



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 949 OF 2002**

**AGNES MUTINDA NDOLO.....1<sup>ST</sup> PLAINTIFF**

**DAVID MUTHUKU NDOLO.....2<sup>ND</sup> PLAINTIFF**

**V E R S U S**

**MBOYA WAMBUA.....1<sup>ST</sup> DEFENDANT**

**G. KINOGOO & F. MUKORA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. On or about the 5<sup>th</sup> day of December 2001, James Ndolo Muthuku (now deceased) was involved in a road traffic accident involving motor vehicle registration no. KQL 420, Isuzu Lorry and motor vehicle registration no. KAN 166C along Kangundo-Nairobi road. As a result of the accident, James Ndolo Muthuku sustained serious bodily injuries. The late James Ndolo Muthuku filed this suit and sought for damages from the owners of the two motor vehicles. Unfortunately, James Ndolo Muthuku passed away on 28<sup>th</sup> March 2003 before his case could be heard. Consequently, Agnes Mutinda Ndolo and David Muthuku Ndolo successfully applied to succeed the deceased. The duo were enjoined to this suit as the legal representatives of the estate of James Ndolo Muthuku, deceased. In the further amended plaint dated 4<sup>th</sup> March 2004, the plaintiffs sued Mboya Wambua the owner of the motor vehicle registration No. KAN 166C and G.K. Kingoo & E. Mukora as the registered proprietors of lorry registration no. KQL 420 make Isuzu as the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively.

2. On 25<sup>th</sup> September 2015, this court determined the question of liability in the test suit vide Nairobi H.C.C.C no. 1079 of 2002 in which liability was apportioned between the 1<sup>st</sup> and 2<sup>nd</sup> defendant in the ratio of 50:50. This judgment thereof is in respect of quantum.

3. When this suit came up for assessment of damages, learned Counsels recorded a consent order to have the assessment disposed of by written submissions. I have considered the submissions and the authorities supplied by the parties. The plaintiffs have given in their submissions the particulars of the injuries the deceased suffered as follows:

***i. Fracture (comminuted, supracondyla) of the (L) femur***

***ii. Fracture (comminuted, supracondyla) of the (L) tibia***

***iii. Fracture of the (L) mid-tibia***

*iv. Fracture of the lower 3<sup>rd</sup> of the (L) fibula*

*v. Deep cut wounds on the posterior aspect of the (L) forearm*

*vi. Deep cut wounds of the posterior aspect of the (L) elbow joint.*

*vii. Deep cut wounds on the forehead.*

4. It is specifically stated in the further amended plaint and in the submissions that the deceased died while domiciled in Kenya on the 28<sup>th</sup> day of March 2003 as a result of the aforesaid injuries. The 1<sup>st</sup> defendant on his part filed submissions stating that the plaintiffs had failed to tender evidence showing the link between the death of the deceased and the accident. On 16.11.2016, this court was invited to give directions on the question relating to assessment of damages. This court proceeded to give directions directing the parties to file and exchange written submissions to enable it quantify damages.

5. This Honourable Court was also invited to look into the issue of liability as decided in Nairobi HCCC No. 1079 of 2002 in which judgment was delivered by Hon. Serگون on 25<sup>th</sup> September 2015 in which the learned Judge stated as follows:

*“It emerged from the evidence on record that there was a stationary lorry in the middle of the road at the material time. It is that lorry that the accident vehicle rammed into. The weather was said to be rainy and misty. In that kind of weather, a driver is expected to be keen in his/her driving. Considering DW1 and Dw2’s evidence that the tyres skidded, I draw an inference that DW1 was driving at a higher speed. It is for that reason that he could not manage to apply brakes to avoid hitting the lorry. Had he been on the look-out and driving carefully he would have avoided the accident. In the circumstances, I find him partly liable for parking in the middle of the road. I find the two drivers equally liable and I apportion liability at the ratio of 50:50 between the 1<sup>st</sup> defendant and 3<sup>rd</sup> to 5<sup>th</sup> defendants. The plaintiff was a passenger and is absolved from liability.”*

6. The issue of liability having been put to rest, I will now go ahead to examine the issue of quantum of damages. It is the plaintiffs submission that the deceased, sustained fatal injuries. This being a fatal claim, the plaintiff is entitled to claim under two Acts; being the Fatal Accidents Act and the Law Reform Act.

7. Damages under the Fatal Accidents Act have been explained by the plaintiff as:

a. Loss of dependency

The deceased was aged 39 years old at the time of his death. He was earning a monthly salary of 32,000/= and was working in the private sector where it is recognised that working life is longer than the statutory 60 years retirement cap for civil servants. The position was stated by the Court of Appeal **Easy Coach Limited –vs- John Thomas Akalongo & Another (2014 eKLR)**. The plaintiff proposes a multiplier of 25. The deceased had (6) six dependants; his parents, wife and three daughters. The plaintiff computes the award for loss of dependency as follows:  
 $32,000 \times 12 \times 25 \times 6/7 = \text{ksh.}3,200,000/-$

8. Damages under the Law Reform Act

(b) Loss of expectation of life

The plaintiff prays for ksh.150,000/= to be awarded and relied on the case of **Peter Kibogoro Wanjohi –vs- Chrisinte Wakuthi Muriuki & Another (2009) eKLR** where Justice R. N. Nambuye awarded ksh.150,000/= as damages of loss of expectation of life in a case of a similar nature.

c. Pain and suffering

The deceased suffered excruciating pain and immense suffering for one year and three months (an equivalent of sixteen (16) months) before succumbing to his injuries. The autopsy report by Dr. James Wasike Simiyu concluded the cause of death as bilateral venous thrombosis. The plaintiff proposed a sum of Kshs.6,000,000/= to be a just and fair award for pain and suffering. The plaintiff relied on the case of **Benedeta Wanjiku Kimani –vs- Changwon Cheboi and another H.C.C.C No.373 Of 2008** where it was held that:

**“In common law Jurisprudence of which Kenya is a part, the courts have two principles, loss of expectation of life and pain and suffering by the deceased, for award of damaged under the Fatal Accidents Act for pain and suffering .....what is commonly referred to as a conventional sum which has increas3ed over the years from Kshs.10,000/- to Ksh.100,000/- currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death.”**

d. On Special damages, the plaintiffs proposed a sum of ksh.685,057/= The receipts proving the amount were supplied to this court. In summary therefore, the plaintiffs have asked this court to make the following awards:

<b>i) Loss of dependency</b>	<b>ksh.8,222,571/-</b>
<b>ii) Loss of expectation of life</b>	<b>ksh.150,000/-</b>
<b>iii) Pain and suffering</b>	<b>ksh.6,000,000/-</b>
<b>iv) Special damages</b>	<b>ksh. 685,057/-</b>
<b>v) Interest on (a) (b )and (c) above</b>	
<b>at court rates</b>	
<b>Total</b>	<b>ksh.15,063,628/=</b>

9. The 1<sup>st</sup> defendant on the other hand has acknowledged that liability was stated on 25<sup>th</sup> September, 2015 vide this court’s judgment in HCCC no. 1079 of 2002. The defendant submits as follows on the issue of quantum.

10. The court has to take into account awards made under the Law Reform Act and under the Fatal Accidents Act, The Defendant cited the case of **Joseph Wachira Maina & Another –vs Mohammed Hassan 2006 eKLR**, and invited this honourable court to be guided by the same, where Justice Kimaru stated as follows *inter alia*:

**“The dependants of the deceased estate should not obtain double compensation, that is under the Fatal Accidents Act and the Law Reform Act.”**

11. It’s for this reason that the 1<sup>st</sup> defendant argues that the Plaintiff’s prayer for general damages for ksh.14,3782,571/= should therefore be dismissed.

a. On damages under the Fatal Accidents Act, the 1<sup>st</sup> Defendant submits that, according to the further amended plaint by the plaintiffs’ the deceased sustained serious bodily injuries and as a result of which he died at the age of 39 years. The 1<sup>st</sup> defendant’s avers that it is trite law that the

burden of proof of any fact or allegation is always on the plaintiff. He who alleges must prove as provided for under Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya. The plaintiffs have not shown a causal link between the 1<sup>st</sup> defendant's negligence and the death of the deceased to warrant the claim for quantum of damages. The 1<sup>st</sup> defendant relied on the case of **Lilian Wanjiku Wanjohi –vs- Tornado Carriers Ltd (2016) eKLR** where Justice J. Mulwa on dismissing an appeal for lack of evidence and casual link between the accident and the respondent's negligence held that;

**“It was incumbent upon the appellant to link the death of the deceased to the respondents negligence. The appellant has to prove the claim on a balance of probability whether or not the respondents tendered enough evidence or not.”**

12. The learned judge in her decision further relied upon **Statpack Industries –vs- James Mbithi Munyao C.A No. 152 of 2003**, where the court observed that:

**“The plaintiff must adduce evidence which, on a balance of probability, a connection between the two may be drawn. An injury per se is not sufficient to hold someone liable for the same.”**

13. It's the 1<sup>st</sup> defendant's submission that the suit is baseless and lacks merit therefore no quantum on damages should be awarded. The evidence on how the deceased earned a living and the ages of the dependants has not been adduced. Therefore the 1<sup>st</sup> defendant's pray that the suit should be dismissed.

b. On damages under Law Reform Act, the 1<sup>st</sup> defendant submits that the prayer for damages for loss of expectation of life has not been supported by any evidence and therefore should be dismissed. The allegation that the estate of the deceased has suffered loss and damages has not been supported by evidence and the same should therefore be dismissed.

14. In the end, the 1<sup>st</sup> defendant submits that this suit should be dismissed with costs.

15. Having considered the rival proposals on quantum, I am of the following view.

i. On loss of dependency, I am of the opinion that a multiplier of 21 years is reasonable. Consequently loss of dependency is calculated as follows:

$$32,000 \times 12 \times 21 \times 1/3 = 2,688,000/=$$

ii. I find the proposal of kshs.150,000/= for loss of expectation of life to be fair.

iii. On pain and suffering, it is clear to me that the deceased endured great pain and suffering for a long time before passing on. I think a fair award on this head is ksh.1,500,000/=

iii. On special damages, I find the proposal by the plaintiff of ksh.685,057/= to have been proved. It is given as prayed.

iv. On costs, costs follows the event. It is awarded to the plaintiff.

16. In the end judgment is entered in the favour of the plaintiffs and against the defendants in the sum of ksh.5,023,057/= as tabulated herein above plus costs and interest at court rates from the date of judgement until full payment.

Dated, Signed and Delivered in open court this 22<sup>nd</sup> day of September, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant