



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL CASE NO. 120 OF 2007.

**ASMIN NANJALA USOLO WAWIRE)
HUMPHREY NAKHWELI USOLO) ::::::::::::::::::::::::::::::::::: PLAINTIFF.**

VERSUS

**DAVID SITIENEI)
SWAN CARRIER LTD.) :::::::::::::::::::::::::::::::::::DEFENDANT.**

J U D G M E N T.

1. The plaintiffs filed this suit against the defendants in their capacity as the legal representatives of the estate of the late William Usolo Wawire. On 14th July, 2010, both counsel for the plaintiffs and the defendants filed the following consent order By Consent

1. Judgment be entered on liability at 50:50 respectively between the plaintiffs and the defendants.
2. Judgment entered into this suit on liability to apply in Kitale HCCC No. "R" 2 of 2007.
3. Parties to fix a date for hearing to enable the Honourable court determine the damages payable.
4. The plaintiffs application dated 27/4/2010 be withdrawn with no orders as to cost."

2. The above consent is essentially settles the issue of liability and the issue of determination is the quantum. The plaintiff's case was supported by the evidence of Humphrey Nakweyi Usolo, one of the sons of the deceased. He testified that on 3rd November, 2002 the deceased was travelling in motor vehicle Reg. No. KAJ 022 J Peugeot on his official duties as the town clerk of Kitale Municipal Council. The vehicle was travelling from Nairobi Kitale and on reaching Naivasha junction the second defendant motor vehicle Reg. No. KAL 547 F Mitshubishi lorry collided with the vehicle in which the deceased was travelling and as a result of the collision, the deceased sustained fatal injuries and died on the same day. This suit is brought under the Fatal Accident Act and for the benefit of the estate of the deceased. The deceased was survived by the following as at the time of his death.

1. Asmin Nanjala Usolo Wawire (Wife.)
2. Geoffrey Wanekwe Usolo
3. Humphrey Nakweyi Usolo.
4. Linet Ukokhe Usolo.
5. Carolyne Nasimiyu Usolo
6. Felix Wawire Usolo.
7. Joan Nekesa Usolo
8. Valary Nasenya Usolo.

3. As at the time the deceased met his untimely death, he was enjoying good health, her was employed as town clerk with the Municipal Council of Kitale earning Ksh. 50,551/= per month. He was also doing farming to support his family thus his estate has suffered loss. The deceased could have been promoted in his career but due to the fatal accident his expectations of life was considerably reduced and his estate suffered loss. The plaintiff also sought for special damages named up as follows:-

(i) Legal fees in Kirtale HC P & A No. 13 of 2005.	- 7,000/=
(ii) Mortuary expense	- 36,000/=
(iii) Traveling expenses	- 547,600/=
(iv) Coffin expense	- 40,000/=
(v) Clothing expenses	- 20,000/=
(vi) Constructing the grave plus labour	- 40,000/=
(vii) Food expenses during the funeral and burial (Kitale and Bunyala	- 503,500/=
(viii) Utensils	- 134,520/=
(ix) Publication/advertisement	- 565,000/=
(x) Miscellaneous expenses	- 60,000/=
(xi) Kumbukumbu	- 26,680/=
(xii) Procurement of death certificate	- 50/=
(xiii) Funeral expenses	- 12,000/=
(xiv) Police abstract	- 100/=
Total	- 2,226,814/=

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4. Evidence was also read by Alfred Wamalwa Natif, an accounts clerk who told the court that he audited and compiled all the expenses incurred during the funeral. Several receipts were produced for all the services that were procured namely the coffin, food items and other miscellaneous expenses amounting to Ksh. 2,226,814/=. Both counsel for the plaintiffs and the defendants filed written submissions. According to the plaintiff, the court should order the plaintiff be paid Ksh. 200,000/= for pain and suffering. This is as it was held in a similar case **Mombasa HCCC No. 324/2002 JENNIFER ODHIAMBO OLOO & HELLEN AWINO ODONGO VS. ELIZABETH MBUKA & BROLLA ADONJO AT PAGE 40.** Under the heading of general damages of loss of life, counsels suggested that the deceased should be awarded a multiplier of 11 years considering that he was 49 years as at the time of the accident and he would have worked upto the mandatory retirement age of 60 years. Counsel relied on the case of **RABECCA SAVETHI MWANGI VS. EASTERN BUS SERVICES LTD. & CHRISTOPHER NGARA KAUKO. – NRB HCCC NO. 2750/1998.** In that case the court awarded a multiplier of 19 years for a deceased who died at the age of 39 years. As regards special damages, counsel submitted that the accounts were reconciled by PW2 and the same were also worked out with **Ben Mulwa from Kenidia Assurance Co. Ltd.** Thus the plaintiff should be awarded the entire claim.

5. On the parts of the defendant, counsel submitted that the deceased was aged 49 years and the estate should be awarded a sum of Ksh. 100,000/= for loss of life since the deceased died at the age of 49 the court should use a multiplier of 5 years. This was as it was held in the authority of **Dainty Vs Haji & Another (2005) 1E.A. 48** where a multiplier of 10 years was applied for a deceased who was aged 27 years. As regards the income of the deceased, counsel submitted that a multiplacant of Ksh. 40,554 be applied based on the deceased net income per month and to apply a dependency ratio of 2/3. For this preposition, the counsel cited the case of **Davies & Another vs. Powell Daffyn Associated Calories Ltd. 1942 All E.R. 657** which was cited with approval by the Court of Appeal in **Maina Kamau & Another vs. Josephat Wangondu & Another C.A. No. 148 of 1989.**

6. As regards special damages, counsel submitted that special damages must not only be pleaded but proved specifically. Counsel pointed out that no receipts were produced to support the travel expenses of Ksh. 547,000/= and also the food expenses of Ksh. 503,500/=. Similarly, no receipts were produced to support publications and advertisements. Similarly, the miscellaneous expenses of Ksh. 60,000/= is not supported.

On the issue of quantum, the deceased was aged 49 years, his payslip was produced in evidence. He was earning a gross salary of Ksh. 50,551/= and a net pay of Ksh. 40,551/=. It is also not disputed that he was supporting his large family consisting his widow and seven children. It is reasonable to consider that the deceased could have used his 2/3 of his salary to support his large family. There is no doubt the plaintiff and her children lost the assistance they used to receive from the deceased. It was held in the case of; **Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & Another 1982-88 Vol. KAR** The Court of Appeal held as follows:-

“The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education are lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, the younger brothers and sisters of the deceased as the deceased matured physically and materially, are extinguished now; almost all assistance of this kind would

in the conditions of Kenya be wholly enormous in substance. So much as to that the loss carried by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the time is the assessment of a fair award in the circumstances of any one case.”

7. The deceased was working as the Town Clerk of the Kitale Municipal council. He would have worked upto 60 years which is the current retirement age of public servants. I will adopt the multiplier of 11 years. Thus general damages should be Ksh. 40,554/= x 11 x 12 x 2/3 =3, 568,752/=. The deceased died immediately after the accident and both counsel for the plaintiff and defendant have proposed a sum of Ksh. 30,000/= for pain and suffering. On the issue of loss of expectation of life, I award a sum of Ksh. 150,000/=. No doubt the deceased had a promising career having been a town clerk and his family must have suffered loss of expectation of life. On the issue of general damages, the plaintiff pleaded all the items but the evidence submitted especially regarding traveling, food, advertisement and miscellaneous expenses were not supported with particular receipts. Accordingly I award the following which were supported by receipts

(i) Legal fees in Kirtale HC P & A No. 13 of 2005.	- 7,000/=
(ii) Mortuary expense	- 36,000/=
(iii) Coffin expense	- 40,000/=
(iv) Clothing expenses	- 20,000/=
(v) Constructing the grave plus labour	- 40,000/=
(vi) Utensils	- 134,520/=
(vii) Kumbukumbu	- 26,680/=
(viii) Procurement of death certificate	- 50/=
(ix) Funeral expenses	- 12,000/=
(x) Police abstract	- 100/=
Total	- 316,350/=
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8. Judgment is hereby entered for the plaintiffs as follows:-

(i) General damages for loss of dependency	-3, 568,752/=.
(ii) Loss of expectation of life	- 100,000/=.
(iii) Pain and suffering	- 30,000/=.
(iv) Special damages	- 316,350/=
Less 50% contribution	
Total	- 2,007,551/=
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9. The above sum shall be divided amongst the dependency of the deceased as follows:-

1. Asmin Nanjala Usolo Wawire (Wife.)	- 507,551/=
2. Geoffrey Wanekwe Usolo	- 180,000/=
3. Humphrey Nakweyi Usolo.	- 180,000/=
4. Linet Ukokhe Usolo.	- 180,000/=
5. Carolyn Nasimiyu Usolo	- 180,000/=
6. Felix Wawire Usolo.	- 260,000/=
7. Joan Nekesa Usolo	- 260,000/=
8. Valary Nasenya Usolo.	- 260,000/=

10. The plaintiff shall also have the cost of this suit.

Judgment read and signed on 8th day of April, 2011.

MARTHA KOOME.
JUDGE.