



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CIVIL CASE NO 9 OF 2015**

**SERAH WOTHAYA MACHARIA**

**ANN WAMBUI MACHARIA(suing as the Administratixs’(sic)**

**and legal Representatives of the estate**

**of THOMAS ONYWEREOMBEGA (Deceased).....PLAINTIFF**

**VERSUS**

**FRANCIS TERERE.....1<sup>ST</sup> DEFENDANT**

**PETO KUREI CRISPIN.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. According to the Complaint dated and filed on 9<sup>th</sup> December 2015, the Plaintiffs blamed the 2<sup>nd</sup> Defendant for having caused the accident on 23<sup>rd</sup> April 2015 along Mombasa- Nairobi Road as a result of which Thomas Onywere Ombega (hereinafter referred to as “the deceased”) sustained fatal injuries. They sued the 1<sup>st</sup> Defendant for having been vicariously liable for the 2<sup>nd</sup> Defendant’s negligence.

2. At the time of filing suit, the Plaintiffs had not filed any Written Statements. Their case had been supported by the Written Statements of Benjamin Mwanjala Mwasoko and George Kangenzinga who witnessed how the accident herein occurred. Notably, the Witness Statement of George Kangenzinga was not signed. However, on 6<sup>th</sup> March 2017, both Plaintiffs filed one (1) Witness Statement that they each signed.

3. They sought the following reliefs in their Complaint:-

**a. Damages under fatal (sic) Accidents Act I (sic) Cap 32 of the laws of Kenya) and damages under the Law Reform Act (cap 20 (sic) Laws of Kenya.**

**b. Special damages**

**c. Cost (sic) of the suit**

**d. Interest at court rates**

**e. Any other relief that this Honourable court may deem fit to grant.**

4. The Defendant's Defence was dated 15<sup>th</sup> April 2016 and filed on 11<sup>th</sup> May 2016. They denied that they were responsible for the fatal injuries that the deceased had sustained because he failed to wear a safety belt contrary to the traffic rules or taking adequate precaution for his own safety. Both the Defendants filed Written Statements.

5. When the matter came up in court on 25<sup>th</sup> April 2017, both parties recorded a consent on liability at 70%-30% in favour of the Plaintiffs herein. The matter was subsequently fixed for assessment of damages.

6. On 19<sup>th</sup> June 2017, the parties also recorded another consent wherein it was agreed that the Plaintiff's bundle of documents be produced and marked as exhibits in the matter herein.

**LEGAL ANALYSIS**

7. As the parties herein did not agree on a joint Statement of Agreed Issues, on 6<sup>th</sup> March 2017, the Plaintiffs filed a Statement of Issues of even date. The issues were as follows:-

**a. Did the accident occur?**

**b. If the above was true, who caused the said accident and which motor vehicles were involved?**

**c. Was there contributory negligence among the involved vehicles and if so, to what extent?**

**d. Do the plaintiffs have *locus standi* to bring this suit to court?**

**e. Did the deceased (THOMAS ONYWERE OMBEGA) die as a result of the accident?**

**f. Was the estate of the deceased (THOMAS ONYWERE OMBEGA) entitled to damages under The Law Reform Act Cap (20) (sic) Laws of Kenya, if so what was the quantum, of damages awardable to the plaintiffs?**

**g. Who was to pay the costs of the suit?**

8. In view of the fact that the parties had agreed on liability, Issues Nos (a) –(e) had now been overtaken by events, leaving issues Nos (f) and (g) for determination by this court. The said issues were dealt with under different heads.

**I. DAMAGES UNDER THE FATAL ACCIDENTS ACT**

9. The Plaintiffs adduced in evidence a Grant of Letters of Administration *Ad Litem* dated 9<sup>th</sup> December 2015 that was issued by this court evidencing proof that they had *locus standi* to institute the proceedings on behalf of the deceased's estate.

10. Section (4) (1) of the Fatal Accidents Act provides as follows:-

**“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child(emphasis court) of the person whose death was so caused, and shall, subject to the provisions of [section 7](#), be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided**

**amongst those persons in such shares as the court, by its judgment, shall find and direct:**

**Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”**

11. Bearing in mind that the Plaintiffs had *locus standi* to institute the proceedings herein as they were the administrators of the deceased's estate, the fact that that the claim was filed within three (3) years of its occurrence and that it was for the benefit of deceased's wife and children, the claim herein had legal basis.

12. In assessing the damages under this head, the court had to consider the multiplicand, the multiplier and dependency ratio. The same have been dealt with as shown hereunder.

#### **A. DEPENDENCY RATIO**

13. According to the 1<sup>st</sup> Plaintiff's evidence, together with the deceased, they had been blessed with three (3) children, one of whom died during the accident herein. The surviving children were aged eight (8) years and one and a half (1 ½) years.

14. In the case of **Bustrack Limited vs Wilfridah Achola Omondi & Another [2010] eKLR**, the court therein adopted a dependency ration of 2/3 where the deceased therein left a spouse and five (5) children.

15. Both the Plaintiffs and the Defendants were agreed that a dependence ratio of 2/3 could be adopted herein. The same is hereby adopted by this court accordingly.

#### **B. MULITIPLIER**

16. According to the Certificate of Death, the deceased was aged thirty three (33) years at the time of his death. The Plaintiffs argued that all things remaining constant, the deceased would have worked until sixty (60) years when his contract would have been renewed giving him twenty seven (27) more years to be gainfully engaged. They therefore submitted that a multiplier of twenty five (25) would be reasonable in the circumstances of the case. On its part, the Defendants proposed a multiplier of ten (10) years due to the uncertainty of life and the fact that the contract the deceased had was renewable in nature.

17. None of the parties referred this court to any cases to support their respect cases. It was therefore left with the task of determining what multiplier was reasonable.

18. In the case of **Patrick Murerwa Mbui vs Attorney General [2006] eKLR** the court adopted a multiplier of twenty two (22) years where the deceased was aged thirty three (33) years. In agreeing with the said decision, Muchemi J adopted a multiplier of twenty two (22) years in the case of **Nancy Marigu Gabriel (suing as legal Representative of the estate of Linus Njeru Marigu (Deceased) vs David Kimani [2015] eKLR**.

19. In the case of **Wayua James & another v Daniel Kipkirong Tarus & another [2015] eKLR**, Mulwa J adopted a multiplier of nine (9) years where the deceased was aged forty eight (48) years.

20. Taking into account the aforesaid decisions which do not bind this court and bearing in mind the imponderables in life, this court nonetheless took a middle ground and adopted a multiplier of twenty two (22) years.

#### **C. MULTIPLICAND**

21. According to the Letter of Appointment dated 25<sup>th</sup> February 2015 from the United Nations, the deceased's gross salary was Kshs 3,682,162/= putting his gross salary at Kshs 306,846.83. Both the Plaintiffs and the Defendants rounded off the figure to Kshs 306,847/=. However, the Defendants pointed

out that the Plaintiffs did not produce in evidence the deceased's pay slip to corroborate his earnings but rather, they had tendered in evidence a Letter of appointment. They proposed that the minimum wage applicable of Kshs 3,500,000/= which translated to Kshs 291,667/= per month.

22. The Defendants did not explain how they arrived at a minimum wage at Kshs 3,500,000/= per annum. In the absence of any evidence to the contrary, this court accepted that the deceased's gross monthly income as at the time of his death was Kshs 306,846/=.

23. Notably, the deceased was employed on 20<sup>th</sup> February 2015. He died on 23<sup>rd</sup> April 2015, which was about two (2) months after he was employed. The contract was also fixed term employment and was to expire on 19<sup>th</sup> March 2016.

24. This court was persuaded by the Defendants' submissions that in view of the fact that the deceased had been employed on contract, there was no guarantee that he would have worked at UN for twenty seven (27) years and that he would have continued earning the said sum of Kshs 306,846/=.

25. The Plaintiff's proposal that they were entitled to Kshs 3,682,162/= for twenty five (25) years was too speculative. The Defendants' proposal that a sum of Kshs 291,667/= would be adequate was not supported hence this court's reluctance to accept the same.

26. It was the view of this court that save for the vagaries of life, the deceased was more or else one entitled to the sum of Kshs 306,846/=. In view of the fact that there was no indication of where the deceased would have worked in two (2) years' time, this court deemed it fit to tabulate the same as follows:-

2/3 x 306,846 x 1 x 12

Kshs 2,454,768/=

2/3 x 10,000 x 21 x 12

Kshs 50,400,000/=

**Kshs 52,454,768/=**

## **I DAMAGES UNDER THE LAW REFPORM ACT**

### **A. LOSS OF EXPECTATION OF LIFE**

27. The Plaintiffs submitted that a sum of Kshs 100,000/= was reasonable for loss of expectation of life. The Defendants contended that a sum of Kshs 70,000/= was fair compensation. They relied on the case of **HCCC No 94 of 2007 Samuel Kahure Ndirangu vs Rhino Ark** (unreported) where the court awarded a sum of Kshs 100,000/= for pain and suffering in 2008.

28. This court did not therefore see any justification in reducing the said sum to Kshs 70,000/= bearing in mind that there has been inflation since 2008. In the circumstances, this court adopted a sum of Kshs 100,000/= for loss of expectation of life.

### **B. PAIN AND SUFFERING**

29. Both parties proposed a sum of Kshs 10,000/= for pain and suffering. Since the same was not contested, this court adopted the same.

## **II. SPECIAL DAMAGES**

30. The Plaintiffs claimed Kshs 45,000/= special damages. The Defendants pointed out that damages must be specifically proven and since the Plaintiffs had not done so, they indicated that a sum of Kshs 25,000/= could be awarded under this head.

31. The receipt that was adduced in evidence was for the sum of Kshs 25,000/=. Legal fees are not

refundable under the Fatal Accidents Act and Law Reform Act. This court would have rejected the same. Bearing in mind that costs are incurred during funeral arrangements, a sum ought to be awarded even in the absence of receipts. Even in the absence of receipts to support the same, this court found that a sum of Kshs 45,000/= would be fair.

### **DISPOSITION**

32. In the circumstances foregoing, judgment is hereby entered in favour of the Plaintiffs against the Defendants for Kshs 13,586,837.60 made up as follows:-

**a. Loss of dependency**

$2/3 \times 306,846 \times 1 \times 12$

**Kshs 2,454,768/=**

$2/3 \times 100,000 \times 21 \times 12$

**Kshs 16,800,000/=**

**Kshs 19,254,768/=**

**b. Loss of Expectation of life**

**Kshs 100,000/=**

**c. Pain & Suffering**

**Kshs 10,000/=**

**d. Special Damages**

**Kshs 45,000/=**

**Kshs 19,409,768/=**

**Less 30% contribution on the part of**

**the deceased**

**Kshs 5,822,930.40**

**Kshs 13,586,837.60**

Plus costs and interest thereon at court rates.

33. For the avoidance, as the Senior Principal Magistrates Court, Voi lacked pecuniary jurisdiction to award the damages hereinabove and the sum of Kshs 13,586,837.60 came within its pecuniary jurisdiction after subjecting the said award to thirty (30%) per cent contribution, the costs in this matter shall be calculated on the scale for high court matters.

34. It is so ordered.

**DATED and DELIVERED at VOI this 30<sup>th</sup> day of October 2017**

**J. KAMAU**

**JUDGE**