



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Civil Appeal 501 of 2008

#### Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate Court Case*

#### TORT

- 2.1 *Running down cause.*
- 2.2 *Motor vehicle collision.*
- 2.3 *Motor vehicle KUV 506 towed by motor vehicle KAG 902F. Tow cable breaks. KAG 902F leaves lane on a dual carriage way and cross over island and collides into opposite dual carriage way along Waiyaki Way and collides into motor vehicle matatu (PSV) KAP 258D*
- 2.4 *Liability determined at 100% by High Court*  
*(Test suit)*  
*HCC 828/03*  
*Marion Njeri Kagoi*  
*Vs*  
*Kenya Railways Corporation*  
*Ang'awa J – 5<sup>th</sup> February 2007*
- 2.5 *Original suit*  
*Samwel Mugwe Gioche*

Vs

Kenya Railways Corporation

CMCC 10075/02

(24<sup>th</sup> August 2008)

2.6 *Issue of quantum only.*

2.7 *Awards:*

*General Damages*

2,155,464/-	i) <i>Loss of dependant</i>	<i>Ksh.</i>
100,000/-	ii) <i>Loss of expectation of life</i>	<i>Ksh.</i>
10,000/-	iii) <i>Damages pain &amp; suffering</i>	<i>Ksh.</i>
45,520/-	iv) <i>Special damages</i>	<i>Ksh.</i>

2.8 *Court awards only Ksh. 2 million – maximum allowed on magistrate’s jurisdiction.*

3. *Appeal*

*by respondent/original plaintiff*

3.1 *Award too excessive*

- a) *Awarded 2,155,464/- loss of dependency*
- b) *Ksh. 100,000/- awarded for loss of expectation of life.*
- c) *Ksh. 10,000/- awarded for pain and suffering.*
- d) *Award excessive and not proportional to loss occasioned to deceased estate.*
- e) *Weight of evidence on record does not support the magistrate’s findings.*
- f) *... failed to evaluate and analyze the evidence in support of appellant’s*

4. *Submissions:*

*By appellant/original defendant*

- 4.1 *All appeals against the award now agreed upon except the issue of a multiplier.*
- 4.2 *Multiplier should have been 15 years and not 27 years.*

*By respondent/original plaintiff*

- 4.3 *Whereas no cross appeal had been filed, multiplier of 27 years is adequate.*

5. *Held:*

- i) *Multiplier of 27 years upheld.*
- ii) *Trial magistrate's decision not interfered with, save as to the multiplicand. The basic salary being Ksh. 10,740/-*
- iii) *Appeal dismissed with costs to the respondent plaintiff*

6. *Case Law:*

- a) *Marion Njeri Kagoi*

*Vs*

*Kenya Railways Corporation*

*(Test Suit) HCC 828/03*

*Ang'awa J*

- b) *Kemfro Africa Ltd t/a Meru Express Services (1976) &*

*Vs*

*Lubin & Another*

*(1987) KLR 30 (Kneller, Nyarangi JJA & Cheson AgJA)*

- c) *Margaret Wangui Kioko*

*Vs*

*Mugs Kenya Ltd*

*Another*

HCC 2005/99

Ang'awa J

d) Kellen Wanjeri Kimani – Vs – Waweru Machere

HCCC 2068/98

Ang'awa J

7. *Advocates* :

i) *P.K. McAsila holding brief for M. Muli instructed by M/s Musyoka Wambua & Katitu & Co Advocates for appellant/original defendant*

ii) *G. Gitau instructed by M/s Gachiengo Gitau & Co Advocates for respondent/original plaintiff*

**KENYA RAILWAYS CORPORATION ..... APPELLANT/ORIGINAL  
DEFENDANT**

**VERSUS**

**SAMWEL MUGWE GIOCHE ..... RESPONDENT ORIGINAL  
PLAINTIFF**

*(Being an appeal from the Judgment of Hon. V.W. Wandera Esq, Senior Principal Magistrate in Civil Case No. 10075 of 2002 dated 25<sup>th</sup> August 2008 at Milimani Commercial Courts)*

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

### **I. INTRODUCTION**

1. A motor vehicle collision occurred along Waiyaki Way on the 13<sup>th</sup> August 2005. A public service vehicle commonly known as a matatu in Kenya, registration No. KAP 258D travelled along the Waiyaki Way along a dual carriage way. On the dual carriage way going into town and which was separated by an island between the two dual carriage way was a lorry motor vehicle KAG 902F being a vehicle towing motor veicle KAV 506. The vehicle KAG 902F left its lane when the tow bar broke crossed the island separating the two dual carriage way and drove into the dual carriage way on the opposite side of the road. It collided into the matatu motor vehicle registration KAP 258D that had been carrying several passengers.

2. HCC 828/03 **Marion Njeri Kago – Vs – Kenya Railways Corporation** (Ang'awa J) was used as a test case under Order XXXVII rule 1 Civil Procedure Rules.

3. In that test suit, the court ruled that liability was established at 100% against M/s Kenya Railways Corporation. They were held to be vicariously liable for the acts of its agents and or servants.

4. No appeal appears to have been filed against this decision. Each respondent persons who sued the defendants returned to their own courts to complete their cases on quantum, the liability having been determined.

5. In this appeal, the respondent original plaintiff had sued in damages for the fatal injuries suffered by

his late wife. This was the case of:

**Samwel Mugwe Gioche (suing as the representative of the estate of**

**Juliana Nthangu Fredrick**

Vs

**Kenya Railways Corporation Ltd**

CMCC 10075/02 (now CA 501/08)

6. The trial court considered the submissions and hearing before it on quantum. The court noted that the plaintiff sought the following award:

By the plaintiff:

6.1 Loss of dependency

Ksh. 10,240/- (multiplicand)

X 27 years (multiplier) X 12 (months) X  $\frac{2}{3}$  =

Ksh. 2,211,840/-

6.2 Loss of expectation of life

Ksh. 100,000/-

6.3 Damages

Pain and suffering

Ksh. 10,000/-

6.4 Special damages

Ksh. 45,520/-

Total Ksh. 2,310,984/-

By the defendant

6.5 Loss of dependency

Ksh. 10,240 (multiplicand)

X 13 years (multiplier) X 12 months X  $\frac{2}{3}$  =

Ksh. 1,036,880/-

7. The trial magistrate, whilst agreeing with the award on the other hand. He combined the prayers under the Law Reform & the Fatal Accident Act into one. He did not address himself on the issue of multiplier which in contention but dealt with the issue of multiplicand.

8. This was by reducing the basic salary of Ksh. 10,240/- to the next salary of Ksh. 9,979/-. This calculation was:

8.1 Ksh. 9,979/- (multiplicand) X 27 years (multiplier)

X 12 months  $\frac{2}{3}$  = Ksh. 2,155,464/-

8.2 The rest of the claim was not interfered with but the total sum summarized as follows before was reduced. Namely:

8.2.1	Loss of dependency	Ksh. 2,155,464/-
8.2.2	Loss of expectation of life	Ksh. 100,000/-
8.2.3	Damages pain and suffering	Ksh. 10,000/-
8.2.4	Special damages	Ksh. 45,520/-
	Total	Ksh. 2,310,984/-

9. The trial court reduced the total sum of Ksh. 2,310,984/- to

Ksh. 2 million because that was his pecuniary jurisdiction. That he was permitted to award (25<sup>th</sup> August 2008).

10. The defendant/respondent filed appeal to this High Court. The appellant/original plaintiff did not appeal against the decision.

## II APPEAL

11. The learned magistrate erred in law and misdirected herself.

**11.1 ... by awarding Ksh. 2,155,464/- for loss of dependency**

**11.2 ... by awarding Ksh. 100,000/- under loss of expectation of life.**

**11.3 ... by awarding Ksh. 10,000/- for pain and suffering.**

**11.4 The learned magistrate's award was excessive and not proportional to the loss occasioned to the deceased's estate.**

**11.5. The weight of evidence on record does not support the learned magistrate's findings.**

**11.6 The learned magistrate erred in law in failing to evaluate and analyze the evidence in support of the appellant's case.**

12. The appellant prayed that this appeal be allowed and the judgment of the trial court be set aside. "That the costs of this appeal and costs in proceedings at the lower court be awarded to the appellant."

13. There was no indication by the appellants what award they prayed be made. The respondent plaintiff did not cross appeal.

## III SUBMISSIONS

### i) By the Appellant Original Defendant

14. The appellants did not pursue the memorandum of appeal prayers No. (2) and (3), save for the issue of the multiplier. The rest of the claim was otherwise satisfactory. What the appellant wished was the multiplier to be 13 years. The multiplicand to remain the same at

Ksh. 10,240/- making a total of Ksh. 1,036,880/-

15. The respondent/original plaintiff prayed that the multiplier be 27 years as reasonable. The sum of Ksh. 10,240/- was used as a multiplicand by both parties.

#### IV OPINION

16. The main contention in this appeal is that of the multiplier of 27 years. This was objected to by the respondent and wished that the multiplier be 13 years. The effect of a multiplier of 13 years would substantially reduce the award given from Ksh. 2,155,464/- to Ksh. 1,036,880/-

17. In looking at the issue of a multiplier, the court takes into account the education of the deceased, her experience and achievements. What she would have continued to become later on in life.

18. The deceased herein produced excellent grades obtained from her training at the Animal Health & Industry Training Institute

(AHITI – Kabete) where out of a subject of 50 she scored all As, Bs & Cs. She went on to become a branch manager at Jumbo Agrovet, a farm dealing with zero grazer – centre, a veterinary agriculture and hygiene centre.

19. At the age of 28 years only, she earned a basic pay of Ksh. 10,740/-. Her net salary after statutory deductions was Ksh. 9,979/-

20. When the trial magistrate came to her findings, she did not interfere with the multiplier of 27 years as suggested by the plaintiff/respondent. What she did was to reduce the basic salary from Ksh. 10,740/- to Ksh. 9,979/-, an issue that had not been in contention.

21. I would find that the basic salary remain Ksh. 10,740/-. This is a fact that is not disputed. It is also the basic salary only that is used, for a person who has a salary as a multiplicand.

22. On the issue of a multiplier, this court has held in past decisions that a person's years of how long they would have worked when alive would be used. This would be based normally on the retirement age of a civil servant, although where proof of retirement is based on more years is given it would be taken into account.

23. This was held as such in the case law of

**Margaret Wangui Kioko**

Vs

**Muus Kenya Ltd**

HCC 2005/1999

Where the deceased husband, a cyclist who died in a road traffic accident, aged 39 years, the court took the lost years he would have lived and been productive to be 15 years.

24. I would in the circumstance uphold the multiplier at 27 years old as determined by the trial court.

25. Thus under the claim for lost years the sum would be

Ksh. 10,740/- X 27 X 12 X  $\frac{2}{3}$  =

Ksh. 2,211,840/-

26. As the appellant conceded to the rest of the claim, the award for the respondent/plaintiff in the magistrate's court would be based on the case law of

**Kemfro Africa Ltd t/a Meru Express Services 1976 & Another**

Vs

**Lubia & Another (No. 2)**



37. Therefore the figure of Ksh 2 million would be approved as follows between the dependants.

37.1 Widower	Ksh. 500,000/-
37.2 Son aged 2 years old Simon Gioche Mugwe at the time of filing suit on 16 <sup>th</sup> December 2002	Ksh. 1,500,000/-
Total	Ksh. 2,000,000/-

38. That the sum of Ksh. 1.5 million be invested in an interest earning account in the name of the widower Samwel Mugure Gioche and the Registrar of the High Court of Kenya in the institution of the widower's choice, failure to a Savings and Loans Ltd until the minor attains the age of majority.

39. There is a further sum in special damages awarded of Ksh. 45,520/-. This sum though proved was not awarded on grounds that the trial magistrate had no pecuniary jurisdiction to award more than what had been allowed by law to award as to his jurisdiction.

40. I would agree that whereas there had been an award made by the trial magistrate of a total of Ksh. 2,310,984/-. That this court the court award be Ksh. 2,820,984/- would only be entitled to Ksh. 2 million.

## V IN CONCLUSION

41. The appeal be and is hereby dismissed save as to the court's adjustments to the award investments.

42. In summary:

- 42.1 Running down cause
- 42.2 Motor vehicle collision
- 42.3 Female passenger aged 28 years old in 2002
- 42.4 Liability 100%  
Test suit High Court  
HCC 828/03

### **Marion Njeri Kago – Vs – Kenya Railways Corporation**

Ang'awa J  
(5<sup>th</sup> February 2007)

42.5 Quantum  
Law Reform Act

- i) Pain & Suffering Ksh. 10,000/-
- ii) Loss of expectation of life Ksh. 100,000/-
- iii) Lost years

Ksh. 10,740 X 27 X 12 X  $\frac{1}{3}$  =

Ksh. 2,211,840/-

### **Fatal Accident Act**

- i) Loss of dependency  
Ksh. 10,740/- X 27 X 12 X  $\frac{1}{3}$  =

Discounted Ksh. 211,840/-

Total Ksh. 2,000,000/- taken into account.

42.6 That the sum of Ksh. 2 million be invested in an interest earning account in the name of Samwel Mugwe Gioche and the Registrar High Court of Kenya.

42.7 That the sum of Ksh. 1.5 million of the Ksh. 2 million be invested for the minor Simon Mugwe Gioche till the attainment age of majority.

42.8 That the sum of Ksh. 500,000/- be paid to the widower Samwel Mugwe Gioche.

42.9 That the fatal accident claim is taken into account.

**Special Damages**

42.10 That the special damages claim Ksh. 45,520/- whereas allegedly proved be not awarded.

42.11 Whereas all other sums over and above Ksh. 2 million being the pecuniary jurisdiction of the court is not awarded. (Ksh. 820,984/-)

43. That there be costs of this appeal to the respondent/original plaintiff.

44. That there be costs of the magistrate's court case to the original plaintiff.

45. There will be interest on Ksh. 2 million from the date of judgment

25<sup>th</sup> August 2008.

**DATED THIS 24<sup>TH</sup> DAY OF OCTOBER 2012 AT NAIROBI**

**M.A. ANG'AWA**

**JUDGE**

*Advocates* :

- i) *P.K. McAsila holding brief for M. Muli instructed by M/s Musyoka Wambua & Katitu & Co Advocates for appellant/original defendant*
- ii) *G. Gitau instructed by M/s Gachiengo Gitau & Co Advocates for respondent/original*

*plaintiff*