



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

**AT KISII**

**CIVIL CASE NO. 229 OF 2010**

**SAMWEL KIMUTAI KORIRI (*Suing as personal***

***and Legal Representative of Estate) of***

**CHELANGAT SILEVIA.....PLAINTIFF**

**VERSUS**

**NYANCHWA ADVENTIST SECONDARY SCHOOL)**

**NYANCHWA ADVENTIST COLLEGE.....DEFENDANTS**

**JUDGMENT**

1. On 16<sup>th</sup> August, 2010 the plaintiff herein, Samuel Kimutai Korir, sued the Defendants in his capacity as the personal representative of the estate of CHELANGAT SILEVIA (deceased) in a suit initiated by way of plaint and sought judgment against the Defendants jointly and severally for:

- i. General Damages Under the Law Reform Act as well as the Fatal Accident Act, Chapters 26 & 31, Laws of Kenya, respectively.**
- ii. Special Damages in the sum of Kshs. 64,600/= only.**
- iii. Costs of this suit be borne by the Defendants.**
- iv. Interests at Court rates (14%) on (i), (ii) & (iii) above.**
- v. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.**

2. The Plaintiff's claim arises out of a road traffic accident which is alleged to have taken place on 18<sup>th</sup> March, 2010 as the deceased was lawfully boarding Motor Omnibus Registration number KAW 312K, Isuzu, when near Mwenye-Getinge Area along Kisii- Nyanchnwa Road, the Defendants' driver agent for whose tort of negligence the defendant's are vicariously liable, drove off the said Motor Omnibus before the deceased could properly board the same thereby throwing her off the said bus, running over her and causing her fatal injuries.

3. The Plaintiff stated the particulars of negligence of the part of the defendants' driver as follows:

- i. **Driving Motor Omnibus Registration Number KAW 312K, at an excessive speed,**
- ii. **Commencing to drive the suit Omnibus without allowing the Deceased to lawfully board same.**
- iii. **Failing to exercise and/or take necessary and precautionary measures, before driving the suit Omnibus.**
- iv. **Failing to exercise any proper control over the suit Motor Omnibus, to avoid the accident.**
- v. **Failing to brake and/or otherwise manage the suit Motor Omnibus so as to avoid the accident.**
- vi. **Driving at an excessive speed contrary to the obtaining and/or applicable speed limit in the area.**
- vii. **Disregarding the known and/or established Traffic Regulation (s).**
- viii. **Loosing Control of the suit Motor Omnibus.**
- ix. **Failing to heed the presence of the Deceased.**

4. The Plaintiff stated that pursuant to the said accident, the deceased suffered pain and loss of amenities, coupled with loss of expectation of life. The suit is brought by the plaintiff pursuant to the **Law Reform Act, Chapter 26 Laws of Kenya** as well as **Fatal Accidents Act Chapter 3, Laws of Kenya** on his own behalf and on behalf of the defendants of the deceased.

5. The particulars of the deceased's dependants were listed as:

- a. **Samuel Kimutai Korir – Father.**
- a. **Sarah Chebet Korir – Mother.**

6. The plaintiff pleaded that at the time of her death, the deceased was aged 21 years, enjoyed a healthy, vigorous and happy life and was P1 trainee teacher at Nyanchwa Adventist College who expected to earn a minimum monthly salary of Kshs. 20,000/= upon the completion of her training.

7. It was the plaintiff's case that the parents of the deceased would have depended on her upon the completion of her training as she would then be employed as a P1 teacher earning a minimum salary of Kshs. 20,000/=.

8. The Defendants entered appearance on 1<sup>st</sup> September, 2010 and filed their joint statement of defence on 6<sup>th</sup> October, 2010 in which they denied all the averments and allegations made by the plaintiff in the plaint. The defendants further denied all the particulars of negligence attributed to their driver by the Plaintiff and further denied all the particulars of loss and suffering claimed by the plaintiff under the **Law Reform Act (cap 26)** and **Fatal Accidents act (Cap 31)**.

9. The Defendant pleaded in the alternative and on a without prejudice basis, that if indeed any accident occurred as pleaded by the plaintiff, then the same was wholly caused or substantially contributed to by the deceased.

10. The defendants enumerated the particulars of the negligence attributed to the deceased as follows:

- a. **Boarding the Motor Vehicle Registration No. KAW 312 K which was in motion.**
- b. **Generally being mindless of her own safety while boarding the said Motor Vehicle KAW**

312K.

c. **Standing in the path of the said Motor Vehicle.**

d. **Boarding the said Motor Vehicle playfully.**

e. **Failure to heed to requests to board the Motor Vehicle safely.**

11. The plaintiff was represented in the case by the firm of Oguttu Mboya & Co. Advocates while the defendants had the firm of Okong'o Wandago & Co. Advocates acting for them.

12. The Plaintiff testified that the deceased was his third born child who was born in 1988, and was at the time of her death a 2<sup>nd</sup> year student pursuing a P1 Teacher training course at the 2<sup>nd</sup> defendant's college.

13. The plaintiff testified that he was informed about the accident on 18<sup>th</sup> March, 2010 by a third party thereby prompting him to go to the 2<sup>nd</sup> Defendant's college where he confirmed that indeed his daughter had died in an accident involving the defendants Motor Vehicle that threw her off as she was trying to board it and ran over her. The plaintiff thereafter reported the matter to the police after viewing the deceased's body at the mortuary.

14. The Plaintiff produced the following documents in support of his case.

***PExhibit 1* Admission letter to the 2<sup>nd</sup> Defendant's college.**

***PExhibit 2* Bundle of receipts issued by the 2<sup>nd</sup> Defendant in acknowledgement of college fees payment by the deceased.**

***PExhibit 3* Certificate of Death the deceased dated 15<sup>th</sup> April, 2010..**

***PExhibit 4* Burial permit dated 24<sup>th</sup> March, 2010.**

***PExhibit 6* Letter by the 2<sup>nd</sup> Defendant dated 24<sup>th</sup> March 2010 in respect to the deceased.**

***PExhibit 7* Copy of records in respect to Motor vehicle registration No. KAW 312K dated 30<sup>th</sup> April, 2010.**

***Pexhibit 9* Letter of administration Ad Litem in respect of the estate of Chelangat Silevia, issued vide Kericho HCC Succ. Case No. 26 of 2010.**

***PExhibit 10 (a)* Receipt for coffin.**

***PExhibit 10 (b)* Bundle of receipts for funeral expenses.**

***PExhibit 10 (c)* Receipt for police abstract**

***PExhibit 11***

15. The Plaintiff called two witnesses in support of his case.

16. PW2 Langat Kiprono Rubben a P1 teacher and a former student at the 2<sup>nd</sup> Defendant's college testified that he knew the deceased as a former college mate who was one year ahead of him. He stated that the deceased was a netball player and on the fateful day, being 18<sup>th</sup> March, 2010, PW2 and the deceased were among the group of students who were slated to go for a sports competition at Kamagambo Teachers College and the students were to be ferried in the 2<sup>nd</sup> Defendants bus Reg. No.

KAW 312K.

17. It was the testimony of PW2 that the students waited for the bus along Kisii Nyanchwa road and when it came, it stopped and the door was opened for the students to board and indeed some students boarded but no sooner had the deceased and all the other students stepped into the bus and boarded than the driver started to accelerate suddenly thereby throwing the deceased off the bus whereupon she fell down headlong and the left rear tyres ran over her thereby killing her instantly. PW2 stated that even after running over the deceased, the bus did not stop immediately but continued to accelerate for about 20 meters from the scene before the driver was alerted about the accident by students who were still outside waiting to board the said bus. PW2 was categorical that the deceased was not standing on the path of the bus, but was trying to board very carefully as the bus had stopped at the time she started to board.

18. According to PW2 the deceased was not responsible for the said accident.

19. Upon being cross-examined by Mr. Odhiambo advocate for the defendants, PW2 stated that he was an eye witness to the accident and that he was just about to board the bus after the deceased when the driver suddenly started to drive off yet the accused was at the stairs of the bus before she could hold the support bar inside the bus.

20. According to the PW2, the driver took off so suddenly and with a lot of speed that even the students who were already in the bus but had not taken their seats fell down inside the bus aisle. PW2 testified that the deceased was about 1 meter away from him at the door of the bus when the accident happened.

21. PW3 Police Constable No. 51024 PC Samuel Opiyo a traffic officer, attached to Kisii traffic section produced the Police Abstract report as exhibit 8. He stated that his investigations revealed that the accident occurred at the time the deceased was trying to board the bus when she slipped and fell off and was run over by the bus' rear tyre.

22. According to PW3, the driver of the bus had not been prosecuted for any traffic offence even though about 8 students who witnessed the accident had recorded statements with the police.

PW3 produced the Post Mortem report in respect to the deceased as P. Exhibit 5.

23. On cross-examination by Mr. Odhiambo advocate for the defence, PW3 confirmed that he did not investigate the accident and that the police file was closed as there was no sufficient evidence to sustain a prosecution.

According to PW3, the accident was an unfortunate occurrence and there was no one to blame for it. PW3 added that an inquest file was opened following the accident but was closed before any witness could testify and that no other court proceedings were initiated after the inquest.

24. At the close of the plaintiff's case, the defendants advocate Mr. Odiambo sought an adjournment to enable him avail the defence's witnesses. The case was then fixed for defence hearing on 9<sup>th</sup> June, 2015.

25. On 9<sup>th</sup> June, 2015, Mr. Odhiambo advocate for the defendants intimated to the court that he did not have any witnesses in court and opted to close the defence case.

26. At the close of the defence case, parties agreed to put in their written submissions on liability and quantum.

### **Plaintiff's Submissions.**

27. The Plaintiff's submissions filed on 21<sup>st</sup> September, 2015 outlined and analyzed the background of the case, the pleadings, the oral and documentary evidence tendered by the plaintiff during the trial.

28. The plaintiff submitted that he had proved negligence on the part of the defendants' driver and/or agent and was thus entitled to the prayers sought in the plaint

29. The plaintiff relied on the decisions made in the following cases:

*Martha Seyle Omondi –Vs- Webuye Escort Company Ltd & Another Civil Case No. 84 of 1999; Hassan –Vs- Nathan Mwangi Kamau Transporters & 4 others Mombasa Civil Appeal No. 123 of 1985; Sabina Adhiambo Odongo –vs- Ruth Wangui & Another Kisii HCCC 97 of 2011.*

### **Defendants' submissions**

30. The Defendants' submissions focused mainly on the issue of liability. Counsel for the defendants submitted that both the deceased and the bus driver equally contributed to the accident and that liability ought to be shared on a 50% to 50% basis between the owner of the bus and the deceased. It was the defendant's contention that the deceased was not in any formal employment and therefore not having any periodic payment or income that could justify a claim under the Fatal Accidents Act. According to the defendants, the plaintiff was only entitled to compensation under the Law Reform Act for pain suffering and loss of amenities and the special damages of Kshs. 64,600/= proved during the hearing.

31. The defendants further submitted that an award for loss of future earnings is not applicable in respect to the estate of a deceased person as had been suggested by the plaintiff in his submissions.

32. The defendants relied on the case of *Bayusuff Traders Ltd –vs- Patrick Mbatha Kyengo Nyeri C.A No. 19 of 2014* where: a multiplier of 20 years was adopted in the respect to a deceased who was aged 26 years old at the time of his death.

### **Analysis and determination:**

33. I have considered the pleadings, the evidence tendered by the plaintiff, the submissions and the authorities cited. I believe the evidence of the plaintiff and his witnesses that the deceased was in the process of boarding the bus when the defendants' driver suddenly started to drive off thereby throwing the deceased out of the bus and running over her. It was not disputed that the deceased sustained fatal injuries as a result of the said accident.

34. From the testimony of PW2, the bus had stopped for the students to board and indeed some of the students were already inside the bus while the deceased together with PW2 were still outside waiting to board and no sooner had the deceased stepped inside the bus than the driver suddenly took off at a high speed thereby not only throwing the deceased off the bus, but also causing he students who were already in the bus to fall down on the aisle.

35. PW2 stated as follows:

**“The door was opened to allow the students to board the bus. Some students had boarded while others were still standing. When Sylvia was stepping in the bus, I was still outside. When the driver started the bus, the deceased had not boarded fully. Those who had not seated fell down. Outside the bus, the deceased fell facing the bus and accidentally the left rear tyres ran over her causing her death.”**

36. I find that the testimony of PW2 was compelling, candid and graphic such that one cannot doubt that he was indeed an eye witness to the accident. The testimony of PW2 was not impeached on cross-examination. The circumstances of this case are such that one cannot say that the deceased could have in any way contributed to the accident. A careful and diligent driver, ferrying passengers and students for that matter, should have exercised caution and care in ensuring that all the students had safely boarded the bus and the door closed before taking off.

37. It is therefore my finding that the defendant's driver was wholly to blame for the said accident as he

drove the vehicle negligently. The defendants are as a result vicariously liable for the said accident.

38. I am also satisfied that the plaintiff is the father of the deceased and the duly appointed administrator (ad litem) of her estate and thus competent to institute the instant suit under the Law Reform Act and the Fatal Accidents Act for his own benefit and that of the mother of the deceased as the potential dependants of the deceased.

39. As regards the deceased's earnings, it was proved and indeed it was not disputed, that the deceased was a P1 teacher trainee at the time of her death. It was expected that the deceased would be employed as a teacher earning Kshs. 20,000/= per month. This court takes judicial notice of the Teacher's salaries and Allowances (TSC Salary Scales) 2015/2016 as revised by the Salaries Remuneration Commission (SRC) and the fact that, going by the Teachers Service Commission scale of teachers salaries, the lowest paid teacher in Kenya (P1) earns the minimum (gross) sum of Kshs. 25,692/= per month. The plaintiffs claim for the sum of Kshs. 20,000/= as the deceased's expected earnings was therefore not far-fetched or unreasonable.

40. On damages I find that the deceased's estate is entitled to compensation for pain and suffering before death, loss of expectation of life and funeral expenses.

41. When assessing damages for loss of expectation of life under Fatal Accidents acts, it is expected that the damages awarded under the Law Reform Act be taken into account lest the beneficiaries get double benefit from the same accident. I will first deal with damages under the Law Reform Act and then under the Fatal Accident Act.

#### **Damages under Law Reform Act:**

Damages under the Law Reform Act are payable for the benefit of the deceased's estate. The claim is maintainable in this case since the plaintiff had obtained a limited grant of Letters of administration.

##### **a. Pain and suffering**

The deceased is reported to have died instantly when she fell head first on the road and the rear tyres of the bus ran over head. Still, even in cases of instantaneous death, the courts have severally held that the deceased must have undergone some pain before finally succumbing to the injuries even if for a brief moment. I will in the circumstances make an award of Kshs. 10,000/= under this heading.

b. **Loss of expectation of life.** - This is a claim based on the principle that the deceased had been deprived of normal expectation of life due to the wrongful act of the driver. Awards under this heading vary from one case to another depending on the age of the deceased at the time of his death. I award a conventional figure of Kshs. 100,000/= under this heading. In *Zachariah Bogonko -vs- Dhabir Diarshama & Another NBI HCCC 2377/1991* an award of Kshs. 80,000/= was made in respect of a deceased aged 22 years.

##### **c. Funeral Expenses.**

The plaintiff submitted a bundle of receipts to support his claim of Kshs. 64,600/= for special damages pertaining to funeral expenses. This amount claimed was also specifically pleaded.

I award the plaintiff the said sum of Kshs. 64,600/= as pleaded and specifically proved.

#### **Lost years**

This is the income that would have been earned by the deceased if she had been alive and working after deducting her normal living expenses. This sum is payable to the estate of the deceased when it is proved to the satisfaction of the court that deceased person had been employed, with a regular monthly income and would have been expected to continue living, working and earning that income for her estate had it

not been for her death. The estate would be awarded damages for those “future lost years” income. It is now trite law that damages for “lost years” are payable to parents who prove their claims to the satisfaction of the court even in instances where such deceased children were still in school or undergoing training in colleges. See *Sheik Mususaq Hassan –vs- Nathan Mwangi Transporters & others (1982-1988) KAR and S.F. Muka –vs- Vishrani Ramji Halai & Another Nairobi HCCC NO. 1870 of 1994*

### **Damages under Fatal Accidents Act.**

42. The deceased was a young lady aged 21 years undertaking a Teachers training course at the 2<sup>nd</sup> defendants college. She had no child and was not yet married. Her parents had reasonable expectations that she would take care of them upon graduating and securing employment as a P1 teacher. Under those circumstances, it would be expected that the deceased would spend 2/3 (two thirds) of her earnings on herself and 1/3 on her parents.

The defendants suggested a multiplier of 15 years while stating that a multiplier should not be equated with the balance of the deceased’s active working life before retirement. I will however adopt a multiplier of 25 years while being guided by the findings in *Betty Ngatia (administrator of the estate of Gladys Waithera Ngatia) vs Samuel Kinuthia Thuitha (1999) eKLR.*

On the multiplicand, I note that the **Kshs. 20,000/=** suggested by the plaintiff as a P1 teachers monthly salary is the gross pay that would then be subjected to taxation and the normal statutory deductions since it has not been shown that the expected income would be below the taxable income level.

Assuming that 10% of the income would go to taxes, this leaves a net figure of **Kshs. 18,000** as the multiplicand.

I would therefore assess the plaintiff’s loss of dependence as follows:

$$18,000 \times 12 \times 25 \times 1/3 = 1,800,000/=.$$

43. Fatal Accident’s Act requires that award be apportioned among the dependants. Advocates on record have not submitted on this point. I would apportion the award equally among the 2 dependants.

44. In the end, I enter judgment for the plaintiff against the defendants jointly and severally for the sum of Kshs. 1,974,600/= made up as follows:

a. Liability 100%	
b. Pain and suffering-	<b>Kshs. 10,000/=</b>
c. Loss of expectation of life-	<b>Kshs. 100,000/=</b>
d. Lost years-	<b>Kshs.1,800,000/=</b>
e. Special damages-	<b><u>Kshs. 64,600/=</u></b>
<b>Total</b>	<b><u>Kshs.1,974,600/=</u></b>

I also award the plaintiff the costs of this suit and interest at court rates.

45. It is so ordered.

**Dated, signed and delivered in open court this 18<sup>th</sup> day of April, 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Plaintiff
- Nyangweso for Okongo for the Defendant
- Omwoyo court clerk