



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE NO. 52 OF 2014

JASTINE NZULA MUSYOKA

MAITHYA MWAVU (Suing as The Legal Representatives of the

Estate of MUSYOKA MUTHOKA.....PLAINTIFFS

VERSUS

CHINA WU YI LIMITED.....1ST DEFENDANT

WILSON GITHU.....2ND DEFENDANT

JUDGMENT

The Pleadings

On 3rd January 2013, Musyoka Maithya since deceased (hereinafter referred to as “the Deceased”) was a passenger in motor vehicle registration number KBC 176F when the said motor vehicle collided with motor vehicle registration number KBB 892G. The Deceased suffered fatal injuries in the accident and died on the same day. The 1st Defendant was the registered owner of Motor Vehicle and trailer registration Number KBB 892G and ZD4070, while the 2nd Defendant was the driver of the said motor vehicle.

On 2nd December 2014 , the Plaintiffs, who are the wife and father of the Deceased as well as his dependants and legal representatives, filed this suit by way of a Plaint dated 20th August 2014. They allege that motor vehicle registration number KBB 892G was carelessly, negligently and recklessly driven, managed and/or controlled; and the said motor vehicle abruptly entered the road and in the path of the motor vehicle registration number KBC 176F without any warning signs or giving way, and as a result motor vehicle registration number KBC 176F violently rammed into the said motor Registration No.KBB 892G occasioning an accident.

Further, that that the said accident was caused by the sole negligence of the 2nd Defendant the driver, agent, servant and/or employee of the 1st Defendant, and gave the particulars of the Defendants’ negligence as follows:

- a) Driving at an excessive speed in the circumstances.
- b) Driving dangerously and recklessly without due regard to other road users, particularly the plaintiff.

- c) Failing to keep any or any proper lookout to the safety of other road users.
- d) Failing to give way or warning signals as to avert the accident .
- e) Permitting motor vehicle to join a road when it was not clear to so do.
- f) Failing to brake, swerve, slow down and/or failure to maneuver the Motor Vehicle Registration Number KBB 892 G so as to avert the accident.
- g) Causing and/or permitting the accident to occur.
- h) Driving the motor vehicle in a careless and un-attentive manner on a public road.
- i) Failing to adhere to the Highway Code and traffic rules and regulations

The Plaintiffs also relied on the doctrine of *res ipsa loquitor*.

The claim by the Plaintiffs is that the Deceased's dependants and estate have suffered loss and damage, and they claimed damages under the Law Reform Act and the Fatal Accidents Act. The Deceased's dependants who were averred to wholly depend on him were specified as his wife, his father, his three daughters, and two sons. It is stated that at the time of his death the deceased was aged 44 years and in good health, and was working as a sales and marketing executive. Further, that he earned a net income of Kshs 63,209/60 per month.

The Plaintiff therefore sought special damages of Kshs 121,150/=, general damages under the Law Reform Act and the Fatal Accidents Act, interest on the damages and costs of the suit.

The 1st and 2nd Defendants on their part denied that the 1st Defendant was the registered owner of the said motor vehicle registration number KBB 892G, pursuant to a defence filed in Court dated 12th January 2015. They further denied that the accident was caused by the alleged negligence on the part of the Defendants, and contended that the said accident was caused by or substantially contributed to by negligence on the part of the deceased and/or the driver of motor vehicle registration number KBC 176F. The particulars of the negligence on the part of the deceased and of the driver of motor vehicle registration number KBC 176F were itemized in the said Defence as follows:

On the part of the Deceased:

- a) Boarding an overloaded motor vehicle registration number KBC 176F.
- b) Failure to fasten a seat belt.
- c) Standing while the motor vehicle KBC 176 F was in motion.

On the part of the driver for motor vehicle registration number KBC 176F:

- a) Obstructing the lawful path of motor vehicle registration number KBB 892T.
- b) Over loading motor vehicle registration number KBC 176F.
- c) Ignoring and/or neglecting all the warning signs by the driver of motor vehicle registration number KBB 892T.
- d) Failing to keep any or proper look out for oncoming motor vehicles particularly motor vehicle registration number KBB 892T.
- e) Ramming onto motor vehicle registration number KBB 892T.

f) Over speeding in the circumstances.

g) Failure to muster and stop motor vehicle registration number KBC 176F appropriately.

h) Causing the accident.

The Evidence

During trial, the Plaintiffs called two (2) witness to testify. The first witness was Jastine Nzula Musyoka, the 1st Plaintiff. She adopted her witness statement dated 20th August 2014 as her evidence, and proceeded to further aver that she was married to the Deceased under the Kamba Customary law. The 1st Plaintiff produced the police abstract and death certificate that were marked as exhibits 1 and 2 respectively, as evidence that her husband died in a road traffic accident that occurred on the 3rd January 2013 when he was passenger in motor vehicle registration number KBC 176F.

The 1st Plaintiff averred that the motor vehicle registration number KBC 176F collided with motor vehicle registration number KBB 892G, and that prior to institution of this suit the Plaintiffs had applied for letters of administration ad litem in respect of the deceased's estate limited to bringing this action and produced the limited grant as exhibit number 3.

The 1st Plaintiff further averred that her union with the deceased was blessed with five children, namely Mercy Mwikali Musyoka, Haron Mulinge Musyoka, Hellen Keli Musyoka, Moses Mbatha Musyoka and Emma Mwangeli Musyoka; and she produced copies of their identity cards and birth certificates as exhibits 5(a) to (e) respectively and further a letter from the chief dated 13th May 2013 as exhibit 4.

The 1st Plaintiff also produced a bundle of receipts for special damages incurred as exhibit 6 (a) to (e). She further testified that her deceased husband worked as a sales and marketing executive at Digital Concepts Limited, and produced a letter dated 14th January 2013 from his employer as exhibit 7, and also produced three (3) pay slips of the Deceased as exhibits 8(a), (b) and (c). Lastly, the 1st Plaintiff produced a demand notice dated 24th April 2014 as exhibit 9.

The second witness who testified on behalf of the Plaintiffs was Maithya Mwavu, the 2nd Plaintiff, who adopted his witness statement dated 20th August 2014, and averred that he is a farmer and the father of the Deceased. He reiterated that the deceased died in a road traffic accident along Mombasa Road on 3rd January 2013, and that the Deceased was married to one Jastine Nzula Musyoka (the 1st Plaintiff) and their union was blessed with five children. The 2nd Plaintiff averred that he would receive Kshs. 10,000/- from the deceased on a monthly basis, which money he used for upkeep. Further, that following the Deceased's demise he has immensely lost support that he used to receive from him.

The Plaintiffs closed their case, whereupon the matter was fixed for defence hearing, and the defence closed its case without calling any witnesses.

The Issues and Determination

The substantive issues in this suit are only two. Firstly, who as between the deceased, the driver of motor registration KBC 176F and the Defendants was to blame for the accident that occurred on 3rd January 2013 and to what extent; and secondly, what is the quantum of damages if any, are payable to the Plaintiffs.

The Plaintiffs' learned counsel, J.A Makau & Co Advocates addressed these two issues in submissions filed in Court dated 10th January 2017, while the Defendant's learned counsel, Muriithi & Ndonge Advocates, filed submissions dated 28th November 2016.

On the issue as to liability, this suit was filed alongside two other matters being **Machakos HCCC No. 51 of 2014 - Wilson Nyamai Ndeto & Another vs China Wu Yi Ltd & Another** and **Machakos**

HCCC No. 53 of 2013 - Hyder Nthenya Musili & Another vs China Wu Yi Ltd which arose from the same accident, and directions were issued on 30th November 2015 that the suit in **Machakos HCCC No. 53 of 2014** will be the test suit for the purposes of determination on the issue of liability and that the judgment and/or determination on liability do apply to the other two suits without calling evidence to that effect.

This Court in **Machakos HCCC No. 53 of 2013 - Hyder Nthenya Musili & Another vs China Wu Yi Ltd** considered the evidence adduced and arguments made by the parties therein as to liability, and apportioned liability as between the Defendants and the driver of motor vehicle registration number KBC 176F at the ratio of 70: 30.

On the issue of quantum of damages, the Plaintiffs submitted that for damages under the Fatal Accidents Act, they had demonstrated that the deceased was married and children, and that the dependency ratio to be applied in this case should be two thirds (2/3).

Further, that the evidence before the Court was that the deceased was prior to his death in gainful employment, and his monthly net income was Kshs. 63,209/-. In addition, that it is not in dispute that the deceased was forty four (44) years of age at the time of death, and he would have worked till retirement age being sixty (60) years and therefore would have been in employment for a period of sixteen (16) years, which was proposed as the multiplier for this case .

The Plaintiffs therefore submitted that under the Fatal Accidents Act the compensation for loss of dependence should be calculated as follows:

$$63,209 \times \frac{2}{3} \times 12 \times 16 = 8,090,752/-$$

For the compensation awarded under the Law Reform Act, the Plaintiffs proposed the sum of Kshs. 50,000/- for pain and suffering, and Kshs 100,000/= for the loss of expectation of life. Lastly on special damages, they submitted that the 1st Plaintiff produced receipts in proof thereof for the total sum of Kshs. 30,800/-.

The Defendant on the other hand submitted that the letter from the Deceased's employer produced in Court by the 1st Plaintiff as exhibit 7 did not bear an official stamp from the employer, and further did not indicate where the said company is located, and thus the authenticity of the said letter is put in question. Further, that PW3 could not state where the said Digital Concepts Limited is located or what kind of business her husband was engaged in as sales executive and that upon the registration of his death, they registered the occupation of the deceased as a businessman.

In addition, that the payslips produced by PW3 as Exhibits 8(a), (b) and(c) did not bear the name of the company they originate from, and further, did indicate the statutory deduction of pay as you earn. The Defendants submitted that both the letter from Digital Concepts Limited and the payslips produced are not authentic, and the same should not used to calculate the multiplicand of the deceased.

The Defendants thus proposed that the court uses the minimum wage of the deceased at the time of his death (January 2013) as the multiplicand, which would be Kshs. 8,579.80/= per month with Nairobi area as per Legal Notice No. 71, The Regulation Of Wages (General) (Amendment) Order, 2012). However, that should the court find that the said payslips are admissible as evidence of how much the deceased earned, since the said payslips do not bear the income tax paid as statutory deductions, and the basic salary of the deceased therein was Kshs. 45,750/=-, this figure that should be subjected to statutory deductions (pay as you earn).

Further, that the statutory deduction would be 1/3 of Kshs. 45,750/= which would be Kshs 13,725/=-, and the amount the deceased would have taken home would therefore be Kshs. 32,025/=-. Reliance was placed on the decision in **Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others** [2014] eKLR in this regard.

The Defendants in addition submitted that a multiplier of 14 years will be reasonable in this case taking into account the vicissitudes of life, and cited various judicial authorities for this proposition, including the case of **In Re the Estate Of Eva Mayaa Manase (Deceased) [2012] eKLR**. Lastly, on the dependency ratio the Defendants propose the ratio of two-third (2/3) as the deceased was survived by his wife and five children.

On the damages to be awarded under the Law Reform Act, the Defendants submitted that the deceased died at the scene of the accident and that an award of Kshs. 10,000/= will be adequate compensation for pain and suffering. Further, that an award of Kshs. 100,000/= will be adequate for loss of expectation of life.

Lastly, on special damages to be awarded, it was the Defendant's contention that the Plaintiffs pleaded for special damages amounting to Kshs 121, 150/= in their Plaint, However that during the hearing, the 1st Plaintiff produced the following receipts: for Kshs . 10,000/= for the coffin, Kshs. 8,300/= for mortuary charges, Kshs. 500/= for motor vehicle search and Kshs. 12,000/= for obtaining letter of grant ad litem, amounting to Kshs. 30,800/=. The Defendants submitted that Kshs. 30,800/= be awarded as the special damages that were pleaded and proved.

What are the applicable principles of law as regards the award of the damages urged by the parties? To properly assess damages under the Fatal Accidents Act, it is necessary to determine the deceased's income, the dependency ratio of his dependants and the multiplier to be used. This Court is guided by the manner of assessment of damages for loss of dependency as aptly explained by Ringera J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows;

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

In addition, only the deceased's wife, children and parents are entitled under upon proof of dependency under section 4(1) of the Fatal Accidents Act, and the 1st Plaintiff who was the Deceased's wife produced the identity card and birth certificates of the Deceased's children who were aged between 3 and 20 years at the time of his death as exhibits 5(a),(b),(c),(d)and(e). The 2nd Plaintiff also testified as to his dependency on the deceased for his subsistence.

The 1st Plaintiff gave evidence that has been disputed by the Defendants that the deceased was employed as a sales executive by Digital Concepts Ltd, and produced payslips showing that his net pay that ranged from Kshs 63,000/= to 75,000/= depending on commission he earned. The Defendants however did not object to the production of these documents during the hearing, and cannot raise the issue in submissions when the Plaintiffs no longer have the opportunity to call the maker of the documents. In addition the Defendants did not call any evidence to disprove the contents of the said document.

I have however noted the submissions by the Defendants that the payslips produced as exhibits do not have any statutory tax deductions. In this regard, the average monthly net income of the Deceased from the 3 payslips produced as exhibits 8(a), (b) and (c) was Kshs 68,500/= per month, and after deduction of income tax at 30%, I find that a monthly net income of 47,950/= per month would be reasonable. The parties were agreed on a dependency ratio of two-thirds (2/3) which is reasonable in light of the evidence adduced on dependency.

Lastly, on the multiplier, the deceased was aged 44 years when he died as shown in the death certificate produced by the 1st Plaintiff as exhibit 2. Everything being equal he would have worked to the official retirement age of 60 years. But due allowance must be given for the vagaries, vicissitudes and uncertainties of life, and due regard must also be had of the fact that the payment under this head is also being made in a lump sum. The Plaintiffs' advocates propose a multiplier of 16 years while the Defendant's advocates proposed 14 years. I find that a multiplier of 14 years would be reasonable. Damages under the Fatal Accidents Act will thus work out at KShs 47,950 X 12 X 14 X 2/3 = KShs 5,370,400/=.

This sum will be reduced by 30% to take into account the contributory negligence of the deceased.

As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life.

In **Rose vs Ford, (1937) AC 826** it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in **Benham vs Gambling, (1941) AC 157** it was further held that only moderate awards should be granted under this head for the following reasons:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is KShs 100,000/- while for pain and suffering the awards range from KShs 10,000/= to KShs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death. In the present case PW1 and PW2 testified that the deceased died at the scene of the accident and I find that an award of KShs 10,000/= for pain and suffering and KShs 100,000/= for loss of expectation of life is reasonable.

Lastly, it is trite law that for special damages to be awarded, they must be specifically pleaded and also strictly proved. It was held as follows in **Maritim & Another -v- Anjere (1990-1994) EA 312** at 316 in this regard:

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

The Plaintiffs pleaded special damages of KShs 121, 150/=. Both the Plaintiffs and Defendants agree that the special damages proved by production of receipts was however KShs 30,800/=.

I accordingly enter judgment for the Plaintiffs against the Defendants as follows –

1. The Defendants are found 70% liable for the accident with contributory negligence by the driver of motor vehicle registration number KBC 176F of 30%.

2. The damages awarded in favour of the Plaintiffs as against the Defendants are as follows:

Damages awarded under the Law Reform Act..... KShs 110,000/=

Damages awarded under Fatal Accidents Act.....	Kshs 5,370,400/=
Special damages.....	Kshs. 30,800/=
Sub total.....	Kshs 5,511,200/=
Less 30% contributory negligence.....	Kshs 3,316,185/=
Total Award.....	Kshs 3,857,840/=

3. I apportion the damages under the Fatal Accidents Act (Kshs 5,370,400/=less 30% = Kshs 3,759,280/-) as follows: –

(i) Jastine Nzula Musyoka.....	Kshs 1,059,280/=
(ii) Mercy Mwikali Musyoka.....	Kshs 300,000/=
(iii) Haron Mulinge Musyoka.....	Kshs 400,000/=
(iv) Hellen Keli Musyoka	Kshs 500,000/=
(v) Moses Mbatha Musyoka	Kshs 500,000/=
(vi) Emma Mwangeli Musyoka	Kshs 800,000/=
(vii) Maithya Mwavu.....	Kshs 200,000/=

4. The general damages will carry interest at court rates from the date of judgment while the special damages will attract similar interest from the date of filing suit.

5. The Plaintiffs shall have costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of September 2017.

P. NYAMWEYA

JUDGE