



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

**AT KISUMU**

**CIVIL CASE NO.191 OF 2009**

**LINET KWAMBOKA GICHANA .....PLAINTIFF**  
**(suing as a legal representative of the estate of;**  
**DANIEL GICHANA – deceased**  
**VERSUS**

- 1. ACACIA VENTURES LIMITED.....1<sup>ST</sup> DEFENDANT**
- 2. DUNCAN ODHIAMBO AOKO .....2<sup>ND</sup> DEFENDANT**

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

The plaintiff **LINET KWAMBOKA GICHANA** brought this suit as the legal representative of the estate of **DANIEL GICHANA** (deceased) and on her behalf and for the benefit of herself and other dependants of the estate of the deceased under the **Fatal Accidents Act** and the **Law Reform Act**.

The plaintiff moved the court by way of a plaint on the 10<sup>th</sup> of December, 2009, claiming that on or about the 3<sup>rd</sup> of February, 2009, the deceased while driving a family motor vehicle registration number **KBF 232A** Nissan Sunny Saloon in the company of the plaintiff, their daughter **Jackline Nyanaboka Bonge** (who died in the accident) and **Kevin Gichana Ongubo** (a son), when the 1<sup>st</sup> defendant's motor vehicle registration number **KBC 733S** that was being driven by the 2<sup>nd</sup> defendant carelessly and recklessly hit and/or rammed into their motor vehicle whereby the deceased was fatally injured. The plaintiff gave particulars of the 2<sup>nd</sup> defendant's negligence and claimed that as a result of the accident the estate of the deceased suffered loss and damage. The deceased she claimed was 45 years of age of good health, worked for Kenya Power Lighting Company Limited where he earned a gross salary of Kshs.81,842/56 per month, was also a businessman and was the sole bread winner for his family, before he met his death. She sought for general damages, costs and interest.

The plaintiff amended the plaint on 31<sup>st</sup> May, 2010 altering the earnings of the deceased from 81,842/= to Kshs.88,941/=.

The defendants filed a joint defence on the 24<sup>th</sup> December, 2009 denying that the plaintiff is the legal representative of the estate of the deceased. They also denied ownership of the motor vehicle registration number **KBC 733S** the allegations of negligence attributed to the 2<sup>nd</sup> defendant, and put the plaintiff to strict proof. In the alternative they averred that the deceased was wholly or substantially contributed to the accident, they relied on the doctrine of **res ipsa loquitor**. They also challenged the jurisdiction of the court; seeking to have the suit dismissed with costs.

In the evidence the plaintiff **PW1** stated, that the deceased died on the 3<sup>rd</sup> of February, 2009 as a result of the accident between motor vehicle registration **KBF 232A** and **KBC 733S**. She produced as **Exhibit P2** the death certificate; she brought this suit as a representative of the estate of the deceased and produced as **Exhibit P3** a limited grant of administration issued in succession No.413 of 2009, she further stated that she had lived with the deceased as husband and wife for 22 years. It was her claim that she was married under Kisii Customary Law and was a passenger of motor vehicle **KBF 232A** Nissan Saloon being driven by the deceased and witnessed the accident which accident occurred along Kisumu/Busia Road at Chulaimbo. She contended that the deceased drove on his right side of the road, she saw a mini bus coming from Kisumu the opposite direction overtaking other vehicles, it left its side of the road to their side, the deceased tried to swerve but the mini bus hit their vehicle that had veered off the road and the deceased died instantly. The plaintiff's evidence was that the mini bus **KBC 732S** Isuzu belonged to the 1<sup>st</sup> defendant. She produced an **Exhibit P4** a search certificate in support. She blamed the mini bus driver the 2<sup>nd</sup> defendant for the accident. It was her evidence that the 2<sup>nd</sup> defendant was careless was indeed found guilty in Traffic case number 20 of 2009.

The plaintiff further stated that the deceased was aged 45 years at the time of his death, he worked as a Revenue Collection Officer 11 with Kenya Power and Lighting Company Limited and earned a salary of Kshs.88,941/=. She produced the salary slip for January 2009 and October 2009 as **Exhibit P5**. She also stated that they have 6 children alive namely:

- **Vincent Onyona Gichana born on 21/11/1989;**
- **Damaris Mungare Gichana born on 5/4/1992;**
- **Kelvin Ombogo Gichana born on 18/7/1994;**
- **Hellen Nyanchoka Gichana born on 2/8/1999;**
- **Blessing Bosibori Gichana born on 28/7/2005 and;**
- **Brandy Barongo Gichana born on 28/7/2005.**

The plaintiff produced their birth certificates as **Exhibits P6(a-f)**. All the children she stated are in school and her late husband assisted the family as he was the sole breadwinner as she did not work. She sought for general damages and costs.

**PW2 P.C. Cleophas Sang** attached to Maseno Police Station Traffic Section produced in court police file reference IR/Fatal 6 of 2009 in regard to the accident subject matter of this case. He informed the court that on the 3<sup>rd</sup> of February, 2009 an accident occurred along Kisumu/Busia road involving two motor vehicles, **KBF 232** a Nissan Saloon and **KBC 733S** Isuzu mini bus owned by the 1<sup>st</sup> defendant driven by the 2<sup>nd</sup> defendant who was charged with the offence of causing death by dangerous driving in Traffic case number 123 of 2009. He stated that the police record showed that the bus swerved to the right and collided with the saloon car. He produced a copy of police abstract as **Exhibit P4**.

**PW3 Police Sergeant Eliud Mukiku** was at the material time stationed at Maseno Police Station. He visited the scene of the accident. He found both vehicles on the left side of the road facing Maseno. He blamed the accident on the bus driver as he was trying to overtake and followed the saloon car that had veered off the road. He further stated that the bus driver was charged and was sentenced to 4 years each on 2 counts of causing death by dangerous driving. He also confirmed that he was the investigating officer he produced the original abstract and sketch plan as **Exhibit 8(a)** and **b**.

The defence did not call any evidence.

I have considered the pleadings, evidence on record, submissions and authorities cited by counsel on record for the parties. The plaintiff filed list of issues on 18<sup>th</sup> of January, 2010. I have considered the same. I have also considered issues arising from the evidence adduced. The following in my view are the issues for consideration by the court:

1. **Is the plaintiff the legal representative of the estate of the deceased?**
2. **Is the suit before court competent?**

3. **Did an accident occur on the 3<sup>rd</sup> of February, 2011 involving motor vehicles registration Nos. KBF 232A Nissan Saloon and KBC 733S Isuzu minibus?**
4. **If so who was to blame for the accident?**
5. **Who is the registered owner of motor vehicle registration number KBC 733S?**
6. **Did the deceased contribute to the accident?**
7. **What is the quantum of damage if any?**
8. **Who pays the costs?**

The defence failed to call any evidence which in essence means that the averments in the defence remain mere allegation and the only evidence left to the court's consideration is that placed before it by the plaintiff and her witnesses. In the case of **Edward Mariga versus Nathaniel David Schulter & Another C.A. Case No.23 of 1997** the Court of Appeal stated inter-alia:

**“The Respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother .....**”

**“.....the allegations in the defence is not evidence and remains so forever.”**

The plaintiff produced in court the grant of letters of administration **ad litem** granted by this court to her on the 6<sup>th</sup> July, 2009. This therefore settles the issue of whether she has the locus to file this case as the legal representative of the estate of the deceased. The answer is in the affirmative.

The plaint filed in court on the 10<sup>th</sup> of December, 2009 is dated the 11<sup>th</sup> of December, 2009 whereas the verifying affidavit is dated the 22<sup>nd</sup> of August, 2009 which in essence means the affidavit may have been prepared in advance of the plaint. The defence has submitted that the plaint is fatally defective. In as much as there is a technical issue from the dates on the two documents should this court strike out the suit on account of the technicality?

The Constitution of Kenya 2010 in Article 22 (3) d provides:

**“the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.”**

Section 1A of the Civil Procedure Act provides in part as follows:

**“1A(1) The overriding, objective of this Act and the rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the disputes governed by the Act.**

**(2) The court shall in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section(1).**

Section 1b provides:

**“(1) For the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters prescribed before it for the purpose of obtaining the following aims.**

- (a) the just determination of the proceedings;**
- (b) the efficient disposal of the business of the court;**
- (c) the efficient use of available judicial and administrative time.”**

Will dismissing this suit on a technicality be in line with the constitution and overriding principles stipulated above? Noting that if the case is dismissed the plaintiff will still have time to file a fresh suit, the act of dismissing will fall short of compliance with the overriding principles in that the court will disregard substantive justice in favour of a technicality that does not go to the core of the matter, secondly the litigants will incur more costs by having a fresh suit and requiring another court to adjudicate over this

matter a fresh. I choose to apply the purposive approach to this matter in an attempt to ensure substantive justice ignoring the technicality raised. The date on the verifying affidavit does not go to the core of the issues raised. I will therefore deem the proceedings before court to be proper.

From the evidence of **PW1** who was a passenger in vehicle registration number **KBF 232A** and **PW4** the investigating officer who visited the scene of the accident on the material day an accident did occur between a saloon car vehicle registration number **KBF 232A** and a mini bus registration number **KBC 733S**. This fact is fortified by the abstract form produced in evidence as **Exhibit 8(a)**. I therefore find as a matter of fact that on the 3<sup>rd</sup> of February, 2009 an accident occurred between vehicles registration numbers **KBF 232A** Nissan Sunny and **KBC 733S** Isuzu minibus.

The plaintiff also produced a copy of record of the registration of motor vehicles which gives detail of ownership as Acacia Ventures Limited. The defendants did not produce any evidence to controvert this information and I find therefore that minibus registration number **KBC 733S** belonged to the 1<sup>st</sup> defendant on the material date.

**PW1** and **PW3** both blamed the first defendant for having overtaken other vehicles, driving on the left side and following the deceased as he veered off the road. There is no evidence whatsoever in rebuttal and as such the court takes the evidence of the two witnesses and finds that the 1<sup>st</sup> defendant was substantially to blame for the accident for crossing over from his side of the road and failing even when there was an attempt from the deceased to move away from him, to avoid the said accident. However I decline to find the 1<sup>st</sup> defendant wholly to blame for the acts of its driver the 2<sup>nd</sup> defendant as the deceased had a duty of care equally to avoid the accident equally I take cognizant of the fact that the 2<sup>nd</sup> defendant moved to the deceased side in the circumstances I apportion liability at 20:80.

The next issue for consideration is that of quantum. The evidence on record is that the deceased was 45 years of age and married to the plaintiff. They had 7 children including the one who perished in the accident now leaving 6 of them surviving and all school going. The plaintiff was then a housewife and the whole family was dependant on the deceased. He worked as Revenue Officer 11 with Kenya Power and Lighting Company where he earned a gross salary of Kshs.88,941/95 per month.

All the above was not challenged save for the net pay earned by the deceased. I therefore adopt the evidence by the plaintiff and find that at the time of his death the deceased was 45 years. He was survived by a widow and 6 school going children, earned a salary of Kshs.88,941/= and was sole breadwinner of his family. Having considered all the above, I will now assess damages as follows:

1. **Damages under the Fatal Accident Act:**

(a) **Pain and Suffering:**

There is evidence on record whether the deceased died instantly. I will award a minimal sum of Kshs.10,000/= in this regard.

(b) **Loss of dependency:**

The deceased salary after statutory deductions was Kshs.50,255/=. I decline to consider the mileage claim as part of his monthly pay. I also

decline to consider deductions for loan and pension contribution. The deceased was 45 years. The mandatory age of retirement is 60 years and the deceased had another 15 years to work.

I find the multiplier proposed by the plaintiff of 20 years misplaced. The defendants have proposed 15 years and I will adopt the same. Both parties agree with the multiplicand of 2/3. The same is reasonable as the deceased left dependants behind. I will award loss of dependency therefore as follows:  
**Kshs.50,225x12x15x2/3=6,027,000/=**

In the case of **Mildred Aori Odinga versus Hussein Dairy Limited HCCC No.24 of 2009** the court discounted 15% of an award since the award was being paid in lump sum. I am persuaded by the said authority but in the circumstances of this case I will discount 10% of the award and leave the award under this head as **Kshs.5,424,300/=**.

**Damages under the Law Reform.**

I will award the conventional figure of Kshs.100,000/= under this heading. I am guided by the case of **Asal versus Muge & Another (2001) KLR 2002**. This sum is to be considered together with loss of dependency so that the dependants do not benefit twice, so that in the final analysis this amount will be considered alongside the total award and the same discounted.

The summary of judgment entered is as follows:

- |   |                                |
|---|--------------------------------|
| <b>i. Pain and suffering</b>            | <b>Kshs. 10,000/=</b>          |
| <b>ii Loss of dependency</b>            | <b>Kshs5,424,300/=</b>         |
| <b>iii. Loss of expectation of life</b> | <b><u>Kshs. 100,000/=</u></b>  |
|   | <b><u>Kshs.5,534,300/=</u></b> |
| <b>Less Kshs.100,000 discounted</b>     | <b><u>100,000/=</u></b>        |
| <b>(loss of expectation of life)</b>    |                                |
| <b>Less 20% contributory</b>            | <b>Kshs.1,086,860/=</b>        |
| <b>Total=</b>                           | <b><u>Kshs.4,347,440/=</u></b> |
- iv. Costs and;**
- v. Interest.**

The Fatal Accident Act Section 4(1) requires the amount awarded shall be divided amongst the beneficiaries.

I direct the administrator of the estate to divide the amount awarded to the beneficiaries giving consideration to the younger children of the deceased. The details be filed in court at a date to be fixed and for further direction by the court.

The widow be entitled to 1/3 of the estate for her up-keep and that of the children.

**Dated and delivered at Kisumu this 8<sup>th</sup> April, 2011.**

**ALI-ARONI**  
**J U D G E**

**In the presence of:**

..... **Counsel for the plaintiff**  
..... **Counsel for the defendant**