



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL CASE NO. 51 OF 2014**

**WILSON NYAMAI NDETO**

**FLORENCE MUENI MBUVA (Suing as**

**The Legal Representatives of the**

**Estate of ERASTUS MUKILYA NDETO.....PLAINTIFFS**

**VERSUS**

**CHINA WU YI LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WILSON GITHU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**The Pleadings**

On 3<sup>rd</sup> January 2013, Erastus Mukilya Ndeto 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 1<sup>st</sup> Defendant was the registered owner of motor vehicle and trailer registration Number KBB 892G and ZD4070, while the 2<sup>nd</sup> Defendant was the driver of the said motor vehicle.

On 2nd December 2014 , the Plaintiffs, who are the brother and wife 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 loquitur*.

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 and two minor sons. It is stated that at the time of his death the deceased was aged 30 years and in good health, and his wife run a business for the sale of motor vehicle tyres and earned a net income of Kshs 85,000/= per month.

The Plaintiff therefore sought special damages of Kshs 272,100/=, general damages under the Law Reform Act and the Fatal Accidents Act, interest on the damages, and costs of the suit.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants on their part denied that the 1<sup>st</sup> Defendant was the registered owner of the said motor vehicle registration number KBB 892G, pursuant to a defence filed in Court dated 12<sup>th</sup> 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 testified and called two additional witness to testify on their behalf. The 2<sup>nd</sup> Plaintiff (Florence Mueni Mbuva) was the first witness to testify as PW1. 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. She also produced the police abstract and death certificate that was marked as exhibits 1(a) and 1(b) 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 2<sup>nd</sup> 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 2.

The 2<sup>nd</sup> Plaintiff further averred that her union with the deceased was blessed with two (2) children, namely D N M and E M M, and produced a letter from her area chief dated 11th April 2013 and the children's birth certificates as exhibits 3 and 4(a) & (b) respectively. Further, that she incurred expenses during the funeral of the deceased, and produced a bundle or receipts for specials as exhibits 5 (a) to (I) for the sum of Kshs. 271,800/-.

She also testified that her deceased husband operated a business known as Mojo Auto Tyres and Wheels, and produced a copy of business registration as exhibit 6, and also marked for identification the financial statements of the said business as MFI 7. The 2<sup>nd</sup> Plaintiff averred that her husband had a net income of Kshs. 85,000/-. Lastly, the 2<sup>nd</sup> Plaintiff produced a demand notice dated 24th April 2014 as exhibit 8 .

The 2<sup>nd</sup> Plaintiff in cross-examination confirmed that the deceased's business was registered on 14th August 2012 and that her husband died on 3rd January 2013, and that the financial statements she had marked were from August 2012 to February 2013. Further, that her husband's drawings were over Kshs. 70,000/- per month and the salary of Kshs. 65,000/ indicated therein was their salary. She further confirmed that the business collapsed 6 months after the death of the deceased.

The second witness (PW2) who testified on behalf of the Plaintiffs was Wilson Nyamai Ndeto, the 1<sup>st</sup> Plaintiff, who adopted his witness statement dated 20th August 2014. He averred that he is lives and works in Nairobi and is a brother 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 Florence Mueni Mbuva (the 2<sup>nd</sup> Plaintiff) and their union was blessed with two children. The 1<sup>st</sup> Plaintiff further averred the deceased would on a monthly basis have an income of between Kshs. 80,000/- to Kshs. 100,000/- from his business known as Mojo Auto Tyres and Wheels located in Nairobi, which money he used for upkeep of himself, his wife, children and parents. That following his demise the family has immensely lost support that he used to receive from him.

In cross examination this witness confirmed that the deceased's business was located at Kirinyaga Road in Nairobi which was registered on 14<sup>th</sup> August 2012, that he did not know where his deceased brother sourced goods from.

The third witness for the Plaintiffs was Peter Nthenge (PW3), who averred that he is on accountant by

profession and works at Ndombuki & Associates, and that he prepared on income and expenditure statement for Mojo Auto Tyres and Wheels on the 16th January 2015. Further, that the said statement showed the profit the business made from August 2012 to February 2013, which was a period of seven (7) months.

The witness indicated that the total net income for the period was Kshs. 553,000/- translating to Kshs. 79,000/- per month, and that in the statement there was an item identified as salaries and wages which was for an employee employed in the business for that period. The witness confirmed that the financial statement was signed by the 2nd Plaintiff and PW3's employer, one Mr. Ndombuki, and produced the same as exhibit 7.

In cross examination the witness confirmed that he had prepared the documents on 16th January 2015, and that the client had furnished him with the expenditure and income receipts and other documents to enable him prepare the accounts. Further, that the deceased did not draw any particular salary rather he depended on the profits and that the statement was consolidated for the period of accounting.

The Plaintiffs closed their case at this point and the defence subsequently 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 3<sup>rd</sup> 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 8th February 2017, while the Defendant's learned counsel, Muriithi & Ndonye Advocates, filed submissions dated 3<sup>rd</sup> March 2017.

On the issue as to liability, this suit was filed alongside two other matters being **Machakos HCCC No. 52 of 2014 -Jastine Nzula Musyoka & 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 had dependants within the meaning of the Fatal Accidents Act, therefore the dependency ratio to be applied in this case would 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 net income was Kshs. 79,000/-, and a financial statement of the Deceased's business was produced by PW3 as exhibit 7. Moreover, that PW3 also produced a copy of certificate of registration to demonstrate existence of the business as exhibit 6. In addition, that it is not in dispute that the deceased was thirty (30) 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 thirty (30) 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;

$$79,000 \times \frac{2}{3} \times 12 \times 30 = 18,960,000/-$$

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 1<sup>st</sup> Plaintiff produced receipts in proof of the special damages that were pleaded of Kshs. 271,800/- .

The Defendant on the other hand urged this Court not to use the Income and Expenditure Statement produced by PW3 as evidence to ascertain how much the deceased derived from his business, for reasons that the deceased run the said business for only four months that is until 3rd January 2013 when he met his death. Further, that it was PW1's testimony that together with her husband they drew a salary of Kshs, 65,000/= from the said business from August 2012 until 28th February 2013 as indicated in the Income and Expenditure Statement.

However, that the same was contested by PW3 who testified that Kshs. 65,000/= as indicated in the Income and Expenditure Statement was used to pay the workers and that the same was not the salary for the deceased and his wife. Lastly, that PW3 could not tell how much the tyre business made between 3rd January 2013 and 28th February 2013 to ascertain how much the deceased earned for the four months he operated the business.

The Defendants submitted that from the evidence adduced by the Plaintiffs in court is it not clear how much the deceased earned per month for the four months he operated the tyre business. 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).

The Defendants in addition submitted that a multiplier of 18 years will be reasonable in this case taking into accounts the vicissitudes of life, and cited various judicial authorities for this proposition, including the case of **J. W. K. & Another vs. George Omondi & 2 Others [2016] 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 two children. Therefore that under the Fatal Accidents Act the compensation of loss of dependency should be calculated as follows:

$$\text{Kshs. } 8,579.80 \times 18 \times 12 \times \frac{2}{3} = \text{Kshs. } 1,235,491.00/=$$

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. The Defendants further submitted that PW1 and her children are the deceased's beneficiaries under the Law Reform Act and dependants under the Fatal Accidents Act, and thus awarding PW1 and her children under both Acts would amount to double compensation.

Thus the defence submits that the award under Law Reform Act be subtracted from the award made under Fatal Accidents Act. Reliance was placed on the decisions in **Aphia Plus Western Kenya & another v Mary Anyango Kadenge & Another [2015] eKLR** and the Court of Appeal decision in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited, [2015] eKLR**.

Lastly, on the special damages to be awarded, it was the Defendants' contention that the Plaintiffs pleaded for special damages amounting to Kshs 272,100/= in their Plaintiff. However, that during the hearing the receipts of Kshs. 21,000/= from Classic Funeral Services and of Kshs. 35,000/- Mbaku Funeral Services Limited, both which were for transporting the body from Machakos to the burial site, were contested by the defence as double charges.

It was PW1 evidence that the court should take into account the receipt of Kshs. 35,000/- from Mbaku Funeral Services Limited and not the one from Classic Funeral Services as charges for transport the body. Further, that during the hearing PW3 confirmed that the original receipts from Forward Travellers for Kshs. 55,000/= and Mutuku & Kioko Investments for Kshs. 85,000/= were not signed. It is the defendant submission that the said receipts are not authentic and that this Court should not rely on the same. The Defendants submitted that Kshs. 111,100/= 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 2<sup>nd</sup> Plaintiff who was the Deceased's wife produced the birth certificates of the Deceased's two minor children aged 3 and 6 years at the time of the his death as exhibits 4(a) and (b), and the 2<sup>nd</sup> Plaintiff testified as to her dependency and on the deceased for her subsistence and medical expenses.

The 2<sup>nd</sup> Plaintiff gave evidence that the deceased operated a tyre business known as Moja Auto Tyres and Wheels, and produced a certificate of registration showing that the business was registered on 14<sup>th</sup> August 2012. Her evidence was corroborated by PW2 and PW3. The Defendants do not dispute the existence of the business, but dispute the income the Deceased received from the business.

I note in this regard that the Income and Expenditure statement of the business produced by PW3 as exhibit 7 was for a period of the 7 months ending on 28<sup>th</sup> February 2013. It showed that the business had a surplus for the period of Kshs 553,000/=. PW3 clarified that the item on salaries & wages was for an employee of the business. This Court is inclined to believe that it was PW3 who was telling the truth as he was the expert and maker of the income and expenditure statement as opposed to the 2<sup>nd</sup> Plaintiff.

The average monthly net income of the Deceased from the income and expenditure statements was therefore approximately Kshs 79,000/= per month, and after deduction of income tax at 30%, I find that a monthly net income of 55,300/= 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 30 years when he died as shown in the death certificate produced by the 2<sup>nd</sup> Plaintiff as exhibit 1. 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 30 years while the Defendant's advocates propose 18 years. I find that a multiplier of 27 years would be reasonable. Damages under the Fatal Accidents Act will thus work out at KShs 55,300 X 12 X 27 X 2/3 – KShs

11,944,800/=.

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.

On the submissions by the Defendants that the damages awarded under the Law Reform Act be subtracted from the award made under Fatal Accidents Act, I am guided by the law and practice where a claimant gets awards for loss of life both under the Law Reform Act and the Fatal Accidents Act as explained by the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] eKLR** as follows:

**“20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.**

**21. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the *ratio decidendi*. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the *ratio decidendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, that:-**

**“6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.**

7. *The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.*

8. *The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."*

I note in this regard that the evidence by PW2 was that the Deceased used to support his wife children, and in addition his parents and family members. There were thus other beneficiaries of his estate who will benefit from the award of loss of expectation of life other than the dependants getting compensation under the Fatal Accidents Act.

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 271,800/=. The said amount was proved by production of receipts. In this regard I find the explanation by PW2 as to why there were two receipts produced by the Plaintiffs for transport reasonable, as he stated the receipt from Classic Funeral Services was for services they provided of a gazebo, the coffin stand and lowering gear. He also confirmed that he made the payments with respect to the receipts that were not signed.

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 11,944,800/=

Special damages.....Kshs 271,800/=

Sub total..... Kshs 12,326,600/=

Less 30% contributory negligence.....Kshs 3,697,980/=

**Total Award.....Kshs 8,628,620/=**

3. I apportion the damages under the Fatal Accidents Act (Kshs 11,944,800/= less 30% = Kshs 8,361,360/-) as follows: –

(i) Florence Mueni Mbuva.....Kshs 4,000,000/=

(ii) D N M .....Kshs 2,000,000/=

(iii) E M M.....Kshs 2,361,360/=

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 21<sup>st</sup> day of September 2017.

**P. NYAMWEYA**

**JUDGE**