



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 11 OF 2013**

**VIVIANE ANYANGO ONYANGO**

**MAURICE OTIENO AMBURO**

**(Suing as the Legal Representatives of the Estate of**

**PRISCILLA AKINYI AMBURO – DECEASED.....PLAINTIFFS**

**-VERSUS-**

**CHARITY WANJIKU..... DEFENDANT**

**JUDGMENT**

**1. Background and Pleadings**

The plaintiffs are the legal representatives of the Estate of the Late Priscillar Akinyi Amburo (deceased) by virtue of Letters of Administration *Ad Litem* issued by the **High Court At Nairobi in P&A Cause No. 1705 of 2012** on the 12<sup>th</sup> September 2012. On the 3<sup>rd</sup> March 2012 the deceased was fatally injured in a road traffic accident while aboard motor vehicle Registration No. KBJ 547T as a passenger that while along the Mai Mahiu road hit an animal, lost control and causing her to sustain fatal injuries.

At time of death, she was 43 years old and was employed as a lecturer at Narok University earning a gross salary of Kshs.122,067/= and allegedly operating a business at Kahoya Mixed Secondary school with an income of Kshs.30,000/= per month.

2. The plaintiffs therefore filed this suit against the registered owners of the vehicle, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, seeking compensatory damages under both the Law Reform Act and the Fatal Accidents Act. The defendants are blamed for negligence and the particulars are stated as well as particulars pursuant to the Fatal Accidents Act. A claim for Kshs.2,157/= being special damages is also pleaded in the plaint dated 22<sup>nd</sup> January 2013 and filed on the 5<sup>th</sup> February 2014.

3. In their statements of defence filed on the 15<sup>th</sup> March 2013 and 30<sup>th</sup> April 2013, the claim is denied and plaintiffs put to strict proof.

However by a consent letter filed on the 18<sup>th</sup> March 2016 and adopted as an order of the court, the 1<sup>st</sup> Defendants case was struck out leaving the Charity Wanjiku as the only defendant in the case.

**4. Plaintiff's case and evidence**

The 2<sup>nd</sup> plaintiff PW1, Maurice Otieno Amburo, a brother to the deceased testified that he did not witness the accident but that the deceased was a lecturer at the Narok University and had two minor children.

He produced the death certificate, motor vehicle records from Kenya Revenue Authority, the Letters of Administration *Adlitem* and the birth certificates for the deceased's minor children all in a bundle PExt 1, 10 and 13 and as filed in the plaintiff's list of documents on the 22<sup>nd</sup> January and 18<sup>th</sup> January 2015.

The police abstract was by consent of counsel admitted by the court.

Upon cross examination PW1 told the court that the deceased's husband was dead.

5. The Defendant's case was urged by one **Joseph Muraguru as DW1** who was the driver of the defendants vehicle on the fateful day and

time. He denied having been careless as he drove the accident vehicle. He blamed a cow that ran across the road for the accident. It was his testimony that he saw it at a short distance while driving at a speed of 70-80 KPH. It was his testimony that he tried to avoid hitting the cow but could not as another vehicle was approaching from the other side. He stated that he was not charged with any traffic offence. He confirmed that the deceased was a passenger in the vehicle and that she died in the accident.

6. Parties proceeded to file their written submissions upon the above evidence. I have considered the pleadings, evidence and submissions by both parties.

From the evidence, the issues that arise for consideration by the court, in my view, is on both liability and *quantum* of damages, thus:

**(1) Whether the defendant's driver was negligent and therefore liable in damages.**

**(2) Whether the deceased contributed to the occurrence of the accident.**

**(3) Whether the plaintiffs are entitled to the reliefs sought in the plaint.**

7. I have perused the documents filed by the plaintiffs and produced as exhibits, including the police abstract.

There is no dispute that the plaintiffs are properly suited to bring the suit, that the defendant was the registered owner of the accident vehicle and that the deceased was a lawful passenger in the vehicle.

There is also no dispute that the deceased was aged 43 years (certificate of death) and had left behind two children, 19 and 16 years old who wholly depended on her for their upkeep and survival. It is also not in dispute that the deceased was a lecturer at Narok University. Her latest payslip was produced as exhibit.

8. **On Liability**, and in an attempt to interrogate issue No. 1 above I want to visit the issue of causation, see **Amalgamated Saw Mills Ltd -vs- Stephen Muturinguru HCCC No. 75 of 2005** (J. Musinga, as he then was).

A casual link between someone's negligence and the injury or death ought to be proved. It is trite law that the burden of proof of any fact or allegation is on the plaintiff. The judge proceeded to hold that:

**“----not every injury is necessarily as a result of someone's negligence --- that an injury per se is not sufficient to hold someone liable.”**

9. Based on the above pronouncements by the Learned Judge, the defendant submits that as the deceased voluntarily boarded the vehicle being a lethal weapon, and being driven by a human being, chances of an accident happening can not be ignored, and relies on the doctrine of *volenti non fit injuria*.

With respect to counsel, I think he totally missed the meaning and construction of the said doctrine.

10. There is a silent contract between a lawful passenger who with authority of the driver (in the case of a public service vehicle and owner in a private vehicle that upon payment of the requisite fare, he is expected to be safely delivered to his destination.

A passenger in my opinion, that I hold dearly, cannot be held liable or even contribute to an accident unless it is demonstrably shown that the said passenger contributed to the occurrence of the accident.

Nothing was shown in the instant case. The deceased was not in control of the manner the vehicle was being driven. She cannot have contributed to its occurrence in the circumstances.

11. I totally disagree with the defence submissions that the plaintiffs failed to prove any negligence on the part of the defendant's driver. The driver admitted in his evidence in chief having been unable to swerve to avoid hitting the cow that he blamed as the cause of the accident. He did not blame the deceased.

It was the duty of the defendant to bring up proceedings against the owners of the cow under the **Rule in Rylands -vs- Fletcher** to seek for contributory negligence. This she failed to do.

12. It is my very strong view, and supported in numerous court decisions, that a passenger cannot be held liable when a vehicle he is travelling in is involved in an accident. See **Rosemary Wanjiru Kungu -vs- Francis Mutua Mbuvi & Another (2014)**. Unlike in the Court of Appeal decision in **Civil Appeal No. 11 of 2014. The Chairman St. Teresa's Nyangusu Girls Secondary School -vs- Jackline Monari**, the deceased cannot be said to have had a hand in the occurrence of the accident.

13. In its totality, I find the driver of the defendant's vehicle to have been driving at a high speed and carelessly as he would have been able to slow down or swerve to avoid hitting the cow thus avoid the accident had he been careful. DW1, being the authorised driver of the defendant must be held wholly to blame for the accident and by virtue of the doctrine of vicarious liability, the defendant is thus held liable both in negligence and damages. See **Francis Njoroge Njonjo & Another -vs- Irene Muoki Kariuki & Another (2007) e KLR and Daniel Kaluu Kieti -vs- Muturi Ali Nyalo & Another (2016) e KLR**. Issues No.1 and 2 are thus resolved.

#### **14. Quantum of damages**

There is no doubt that the death of the deceased caused suffering and loss to her dependants. They lost not only her financial support but also their mother.

Though money cannot bring back a life lost, it can ease the pain of financial burden to children left without a breadwinner.

I shall endeavour to assess such compensation guided by the principles stated in the **Beatrice Thairu -vs- Hon. Ezekiel Bargetuny & Another HCCC No. 1438 of 1990** (unreported) among other decisions.

#### **15. Damages for pain and suffering and loss of expectation of life under the Law Reform Act.**

The plaintiffs have urged and proposed a sum of Kshs.100,000/= and Kshs.300,000/= respectively and cites the cases of **Alice O. Alukwe -vs- Akamba Public road Services Ltd (2013) e KLR** and **Elizabeth Ngina Muthoka -vs- Martin Musila Kombo (2009) e KLR**.

In both cases a sum of Kshs.300,000/= were awarded for loss of expectation of life. In the **Elizabeth Ngina** case above, the deceased was a University Lecturer, 47 years old.

16. The defendant proposes a sum of Kshs.10,000/= for pain and suffering and Kshs.70,000/= in respect of loss of expectation of life.

It is not clear whether or not the deceased in the present case died instantly. I shall therefore allow a sum of Kshs.20,000/= being damages for pain and suffering and a sum of Kshs.200,000/= for loss of expectation of life.

17. **Damages Under the Fatal Accidents Act** are premised upon the deceased's earnings at the date of death, the age and the life expectancy of the dependants. See **Beatrice Thairu Case (Supra)** and **Naomi Nyambura Karanja -vs- Zacharia Muteru Kadinga (2017) e KLR**.

I have seen the deceased payslip from Narok University for the month of February 2012, one month prior to her death. The Gross salary was Kshs.122,067/=. Out of the above, Statutory deductions – NSSF, PAYE and NHIF total to Kshs.28,679/=. The balance, which is the **Net Salary** is Kshs.93,908/=. That in my opinion is the earnings of the deceased at the date of her death, and for proposes of determining the multiplicand.

18. I do not agree with the defence submissions that all other deductions from the salary being union dues, loans, insurances and so on should be deducted. These are made for personal improvement and welfare of the deceased's family. They are not statutory deductions.

The plaintiffs submission that the deceased had an extra income from some entrepreneurship was not proved by any evidence. **Section 107-108** of the **Evidence Act**.

I shall apply the NET salary of Kshs.93,908/=.

19. **On the Multiplier**, the plaintiff suggests 32 years on the basis that scholars hardly retire and can productively work to over 75 years old and cited the case of **Elizabeth Ngina** above – where the deceased was 46 years old. The court adopted a multiplier of 19 years old. The deceased too was a scholar, and a University Lecturer.

The defendant proposes a multiplier of 5 years and a dependency ratio of one half ( $\frac{1}{2}$ ).

20. I have considered the submissions. I agree that scholars hardly retire. But again, uncertainties and vagaries of life must be taken into account.

In **MO -vs- Simon Kimutai & Another (2016) e KLR**, for a University Lecturer aged 46 years at time of death the court adopted a multiplier of 19 years based on a retirement age of 65 years and dependency ratio of  $\frac{2}{3}$ .

Being guided by the decisions cited above, the multiplier that commends to me as fair and reasonable is 15 years. I shall adopt the same.

Thus, the plaintiffs are entitled to loss of dependency as hereunder:

$$\text{Kshs.93,908} \times 12 \times 15 \times \frac{2}{3} = \text{Kshs.11,268,960/=.}$$

21. In arriving at the above *quantum* of damages under both statutes, I have considered and taken into account the provisions of **Section 2(5) of the Law Reform Act**, that the rights conferred by or for the benefit for the state of the deceased shall be in addition to, and not derogation of any rights conferred on the dependants under the Fatal Accidents Act.

There is no necessity or requirement to deduct the award under the Law Reform Act from the award under the Fatal Accidents Act. See Court of Appeal pronouncements in **Civil Appeal No. 22 of 2014 Hellen Wanguru Waweru -vs- Kiarie Shoe Stores Ltd (2015) e KLR**.

22. **Special damages** of Kshs.2157/= were pleaded. It is allowed as reasonable.

23. In summary Judgment is hereby entered for the plaintiffs against the Defendant **Charity Wanjiku** as follows:

(a) Liability	-	100%
(b) Special damages	-	Kshs. 2,157/=
(c) Damages for		
(i) Pain and suffering	-	Kshs. 20,000/=
(ii) Loss of expectation of life	-	Kshs. 200,000/=
(iii) Loss of Dependency	-	Kshs.11,268,960/=
(iv) Special damages	-	<u>Kshs. 2,157/=</u>
<b>Total</b>	-	<b><u>Kshs.11,491,117/=</u></b>

Interest at court rates shall accrue to the above awards from the date of this judgment.

24. The plaintiffs shall have costs of the suit.

**Dated, Signed and Delivered this 21<sup>st</sup> Day of September 2017.**

**J.N. MULWA**

**JUDGE**