



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 237 OF 2013**

**LUCY WAMBUI KIHORO** (suing as personal representative of deceased, Douglas Kinyua Wambui).....**PLAINTIFF**

**VERSUS**

**ELIZABETH NJERI OBUONG**.....**DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit as the personal representative of the estate of Douglas Kinyua Wambui (deceased) seeking recovery of damages. It was alleged that the deceased was on 24<sup>th</sup> June, 2012 lawfully driving motor vehicle registration number T984 BEN Toyota Premio (“**T984 BEN**”) along Isinya Kitengela road when motor vehicle registration number KBR 493M owned by the Defendant was carelessly driven that it lost control veered off its lane and rammed into motor vehicle T 984 BEN as a result of which the deceased was fatally injured.
2. The Defendant filed a defence and denied the claim. When this matter came up on 23<sup>rd</sup> January, 2015, parties recorded a consent on liability in favour of the Plaintiff against the Defendant at 75%-25%. The matter then proceeded for assessment of damages on 17<sup>th</sup> March, 2015.
3. The Plaintiff testified that the deceased was her son aged 30 years and was a finance manager at Palace Hotel, Arusha. That the deceased used to earn USD 3000 plus other allowances as per the employment agreement and his net salary was USD 4,230. She stated that with the money, the deceased provided her with basic needs like paying rent, medical bills and school fees for her son who was at the time of the accident aged 12 years and in class 7. She stated that her life changed after the deceased's death since she had to move from a house rented at KShs 25,000/= to a smaller house. He stated that the deceased could give her between KShs. 30,000/= to-KShs. 80,000/= per month. It was her testimony that the funeral arrangements costed her KShs. 200,000/=. On cross-examination the Plaintiff stated that she runs a business of weaving pullovers which business she started in the year 2010. That the said business fetches her about Kshs. 25,000/= per month. On cross-examination the Plaintiff stated that the salary of USD 4,230 was inclusive of a bonus but the net salary was USD 2,730.
4. The parties filed written submissions which I have carefully considered. The issue of liability has been dispensed with and the only issue this court is left with to determine is quantum. Great caution should be exercised in awarding damages under the Law Reforms Act and the Fatal Accidents Act to ensure that the awards are not duplicated. See **Kemfro Africa Ltd <sup>1</sup>/<sub>a</sub> Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727** where the court said:-

***“...the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under***

*the former Act...This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that-‘the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act’...anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya.”*

5. Section 2(5) of the Law Reforms Act, Cap 26, Laws of Kenya reiterate the above quoted provision. It stipulates:-

*“(5) The right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act...”*

6. On pain and suffering, the Plaintiff suggested a sum of Kshs.50,000/= while the Defendant submitted for Kshs.10,000/=. Damages under this head are awarded on the basis of the time the deceased suffered pain before death. From the death certificate produced, it is evident that the deceased died on the date of the accident. Death seems to have been instant. I therefore find that an award of Kshs. 20,000/= under this head to be appropriate.
7. On loss of expectation of life, the Plaintiff suggested KShs. 300,000/= while the Defendant proposed KShs. 70,000/=. The amount of KShs. 300,000/= is in my view quite high. I appreciate that the deceased was young and healthy and would have probably lived a long and happy life. Under this head, I award a conventional figure of Kshs. 100,000/=.
8. Under the head of lost years, the Plaintiff cited **David Kimathi Kaburu v. Gerald Mwobobia Murungi (2014) eKLR** where the court used a multiplier of 30 years where the deceased was 28 years of age. She suggested a dependency ratio of  $\frac{1}{2}$  and salary of USD 2,855 per month. The Defendant on the other hand suggested a multiplier of 15 years on the basis of **Mombasa High Court Civil Case No. 41 of 1998 Patrick Jacob Ouma v. Tawfiq Bus Services (Company) Limited** where the court applied a multiplier of 20 years for the deceased who was aged 26 years. It was submitted that there was no evidence with regard to how much support the deceased expended on the Plaintiff. The Defendant suggested that a sum of Kshs. 15,000/= be applied.
9. In determining the award under this head I am guided by the principles laid out by the Court in the case of **Hassan v. Nathan Mwangi Kamau Transporters & 4 others [2008] 1 KLR (G&F ) 90:-**

*“My summary of their relevant principles is this:*

- i. *A parent cannot insure the life of his child,*
- ii. *The death of the victim of the negligence does not increase or reduce the damages for the lost years,*
- iii. *The sum to be awarded is never a conventional one but compensation for a pecuniary loss,*
- iv. *It must be assessed justly and with moderation,*
- v. *The complaints of insurance companies at the size of such awards should be ignored,*
- vi. *Disregard remote inscrutable speculative claims,*
- vii. *Deduct the victim’s living expenses during ‘the lost years’ for they would not form part of the estate,*
- viii. *A young child’s present or future earning in most cases would be nil,*
- ix. *An adolescent’s would usually be real, assessable and small,*
- x. *The amount will vary greatly from case to case for it depends on the facts of each one including the victim’s station in life,*
- xi. *Calculate the annual gross loss,*
- xii. *Apply the multiplier (the estimated number of ‘lost working years’) accepted as reasonable in each case,*
- xiii. *Deduct the victim’s probable living expenses of a reasonably satisfying enjoyable life for him or her; and*

xiv. ***Living expenses include the reasonable cost of housing, heating, food, clothing, insurance, travelling, holidays, entertainment, social activity and so forth.***”

10. The Plaintiff testified that the deceased was 30 years old at the time of his death and this is confirmed by the certificate of death produced at page 16 of PExh1. The payslips produced revealed that the deceased was a finance manager with Palace Hotel and according to the pay slip submitted as evidence he was earning a monthly salary of USD 2,730 and this is the sum I adopt as the multiplicand. On the multiplier, I find that the deceased would have worked for up to the retirement age of 60 years. I am of the view that the deceased would have engaged in gainful employment for 20 years. However taking into account the uncertainties of life I will apply a multiplier of 16 years. The deceased was not married and was survived by the Plaintiff who did not furnish evidence on how much the deceased expended on her. But it is most likely that as a son he must have been taking care of her needs. The Plaintiff testified that before his demised the deceased was paying the school fees for his sibling. In **Mary Kerubo Mabuka Vs Newton Mucheke Mburu & 3 others (2006) eKLR** the court used a multiplier of 20 years on a 26 year old unmarried lady and a dependency ratio of ½. Similarly in the case of **Alice O. Alukwe Vs Akamba Public Road Services Ltd (2013) eKLR**, the court used a dependency ratio of 1/2/ on an unmarried lady aged 24 years.
11. The Defendant submitted that a multiplicand of Kshs.15,000/- be used as there was no evidence that the deceased was giving the Plaintiff between Kshs.30,000/- and Kshs.80,000/- which she testified about. The Defendants submitted for Kshs.1,700,000/= before contribution whilst the Plaintiff submitted for Kshs.48,936,712/= before contribution.
12. Apart from the said amount of between Kshs.30,000/- and Kshs. 80,000/- which the Plaintiff stated the deceased used to give her, he was also paying for rent (Kshs.25,000/=), medical bills and fed the Plaintiff and his sibling. It is my considered view that the deceased must have spent half of his salary on living expenses. I will use a multiplicand of US\$2730 and a multiplier of 16 years and a dependency ratio of half (½). I will award US\$262,080 under this head, made up as follows US\$2730 x 12 months x 16 years x ½. I herein apply the current mean exchange rate being 1USD = Kshs.93 which amounts to Kshs.24,373,440/-.
13. The Plaintiff pleaded special damages of Kshs. 51,530/= however she only produced the receipt for the death certificate and limited grant letters of administration which amount to Kshs. 930/=. There were no receipts produced to prove the claim for funeral expenses. However, the court may make a reasonable award in the absence of such proof. The Court of Appeal in the case of **Jacob Ayiga Maruja & another v. Simeon Obayo [2005] eKLR** awarded the Plaintiff Kshs. 60,000/= for funeral expenses and holding that:-

***“We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on.***

***We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.”***

14. In this regard, I award the pleaded and proved sum of Kshs. 930/= and Kshs. 50,000/= as funeral expenses. I enter judgment on liability for the Plaintiff against the Defendant at 75:25 ratio and award her Kshs. 18,333,277/50 made up as follows:-

a. General damages for pain and suffering	Kshs. 20,000/=
b. General damages for lost years	Kshs.24,373,440/=
c. General damages for loss of expectation of life	Kshs. 100,000/=
d. Funeral expenses	Kshs.50,000/=
e. Special damages	<u>Kshs. 930/=</u>
<b>Subtotal</b>	<b>Kshs.24,544,370/=</b>

*Less award under Law Reform Act*

*Kshs. 100,000/=*

**Total**

**Kshs. 24,444,370/=**

**Less 25% contribution**

**Kshs.6,111,092.50**

**Total**

**Kshs.18,333,277.50**

I will award costs and interest at court rate to the Plaintiff. Interest on general damages to apply from the date of this judgment whilst on specials to apply from the date of filing suit.

Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of **May, 2015.**

**A. MABEYA**

**JUDGE**