



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 123 OF 2008

1. TESSIE MARGARET KARIUKI

2. ANTHONY GITAU KARIUKI

(Suing as Administrators of the estate of

DANIEL KARIUKI KAMANDA, Deceased).....PLAINTIFFS

VERSUS

1. SHAKHALAGA KWA JIRONGO

2. SAUL NYONGESA LUMBASI.....DEFENDANTS

J U D G M E N T

1. The Plaintiffs' claim is in negligence on account of the death of one **Daniel Kariuki Gitau** (the **Deceased**) in a road accident on 05/01/2002. The accident occurred along **Eldoret-Webuye** road at **Kipkaren** when motor vehicle registration number **KAN 833 S** collided with the Deceased's motor vehicle registration number **KXX 180**. The Deceased, who was driving his motor vehicle, sustained severe injuries to which he succumbed.

2. The 2nd Defendant was the driver while the 1st Defendant was the registered owner of motor vehicle registration number **KAN 833 S**. It is the Plaintiffs' case that the accident occurred solely due to the negligence of the 2nd Defendant. Particulars of negligence are pleaded.

3. Damages are claimed under the **Fatal Accidents Act, Cap 32** and also under the **Law Reform Act, Cap 26**. The Plaintiffs are, respectively, the Deceased's widow and son. They have claimed on their own behalf and on behalf of the Deceased and the 1st Plaintiff's other two children, **E W** and **J M** as dependants of the Deceased. At the time of filing suit **J M** was aged 15 years. He attained majority a long while back.

4. The Defendants in their **statement of defence dated 27th October 2010** denied that an accident occurred as pleaded, or that it was caused by any negligence of the 2nd Defendant, or that there was any loss or damage suffered by the Plaintiffs as claimed, and put them to strict proof. They also pleaded that an accident happened as pleaded, it was caused by the negligence of the Deceased, particulars of which were pleaded.

5. The suit was originally filed in the Chief Magistrate's Court, Nairobi. Before it was transferred to this Court on 20th January 2005 judgment on liability was entered by consent in the following terms -

"Judgment on liability is as follows:

- i. **Defendants to bear 80% and**
- ii. **Plaintiff to take 20%...."**

The case therefore proceeded to hearing only for purposes of assessing damages due to the Plaintiffs.

6. For the Plaintiffs the 1st Plaintiff testified and called two other witnesses. The 1st Plaintiff (PW3) adopted her **witness statement dated 24th March 2014** as her evidence-in-chief. She also produced in evidence as **Exhibit P1** her **bundle of documents** filed in court on 25th March 2014.

7. The 1st Plaintiff's testimony was that the Deceased was a businessman in Eldoret town and was aged 45 years at the time of his death. He managed a business known as Airfield, which made juices and bottled water. She stated that the Deceased made a net profit of KShs 80,000/00 a month. He ran a successful business, employed a total of fourteen employees and made net profit of KShs. 980,000/00 per year. She did not know if he paid taxes on the income, and she did not find it necessary to inquire as to any unpaid taxes as the administrator of his estate.

8. The 1st Plaintiff also testified that she and her children depended solely on the Deceased for their sustenance, education, clothing and entertainment. She asserted that at the time of the Deceased's death, the 2nd Plaintiff and the second child were 21 and 19 years old respectively as opposed to the ages shown in the amended plaint. They were young adults in school and still fully dependent on the Deceased. At present though the 2nd Plaintiff and the third child assist her in her farm while the second child works in Nairobi.

9. The 1st Plaintiff further testified that she had not collected the Deceased's motor-vehicle wreckage from the Turbo Police Station where it was held as she was going through a lot of trauma, and that in any event, on the one occasion she attempted to collect it, she was denied access by the police. I will revert to the testimonies of PW1 and PW2 shortly. The Defendants did not lead or call any evidence. The parties filed written submissions. Those of the Plaintiff were filed on 29th May 2014 while the Defendants' were filed on 16th June 2014. I have considered those submissions, along with the cases cited. I will now tackle the issue of damages.

Under the Law Reform Act

10. The damages to be awarded under this statute are for pain and suffering and loss of expectation of life. There are also funeral expenses, which are usually, and wrongly, claimed as special damages.

11. Pain and Suffering: The Deceased appears to have died "instantly", which usually means at the scene of the accident. I will award **KShs 20,000/00** under this head.

12. Loss of Expectation of Life: The Deceased was aged 45 years and of good health when he died. He was at the prime of his life. Everything being equal, he had many more productive years ahead of him. But nothing is ever equal in life. **KShs 120,000/00** for loss of expectation of life is appropriate under this head.

13. Funeral Expenses: Funeral expenses ought ideally to be a claim under the Law Reform Act without the necessity of strict proof. Every funeral must involve some expense to the estate of the deceased. The quantum thereof will depend on the deceased's religion, his status and his means. In 2002, and given the status of the Deceased, **KShs 15,000/00** would have been a reasonable sum to spend on his funeral. I will award that sum under the Law Reform Act, not as special damages.

Under the Fatal Accidents Act

14. Damages under this statute must be for the benefit only of the wife, husband, parent and child of the deceased person. See **section 4(1)** of the Act. The Deceased was survived by the 1st Plaintiff and three children. They are all named at paragraph 9 of the amended plaint. In order to assess damages under the Fatal Accidents Act, the Deceased's **income**, the extent of his dependants' **dependency** and the **multiplier** to be used must be determined.

15. As for income, the Deceased was a businessman running a juice and bottled water business in Eldoret Town. From the 1st Plaintiff's testimony, the business appears to have been the Deceased's full-time occupation. PW1 was called by the Plaintiff to testify as to the Deceased's income from his bottled water and juice business. The witness had prepared what he called financial statements of the business for the year 2001 at the request of the 1st Plaintiff. He relied on explanations given by some of the Deceased's employees. The business was a sole proprietorship called ***Airfield Enterprises (Kerio Springs)***.

16. PW1 testified that after preparation of the statements of account, he signed a certificate at page 1 of the statements of account. They appear in Exhibit P1 in the first four pages. The Trading Profit and Loss Account for the year ended 31st December 2001 discloses a profit of KShs 967,071/00.

17. In cross-examination, he said that they were not fully audited accounts; he did not know how long the business had run or how much capital had been injected in the business; that he did not use any documents in preparation of the accounts as they were only income and expenditure statements. He couldn't also tell whether the Deceased paid any taxes as he did not see any tax returns. The witness conceded that audited financial statements are required to be signed by the owner of the business or instructing client. He admitted that the 1st Plaintiff had requested him to prepare the statements for insurance purposes.

18. PW2's testimony was that the tax payable by the Deceased for the year 2001 upon the income arrived at by PW1 would have been about Kshs 232,051/00 subject to relief of Kshs 12,000/00.

19. There is not before the court any credible evidence of the Deceased's income. The testimony of PW1 and his financial statements is nothing more than speculation based on hearsay provided by some of the Deceased's employees. The court was not told the line of work of these employees or whether they were in a position to provide any useful information to PW1. It is to be noted also that PW1 did not rely on any documents emanating from the Deceased's business or at all.

20. I will however accept the proposition that the Deceased had an income from his juice and bottled water business from which he was able to sustain himself, his wife and three children. He was educating the three children. He appears also to have been deriving an income from his farm. Doing the best that I can with the inadequate materials placed before the court, and bearing in mind that the Deceased's income should have been subject to taxation, I will assess the Deceased's monthly income at KShs 40,000/00.

21. As for dependency, the available evidence is that the 1st Plaintiff and their three children depended wholly upon the Deceased. He could not have used less than two-thirds ($\frac{2}{3}$) of income on his dependants. A **dependency ratio of $\frac{2}{3}$** of his income is thus sufficient.

22. The Deceased was aged 45 years at the time of his death. A private business, cannot be limited by any formal retirement age. If he had lived and decided that selling bottled water and juice would be his life's occupation, and everything being equal, he should have been able to carry on the business probably into his late 60's/early 70's. But due allowance must be given for the vagaries and uncertainties of life. A **multiplier of 15 years** will be appropriate.

23. Damages under the Fatal Accidents Act will work out thus –

KShs 40,000/00 x 12 x 15 x 2÷3 = 4,800,000/00

Special Damages

24. Kshs 275,100/00 was claimed. These include KShs 260,000/00 for material damage to the Deceased motor vehicle for which a valuation report is provided. Special damages must not only be particularly pleaded, they must also be strictly proved. KShs 265,100/00 has been strictly proved by way of receipts, which are in Exhibit P1. I will award that sum. The other special claims set out in paragraph 10 of the plaint relate to the funeral of the Deceased.

Summary

25. In the event, I will enter judgment for the Plaintiffs against the Defendants as follows after taking into account the **20% agreed contributory negligence** –

(i) Pain and suffering	KShs 16,000/00
(ii) Loss of Expectation of Life.....	96,000/00
(iii) Under the Fatal Accidents Act.....	3,840,000/00
(iv) Funeral Expenses.....	12,000/00
(v) Special Damages	<u>212,080/00</u>
Total	<u>Kshs. 4,176,080/00</u>

26. The general damages will carry interest at court rates from the date of judgment until payment in full while the specials will carry interest from the date of filing suit until payment in full.

27. The damages awarded under the Fatal Accidents Act have to be distributed among the dependants as required by the statute. Those damages are KShs 3,840,000/00. I will apportion the same as follows –

(i) 1st Plaintiff	-	Kshs 2,040,000/00
(ii) 2nd Plaintiff	-	600,000/00
(iii) Elizabeth Wangari	-	600,000/00
(iv) James Muange	-	<u>600,000/00</u>
Total KShs		<u>3,840,000/00</u>

28. For the avoidance of doubt the 1st Plaintiff shall pay any advocate’s costs; the other dependants shall not be responsible for such or other costs of the suit. The Plaintiffs will have costs of the suit and interest thereon at court rates. Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 25TH DAY OF JULY 2014

H P G WAWERU

JUDGE