



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

**Civil Suit 408 of 1999**

**REGINA WAMBUI NJENGA ..... PLAINTIFF**

**VERSUS**

**DR. R. K. OBURA ..... 1<sup>ST</sup> DEFENDANT**

**J. M. ONYANGO AMARA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By an amended plaint, the plaintiff filed suit on behalf of the estates of Veronica Mumbi Njenga – deceased and Kennedy Mungai – deceased (*hereinafter referred to as the deceased persons*) seeking to be paid damages under the **Law Reform Act** and the **Fatal Accidents Act**. The plaintiff averred that on 17<sup>th</sup> October 1998, while Veronica Mumbi Njenga – deceased was walking along Elburgon-Njoro Road while carrying her nephew Kennedy Mungai – deceased, the 1<sup>st</sup> defendant's son, who was driving motor vehicle registration number KZB 923 Peugeot 505 Saloon, negligently and recklessly drove, managed or controlled the said motor vehicle that it knocked down the deceased persons as a result of which they sustained fatal injuries. The plaintiff averred that the 1<sup>st</sup> defendant's son died in the said accident. The plaintiff set out the particulars of negligence on the part of the 1<sup>st</sup> defendant's son which included *inter alia*, the fact that the said driver had driven the said motor vehicle at an excessive speed in the circumstances, had driven the said motor vehicle without due care and attention and had failed to stop, slow down, swerve or in any other way manage or control the said motor vehicle so as to avoid the accident.

The plaintiff averred that she sued the 1<sup>st</sup> defendant as the owner of the said motor vehicle and the 2<sup>nd</sup> defendant as the ostensible owner of the motor vehicle. The plaintiff averred that as a result of the said accident, the deceased persons lost the normal expectation of a happy and successful life. She averred that at the time of their death, Veronica Mumbi Njenga was aged 13 years and was a standard five pupil at St. James Primary School, Elburgon. Kennedy Mungai was 8 months old and was a healthy and fit boy. The plaintiff set out the particulars of special damage that she incurred in transporting the bodies of the deceased from the mortuary to the place of burial. The plaintiff urged the court to compensate her by reimbursing her the special damages that she incurred. She also prayed for the court to pay the estates of the deceased persons damages as compensation as a result of loss of their lives. The plaintiff also prayed to be awarded costs of the suit.

The 1<sup>st</sup> defendant filed a defence to the suit. He denied being the owner of the motor vehicle that was involved in the accident and put the plaintiff to strict proof thereof. He denied the averment by the plaintiff that the deceased persons were fatally injured while walking along Elburgon-Njoro Road or that

the 1<sup>st</sup> defendant's agent or servant was negligent or reckless in driving, managing or controlling the said motor vehicle thereby causing it to knock down the deceased persons. The 1<sup>st</sup> defendant denied the particulars of the negligence pleaded by the plaintiff and put the plaintiff to strict proof thereof. The 1<sup>st</sup> defendant further denied that the plaintiff was entitled to be paid any damages, under either the **Law Reform Act** or the **Fatal Accidents Act**. The 1<sup>st</sup> defendant denied that the plaintiff was entitled to be paid special damages as pleaded in the plaint. The 1<sup>st</sup> defendant averred that the plaintiff had failed to establish that the estate of the deceased persons suffered loss and damage and therefore entitled to be paid damages. The 1<sup>st</sup> defendant pleaded that the plaintiff's suit was misconceived, incompetent and bad in law as it did not disclose a reasonable cause of action. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff called three witnesses, namely PW1 Regina Wambui Njenga (*the plaintiff*), PW2 Sammy Kiarie Mwangi and PW3 Paul Joseph Waweru in support of her case. The 1<sup>st</sup> defendant chose not to call any witness in support of his defence. After the close of both the plaintiff's and the 1<sup>st</sup> defendant's case, the parties agreed by consent to file written closing submissions. They duly complied. The facts of this case as can be gleaned from the uncontroverted evidence of the plaintiff's witnesses are as follows:

On 17<sup>th</sup> of October 1998 at about 6.00 p.m., while PW2 was standing by the roadside on Elburgon-Njoro Road, he saw a motor vehicle which was being driven at a high speed towards the direction of Njoro. PW2 recalled that the motor vehicle was a Peugeot 505 saloon registration number KZB 923. He testified that there were three girls standing next to the road, one of whom was holding a small child. In his estimation, the girls were standing about 10 metres from the road. He recalled that the motor vehicle lost control, veered off the road, hit a tree on the side of the road and then knocked down one of the girls was holding a child. PW2 testified that the girl was the daughter of the plaintiff. He testified that the two children died immediately upon being hit by the said motor vehicle. The driver of the motor vehicle died at the scene of the accident. PW2 recalled seeing alcohol in the motor vehicle. The passengers in the motor vehicle appeared drunk. PW2 made a report of the accident to Elburgon Police Station. While recording a statement at the police station, PW2 was informed by the police that the motor vehicle belonged to a Dr. Obura of Egerton University. PW3 was at the police station when the 1<sup>st</sup> defendant visited the police station. He recalled that the 1<sup>st</sup> defendant told him that his son was the driver of the motor vehicle that had been involved in the accident. The son of the 1<sup>st</sup> defendant was fatally injured in the accident.

In her testimony before court, the plaintiff (*PW1*) produced the respective death certificates of the deceased persons, a letter from St. James Primary School, Elburgon where Veronica Mumbi Njenga – deceased was a standard five pupil at the time of her death, two police abstract reports confirming the 1<sup>st</sup> defendant as the owner of motor vehicle registration number KZB 923 Peugeot 505 saloon, and further confirming that the deceased persons were fatally injured in the accident. She also produced limited grant of letters of administration *ad colligenda bona* issued to John Njenga Karuma, in respect of the estates of the deceased persons (*the said John Njenga Karuma, the father of the plaintiff filed the present suit. He died before the case was heard and determined by the court*), limited grant of letters of administration *ad litem* in respect of the estate of John Njenga Karuma, demand letter written to the 1<sup>st</sup> defendant by the advocate of the plaintiff to admit liability and pay compensation to the estate of the deceased, and receipts in respect of expenses which were allegedly incurred by the family of the deceased persons during burial. The plaintiff urged the court to award damages to the estates of the deceased persons as compensation for their untimely deaths. The plaintiff urged the court to order the 1<sup>st</sup> defendant to pay compensation to the estates of the deceased persons under the **Law Reform Act** and the **Fatal Accidents Act**.

As stated earlier in this judgment, counsel for the plaintiff and the 1<sup>st</sup> defendant filed written closing submissions. I have carefully considered the evidence adduced in this case. I have also considered the submissions made by the parties herein. The issues for determination by this court are two-fold; whether the plaintiff established, to the required standard of proof, that the 1<sup>st</sup> defendant's agent negligently and

carelessly caused the accident and therefore the 1<sup>st</sup> defendant should be held vicariously liable in tort to pay damages to the estates of the deceased persons. The second issue for determination is what damages, if any, should be paid to the estates of the deceased persons. On the first issue, as stated earlier, the evidence adduced by the plaintiff's witnesses was uncontroverted. The suit motor vehicle was at the material time being driven by the son of the 1<sup>st</sup> defendant, who was fatally injured in the accident. Although the 1<sup>st</sup> defendant denied ownership of the said motor vehicle in his defence, upon perusing the police abstract reports which were produced in evidence by the plaintiff, I am convinced that the 1<sup>st</sup> defendant was the owner of the motor vehicle. No evidence was adduced by the 1<sup>st</sup> defendant to controvert the evidence by the plaintiff that the motor vehicle belonged to the 1<sup>st</sup> defendant.

On evaluation of the evidence adduced by PW2, an eye witness of the accident, it was clear that the driver of the suit motor vehicle was drunk at the time of the accident. He was also driving the motor vehicle at a speed that was excessive, reckless and negligent in the circumstances. According to PW2, the driver of the said motor vehicle lost control of the motor vehicle, veered off the road and collided with a tree by the roadside before hitting the deceased persons, causing them to sustain injuries which proved fatal. There was no evidence adduced to suggest that the deceased persons in anyway contributed to the said accident. The deceased persons were walking about 10 metres away from the said road. It was therefore evident, upon analysis of the evidence adduced, that the said accident was solely caused by the negligence of the driver of motor vehicle registration number KZB 923 Peugeot 505 saloon. As it was established that the motor vehicle was at the material time owned by the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant is vicariously liable in tort to the estates of the deceased persons. I therefore hold the 1<sup>st</sup> defendant is 100% liable in tort to pay damages to the estate of the deceased persons.

As regard special damages, the plaintiff produced receipts which established that the family of the deceased persons incurred expenses to the sum of Kshs.23,550/= during the burial of the deceased persons. This expense included the cost of the coffins, the cost of transporting the bodies of the deceased persons from the mortuary to the place of burial, and the fee paid to the mortuary where the bodies of the deceased persons were preserved before burial. It also included the fee paid to the police and to the government for the death certificates and the police abstract reports. I therefore hold that the plaintiff is entitled to be paid the said sum of Kshs.23,550/= as proven special damages.

The deceased persons were aged 13 years and 8 months at the time of their death. In her submission, the plaintiff urged the court to award the estate of the 1<sup>st</sup> deceased, Veronica Mumbi Njenga the sum of Kshs.250,000/= as damages under the **Fatal Accidents Act**, the sum of Kshs.150,000/= for loss of expectation of life and the sum of Kshs.25,000/= for pain and suffering. The total amount sought on behalf of the estate of the 1<sup>st</sup> deceased is Kshs.425,000/=. As regard the 2<sup>nd</sup> deceased, counsel for the plaintiff urged the court to award the sum of Kshs.150,000/= as damages under the **Fatal Accidents Act**, Kshs.120,000/= for loss of expectation of life and Kshs.15,000/= for pain and suffering. On his part, the 1<sup>st</sup> defendant urged the court not to make any award in respect of the estate of the deceased persons because, according to him, the plaintiff had not established dependency on the deceased persons on the part of the beneficiaries of the estates of the deceased persons.

I have carefully considered the rival submissions made by the parties herein in regard to whether or not damages should be paid to the estates of the deceased persons. The issue whether damages should be paid to the estate of a deceased child was long settled by the Court of Appeal in the case of **Sheikh Mushtaq vs. Nathan Mwangi Kamau Transporters & Others [1985 – 1988] 1 KAR 217** where Nyarangi, JA recognized the fact that in African and Asian communities, an expectation by parents that their children would take care of them in their old age was normal. In **Kenya Breweries Ltd. vs. Saro [1991] KLR 408** at page 411 the Court of Appeal held that:

*“We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken in to account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not*

*been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have “homes” for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a “home” while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase “being mindful of other people’s welfare”.*”

However, I agree with the 1<sup>st</sup> defendant that the plaintiff, on behalf of the estates of the deceased persons cannot be paid damages for loss of dependency, as plaintiff did not establish any loss of dependency. The deceased persons had not earned any income to entitle the family to be paid loss of dependency. Doing the best I can in the circumstances, I award damages under the **Fatal Accidents Act** of Kshs.350,000/= to the estate of the 1<sup>st</sup> deceased, Veronica Mumbi Njenga. I award damages under the **Fatal Accidents Act** of Kshs.150,000/= to the estate of the 2<sup>nd</sup> deceased, Kennedy Mungai.

In the premises therefore, judgment is entered in favour of the plaintiff as against the 1<sup>st</sup> defendant, on behalf of the estates of the deceased persons, as follows:

- (i) The 1<sup>st</sup> defendant is held solely liable in negligence for the accident that resulted in the death of the deceased persons.
- (ii) General damages under the **Fatal Accidents Act** is awarded as hereunder:
  - (a) For the estate of Veronica Mumbi Njenga – deceased - Kshs.350,000/=
  - (b) For the estate of Kennedy Mungai – deceased – Kshs.150,000/=
- (iii) The plaintiff shall be paid proven special damages of Kshs.23,550/= .
- (iv) The plaintiff is awarded costs of the suit.
- (v) Interest on special damages shall be paid from the date of filing suit, while interest on general damages awarded shall be paid from the date of this judgment.

**DATED** at NAKURU this 22<sup>ND</sup> day of **MAY 2009**.

**L. KIMARU**

**JUDGE**