



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACAHAKOS

CIVIL SUIT NO. 332 OF 2012

JANET CHONGE WALUMBE, JANET NASIMIYU SIMIYU AND

FRANCIS CHARLES WECHULI(suing as the ADMINISTRATORS

OF THE ESTATE OF ERIC SIFUNA WALUMBE) DECEASED.....PLAINTIFFS

VS

JULIUS MWANIKI.....1ST DEFENDANT

JOSEPH MUENO.....2ND DEFENDANT

JUDGMENT

Introduction

1. By an amended plaint dated 29/10/2015 and filed in court on 2/11/2015 the plaintiffs as administrator and Administratrixes of the estate of the late Erick Sifuna Walumbe sued the defendants. The 1st defendant was sued as the registered owner of Motor Vehicle Registration No. KBN 447 Q while the 2nd defendant was its authorized agent/servant or driver. It was alleged at paragraph 5 of the amended plaint that on or about the 19/12/2011 along Machakos - Nairobi road the deceased was travelling as a lawful passenger in the said vehicle when it was negligently driven, it veered off the road rolled causing fatal injuries to the deceased. The defendant's statement of defense dated 22/10/2012 was filed on 24/10/2018. They denied ownership of the said vehicle and in particular that the vehicle was driven negligently by the driver and put to strict proof and attributed negligence on the deceased.

2. The parties agreed to settle the issue on liability by recording a consent on liability which was adopted by court on 17.2.2016 in the ratio of 10:90 in favor of the plaintiff as against the defendants.

Evidence

3. The plaintiff, therefore, led evidence on the facts necessary for the court's assessment of the appropriate compensation in damages.

Submissions

Plaintiff's submissions

4. The plaintiffs urged that they had obtained an limited Grant of Representation thus they had the legal capacity to bring the claim under the Law Reform Act and the Fatal Accidents Act. Under the law of Reform Act they submitted as follows:

a. Pain and suffering

The proposed an award of Ksh.50,000/- since the deceased had died the same day. They relied on *Richard M. Nderitu v. Philemon Rotich & 3 Ors* Nakuru HCC No. 86/2012 where Ksh 50,000/ was awarded and in *Patricia Mona & Anor v. Samuel Pot & Anor*, Nairobi HCCC No. 574/2010 where a sum of Ksh 20,000/= was awarded when the death was immediate.

b. Loss of expectation of life

They urged for Ksh.200,000/= and referred to the above cases

c. Special damages

They urged for Ksh. 95,500/ as amount pleaded and proved.

Damages under the fatal Accident Act

a. multiplier

5. The deceased was aged 50 years, he was a teacher employed by Teachers Service Commission. He was also a businessman operating posho mills and doing sugar cane farming which he could have carried out upto 65 years. They proposed a multiplier of 10 years in respect of his earnings from teaching and 15 years from his other business. They referred to **Samuel Osawe Ochillo v. Simon Omwoyo**, Kisii HCCC No. 42/2010.

b. Dependency ratio

They urged the deceased had 2 wives, 10 children aged 19 and 2 years and 2 other children sired out of wedlock. A marriage certificate, an affidavit of marriage and the children's birth certificates were produced. They urged the ratio of 2/3 be used.

c. Multiplicand

The deceased had 3 sources of income. There was income from teaching. He earned a gross income of Ksh 57,084 after deductions it would leave a net of Ksh. **46,247.75**. He also had three posho mills, one in Wacheke, Bukembe and Misanga. Though the last permit to operate Wacheke Posho mill was issued 2007, it still existed. It was PW1's evidence that he audited the deceased's posho mills by using the record of sales and purchases. The Audit report (ex. 14) showed sales for 2010, 2011, its costs and net income. It showed his net as Ksh. **27,253.33** from the three posho mills.

He said the documents were kept in a simple unprofessional manner though it appeared to be an honest reflection of the deceased daily records. He relied on the information availed through the books of accounts and estimates of expenses not recorded. The annual expenses for 2011 were Ksh 161,110. The auditor said that he did not factor in payments made in kind (barter trade) if he had done so then the revenue would have been higher. The deceased monthly income from the posho mills was given Ksh. **27,253.33**.

6. It was also urged that the deceased was a sugar cane farmer as testified by PW2. He farmed from his own farm and land leased from third parties, and would also buy and sell mature cane to the factory. An agreement dated 22/09/2009 showing purchase of cane from one David Makokha (Exh 18) net monthly earnings from the sugarcane was averagely Ksh. 25,000/=. There were three fields No. 13500507210, 13509312680 and 13515612684 though cane took **24 months to mature**, the court was urged to refer to the frequency of delivery between the month of March 2009 and February 2010, the deceased supplied cane worth Ksh.174,864.92 to Nzoia sugar Company, which translated to Ksh.14,500/= per month though PW2 had urged an average of Ksh.25,000/=.

7. It was urged that they had lost income from the sugarcane and posho mill. PW2 testified that the mills kept breaking down and eventually they were closed. The Muranga posho mill had an oil breakdown for 4 days in December 2010, 26th December 2010 and 13/01/2011. The Wacheke mill did not operate on 19th and 25th April 2009. They urged the court to compute as follows:

i. Loss of income from teaching

$$(Ksh.46,247 \times 12 \times 15 \text{ years} \times 2/3) = 5010,360/8710,120$$

Defendant's submissions

8. The issue on liability had been settled at the ratio of 90:10 in favour of the plaintiff. The claim falls under the Law Reform Act and the Fatal Accident Act.

Under the Law Reform Act.

a. Pain and suffering

They urged a sum of Ksh.5000 since the deceased died on the spot. See **Floice Adema Onami v. Kezia Muthoni Ngure & 2 Ors**. In this case 10,000 would suffice as seen in Nairobi HCCC No. 1615 of 2001, **Satwinder Sigh Bhigal v. Satwinder Kaur Benawra & 2 ors**.

b. Loss of expectation of life

This is a conventional figure and the court was urged to give Ksh.80,000/= as held in **Lucy Waithira Kimani v Charles Kimani**, Nairobi HCCC No. 3873 of 1993.

Under the Fatal Accidents Act -

a. Multiplicand

The deceased was 50 years working as a teacher earning a monthly salary of Ksh.57,084/= and income from posho mill and sugarcane at Ksh. 27,250/= and Ksh. 12,369/= respectively. The pay slips for the month of October and November showed a net pay of Ksh.14,409/= and 12,198/= respectively. The loans are normally insured and PW2 confirmed that she is not being followed to pay up and thus the estate should not benefit twice.

Sugarcane business

The plaintiffs had not proved the sugarcane earnings of Ksh.12,369/= as the expenses such as farm inputs and labour was not factored in. It was not possible for the 6 adults to plant in the 36 Hectares and take 7 days to complete the same. The income from the cane was after 24 months since sugarcane took 24 months to mature. Sugarcane farming is a continuous business and if it was stopped the plaintiffs are to blame. There was also no record for the year 2011 which simply means they had stopped the sugarcane farming. The plaintiff (PW2) had testified that they had gone to maize farming. There should not be any award from farming business since it still exists.

Posho mill Business

PW1 an accountant had given a sum of **Ksh.27,250/=** as monthly income. He had prepared the audit report. He did not view any books after 2011 December thus didn't know the progress of the business. For the Wacheke posho mill, the expenditure was not factored in calculating the net income. The expenditure could be more than the gross income but the net income would be constant.

For the Misanga Posho mill, no expenditure was factored yet the plaintiff had confirmed the mill used diesel.

For Bukembe posho mill, the 2010 record book only showed columns for gross income and net expenses. There was no expenditure recorded for the year 2010 and 2011. In cross-examination the auditor (PW1) stated the expenses included fuel, wages, paper bag etc. the monthly expenses for the 3 posho mill ranged from Ksh. 2000/= to 5510/=. However, PW2 in cross examination stated that they used ten 5 litre jerrycan and a 5 litre jerrican costed between 800-1000 which translated to Ksh. 9000/= as expenses for the three posho mills. The deceased was not running the posho mills since he was a full time teacher and on his demise.

There was no reason why the posho mills could not be run.

b. Multiplier

The deceased died at the age of 50 years. The deceased was left with 10 years as the retirement age was 60 years. The court was urged to use a multiplier of 5 years. In *Beatrice W. Murage v. Consumer Transport Ltd & Anor* [2014] eKLR the deceased was 50 years and a multiplier of 4 years was adopted.

c. Dependency Ratio

The deceased had a wife and children and urged the court to adopt ½ making the damages as follows:

$$14,409 \times 5 \times 12 \times 2/3 = 576,360/=$$

9. The demand notice was denied and it not proved therefore costs are not affordable.

Issues for Determination

10. The court has referred to the pleadings, the evidence on record, the submissions and authorities and has framed the following specific issues.

- a. Whether the deceased earned income from sugarcane farming and posho mills.
- b. If so, how much was monthly income.
- c. How much compensation was adequate under both the Law Reform Act and the Fatal Accidents Act.

Determination

11. The plaintiffs sued the defendant for general damages and special damages under both the fatal Accidents Act and the Law Reform Act arising out of an accident. The deceased was a passenger in motor vehicle Reg. No. KBN 447 Q Toyota Matatu. The issue on liability was settled. The only issue left for determination is on quantum of damages.

12. Under the Law Reform Act

a) pain and suffering

It was pleaded that the deceased died on the same day. The plaintiff urged for Ksh 50,000/= and relied on *Richard M Nderitu v. Philemon R. Langat* [2013] e KLR whereas the defendants made submissions of Ksh. 10,000/= as sufficient. This court finds that an

award of Ksh. 20,000/= would be sufficient considering the deceased died on the spot.

c. Loss of expectation of life

The deceased was 50 years old at the time of death. There was no evidence that the deceased suffered any ailment that would shorten his life. In *Violet Jeptum Rahadi v. Albert Kubai Mbogori* [2013] eKLR the court held that “but nothing is ever equal in this life. Everything being equal, he had more productive years ahead of him”. the defendant on the other hand relied on *Lucy Waithira Kimani v. Charles Kiarie Kimani*, Nairobi HCCC No. 3873/1993 where the deceased was 29 years and the court awarded Ksh. 70,000/= under this head. Of Importance to note is that, the deceased had passed on 18/11/1991. This was an old case to refer to. Considering the age of the deceased this court awards a sum of Ksh.100,000/= as a conventional figure under this head.

13. Under the Fatal Accidents Act.

a. Multiplier

According to the death certificate the deceased was 50 years. He was a teacher employed by the Teachers Service Commission. Indeed the retirement age in Kenya for civil servants has been enhanced to 60 years. The plaintiffs urged for a multiplier of 10 years, and a further 15 years since he was a business man. In *Samwel Osewe Ochillo v. Simion Omoyo Obare* [2013] eKLR. The deceased was 50 years who was a vegetable and maize hawker. The court had adopted a multiplier of 15 years. This was opposed by the defendant who urged the use of 5 years and relied on *Beatrice W. Murage v. consumer Transport Ltd & Anor* [2014] eKLR, the deceased in this case was a 74 years old, it's no wonder a multiplier of 4 years was adopted. The deceased in this case was a 50 years old. This court shall adopt a multiplier of 10 years considering he was a teacher and was in business also.

b. Dependency ratio

The deceased had 2 wives. PW2 was one of the wives and she said she had a co-wife and they all had 10 children. PW2 testified that the deceased supported the family through his salary and business. The defendant urged for a ratio of $\frac{1}{2}$ whereas the use of $\frac{2}{3}$ as the ratio from the evidence the court shall adopt the use of $\frac{2}{3}$ since being a married man most of his income went to the upkeep of the family.

c. Multiplicand

The plaintiffs at paragraph 6 (b) of the amended plaint avered that the deceased was a teacher and he also engaged in sugarcane farming and operated posho mills. His salary was Ksh. 57,084 and he earned a net income of Ksh. 12,369 from the sugarcane and Ksh.27,250 from the posho mill businesses. PW1 (auditor) and PW2 (1st wife) testified and the following documents were produced in regard to this issue.

1. Payslip for month of November 2011(Exh 6)
2. Transport receipt and receipt from funeral home (Exh no. 9 (a)(b))
3. Audit report (Exh 14)
4. Business permit (Exh 15)
5. Receipts for purchase of posho mills (Exh 16)
6. Agreement for purchase of posho mills (Exh no 17)
7. A bundle of 3 statements from Nzoia sugar Co. (Exh 20)
8. Bundle of the three books (Exh no 22)

i. Salary

The witness (PW2) testified and produced payslip for the month of November 2011. The court has referred to this payment and the total earnings were Ksh. 57,0784/= the deductions were Ksh. 42,674.25 leaving a net pay of **Ksh.14,409.75**. The plaintiffs had urged this court to use Ksh. 46,247.75 and to deduct PAYE of Ksh. 10,105.40 and WCPS contribution of Ksh. 730.85/= only. However the court is in agreement with the defendant that the loans were deductions which had already been insured and a further confirmation by PW2 on cross examination that she had not been required to pay any SACCO dues taxes. The court also notes that not including the loans will lead to a double compensation to the plaintiffs since loans money had already been used. This court shall adopt the income of **Ksh.14,409.75**.

ii. Sugarcane plantations

PW2 testified that the deceased was a farmer earning Ksh.12,369/= per month. Sugarcane takes 24 months to mature and it could only be harvested and supplied after 24 months. PW2 further testified that the deceased leased land to grow sugarcane and sell to

Nzoia Sugar Company. There was production of an agreement for purchase of sugarcane dated 22/7/2009, there was also an affidavit of 15/7/2010 indicating the same plot number. There was a statement of account as at 07/03/2009 plot No. 13515612684 where the deceased earned net of Ksh.75,809.7, statement of 28/2/2010 showed net of Ksh. 26,732.64 and a statement of 24/2/2010 which showed net due of Ksh.72,323.14, however this statements had ID card Nos. 2041989, 5117130 and 5117130 respectively. The deceased ID No. according to the agreement dated 22/7/2009 was 5117130. The authenticity of these statements is wanting, how they could have two different I.D Nos. referring to one person. This court shall disregard the statement dated 7/3/2009 and one dated 28/4/09 which has I.D No 20419891 and shows net pay of 75,809.78. These monies had been received way back in 2010 and had therefore been utilized as PW2 had testified that they stopped farming sugarcane and planted maize in the land there is no loss of income. The income under this business fails.

iii. Posho mills

The auditor (PW1) testified and produced various documents. A business permit for 31/03/2011 for the Misanga posho mill was produced. The business permit for Bukembe for the year 2011 was produced. It is not in dispute the deceased was engaged in this business and they had experienced breakdown after his demise. The amount shown as monthly from the posho milling business at Ksh.27250/- must be adjusted with the cost of fuel calculated at ksh.9000/- for the three mills. Accordingly, the court adopts the sum of **Ksh.18250/=** as the multiplicand for the income from the posho milling.

Special damages

14. The plaintiffs pleaded for **Ksh.95,500** under this head. PW2 produced various receipts proving the same. The court awards the amount as pleaded and proved.

Conclusion

15. The amount of damages under the Law Reform Act for pain and suffering where death immediately or shortly follow the accident and for loss of expectation of life are conventional figures which I accept today at Ksh.20,000/- and Ksh.100,000/-, respectively. For the later see the decision of *Nkudate v. Touring & Sports Cars Ltd.* (1979) KLR 199 where Platt, J. (as he then was) set the conventional sum for loss of expectation of life in Kenya at Sterling pounds 850 (at today's exchange rate approximately Ksh.100,000/-)

As held in *Hayes v. Patel* (1961) E.A. 129 “*the assessment of damages for the death of a husband and father of small children should start with ascertainment of the age of and expectation of working life of the deceased and the ages and expectations of life of his dependants, the net earning power of the deceased (ie. his income les tax) and the proportion thereof which he would have made available for his dependants.*”

From the evidence before the court, the net salary of the deceased at the time of his death was **Ksh.14,409.75**. The deductions relating to the loans taken by the deceased had presumably benefitted the family of the deceased and it would double compensation if the salary multiplicand included the loan deductions. The sugar cane farming business accounts were not properly proved as expenses thereon were not factored in the income and the loss could not be ascertained. In addition, the deceased did not do the actual sugar farming himself and the deceased's family could still have proceeded with the sugarcane farming but had opted to go into maize farming whose accounts were not established. The court does not, therefore, consider any income from the sugar cane farming. As regards the Posho Mill business, the deceased's management acumen and expertise may have been necessary to run the posho machines, and the court is willing to factor the proved income from the business. As regards the multiplier, the deceased would have had to retire from teaching 10 years later at 60 but could probably be strong enough to continue with the posho business upto 65 years. The court will, therefore, adopt a multiplier respectively of 10 and 12 for the teacher salary and income from posho business.

16. The court's assessment of damages is, therefore, as follows:

Damages under the Law Reform Act

- a. Pain and suffering – Ksh.20,000/=
- b. Loss of expectation of life – Ksh.100,000/=

Damages under the Fatal Accident Act

- c. Loss of dependency
 - i. Salary – **14,409.75x12x10x2/3 = 1,152,780**

- ii. Income from Posho milling –

18250x12x12x2/3 = 1,752,000

Total Ksh.3,024,780/=

less damages under the Law Reform Act (120,000/-)

Ksh.2,904,780/=

Add special damages - **Ksh.95,500**

Total damages Ksh.3,000,280

Less 10% contribution – (300,028)

Ksh.2,700,252

Orders

17. Accordingly, the court makes the following orders:

1. Judgment on liability is entered as agreed by consent of the parties at 10:90 in favour of the plaintiff.
2. On the basis of consent judgment on liability at 10:90 in favour of the plaintiff, Judgment for the sum of **Ksh.2,700,252/=** is entered for the plaintiff against the defendants jointly and severally with interest at court rate of 14 per cent until payment in full.
3. The costs of the suit to the plaintiff.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JANUARY 2019.

G.V. ODUNGA

JUDGE

Appearances

M/S Cheronno & Co. Advocates for the Plaintiff

M/S Kinyanjui Njuguna & Co. Advocates for the Defendants