on their part proposed as sum of KShs.10,000 relying on *Milka Nyanchoye Omambia V Gohil Soap Factory Limited, [2004] eKLR* where the said amount was awarded to an estate of a deceased who died at the scene of the accident.

17. I have considered the parties' rival submissions and the fact that the deceased died on the spot and may not have suffered much pain before death. I note that the persuasive authority relied on by the defendants was decided over fifteen years ago and taking into account inflationary trends, I find a sum of KShs.30,000 reasonable in this case and the same is hereby awarded to the plaintiff on behalf of the deceased's estate.

18. Regarding loss of expectation of life, the plaintiff proposed a conventional sum of KShs.100,000 while the defendant proposed KShs.80,000. I have ascertained from the death certificate produced in evidence by the plaintiff that the deceased died at the prime age of 28 years. Given the deceased's age, I find the conventional sum proposed by the plaintiff to be reasonable given that his dependants are also going to benefit from damages to be awarded for loss of dependency under the *Fatal Accidents Act*. I thus award KShs.100,000 for loss of expectation of life.

19. Turning to damages for loss of dependency, the plaintiff testified that her marriage to the deceased was blessed with two children and that the deceased was his family's sole breadwinner; that the deceased used to earn a monthly income of KShs.120,000 from his transport business. She produced his bank statement (*Pexhibit 8*) as proof of the deceased's income.

20. The defendants in their submissions noted that the plaintiff had failed to prove that the deceased used to earn an income of KShs.120,000 as the bank statement produced as proof thereof had only one credit entry; that no cogent evidence was adduced to prove that the deceased owned the vehicle allegedly used in the transport business. The defendants urged the court to adopt the minimum wage of KShs.8,579.80, a multiplier of 27 years and a dependency ration of $\frac{2}{3}$ in calculating damages for loss of dependency.

21. I agree with the defendants' submissions that the documentary evidence tendered by the plaintiff including a copy of the vehicle's logbook did not prove that the deceased owned the subject motor vehicle. The plaintiff testified that the deceased had bought the vehicle but had not effected transfer of ownership into his name prior to his death. She did not however produce any evidence to substantiate that claim by for instance, availing a sale agreement showing sale of the subject vehicle to the deceased. She did not also adduce any evidence to confirm that the deceased was involved in the transport business prior to his death. The bank statement (*Pexhibit 8*) contained transactions between 6th December 1999 to 1st December 2000. All of them were withdrawals except for one credit entry of only KShs.623. The bank statement did not therefore aid the plaintiff in proving the deceased's income at the time of his demise.

22. As conceded by the defendants, the deceased was of a working age at the time of his death and given that he had three dependants who relied on him for their upkeep and basic necessities, I am prepared to find, which I hereby do, that he must have been earning some income to sustain his family. The defendants urged the court to adopt KShs.8,579.80 which they described as minimum wage but did not disclose the cadre of workers it related to.

23. Given the impossibility of ascertaining the deceased's income prior to his death in view of the material presented before the court, am convinced that the multiplier approach in the calculation of damages for loss of dependency is not suitable in this case. In my view, the facts

of this case warrant a lump sum or global approach in the award of damages. In making this finding, I am persuaded by the holding of Koome, J (as she then was) in Albert Odawa V Gichimu Githenji, (2007) eKLR who when quoting Ringera, J in Mwanzia V Ngalali Mutua V Kenya Bus Services (Msa) Ltd & Another stated as follows:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.”

24. Considering the age of the deceased at the time of his untimely death and the fact that it is not disputed that he had three dependants but taking also into account the vicissitudes of life, I find a global sum of KShs.2,500,000 to be fair and reasonable compensation for the plaintiff and her two children for loss of dependency. The plaintiff is hereby awarded the said amount.

25. On special damages, the plaintiff pleaded KShs.30,000 as funeral expenses and KShs.250 as costs of a police abstract and death certificate. Though she did not produce any receipts to prove this claim, I am guided by the wisdom of the Court of Appeal in Jacob Ayiga Maruja & Another V Simeon Obayo, [2005] eKLR where the court held that in the absence of production of receipts to prove actual funeral expenses, a reasonable amount may be awarded. The court expressed itself as follows:

“... We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses.....”

26. There cannot be any doubt that the deceased’s estate incurred some expenditure in preparing for the deceased’s interment and finally laying him to rest. The amount claimed in this case in the sum of KShs.30,000 is extremely reasonable and I have no hesitation in allowing it which I hereby do. The same applies to the claim for KShs.250 being cost of procuring a death certificate and a police abstract.

27. In the result, I hereby enter judgment for the plaintiff against the defendants jointly and severally as follows:

i. Pain and suffering:	KShs. 30,000
ii. Loss of expectation of life:	KShs. 100,000
iii. Loss of dependency:	KShs.2,500,000
iv. Special damages	<u>KShs. 30,250</u>
Total:	<u>KShs.2,660,250</u>

28. The general damages will earn interest at court rates from today’s date until payment in full. The special damages will earn interest at court rates from date of filing suit until full payment.

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

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Gathogo for the plaintiff

No appearance for the defendants

Ms Mwinzi: Court Assistant