



**REPUBLIC OF KENYA**

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

**CIVIL SUIT 243 OF 2011**

**PURITY KARIMI NJOROGE.....1<sup>ST</sup> PLAINTIFF**

**PETER KIBIRO KOMU.....2<sup>ND</sup> PLAINTIFF**

**FELISTAS WAITHIRA KOMU.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ALICE WANGUI NDUNGU.....1<sup>ST</sup> DEFENDANT**

**MUSILA KIVAAYAT.....2 DEFENDANT**

**JOHANNA GICHIMO.....3<sup>RD</sup> DEFENDANT**

**PATRICIA ACHIENG.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs are the administrators of the estate of one David Njoroge Kibiro deceased vide a grant of letters of Administration *Ad Litem* issued to them in **Nakuru High Court P&A Cause No. 1693 of 2009 on the 9<sup>th</sup>September 2009**.

The deceased died in a traffic road Accident on the 24<sup>th</sup> February 2008 while travelling as a lawful passenger in motor vehicle registration Number KBD 599D, a Toyota Saloon, the property of the first Defendant that collided with motor vehicle No. KAY 614 Q Isuzu bus registered in the name of the 4<sup>th</sup> Defendant, and another registration No. KAT 133K a Nissan *matatu* registered in the name of the third Defendant.

2. The plaintiffs brought this action against all the defendants for negligence that is particularised in the plaint and sought damages under the Law Reform Act and The Fatal Accidents Act for the benefit of the deceased's estate and dependants, the deceased wife, parents and two minor children.

The defendants upon being served with summons and the plaint failed to appear or file their defence consequently interlocutory judgment entered against all of them jointly and severally. On the 19<sup>th</sup> February 2015 the plaintiffs withdrew the case against the second Defendant. Together with the plaint, the plaintiffs filed a list of documents dated 2<sup>nd</sup> September 2011. There being interlocutory judgment against the defendant the court is only to determine the case on formal proof.

3. PW1 Purity Karimi Njoroge the first plaintiff, and the widow of the late Davidoroge Kibiro, deceased. She produced a Marriage Certificate to confirm that indeed the wife of the deceased having been

married in church on the 8<sup>th</sup> March 2003. Also produced are the Children's' birth certificates to confirm the children were children of the couple. She recorded a statement and filed the same on the 11<sup>th</sup> November 2015. She requested the court to adopt the statement as her evidence. She did not witness the accident that claimed her husband's life. It was her testimony that upon getting information of the accident, visited the scene and found her husband dead together with the driver of the vehicle he travelling in Motor vehicle registration No. KBD 589D It was her evidence that upon investigations by the police, the driver of motor vehicle registration No.KBD 589D found to blame, but since he had died an inquest **No. 11 of 2010** was conducted at the Naivasha Chief Magistrates Court that established that motor vehicle registration number KBD 589D to blame for the accident.

4. PW1 further stated that and family spent a sum of Kshs.345,900/= towards funeral and incidental expenses that are pleaded in the plaint. She produced payment receipts in support of the above expenditure as exhibits.

The death certificate confirms that the deceased was 36 years old when he met his death. He working as a consultant for various firms as an accountant and also the Financial Director of Entrade Company Limited and said to have been earning Kshs.500,000/= per month from which he financially supported his family and which support was no more leaving PW1 as the sole breadwinner. In his submissions, the plaintiffs by their counsel urged the court to find in favour of the plaintiffs as pleaded in the plaint.

5. From the above evidence together with all the Documents produced as exhibits and as in the list of Documents referred to above, there is no dispute that the deceased died in the accident and that as a passenger in one of the three accident vehicles, and having no control of any of them, no blame can be attributed to him or at all. It is noted that all the defendants led to defend the suit. The plaintiffs evidence therefore remains uncontroverted, and unchallenged. The Defendants shall therefore be held liable in negligence and damages. The second Defendant's case was withdrawn. Though the plaintiff stated that the Inquest held to establish the culpable party to the accident found that the first defendant, as owner of motor vehicle registration KBD 589D was blame, no such ruling was availed to the court. It is trite that a party is bound to provide to the court all documents including court rulings and judgments if such party intends to rely on in proof of its case.

I therefore find that the first, third and fourth defendant are jointly and severally liable in negligence and consequently in damages arising from the accident.

6. The plaintiffs claim was brought under the Reform Act and the Fatal Accidents Act. Under the **Law Reform Act Chapter 26 Laws of Kenya**, any benefit accruing goes to the estate of the deceased. The deceased was dead by the time the plaintiff reached the scene of accident. It is not clear how long he was in pain before death. The deceased's life was cut short. He 36 years old and save for the mystery and vicissitudes of life, he would have lived a healthy and productive life to over 70 years, and 60 years as per the government policy on retirement. He was engaged in the business of accounting which poses no serious health hazards. Loss of expectation of life is compensable an award of damages. The plaintiffs have suggested Kshs.1,000,000= under that head. No supporting decisions were availed. The courts have been awarding a conventional sum currently upto Kshs. 200,000/=. I shall award Kshs.20,000/= damages for pain and suffering and a sum of Kshs.200,000= for loss of expectation of life being the conventional sums.

7. The **Fatal Accident Act Chapter 32 Laws of Kenya, Section 4(1)** defines a deceased's dependants as the "wife, husband, parents and child of the deceased." The plaintiffs have proved dependency and therefore are entitled to damages. The damages are to be calculated based on the age and income of the deceased, the life expectancy of the dependants, vicissitudes of life and factor accelerated by payment of a lumpsum.

The principles applicable are stated in the case of **Beatrice Wangui Thairu vs Hon. Ezekiel Bargetuny & Another Nairobi HCCC No. 1438 of 1998 (unreported)**. It was held, *inter alia* t:

*“--- there is no rule of law that two thirds of the income of a person is taken as available for*

*family expenses. The extent of dependency is a question of fact to be established in each case --- that determining the right multiplier, the approach is to consider the age of the deceased, the balance of earning life age of dependents, the right multiplier the approach is to consider the age of the deceased, the balance or earning life age of dependants, the life expected, length of edependency the vicissitudes of life and the factor accelerated by payment iumpsum.”*

8. The deceased had a balance of working life to reach sixty years of twentyfour years. Taking all the factors as stated above, I hold that a multiplier of 17 years would be reasonable, against a multiplicand of 2/3. What then the income or earnings of the deceased at the date of his demise? The plaintiff suggested an income of Kshs.500,000/=. This was based on document produced, and evidence that prior to leaving employment at Nairobi Hospital one year prior to his death. His salary Kshs.199,500/=. A payslip from Nairobi Hospital for the month of April 2005 indicated a basic salary of Kshs. 190,000/= and a net salary of Kshs.138,608/=.

He left the hospital to become the Financial Consultant with **EtradeCompany Ltd.** A letter from the said company stated that the deceased was the Financial Director and his emoluments ranged between Kshs.100,000/= Kshs. 200,000/= per month.

9. I have seen school reports and fees structures of the deceased's children's school in primary school. He paying a minimum of close to Kshs.100,000/= per term for the two children. I have also seen financial statements of the e trade company where he was the founder. He also servicing a mortgage for his house. All these documents were produced as exhibits.

From the analysis of the said documents, they presents to me that the deceased was hard working and able to serve all his financial commitments from earnings from the company as a financial director.

The salary earned at Nairobi Hospital of Kshs.199,500/= per month is an indication that in his own enterprise, he could have been making a better income than that on employment from which he could pay the school feertgage and other obligations.

For those reasons ,and after due consideration of submissions by counsel, I shall allow a NET income of Kshs.150,000/= per month Loss of dependency will thus be calculated as hereunder Kshs.150,000 x 12 x17 2/3

**=Kshs.20,400,000/=**

10. In arriving at the multiplier, I considered among others, the following authorities:

In **VZL & Another vs Crispine Agunya Omoga (2014) eKLR** , the court adopted a multiplier of 20 for a 37 years old, employee of K-Rep who had left minor children behind.

The deceased survived by primary school going children. Together with the other factor stated above, I am of the opinion that a multiplier of 17 years is reasonable.

For loss of dependency, a sum of Kshs.20,400,000/= is awarded. I shall discount the sum of Kshs.220,000/= awarded under the Reform Act as both benefits would go to the same beneficiaries.

That leaves sum of **Kshs.20,180,000/=** under this head.

### **11. Special damages**

A claim for Kshs.345,900/= was pleaded. I have considered the tabulation including the necessary expenditure towards the burial. These are postmortem reports and pathologist fees, transport of body for burial and coffin ,newspaper announcement and radio expenses.

I shall not allow the transport of mourners at Kshs.50,000/=. I shall allow Kshs.5,000/= for transport of the

hearse and coffin. As for Advertisements programmes and radio, with respect, though necessary is not an essential item for disbursement. Having said so, and all the necessary payment received produced and taking into account that a mourning family is not expected to keep all expenditure receipts in anticipation of law a suit, I shall allow Kshs.300,000/= as reasonable expenses.

12. Consequently, judgment is entered for the plaintiffs against the first third and fourth defendants jointly and severally herebelow:

1. Special damages **Kshs.300,000**
2. Damages for pain and suffering **Kshs. 20,000**
3. Damages for loss of expectation of life **Kshs.200,000**
4. Loss of Dependency **Kshs.20,400,000**

The sum of Kshs.220,000/= shall be discounted from the award under the Fatal Accidents Act. That leaves Net award of **Kshs.20,178,000** loss of dependency.

Costs of the suit shall be borne by the Defendants jointly and severally.

**Dated, signed and delivered in court this 17<sup>th</sup> Day of November 2016.**

**JANET MULWA**

**JUDGE**