



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 361 OF 2011**

**MARY WANJIRU WATHEKA.....1<sup>ST</sup> PLAINTIFF**

**ISAIAH NGOTHO WATHEKA.....2<sup>ND</sup> PLAINTIFF**

*(Both suing in their capacity as personal*

*representatives of the estate of Keziah Wanjiku Watheka (deceased)*

**VERSUS**

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

**JOHANA GICHOMO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Multi Track plaint dated the 5<sup>th</sup> December 2011 and filed on the 6<sup>th</sup> December, 2011 the Plaintiffs Mary Wanjiru Watheka and Isaiah Ngotho Watheka suing in the capacity as the personal representatives of the estate of Keziah Wanjiku Watheka, deceased, sought for damages under the Law Reform Act, Fatal Accidents Act and special damages arising from a fatal accident that occurred on the 25<sup>th</sup> December, 2008 along the Gilgil-Nakuru Road involving motor vehicle registration No. KAT 133K and motor vehicle registration No. KBD 589D where the deceased was travelling as a fare paying passenger.

2. The issue of liability between the 1<sup>st</sup> defendant and the plaintiffs was settled on the 24<sup>th</sup> July 2013 when the 1<sup>st</sup> Defendant and the Plaintiffs through their Advocates recorded a consent judgment that was adopted by the court on the 19<sup>th</sup> November 2014 to the extent that the 1<sup>st</sup> Defendant being the beneficial owner of motor vehicle registration No. KBD 589D was liable in negligence and damages at 50%. Damages awardable under the Law Reform Act were agreed at shs. 50,000/= and special damages at shs. 15,750/= both being 50% of the claim against the 1<sup>st</sup> defendant.

3. The only issue this court is called upon to determine is the quantum of damages awardable under the Fatal Accidents Act being loss of dependency for the estate of the deceased.

4. The statement of claim as filed shows that at the time of the fatal accident, the deceased Keziah Wanjiku Watheka 35 years old, was a single mother of one child namely Stancy Wambui Wanjiku then 1<sup>1/2</sup> years old.

Prior to her death, she was gainfully employed as a Secretary by TMS Consulting Group Limited where her NET monthly salary was shs.38,857/60 from which she used to support and maintain her daughter and her own upkeep.

5. Together with the statement of claim, the following documents were filed (*among others*) in support of the claim: certificate of death dated 21<sup>st</sup> January 2009, Grant of Letters of Administration Intestate dated 28<sup>th</sup> January 2011, pay-slip for November 2008, and a statement by the plaintiff Mary Wanjiru Watheka filed on the 9<sup>th</sup> December, 2011.

6. On the 19<sup>th</sup> November 2014, the plaintiff Mary Wanjiru Watheka testified before me that she is a sister of the deceased and personal representative of her estate and that since the death of her sister, the deceased, she took up the duties of caring for the minor child left behind, now in class two. She produced the death certificate and confirmed that she died at the age of 35 years. The minor's birth certificate was also produced as an exhibit. Two payslips for the months of October and November 2008 from the deceased's employer TMS Consulting Group Ltd were produced as exhibits. The payslips show the Gross Pay as shs. 50,000/= and statutory deductions as shs. 11,142.40/= leaving shs. 38,837.60/= as the NET Salary.

#### 7. **The Plaintiff's case**

In his submissions, the plaintiff's state that a sum of shs. 2,500/= shown in the pay-slips as pension and deducted monthly was not a statutory deduction but was deducted from the deceased's net pay to go towards her pension/savings, hence the net pay should be shs. 41,357/60. On this the defendant urged this court to consider shs. 38,837/60 as the net salary as stated in the payslips.

8. It is submitted that the minor child being the only dependent of the deceased has suffered loss. It is proposed to adopt a multiplier of 24 years and a multiplicand of  $\frac{2}{3}$  against a net salary of shs. 41,357.60/= giving a total sum of shs. 7,940,659.20/= and 50% thereof of shs. 3,970,329.60/=.

The plaintiff in support of the above proposition considered two authorities, **Lois Wairimu Mwangi & Another -vs- Joseph Wambue Kamau (2006) KLR** where the deceased was 35 years old earning a salary of shs. 22,000/=. The court adopted a multiplier of 20 years and a multiplicand of  $\frac{2}{3}$ .

In the case of **Jane Wangovi -vs- Felix Ole Nkaru (2004) KLR**, the court adopted a multiplier of 20 years, and a multiplicand of  $\frac{2}{3}$  where the deceased was 34 years old at time of death.

#### 9. **The Defendants case**

The defendant has urged the court to consider a net salary of shs. 38,837/60/= against a multiplier of 7 years.

In support of the above proposal, the defendant argued that the plaintiff is bound by her pleadings were in the plaint, it was shown the deceased's NET income as shs. 38,857/60 per month, and as captured in the payslips. It is further argued that since no evidence was produced by the plaintiff on the terms of employment, then, the court ought to consider the same as contract terms, and in that instance, there was no guarantee that the deceased would have worked up to retirement age of 60 years. He relied on the case of **Dainty vs. Haji & Another (2004) 2 KLR** where the court applied a multiplier of 10 years for a 27 year old deceased and held that there is no guarantee of life for any period of these days as life expectations is reduced by many factors within modern living.

10. On the multiplicand or ratio of dependency, it was the defence submission that  $\frac{1}{3}$  would be reasonable. This submission was based on the case **Beatrice Wangui Theuri -vs- Ezekiel Bangetuny & Another HCCC No. 1638 of 1985** where the court held that the question of extent of dependency is a question of fact to be determined in each case, and that in his opinion, at the time of her demise, the

deceased's salary expended on the beneficiary child was not more than  $\frac{1}{3}$ , thus concluded that a multiplicand of  $\frac{1}{3}$  was apt.

In his submission, loss of dependency would be -

$38,857.60 \times 7 \times 12 \times \frac{1}{3} = 1,088,012/80$  then 50% thereof would be shs. 544,066/40.

11. The defence further submitted that notwithstanding the consent judgment recorded in court on an award of shs. 50,000/= under the Law Reform Act, such sum should be deducted from the award on loss of dependency under the Fatal Accidents Act as allowing the same would amount to double compensation to the deceased's estate.

## 12. Analysis and determination

The following issues were not disputed by either party. That the deceased, a young woman was 35 years old at the time of death, that she was employed as a Secretary, was earning a gross salary of shs. 50,000/=, that she left behind a dependant a minor child then  $1\frac{1}{2}$  years old. Judgment on liability and amounts awardable under the Law Reform Act and Special damages were also agreed upon.

The deceased's salary as evidenced by the payslips was shs. 50,000/= gross per month, and a NET salary of shs. 38,857/60 which sum is pleaded in the plaint. The item identified as a deduction of shs. 2,500/= towards pension and as submitted by the plaintiff is in my view a savings that would have added up to the deceased's pension sum if she lived up to her retirement age. I hold the view that it is not a statutory deduction. However, as the income pleaded was shs. 38,857/60, I shall adopt the same for purposes of computing loss of dependency.

13. Plaintiff's counsel proposed a multiplier of 24 years based on the argument that the deceased's occupation exposed her to very minimum risk, and a high life expectancy, and that would go with a higher salary increment over the years.

On the other hand, Defence Counsel proposed 7 years as reasonable multiplier, with the only reason that life expectancy is not guaranteed within modern living. I have considered all the authorities quoted by both counsel. I have considered that the occupation of the deceased posed no big risks and she would have worked for a long period time, probably 25 years save for the imponderables and vicissitudes of life. As to the defence argument of the permanency of the employment, that was neither here nor there as the deceased, even if laid off, would have probably got employment as a secretary elsewhere. Having carefully considered all parallel arguments, I would adopt a multiplier of 20 years. See the case of **Loise Wairimu & another, Mwangi -vs- Joseph Wambue Kamau (supra)**.

14. **On multiplicand**,  $\frac{2}{3}$  was proposed by the plaintiff while  $\frac{1}{3}$  was put forth by the defendant. The deceased left behind a small child then  $1\frac{1}{2}$  years. She was a single mother and the child the only dependent. It is not a rule of thumb and nail that  $\frac{2}{3}$  of one's salary ought to be spend on the dependents, nor is it always true that a person spends  $\frac{1}{3}$  on himself from his salary. All depends on one's priorities and character. Instances abound where a person would spend  $\frac{2}{3}$  of his income on himself and only  $\frac{1}{3}$  on his family and dependants. Each case must therefore be decided on its peculiar circumstances.

15. The plaintiff in this case testified that the deceased was single and left a child of very tender years, then  $1\frac{1}{2}$  years. This child shall require upbringing and her educational needs taken care of. I would adopt a multiplicand of  $\frac{2}{3}$ .

16. The claim for loss of dependency shall therefore be computed as follows:

$38,857.60 \times 20 \times 12 \times \frac{2}{3} = 6,217,216/=$

50% thereof = 3,108,608/=

17. I have stated earlier that the sums agreed upon as payable under the Law Reform Act of Kshs. 50,000/= ought to be discounted from the above sum as allowing it to stand for payment would amount to double compensation to the estate – **See Kemfro Africa Ltd -vs- A. M. Lubia (1982-88)1.**

18. That brings the total payable to the estate, in summary as hereunder – on 50% liability basis against the 1<sup>st</sup> Defendant:

(1) Under Law Reform Act .....	50,000/=
(2) Under Fatal Accidents Act.....	3,108,608/=
(3) Special damages .....	<u>5,750/=</u>
<b>Total</b>	<u>3,174,358/=</u>
Less Kshs. 50,000/= under Law Reform Act ....	<u>3,124,358/=</u>

(4) The 1<sup>st</sup> Defendant shall pay 50% of the plaintiffs costs as shall be agreed or taxed.

**Dated, signed and delivered at Nakuru this 28<sup>th</sup> day of May 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Ms. Gachenya for Gatonye - for the plaintiff

Mr. Gai for Kisila - for 1<sup>st</sup> Defendant

Court clerk - Lina