



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 86 of 2012**

**RICHARD MACHARIA NDERITU (legal**

**representative and of the estate of**

**Salome Muthoni Maina) .....**

**PLAINTIFF**

**VERSUS**

**PHILLEMOM ROTICH LANGAS.....**

**1<sup>ST</sup> DEFENDANT**

**EVANS OGETO NYAKUNDI.....**

**2<sup>ND</sup> DEFENDANT**

**SAMSON K. CHEPSAT .....**

**3<sup>RD</sup> DEFENDANT**

**AUTOSOL K. LIMITED.....**

**4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

This suit was filed by Richard Macharia Nderitu, as legal representative and administrator of the estate of Salome Muthoni Maina against Pillemon Rotich Langat, Evans Ogeto Nyakundi, Samson Chepsat and Autosol K Ltd. The plaintiff was on 17/6/2010, lawfully traveling in motor vehicle Registration No. KBK 923A Toyota Hiace as a fare paying passenger, along the Nakuru-Eldoret Road, when motor vehicle KBK 923S driven by the 2<sup>nd</sup> defendant and KAG 038L driven by the 1<sup>st</sup> defendant were so negligently driven that they were involved in an accident as a result of which Salome Muthoni was fatally injured. The 3<sup>rd</sup> and 4<sup>th</sup> defendants were the registered owners of the vehicles were sued for being vicariously liable for the negligent acts of the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. 2<sup>nd</sup> defendants denied being the drivers of the motor vehicles KAG 038L and KBK 923S; the 3<sup>rd</sup> defendant denied being the owner of motor vehicle KAG 038L or that the deceased was traveling as a fair paying passenger. On 12/9/2011, the issue of liability was settled when the parties filed a consent in the following terms:-  
**“1. That judgment be and is hereby entered on liability in favour of the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally at 80%. The plaintiff shall bear 20% contribution;**

**2. The quantum be determined by court if not agreed upon by the parties.”**  
On 25/9/2012, when the matter came up for formal proof, Mr. Kisila, counsel for the plaintiff indicated that they no longer had any claim against the 4<sup>th</sup> defendant. A further consent was recorded on the documents that were admitted in evidence. The consent reads as follows:-

**“1. By consent the death certificate dated 1/7/2010, be produced as PEx. No.1;**

**2. Letter of Chief dated 16/8/2010 be marked as PEx. No.2;**

**3. Birth Certificate for Ian Nderitu be produced as PEx. No.3;**

**4. Birth Certifier for Janet Nyambura be marked as PEx. No.4;**

**5. Letter of appointment by Teachers Service Commission dated 17/7/2010 be marked as PEx. No.5.**

**Payslip for deceased for the month of May 2010 be marked PEx. No.6. Statements of Accounts for Montanna Insurance Agency for 2006/2007/2008 be produced as PEx.7(a), (b) and (c) respectively. A bundle of receipts for special damages totaling Kshs.109,800/- be produced as PEx. No.8. Statement of the plaintiff be produced as PEx. No.9 (dated 10/12/2010)."**

Both counsel filed submissions on quantum, under the

### **1. Damages under the Law Reform Act:**

#### **(a) Pain and suffering:**

The deceased was aged 47 years at the time she met her death. This is evidenced by the death certificate that was produced by consent (PEx. No.1). The police abstract produced in evidence indicates that the accident occurred at 7.00 a.m. and the death certificate does confirm the date of death to be 7/6/2010. It means that the deceased died on the date of the accident. The plaintiff's counsel submitted an award of Kshs.50,000/- on this head and relied on the decision of **Mary Wanjiru Mukuria v KBS HCC 1080 of 2005** where the deceased died about 30 minutes after the accident. The defendant's counsel made a submission of Kshs.10,000/- but did not refer to any precedent. The decision relied upon by the plaintiff's counsel was made in the year 2000, about 10 years ago and I will find that although it is unknown for how long the deceased remained alive after the accident, an award of Kshs.50,000/- is fair.

#### **(b) Loss of Expectation of Life:**

The deceased was 47 years old at the time of death. There is no evidence that she suffered from any ailment that would have shortened her life. The plaintiff's counsel suggested an award of Kshs.150,000/- and for this proposal relied in the case of **Jacob Mutahi Githaiga v Said K. Msellen HCC 98/1999** where an award of Kshs.140,000/- was made for loss of expectation to life. The defence counsel suggested an award of Kshs.100,000/- and added that the same has to be deducted from the total of damages payable because the benefits will be inherited by the same dependents and they should not be heard to benefit twice. In my view, a sum of Kshs.100,000/- is reasonable compensation.

### **2. Loss of Dependency (under Fatal Accidents Act):**

As earlier noted, the deceased was 47 years old at the time she met her death. The plaintiff's counsel urged that she might have lived till she attained the age of 65 years and that the court should adopt a multiplier of 18 years. Counsel made reliance on the decision in **Monicah Nduti Mwangangi & Another v Christopher Mwaniki Kiragu HCC 2844 of 1998** where a similar multiplier was used for a person who was aged 48 years. On the other hand, the defence counsel urged that she had 13 years of service left and the court should adopt a multiplier of 8 years. Taking into account the preponderables of life, that the applicant may not have lived till 60 years the time of retirement in the civil service, I adopt a multiplier of 10 years. Contrary to the submissions that the loss of dependency be calculated based on net pay, I think the correct position is that it is calculated on the basic pay less the statutory deductions. The deceased's basic pay as per her payslip (PEx.6) was Kshs.40,835.00. The statutory deductions which must be subtracted are PAYE – Kshs.11,398.00, NHIF – Kshs.320.00 and Provident Fund of Kshs.2,041.75. The basic salary less the statutory deductions is Kshs.26,076.00.

The deceased had two children who were aged 16 and 13 years. Both parties were in agreement that the deceased spent 2/3 of her income towards maintenance of her family. I will therefore compute the claim for loss of dependency as follows:-

$$26,076.00 \times 12 \times 10 \times 2/3 = 2,086,080.00$$

The deceased was also a director of Montanna Insurance Agency where she earned an average salary of Kshs.27,000/- per month (taking into account the average salary for the audited accounts for the years 2006, 2007 and 2008). She may have continued to work as a director even after retirement. In that event I would adopt a multiplier of 15 years. I would compute the loss of earnings as follows:-

$$27,000 \times 12 \times 15 \times 2/3 = 3,240,000.00$$

### 3. Special Damages:

The defence counsel did not dispute the claim on special damages. The plaintiff produced several receipts; a receipt No. 57069 for Kshs.2,000/- for professional services at Nakuru War Memorial Hospital, a receipt No. 064 for Kshs.13,000/- being post mortem charges, receipt No. 57105 for Kshs.6700/- for mortuary charges at Nakuru War Memorial Hospital, receipts for Kshs.43,000/- for Ngari Workshop and Hearse services, voucher 375561, advertising charges of Kshs.18,200/-. These receipts were produced as a bundle PEx.8. They all total Kshs.82,900/-. The claim in the plaint was for Kshs.114,700/-. However, what was proved was Kshs.82,900/-. It is trite law that special damages have to be specifically pleaded and strictly proved. I adopt the Court of Appeal decision in **Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd** where the court said:-  
“It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded. In **Ouma v Nairobi City Council (1976) K.R. 304** after stressing the need for a plaintiff in order to succeed on a claim for specified damages, **Chesoni J.** quoted in support the following passage from **Bowen L.J.’s Judgment on page 532 and 533 in Ratcliffe v Evans (1832) 2Q.B. 524** an English leading case on pleading and proof of damage.

**The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”**

The total award of damages before deduction of the 20% contribution will be as follows:-

#### Under Law Reform Act:

- |                                |   |                 |
|--------------------------------|---|-----------------|
| 1. Pain and suffering          | - | Kshs.50,000.00  |
| 2. Loss of expectation of life | - | Kshs.100,000.00 |

#### Fatal Accidents Act:

- |                       |   |                          |
|-----------------------|---|--------------------------|
| 3. Loss of dependency | - | Kshs.5,326,080.00        |
| 4. Special damages    | - | <u>Kshs. 82,900.00</u>   |
|                       | = | <b>Kshs.5,415,980.00</b> |

As was held by the Court of Appeal in **Kemfro Africa Ltd v A. M. Lubia (1982-85)1 KAR 727**, when the people entitled to the deceased’s estate are the same persons for whose benefit the action over the Fatal Accidents Act is brought, the award for loss of expectation to life is deductible. I will therefore subtract a sum of Kshs.100,00/- from the aforesaid sum of Kshs.5,415,980/- leaving a balance of Kshs.5,315,980/-. Taking into account the consent on liability that was recorded by the parties herein, the aforesaid sum will be reduced by 20% contribution leaving a balance of Kshs.4,282,784/-. I therefore enter judgment for the plaintiff against the defendant. For Kshs.4,282,784/- plus costs and interest from the date of judgment. I wish commend the advocates of the parties for taking time to discuss

this matter out of court and recording consent on liability leaving only the issue of assessment of damages outstanding. As a result, they saved a considerable amount of the court's time.

**DATED and DELIVERED this 28<sup>th</sup> day of March, 2013.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Ms Wachira for the plaintiff

Ms Kahunga for the defendant

Kennedy – Court Clerk