



**REPUBLIC OF KENYA**

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

Civil Suit 124 of 2008

**MUTUKU MBITHI (suing as Administrator of the**

**Estate of Moses Mbithi Kivuva, Deceased) .....PLAINTIFF**

**V E R S U S**

**1. COAST BUS SAFARIS LTD**

**2. PETER MBAWA KALA.....DEFENDANTS**

**J U D G M E N T**

1. This is a claim for damages in negligence on account of the death of MOSES MBITHI KIVUVA (hereinafter called the **Deceased**). The Deceased died on 10<sup>th</sup> August 2005 in a road accident along Mombasa – Nairobi Highway. The Plaintiff is a son of the Deceased and the administrator of his estate.
2. Damages are claimed under the **Law Reform Act, Cap 26** and also under the **Fatal Accidents Act, Cap 32**. The dependants are names as-
  - (i) **Joyce Kanini Mbithi – Widow**
  - (ii) **Mutuku Mbithi – Son**
  - (iii) **Wanza Mbithi – Daughter**
  - (iv) **Mwongeli Mbithi – Son**
  - (v) **Kalewa Mbithi – Daughter**
3. All the children were adults at the time of the Deceased’s death. Special damages are also sought.
4. Judgment on liability was by consent entered on 16<sup>th</sup> February 2010 in favour of the Plaintiff subject to the Deceased’s contributory negligence of 25%.
5. At the hearing on quantum only the Plaintiff testified. The Defendants did not lead or call any evidence. I have considered the Plaintiff’s testimony, including the documents he produced in evidence.
6. I have also considered the written submissions filed on behalf of the parties including the cases cited. Those of the Plaintiff were filed on 20<sup>th</sup> January 2011. The Defendants’ submissions were filed on 25<sup>th</sup> January 2011.

7. The Deceased was aged 57 years at the time of his death. He was employed by the 1<sup>st</sup> Defendant as a bus conductor on a casual basis. But the Plaintiff stated that the Deceased nevertheless used to work regularly 3 or 4 days a week with earnings of KShs 450/00 per day. But there was no documentary evidence of this employment, and the oral evidence of the Deceased's earnings was hearsay. But it is conceded by the Defendants, at least in their submissions that the Deceased was indeed working as a bus conductor at the time of his death. The Defendants also concede that the minimum wage as then prescribed for bus conductor would be a good guide in assessment of the Deceased's income.

8. Let us start with damages under the Law Reform Act.

**Pain and Suffering**

The Deceased died on the same day of the accident. There was no evidence of prolonged suffering. KShs 15,000/00 will be adequate for this head, and I award the same.

**Loss of Expectation of life**

The Deceased was 57 years old when he died. He had already lived most of the life that he would have expected to live, all thing being equal. But this is not to say that an old person is less precious than a younger one, though the loss of a younger life in terms of years is obviously greater than the loss of an older life. I will award KShs 100,000/00 for this head.

9. I will now look at damages under the Fatal Accidents Act. The Deceased's income was indeterminate, though it is accepted that he worked regularly, though on a casual basis, as a bus conductor for 3 to 4 days a week. Both sides seem to agree that the minimum wage would be a good guide to determine his income.

10. The Defendants have not provided any proof that the minimum wage of a bus conductor was KShs 3,000/00 per month as they submit. The Plaintiff on the other hand has pointed out that under the **Regulation of Wages (General) (Amendment) Order, 2005**, the minimum wage of a conductor was KShs 5,010/00 per month. I will accept that as the Deceased's monthly income.

11. As to the multiplier, the Deceased was already 57 years old. How much longer would he have been able to work as a bus conductor, an arduous job no doubt better suited to younger persons? I will award a multiplier of 5 years.

12. What about the ratio of dependency? The Deceased's children were already adults who cannot have depended on their father's meager income for their sustenance. I do not accept that they were his dependants. They would have been able to fend for themselves. Only his widow could have been the Deceased's dependant. It is not unreasonable to expect that he spent at least one-half (½) of his income on her. I will thus award a one-half dependency.

13. The arithmetic will work out as follows-  
**KShs 5,010/00 X 12 X 5 X ½ = KShs 150,300/00**

14. I will award this sum as damages under the Fatal Accidents Act. The same is subject to the 25% contributory negligence, just as all the other awards are, and will be paid over to the Deceased's widow aforesaid.

15. As for special damages, I consider that KShs 22,580/00 was strictly proved by way of receipts, and I will award the same.

16. To summarize, damages are awarded as follows-

(a) Under the Law Reform Act:

(i) Pain and suffering: KShs 15,000/00

- (ii) Loss of Expectation of Life: 100,000/00
- (b) Under the Fatal Accidents Act: KShs 150,300/00
- (c) Special damages: KShs 22,580/00

All these awards are subject to 25% contributory negligence.

17. The claims for loss of earning cannot be awarded as loss of dependency has been awarded. The claim under the Workmen's Compensation Act is misconceived as there was no proof of employment.

18. There will be interest on the general damages at court rates from the date of judgment until payment in full. There will be similar interest on the special damages from the date of filing suit until payment in full.

19. The Plaintiff will have costs of the suit, also reduced by 25% contributory negligence.

20. The delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thanks God I have now regained my full health.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**  
.....  
**JUDGE**