



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL SUIT NO.97 OF 2003**

**SARAH CHEPNGENO CHEPKWONY.....PLAINTIFF**

**VERSUS**

**SWAN CARRIERS LTD .....1<sup>ST</sup> DEFENDANT**

**JAMES OLYSIUS OLUOCH.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The claim for damages in this case is unique. It is made by a woman, **Sarah Chepngeno Chepkwony** who, as Plaintiff, averred that she was the wife of a woman known as Leah Chemutai Barmoi who was killed in a road accident on 17/1/2001. The death gave rise to the suit.

The Plaintiff averred that her woman husband (the deceased) had married her under the Kipsigis Customary Law. This is a custom practiced by some tribes in Kenya where wealthy women who are barren and need children marry fertile women to bear children for them sired by men sometimes selected by the woman-husband. The fact of the marriage between the Plaintiff (woman) as wife and the deceased (woman) as husband was not contested.

The facts emerging from the evidence are that the deceased was knocked down by a lorry registration No. KAL 073Z when it lost control and overturned and fell on the deceased who was walking along Kapsoit Sondu Road at Kakibei area. The Plaintiff's home was near the road where the accident occurred. She heard screams emanating from the scene of the accident and rushed there. She found the lorry having overturned. When it was being towed away, she saw the body of her woman-husband having been crushed under it. The lorry had left the road. Photographs were taken. They show that the body of the Plaintiff's husband was away from the road. The driver of the lorry No. KAL 073Z was subsequently charged with a traffic offence to wit causing death by dangerous driving c/s 46 (1) of the **Traffic Act Cap 403** in **Traffic Case No. 97/2001** in the Principal Magistrate Court at Kericho. In the Ruling delivered on 22/3/2001, the learned Principal Magistrate, as she then was, acquitted the driver on the ground that although the deceased was found crushed under the lorry, no one saw how the accident occurred. But the exhibits show that the lorry went off the road to where the deceased was crushed. The deceased was not on the road. In the evidence given by Samuel Cheruiyot Rutica (PW2) the latter testified that he knew the deceased and that he was standing near the road when the lorry which was going in a zig-zag manner in trying to avoid potholes hit a pothole and went off the road and overturned and crushed the deceased who was off the road.

The Defendant did not offer any evidence. It is on the evidence adduced and material presented to the Court that the Court has to determine the issue of liability.

The lorry driver owed a duty of care to the deceased not to drive carelessly off the road where the deceased was walking. The fact that the lorry had overturned on its own away from the tarmac road and crushed the deceased off the road was in itself evidence that the lorry driver was negligent in the manner in which he drove. He must have been fast. That can be discerned from the fact that it overturned. He must have left the road as it overturned off the road. The fact that the lorry overturned led credence to the allegation made by PW2 that the driver of the lorry drove in a zig-zag manner. On the basis of the evidence adduced, it is my finding that the lorry driver negligently drove the said lorry. It is also my finding that as a result of the lorry driver's negligence, the Plaintiff's husband lost her life in the accident on 1/7/2001. There is no evidence on the basis of which it can be argued that the deceased contributed to the accident. As the lorry driver was driving the lorry of the 1<sup>st</sup> Defendant in the course of his employment, and as there is no evidence to disprove that he was doing in the course of his employment, it is my further finding that the 1<sup>st</sup> Defendant was vicariously liable.

At the time of his death, the deceased was aged 62 years. She lived and worked on her five acre farm. There was no evidence to prove that she earned from farming a sum of Kshs. 15,000 per month. The deceased and the Plaintiff had 5 children who attended school. The deceased must have had income as the children's school fees was forthcoming. The eldest child, Jane Chesang, was 25 years at the date of the trial. The second child, Charles K. Chepkwony, was 23 years. The other three children were all in school. The Plaintiff produced documents to prove that she incurred expenses in the burial of the deceased. Exhibits 8 (a) and 8 (b) showed an expense of Kshs. 13,000 for the coffin and transport. Other expenses claimed attendant to the funeral were alleged to have amounted to Kshs. 10,000. The cost of police abstract, death and certificate, amounted to Kshs. 200 making a total of Kshs. 23,200.

The Plaintiff claimed damages under Law Reform Act and put this at Kshs. 50,000. The current award today stands at Kshs. 200,000. Damages under the Fatal Accidents Act are computed on the basis of loss suffered by dependants as a result of the deceased's death. In the judgment delivered by the then Chief Justice in **Nairobi H.C.C.C. No. 173 of 1956 (Pegg Frances Hayes & others V. Chunibhai J. Patel & Another)**, which, on appeal, was upheld by the former Court of Appeal, the learned Chief Justice stated the method of assessment of damages under the **Fatal Accidents Acts** as follows:

***“The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants”***

The deceased could have had another 5 years of active life during which she would have continued to earn and support the Plaintiff and the last three children. Although there was no documentary evidence to establish that the deceased earned Kshs. 15,000 per month, the Court has to adopt a common sense approach to the matter. As the deceased managed to feed, clothe and pay school fees to the three younger children, it must be obvious that he earned some income. It is my view that the deceased must have been in receipt in the tune of Kshs. 7,500. Doing the best I can, I hold that the deceased earned about Kshs. 10,000 per month and expended on the Plaintiff and the three dependent children Kshs. 7,500 per month. The annual value would have been Kshs. 90,000 (Kshs. 7,500 x 12). The sum of Kshs. 90,000 would have to be capitalized by multiplying it with five years purchase. The capital sum thereof of Kshs. 450,000 would be the damages under the Fatal Damages Act. The total amount of damages therefore payable would be

- a) Under the Law Reform Act Kshs. 200,000
- b) Under the Fatal Accidents Act Kshs. 450,000
- c) Special damages Kshs. 23,200

**Total**

**673,200**

The damages have to be apportioned among the dependents as follows.

Widow (Plaintiff) Kshs. 273,200

Geoffrey Kiprono Kshs. 200,000

Benard Kipkorir Kshs. 200,000

**Total Kshs. 673,000**

I accordingly enter Judgment in favour of the Plaintiff against the Defendants jointly and severally in the sum of Kshs. 673,200 plus cost of the suit. Of this judgment sum, Kshs. 23,200 shall carry interest at Court rates from the date of filing suit and till full payment and the sum of Kshs. 650,000 shall carry interest at Court rates from the date of this Judgment until full payment.

**DATED at KERICHO** this 13<sup>th</sup> day of April, 2011

**G B M KARIUKI, SC**  
**RESIDENT JUDGE**

**COUNSEL APPEARING:**

Mr. Ochieng, Advocate, for the Defendant

Mr. Koech, Court clerk