



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 398 OF 2012

1. WAYUA JAMES1ST PLAINTIFF
2. JAMES KAKULI MUNYOKI.....2ND PLAINTIFF

VERSUS

1. DANIEL KIPKIRONG TARUS.....1ST DEFENDANT
2. DAVID KIBET RONO.....2ND DEFENDANT

JUDGMENT

1. On the 24th April 2011, the deceased, **James Kakuli Munyoki** was travelling as a fare paying passenger in motor vehicle Registration No.**KAW 579V** along the Eldoret-Nakuru Road. Around Salgaa around the said road, a vehicle registration No. **KBG 901L ZD 0482**, the property of the 1st Defendant and being driven by the 2nd defendant as the authorised driver and agent of the 1st Defendant hit the said vehicle causing him to sustain fatal injuries from which he died.

His widow, **Wayua James** and son **Philip Munyoki Kakuli** obtained Letters of Administration and brought this suit as the administrators of the Estate on their own behalf and that of the Estate under the **Law Reform Act Cap 26 Laws of Kenya** and under the **Fatal Accidents Act Cap 32 Laws of Kenya**.

2. The Plaintiffs in their statement of claim attributed the accident to negligence of the driver of the lorry and trailer.

Registration No.**KBG 901L/ZD 0482** and prayed for compensation under both statutes, in general damages, special damages and costs.

3. Upon service of the plaint and summons upon them, the defendants failed to enter appearance not file their defences interlocutory judgment in default was entered against them jointly and severally on the 9th January 2013.

By their application dated 9th September 2013, the defendants sought to set aside the interlocutory judgment and leave to field a defence out of time but on the 7th March 2014 the court declined to grant the orders sought paving way for formal proof.

4. By a court order issued on the 4th February 2014, this matter was consolidated with other 4 – **HCCC No 400/2012, HCCC No. 159/2012 and HCCC No. 399/2012** whose causes of action arose from the same accident, to the extent that judgment on liability on this case shall apply to the other three matters and *quantum* of damages shall be assessed separately for each individual case.

5. On the 10th March 2015, the plaintiff in **HCCC No. 159 of 2012**, one **Benjamin Muela KimoNo** testified before me.

It was his evidence that on the fateful day the 24th April 2011, he boarded a vehicle from Busia headed to Nairobi where he had been sent by his employer **NESTO Company Limited together with other five employees including the driver of the vehicle registration No. KAN 579w. He named the driver as Stanley Kiptum and the others as Antony Maina, James Kakuli Munyowiki and Josephat Chege Ndichu.** He stated that all the others died in the accident and he was the only survivor.

It was his testimony that at around Salgaa along the Eldoret-Nakuru road, he heard a loud bang at the back of their vehicle and he soon lost consciousness only to find himself at the Nakuru Provincial Hospital. He later learnt that all colleagues and occupants of the vehicle **Registration No. KAN 579W** including the driver died, and that the driver of the vehicle that knocked them from behind one **David Kibet Rono** was charged at the Molo Traffic Court with the offence of causing death by dangerous driving, and the case was on going at the time of his testimony.

6. He testified that he sustained serious injuries, was admitted at the hospital for 4 days and continued treatment as an out patient. He sustained injuries to his both leg, the right which was broken, was operated and metals fitted therein, and that he had not fully healed. He stated that he also sustained an injury to the head where he was stitched. Later, Doctor Lutome from the Nakuru Provincial Hospital Orthopedic Centre prepared a report on his injuries and the same was produced by the plaintiff by consent of both parties.

7. The plaintiff testified that the vehicle he was travelling in was being driven at a moderate speed of 80 Kilometres per hour and that he blamed the lorry trailer for negligence and knocking their vehicle from behind.

The plaintiff, by consent of both counsel produced the following documents as exhibits:

- **Police abstract dated 31st May 2011**
- **Payslips**
- **Bundle of medical expenses receipts in the sum of Kshs.202,300/=**
- **Medical report dated 15th December 2011 and prepared by Dr. Lutomia.**

8. This court has considered the evidence as tendered by the plaintiff herein, Benjamin Muela Kimomo, the only survivor in the accident. He narrated how the vehicle he and his colleagues were travelling in were knocked from behind by the defendants lorry trailer. The defence only cross examined him on his injuries as there was already interlocutory judgment on record on liability.

His evidence remained unchallenged. He correctly blamed the defendant trailer for causing the accident and thus the injuries and fatalities.

9. The plaintiff had no control of the vehicle he was travelling in. The driver of the defendants vehicles did not testify in court on how the accident occurred. Indeed he was awaiting trial at the Molo Traffic court on a charge of causing death by dangerous driving. The plaintiffs evidence was unchallenged, the court holds the driver of motor vehicle **Registration No. KBG 901L/ZD 0482** wholly to blame for the accident and the 1st Defendant, being the Registered owner of the

said vehicle vicariously liable for the negligence of his driver, the 2nd defendant.

10. The court therefore enters judgment on liability at 100% jointly and severally against the defendants.

As agreed and recorded in court, this judgment on liability shall apply to **Nakuru HCCC No. 399 of 2012 and Nakuru HCCC No. 400 of 2012, and HCCC No.159 2012.**

Quantum of damages (in Hccc No 398 of 2012).

11. **Wayua James**, widow of the deceased **James Kaluku Munywoki** testified that the couple had five children, two boys aged 21 and 23 years and three daughters aged 19, 17 and 10 years. She produced the children birth certificates together with her marriage certificate to the deceased. She testified that her late husband was employed by a company called **NESTOL** Kenya Ltd and earned a gross salary of Kshs.40,000/= and a NET salary of Kshs.33,608.60 after all statutory deductions. A payslip for the March 2011, one month his death was shown to the court. She stated that she spent over Kshs.270,000/= towards funeral expenses but could not avail receipts amounting to Kshs.71,300/= she testified that the death of her husband has deprived her of the held he used to give and his contribution towards the childrens education and welfare. She preyed for compensation.

12. In his submissions, Learned Counsel Mr. Kiania Njau qualified his claim under the Law Reform Act at Kshs.150,000/= for loss of life, under the Fatal accident Act at Kshs.5,998,769, taking a monthly salary at Kshs.44,108,60 for 17 years as the multiplier and a multiplicand of $\frac{2}{3}$. He relied on two authorities:

1. **HCCC No. 399 of 2012 Nakuru**

Ndichu Kariri -vs- Kipkirong Tarus & Another where the court applied a multiplier of 32 years and a multiplicand of $\frac{2}{3}$ to a deceased aged 33 years.

2. **HCCC No. 400 of 2012 Nakuru Milka Waufiki Muthua and Another -vs- Daniel Kipkirong Tarus and Another.** In this case the deceased was aged 33 years and was employed. A multiplier of 32 years and a multiplicand of $\frac{2}{3}$ was also applied.

He therefore urged the court to adopt a multiplier of 17 years against retirement age of 65 years, salary of Kshs.44,108/60(no indication where he got the salary applied) and a multiplicand of $\frac{2}{3}$ to arrive at the figure of Ksh.5,998,769.60/=.

13. Looking at the deceased's documents, it is clear that the deceased was 48 years old, and was earning a net salary of Kshs.33,608.60 per month. He could have worked for 12 years to retire at the current official retirement age of 60 years all things being equal. He left behind a young wife ad children.

14. Damages under the Fatal Accidents Act are awarded for he benefit of the deceased's dependents the wife husband, child, parent ought to be brought in the name of the administrator or executor of the decease's estate See **HCA NO. 118 of 2012 David Kajogi M'mugaa -vs- Francis Muthoni.**

I am satisfied that the plaintiffs claim is well suited and founded. I am not bound to agree with the plaintiff's counsel on his computation of damages under Fatal Accidents Act as stated above.

Firstly, it is clearing the deceased's payslip, one month prior to his demise, that the **NET** salary was Kshs.33,608.60/= and not Kshs.44,108/60. He would have worked for official retirement age of 60 years or more thus there was 12 years left to retirement. Due to the *imporandables* of life – one may die of natural causes like illness of loss of job by retrenchment or other , I am satisfied

that a multiplier of 9 years would be reasonable in circumstances.

I shall therefore adopt a multiplier of 9 years upon

a salary of Kshs.33,608/= and a

multiplicand of $\frac{2}{3}$.

Thus **Kshs.33,608 X 12 X 9 X $\frac{2}{3}$ = Kshs.2,419,776/=** .

See the case **Nakuru HCCC NO 86 of 2012 Richard Macharia Nderitu -vs- Philemon Rotich Langas & 2 Other**. The court adopted a multiplier of 10 years against the deceased age at 47 years, and damages for loss of expectation of life at Kshs.100,000/=.

15. On the damages under the **Law Reform Act Chapter**, it was proposed Kshs.150,000/=. Damages under this head are awarded for loss of expectation of life, pain and suffering by the deceased prior to his death followers immediately. There is no suggestion that the deceased would not have lived a happy life. As stated, the damages awardable under this head shall go to the same beneficiaries under the **Fatal Accidents Act**. As such, the beneficiaries would have double benefit. This cannot be allowed. I shall therefore not go into details as to state that the conventional sum of Kshs.150,000/= would have been allowed if the beneficiaries were not the same. See **Richard Machani's** case above (supra). See **Kemfro Africa Ltd -vs- A.M. Lubia (1982-85) I KAR 727**, among other authorities.

16. The plaintiff's pleaded a sum of Kshs.71,300/= as special damages, being principally funeral expenses. A bundle of receipts was produced to represent the said sum (See PExt 7). All the receipts have no revenue stamp to comply with the stamp duty **Act, Cap 480 laws of Kenya**.

However, that in my considered opinion, is not to say that the deceased family did not spend money, in say mortuary expenses, transport of the body to its burial site at Kitui from Nakuru county and so on.

17. The defence did not object to the production and admission for the said bundle of receipts. Under the **Stamp Duty Act Cap 480 Laws of Kenya**, it is not specifically provided that payment receipts in respect of services rendered ought be stamped. **Section 88 of the Act**, in my opinion, it is the duty of the receiver of payment who is under a duty to affix revenue stamps on the payment receipt, not the payee who should not be penalised for omissions of the receiver. I am guided by the cases **Benedetta Wanjiku Kimani -vs- Changow Cheboi & another HCCC No 373 of 2008 and Irene Ngombo Mshingo -vs- Miriam Kadogo (2000) KLR** where the learned judges held that a document does not cease to be admissible for lack of affixation of a revenue stamp. In the latter case, the court proceeded to admit payment receipts from Kenyatta National Hospital without revenue stamps affixed thereon.

I shall allow the plaintiff's special damages pleaded at Kshs.71,300/= as reasonably fair expenditure towards funeral expenses.

18. Consequently and based on the above findings, the plaintiffs case is allowed as prayed in the following terms:

(a) The defendants are held wholly to blame for the accident jointly and severally.

(b) The plaintiffs are awarded a sum of **Kshs.2,419,776/=** damages under the **Fatal Accidents Act** and a sum of **Kshs.71,300/=** is allowed as special damages.

(c) The plaintiffs shall have the costs of the suit. Interest on special damages shall accrue from the date of filing of the suit at court rates, while interest on general damages shall

accrue from the date of this judgment.

Dated, signed and delivered in open court this 12th day of November 2015.

JANET MULWA

JUDGE