IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 248 OF 2005

JAMES WAMBURA NYIKAL & ANR. ……..……PLAINTIFFS

VERSUS

MUMIAS SUGAR COMPANY LTD & ANR. ……DEFENDANTS

JUDGEMENT

Coram: Mwera J.
Arwa for plaintiffs
Wetangula for defendants
Court clerk Kajuju

Pleadings in this matter were filed and amended to an extent that the court rested with the followings as the basis of its decision and this is how they appear on the record;

i) the amended plaint dated 6/8/07

ii) the reply to the 1st defendants defence dated 3/9/07

iii) the reply to the amended defence of the 2nd defendant dated 3/9/07

iv) the 2nd defendant's amended defence dated 21/9/07

v) the 1st defendant's defence dated 27/8/07

And there were 11 issues filed by the plaintiffs on 21/6/05.

As per the amended plaint the 2 plaintiffs, a brother and widow of the deceased Alfred Obonyo Nyikal, took out a joint grant of letters to administer the estate of the late Nyikal. It was pleaded that the deceased was an employee of the 1st defendant – a sugar miller. It was claimed in the pleadings and proceedings that the 2nd defendant was the registered owner of a tractor/trailer no. KAH 024R which caused the death of Alfred Nyikal on 10/2/02. On that day the deceased was going about his duties as a shift manager at about 5.00 am on the employer's premises when the employee/agent of the 2nd defendant negligently drove the said tractor KAH 024 R permitting it to run over Alfred. He was rushed to the 1st defendant medical clinic where Dr. Samuel Yuaya in charge attended to him but Alfred died on the way while being transported to hospital.

Particulars of negligence against the 1st defendant were stated to have been failure to provide safe working conditions for the deceased; failure to construct barriers at its 2 weighbridges to keep apart the pedestrians and tractors moving about there; failure to install equipment to record movements at the weighbridges and to engage qualified supervisors thereat; failure to provide adequate lighting at the weighbridges where people worked at night; constructing some 2 concrete pillars at the weighbridges which obstructed view; running an ill-equipped medical centre manned by unqualified staff to deal with emergency cases. The other particulars were that the 1st defendant's medical clinic was not registered as required by the Medical Practitioners & Dentists Board. It was added that the 1st defendant's doctor running its medical clinic did not reconstitute a resustation team; did not diagnose well the deceased's condition in order to give required treatment and he did not refer the deceased to the nearest hospital but instead referred him to one far off in the light of the injuries sustained. That that doctor failed to accompany the deceased or detail medical staff to do so on the trip to hospital. He did not give the patient, now deceased, oxygen or intravenous fluids or "stalise" his pelvis. That the said doctor gave wrong medicine and kept no notes of the deceased etc.

On the part of the 2nd defendant, it was claimed that its tractor driver did not have sufficient regard for those who were at the loading area where the accident took place and he reversed on that area, when such was expressly prohibited, with the tractor with a full load which obstructed rear visibility, and without aid of a supervisor. That the tractor had defective brakes. That the driver failed to use rear view mirrors, took no special care, did not stop or brake to avoid hitting Alfred fatally and that in the report made by the 1st defendant's safety manager, it pointed to negligence on its part. And the disciplinary proceedings to which the 1st defendant's doctor was subjected by the relevant board found him guilty of negligence. Perhaps these two last points should have been included in the particulars of negligence listed against the 1st defendant.

Still on the 2nd defendant it was pleaded that its driver, one Wilson Mbakaya Barasa had been charged in KAK CM TR. C. 1271/02 and found guilty of causing death of Alfred due to negligent driving. So the plaintiffs brought this suit under both the Law Reform and Fatal Accidents Acts to recover damages following the death of Alfred. The cause was brought for the benefit of the deceased's estate and loss of dependency by his wife (2nd plaintiff), 5 sons, 4 daughters plus 2 parents – the father and the mother.

It was added that the deceased who was 49 years of age at the time of his demise earned sh. 2,160,000/= pa from the 1st defendant, and looked forward to future advancement and over 5 years he could have grossed sh. 3.6 m pa. His family depended on him and his life had been cut short by the accident.

It was averred that the family incurred approximately sh. 250,000/= in funeral and related expenses.

The damages sought from the 1st defendant were pleaded to have arisen from the professional negligence of its doctor.

In its defence filed on 23.8.07 the 1st defendant denied that it employed the deceased, Alfred, or that there was an accident on its premises involving him on 10/4/02. This defendant denied that its Dr. Samuel Yuaya attended the deceased after the accident, and all particulars of negligence attributed to it were denied. It was however added that the plaintiffs had been duly compensated in the sum of sh. 6.07m in full and final settlement and by that the 1st defendant was fully discharged from liability.

It was averred further that if the accident of 10/4/2002 occurred, the deceased was its own author because it happened when he was communicating on radio call/pocket phone in the trailer-operating area; he did not keep a proper look-out or give adequate warning of his approach. He did not heed the warning of an approaching driver and he ignored the safety instructions given to him by the 1st defendant. This defendant averred to rely on the doctrine of ***Volenti non fit injuria*** at the trial.

In the reply to this defence the plaintiffs reiterated averments in their amended plaint and denied

that the deceased was the author of the subject accident. Negligence was thrown back to the 1st defendant's doctor at its clinic, the tractor driver and that the 1st defendant's own officer had in a report about that accident, found negligence on the part of the 1st defendant.

As regards the sum paid of sh 6.07 m the plaintiffs denied that it was compensation following the subject accident. To them:

"…….the only monies received were part of the deceased's terminal benefits comprising of (sic) his savings and insurance cover dues."

And lastly that the principle of ***Volenti non fit injuria*** did not apply.

Now we turn to the 2nd defendant's amended defence: It denied that it was the registered owner of tractor KAH 24 R or the trailer as pleaded. Such a tractor was not delivering sugar cane on the 1st defendant's premises on the material day. The occurrence of the accident was denied together with the particulars of negligence. Or that Alfred died and the plaintiffs suffered loss and damage.

It was instead averred that if the accident occurred it was due to the deceased's own negligence by not keeping a proper look-out; failing to heed the Highway Code, not heeding warnings or caring about his safety. It was added that he stood behind a reversing tractor without announcing his presence, while communicating on his pocket phone. All in all the plaintiffs' claim was denied in all its aspects and that sh. 6.07 m had been paid as compensation.

Again the plaintiffs replied to the 2nd defendant's amended defence in essence reiterating what they stated in their amended plaint and that a report made following the accident would support their claim.

The 2nd plaintiff, Doris Achola Adero (PW1) the widow of the deceased, herein told the court that the two were married for 15 years. Early on 10/4/04 he left home to go to his place of work with the 1st defendant. At about 6 am, a driver came and reported to PW1 that the deceased had been involved in an accident at the 1st defendant's factory. The witness went there and found the deceased on the floor of an ambulance; he could recognize her. She got into that van which started off to a hospital at a place called Mukumu Mission some 45 km away and not to the nearby St. Mary's Hospital. There was no First Aid Kit in the van, no oxygen equipment or a doctor. A clinical officer who sat with PW1 in the van's cabin was sick himself so he was going for treatment – not attending the patient(Alfred). The van then took the dusty rather than the tarmac route to Mukumu. PW1 had observed that the deceased was having a problem breathing. She learnt that a reversing loaded tractor knocked him. The deceased, a superintending engineer with the 1st defendant, was pronounced dead on arrival at Mukumu Hospital. PW1 who was not present at the time of the accident, could not say whether there were lights where the deceased was hit while on duty that early morning. The body was taken to a mortuary and burial arrangements started. Their costs/expenses came to about sh. 300,000/=. Alfred was buried at a place called Seme on 20/4/02.

PW1 knew that the tractor driver Wilson Mbakaya was charged with careless driving, found guilty and convicted. The witness produced their bundle of documents (Exh. P1) which contained among others, a grant of letters of administration (Exh P1-6) and the court proceedings against the driver (Exh P1 – 8 to 45). The witness also referred to criminal proceedings against the 1st defendant company (MFI P2 – 49 to 68) for failure to provide safe working conditions. That 2 accused persons there were found guilty MFI P2 – 50to 73) and were fined.

Then reference was made to the proceedings before the Medical Practitioners & Dentists Board (MF1 P3 – 75 to 143) against Dr. Samuel Yuaya, the 1st defendant's doctor at its clinic when the accident occurred. To PW1, Dr. Yuaya did not take proper care of Alfred after the accident and he allowed him to be transported in an ambulance without oxygen equipment and having a sick clinical officer. The same doctor should have directed the ambulance driver to take the patient to the nearer St Mary's Hospital and

not to far away Mukumu. And that the board found Dr. Yuaya negligent. At this point Mr. Wetangula for the defendants interjected that the Medical Board's decision was later quashed by the High Court.

PW1 was also aware that the 1st defendant conducted an internal investigation in the subject accident and a report was rendered (Exh P1-164). The deceased was earning sh. 184,521 gross (Exh P1-171) in April 2004 or a net of sh. 92,981/70. That the deceased used to farm sugar cane on leased properties making about sh. 300,000/=. This activity also included buying cane from farmers and selling it to the 1st defendant. He was paid by cheque (Exh P1 – 288) into his account with a Kenya Commercial Bank (KCB). That the deceased also ran Ngere General Store, earning some sh. 100,000/= per month. Ngere Stores used to buy and distribute sugar from the 1st defendant (Exh P1-269 to 278). Documents were produced to show that Ngere Stores used to buy other stocks from merchants eg. Dishal Enterprises (Exh P1-271 to 278).

PW1 then moved to lay out the details of burial expenses (Exh P1-291 to 293): feeding mourners – sh. 136 635/=; tents and chairs – sh. 111,000/= other food items & utensils sh. 69,721/=; a coffin sh. 20,000/=; transport, funeral clothes – sh. 40,000/=; outside caterers – sh. 40,000/=. However, there were no receipts to support sums on some items e.g. caterer's expenses and the coffin.

As for the children, the court heard that all of them were in school/college. The deceased used to pay for all their needs. PW1 did not have their birth certificates at hand. The defence was willing to see them at the time of submissions. PW1 told the court that the 1st defendant paid her sh. 6,070,500/= only but she did not know why. She did not know whether the deceased had an insurance cover with the 1st defendant and no more payment was made to her.

In cross-examination PW1 told the court that she went to the scene and found her husband in the ambulance. She did not know who directed that he be taken to a hospital at Mukumu. Not being a medical person, PW1 told the court she did not know the injuries the deceased had suffered. There was no medical kit in the ambulance, no oxygen unit or medical personnel. And the clinical officer in the van sat in the cabin – not where the patient was.

Referring to the shopping list (EXh P1 – 291) PW1 conceded that there were no receipts to back it. There was no document e.g. for registration or licence that Ngere Stores was the business of the deceased. She did not have audited accounts of the business either. She produced a land lease agreement (Exh. P1-287) of 3/9/87 to show that the deceased was a sugar cane farmer. But there was no evidence of cane delivery at all. And a cheque she produced (Exh P1 – 288) of 20/2/02 payable to KCB did not have supporting evidence that the payment was for cane delivered.

As for a welding shop business PW1 had no registration documents or other, to demonstrate that it was owned by the deceased. The same state of things prevailed when asked to show that a firm called Baj Engineering was owned by the deceased. No evidence of registration or audited accounts.

And the 3 pay slips for the months of April, March and February 2002 showed net salary of sh. 92 981/=, 32,788/= and sh. 29,670/= respectively (Exh P1-171, 172, 1731/=). Therein it was shown the pensionable salary was sh. 73,000/=. For any income claimed to flow to the deceased, PW1 could only show evidence of pay slips.

As regards the funeral expenses, there was no evidence for the transport and the coffin. There was also reference to a firm called Sugarland Enterprises claimed to have been owned by the deceased.

Dr. James Wambura Nyikal (PW2, 1st plaintiff) then took the witness stand – a co-administrator of the estate of the deceased. He also went over how he learnt that the deceased met his death while on duty with the 1st defendant. A tractor owned by the 2nd defendant ran over him. He was given First Aid at the employer's clinic and nothing else. PW2, a medical doctor himself gave the view that his brother was not accorded sufficient attention and he came to know later that the clinic where he was given First Aid was not registered as per the relevant registration requirement. He visited it. He would have expected that with

the injuries sustained, the deceased should have been given fluids and placed on oxygen. PW2 who told the court that he was told of the circumstances in which his brother was injured, said that the 1st defendant's Health & Safety Manager, a Mr. Adambo, investigated the subject accident (EXh P1 – 144) finding that the offending tractor had run over the body of the deceased as it reversed from a weighbridge. Without stating the nature of injuries suffered, PW2 said that he was aware of a warning that forbade tractors from reversing from weighbridges – without warnings or barriers to prevent accidents. PW2 had visited the scene and had been shown around by an employee whose duty was to guide tractors. He had been told that the floodlights were not working at the time of accident at about 5.30 am. When PW2 visited, the light was being repaired. The witness was of the view that the 1st defendant had been negligent in the circumstances, considering the medical attention given to the deceased and the medical board's report. At the time the Board investigated the incident, PW2 who was its member was excluded from its proceedings and it proceeded to make its findings. That the Board found the 1st defendant guilty of not having registered its clinic and the doctor running it did not professionally do what he was supposed to do in the event like the present one. And that Mr. Adambo found that the tractor should have driven through the weighbridge and not reversed. PW2 knew of the traffic case of dangerous driving against the tractor's driver (Exh P1 – 7 to 45). He was fined. And that the Ministry of Labour's Occupational Health and Safety Board (Exh P1 – 46 to 73A) found that the 1st defendant did not follow the safety precautions. So the plaintiffs filed these proceedings based on negligence: working in unsafe environment, failure to follow safety regulations and not offering sufficient medical attention to the deceased. And that there was a better equipped hospital some 5 km away from the scene but the deceased died while being taken to a far off hospital. He died living dependants as pleaded, who have now fallen on the shoulders of the witness to give help as and when it is possible or necessary. The mother (PW1) got the benefits from the 1st defendant as per the group insurance cover that the employer had. PW1 also enjoys some regular payments from 1st defendant.

The deceased made contributions to the insurance scheme from which sh. 6.07 m was paid but there should be some payments still to be made. And that funeral expenses totaled about sh. 300,000/=. Receipts were with PW1. The defendant could have lived much longer earning income from employment and business outfits which ceased operations on death. The dependants will need help over a long time to cover educational and other expenses.

The 1st defendant offered transport and a coffin but the family had to hire buses to ferry the mourners.

PW2 said in cross – examination that when he visited the scene after 3 days he was taken round by the 1st defendant's staff whose names he could not recall. The doctor at the clinic also took him round and told PW2 that there were no drip facilities and the witness observed that equipment there was inadequate. When the case went to the Medical Board, it made findings which later the High Court quashed.

The deceased ran his businesses with his wife (PW1) but he was not aware that registration certificates or licences thereof were not tendered before court. PW2 added that he was aware that the 2 defendants were separate corporate entities. The 2nd defendant was contracted by the 1st defendant to ferry cane for it. After the High Court quashed the medical board's findings seemingly an appeal was preferred, where the plaintiffs featured as interested parties. And with that the plaintiffs closed their case. The defendants did not call witnesses and the trial closed. Each side submitted.

The plaintiffs restated their claim and answered the 5 issues raised in their favour in that the 1st defendant was bound at common law to take liability where its employee was injured in the course of his duties, when the employer had not taken reasonable precautions to ensure the employee's safety while on duty. That was the case here yet the 1st defendant failed to discharge that duty whereupon Alfred was fatally injured while on duty. The accident took place in the very early hours of the day when the tractor was reversing from the weighbridge, knocking down the deceased. Lights may have been on or not at all at the spot but it was still dark and so the tractor driver's (Wilson Mbakaya Barasa) capacity to see well was impaired. This and absence of a supervisor to oversee activities at the weighbridge, constituted

unsafe procedures and conditions that ended in Alfred's death. Further, that the 1st defendants' own Mr. Adambo had investigated the accident and found that barriers should have been erected or had to be erected to check unauthorized maneuvers at the weighbridge area. In that regard the 1st defendant was thus liable at common law. That also the 1st defendant was enjoined by the then Factories Act, (Cap 514), now repealed, to provide suitable lighting artificial or natural in every part of the factory where people were working or passing. The 1st defendant had been found in breach of such statutory duty when in CMCRC. 3026/***03 R vs Mumias Sugar Co Ltd & Anr*** it was found guilty. So on both fronts the 1st defendant was liable. There was no evidence to the contrary.

Moving to the vicarious liability to be borne by the 1st defendant on account of the negligent acts of the doctor it employed to run its clinic where the deceased was first taken for medical attention and his conduct taken regarding the health of the patient/deceased, the court was told that Dr. Samuel Yuaya failed in this in that he did not treat the deceased sufficiently or provide suitable facilities or personnel for his care and even directed that he be taken to a far off hospital at Mukumu while nearby was a better equipped St Mary's Hospital.

The next aspect of vicariously liability was linked to the driver of the tractor which fatally ran over the deceased. It was claimed that this tractor had been contracted from the 2nd defendant to render services to the 1st defendant. It was asserted, without proof, that it was registered in the name of the 2nd defendant. No such evidence as to registration was specifically placed before the court. The 2nd defendant denied such registration, though. And so it was hard to attribute liability of the tractor's driver to the 2nd defendant. But that was the plaintiffs' position anyway. Evidence of registration from the office of the registrar of motor vehicles or such other credible evidence as to beneficial user or ownership, where a chattel is in the process of being transferred, could have aided the court. It was not tendered, even as it was shown to court that the driver Wilson Mbakaya Barasa, in KAK CM TR. C. 1271/02 was found guilty of dangerously driving the said tractor and causing Alfred's death. The link between Wilson and the subject tractor was there but none between the tractor and the 2nd defendant. The court was minded to dispose of this point right away without doing so later. After maintaining that liability had been proved, the question of the quantum of damages was next.

i) **Loss of Dependency**: The court was told that the deceased aged 49 years was earning sh. 184,521/15 pm salary and so with a multiplier of 16 loss of dependency was computed to sh. 23,618,707/20.

The same multiplier was applied to an income of sh. 100,000/= from the business the deceased was said to have been operating and loss of sh. 12,800,000/= was arrived at.

ii) **Pain & suffering**: A sum of sh. 150,000/= was proposed as conventional

iii) **Loss of Expectation of Life**: A proposal of sh. 200,000/= was made.

iv) **Loss of Consortium**: That the 2nd plaintiff lost a companion. This was not pleaded but an award of sh. 200,000/= was found to be reasonable.

v) **Special Damages**: All related to funeral expenses as given in evidence – a total sum of sh. 331, 841/= was put forth.

All those put together came to a grand total of sh. 37,300,548/20.

May we now turn to the side of the defendants beginning with the issue of liability. The court had directed that this aspect could be determined on evidence at the trial and first to be considered was whether it had been proved that the 2nd defendant was registered owner of tractor no. KAH 024 R and his employee was driving it when the subject death occurred, and then second, liability as to the 1st defendant providing safe working conditions/environment.

The defendants dealt with the liability of the 1st defendant first. It was submitted that the plaintiffs had told the court that they were not present when the subject accident occurred. And the investigation report (Exh P-144 to 156) by Wenslaus S. M. Adambo was not produced. Right away the issue of producing that report should be cleared. On 1/7/12 the plaintiffs' bundle of documents including Mr. Adambo's report was produced by consent as Exh. P1. Then the witnesses referred to individual documents therein. Those not referred to were deemed to have been abandoned as not being vital/relevant. Accordingly when PW2 referred to Adambo's report, he was in order. Even at that time the defendants were at liberty to insist on having Adambo, the maker testify on that report. They did not. After all he was said to be an employee of the 1st defendant. Therefore to impeach it in the submission is untenable. But the criminal proceedings in CR.C. 3026/003, though in the Exh P1 were marked for identification, (MF1 P-2), perhaps with a view to bring the original court record but that was not done. The copy placed before court was not certified either and so that need not be relied on. The defendants added that the Medical Practitioners & Dentists Board proceedings on the 1st defendant's clinic and doctor should similarly not be relied upon because the High Court quashed them under judicial review. There should be no dispute about that. The court was urged to exclude the evidence of PW2, a medical doctor who gave his opinion that Dr. Yuaya was negligent in handling the deceased's case. Yes. PW2 was not there and an expert's report was filed wherein Dr. Yuaya was found professionally negligent.

To answer whether the 2nd defendant was negligent and therefore liable in the circumstances, focus shifted to that defendant as the registered owner of the tractor KAH 024R. The defendants maintained that such ownership was not proved by documents. This bit was disposed of earlier on above in that there was no proof that the 2nd defendant was registered owner of the subject tractor. There was a bit to discredit the weight the plaintiffs put on the prosecution of KAK CM TR.C. 1271/02 against the tractor driver Wison Mbakaya Barasa in that though it was in Exh P, (pages 8 to 48) it was only marked for identification but not produced. That impression was incorrect. PW1 produced those proceedings as Exh P1-8 to 45. They were a certified true copy of the original trial court record and therefore valid. Although the charge sheet was not part of the proceedings placed before court, however perusing the judgement reveals that the tractor driver, Wilson, faced a charge of causing death by dangerous driving contrary to section 46 of the Traffic Act. But as the defendants maintained, the conviction of Wilson could not and did not automatically link the 2nd defendant to these proceedings so again it is not a basis to found liability against the defendants severally and jointly.

So on issue of liability this court is satisfied that none attached to the 2nd defendant herein – Miwa Transporters Ltd. There was no evidence that it was the registered owner of the offending tractor no. KAH 024R or that its employee was driving it in the course of his duties to the 2nd defendant at the time the accident took place. But the accident took place anyway.

As for the 1st defendant, this court is of the view that liability herein falls on it because, first as common law, it was expected to take reasonable precautions to ensure that its employees worked in a safe environment. Here it had put up a weighbridge over which loaded tractors were driven. And as per PW12 in the traffic case (IP Gideon Kivaa) there was a notice clearly written that drivers were not allowed to reverse while at the weighbridge. That was a fair attempt on the part of the 1st defendant to instruct its tractor drivers while on the weighbridge. It was definitely aware of the danger that reversing tractors would pose. But Wilson Mbakaya Barasa, while driving the tractor herein on the weighbridge to deliver sugar cane for the benefit and profit of the 1st defendant, ignored the no-reverse warning, did reverse and fatally hit the deceased.

In Adambo's report he made the following recommendations among others so that in future what led to the death of Alfred at the weighbridges B3 and B4 should be avoided. (Exh P1-156, 157).

"1. Scale checking using contracted transporters should stop immediately. Instead the company tractor with a low weight load should be used under strict supervision. The tractor/trailer should be fitted with hazard warning sound and light when reversing.

2. Barriers should be urgently constructed at least 14 meters along weighbridge B3 and B4 platforms as is the case with weighbridges B1 and B2 platforms to stop any unauthorized pedestrian movement and trailer maneuvers.

He too noted the warning written at the scene in Kiswahili which read in part:

" **Usirudi Nyuma**."

Adambo referred to that in his Fig. 8.

" Speed limit and Reversing instructions……"

That the warning showed speed limit and no reversing instructions at the weighbridge platforms, yet the driver (Wilson) reversed there without any supervision.

Although as noted above the 1st defendant had put up a warning as per Adambo, it ought to have placed there its own tractor to be used under strict supervision when it came to weighing sugar cane on the weighbridges. That tractor to be fitted with hazard warning sound and light to operate when reversing. And barriers also needed or ought to have been erected at the 2 accident weighbridge platforms. It can only be deduced from the foregoing that the 1st defendant ought to have put in place these and taken in regard reasonable precautions to ensure that those working at the scene in question were fairly safe from accidents as the present one. It did not; a tractor driver reversed on the weighbridge and hit Alfred who died. The 1st defendant, had a duty of care to Alfred; it breached that duty by failure to take reasonable safety precautions. A tractor hit Alfred, he died. The 1st defendant was liable.

Under the stature, and that is the popularly known as the Factories Act (now repealed), it was provided under section 16:

"16. (1) Effective provision shall be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which people are working."

The accident took place when this Act was in operation, at the factory of the 1st defendant where, it appears, work went on day and night. The deceased was called to go on duty at the weighbridge very early in the morning. At about 5 am the accident took place. Those present (see the criminal proceedings) said that it was still darkish. Either there were no flood light to illuminate the spot well or the light was insufficient. So here is Alfred and others working in an area where there is insufficient or unsuitable lighting. Then the accident took place. PW2 visited the scene after 3 days and found the floodlight being repaired. Accordingly the 1st defendant breached its statutory duty to provide a safe working place. Probably had there been sufficient and suitable light for those others working with Alfred at the scene, they could have seen the tractor reversing and quickly alerted him to get out of the way. That was not to be. Alfred was crushed to death. The court heard that a Ministry of Labour team visited the place and made a report finding the 1st defendant to have been in default on this account. With all the foregoing liability in this case squarely falls on the 1st defendant.

Now as to the quantum, the plaintiffs' proposals had been alluded to earlier. On the defendant's side and referring to the principle well exercised in the law of torts, the court was told that special damages must not only be specifically pleaded but also proved. That in this case there was no pleading to that effect, nor proof of sh. 331,841/= the plaintiff claimed in evidence. Basically, that position is true here. There was no pleading for special damages and there was limited documentary evidence or none at all to back the claim. So all in all the claim should fail. But all around do not dispute that Alfred died in the subject accident and he was buried at a place called Seme. There was definitely a funeral. The 1st defendant offered a van to assist in transport and also a coffin or money for the same. The funeral expenses quite likely went beyond that. In the circumstances the court on its own, awards the plaintiff a nominal sum of sh. 80,000/= towards funeral and other expenses.

(i) **Under the Law Reform Act**: The deceased died on the same day of the accident. The court has considered the proposal by both sides. It awards the conventional sum of sh. 90,000/=

Regarding loss of expectation of life, another conventional sum of sh. 100,000/= is awarded for pain and suffering.

Pain & suffering	sh. 90,000/=
Loss of Expectation of Life	sh. 100,000/=
	Total sh. 190,000/=

(ii) The Fatal Accidents Act

The figures proposed by the plaintiffs are set out above. There was also a figure for loss of consortium i.e. that the 2nd plaintiff lost a companion. This was not pleaded for the defendants to deal with it as well as the court. Probably loss of consortium falls under loss of dependency or as separate kind of damage. The court will need time to acquaint itself further about it. And with that that proposal of an award is left by the wayside.

Loss of dependency is worked basing on hard pounds and pence i.e. that the deceased used to earn income part of which he supported the dependants with. Where no specific sums are put forth as the income, the court would not be in error to hazard or guess a reasonable sum to represent income. But in most cases some basis is given and here the pay slips were produced.

If a claim is laid based on businesses operated or some other, the court is satisfied to have credible accounts laid before it. It will rarely pick a random sum here, based on a mere claim in the pleadings or evidence. And for business-based income the claimant will do well to place before court evidence of registration of that business, books of accounts, licences and/or audited accounts. Such evidence enables the court to form a picture of what it should go by.

In the present case the deceased's payslips were produced. And it was claimed that he had businesses from which he earned other income: farming, trading, manufacturing etc. But no documents were placed before court to the effect that the deceased owned/operated such businesses or that he earned income from them. No certificate of registration, licences, books of account or other credible evidence was brought here by the plaintiffs. In such circumstances the court was unable to work with the figures claimed as representing income from other sources. So loss of dependency was only approached with the salary that the deceased earned as an employee of the 1st defendant, as the only income.

On this point it must be stated that plaintiffs fell in error to take the gross salary of 184,521/15 for the month of April 2002 as the multiplicand with a multiplier of 16. The income that one has at his disposal to support himself and others is the net. That is the hard cash he has in hand to spend- not the gross. And where possible because net income fluctuates, where evidence avails an average over a period is a better basis to work with. The plaintiffs offered the income of the deceased (e.g.Exh P1 – 171, 172, 173) over a period - It fluctuated from February to April 2002- sh 29,670/=, 32,788/= and 97,981/=. The average net income was sh. 51,813/=m while the defendants proposed shs. 70,000/= per month with a multiplier of 4. The litigants then came up with loss of dependency put at sh. 12.8m and sh. 20.8m respectively.

The deceased died at age 49. He was employed by the 1st defendant, known to be a parastatal. He could have retired at 55 years of age. This court therefore adopts a multiplier of 6 despite being aware of the uncertainties of life. The multiplicand is sh. 52,000/= per month income. All these work at a sum of sh. 2,496,000/=

(52,000 x 12x 6x 2/3)

The grand award is:

Under the Law Reform Act	-	sh. 190,000/=
Under the Fatal Accidents Act	-	sh. 2,496,000/=
Special damages	-	sh. 80,000/=
		Sh. 2,766,000/=

In the olden days it used to be a principle that where the same claimant is a beneficiary under the 2 Acts, it was considered that he should not benefit twice over and so the award under the Law Reform Act was deducted.

It was also a principle that a certain fraction or percentage be knocked off from the award under what was termed “accelerated” payment to the claimant. (see Kemp & Kemp on **The Quantum of Damages**). Over several years this court has observed that those 2 principles have fallen out of application or they are rarely applied by the courts.

Having the foregoing in mind, this court awards the plaintiff a total sum of sh. 2,766,000/= (Two Million Seven hundred and sixty six thousand) in damages. They also get costs and interest.

It is of interest but also pertinent to repeat that the defendants did not call evidence in rebuttal. And also that there was a claim that the 1st defendant paid sh. 6.07m as compensation. The plaintiff conceded such payment with PW2 adding that it came from a group insurance scheme where the deceased was a contributor – not on account of or as compensation/damages following the accident herein. And no side submitted on this aspect.
In sum the claim against the 1st defendant has been proved. The plaintiff will recover damages, costs and interest from it on the lower court scales.

The claim against the 2nd defendant has been dismissed with costs.

Delivered on 6.6.2011.

J. W. MWERA
JUDGE