



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

**Civil Suit 98 of 2006**

**RUTH JEMUTAI KOSGEI**

**(Suing as the legal representative of the estate of**

**TIMOTHY KIPKOSGEI KIPYAGAN) .....PLAINTIFF**

**VERSUS**

**SPENCER KIPRUTO KIMELI .....1<sup>ST</sup> DEFENDANT**

**PHILIP KIPYEGO .....2<sup>ND</sup> DEFENDANT**

**AND**

**DANIEL KAHORIA .....THIRD PARTY**

**JUDGEMENT**

The First and Second Plaintiffs are the Administrators of the Estate of the late Timothy Kipkosgei Kipyagan and instituted this suit for the benefit of the Dependants of the deceased under the Law Reform Act and Fatal Accidents Act.

It is the Plaintiff's case that on the 11<sup>th</sup> December, 2004 the deceased was lawfully traveling aboard a private vehicle registration No. KAM 914 Peugeot 505 Station Wagon along Eldoret – Iten Road at Kaptui Area when the Second Dependants's lorry driven by the First Defendant motor vehicle registration number KXJ 287 Isuzu lorry lost control, zigzagged and plunged into the deceased's motor vehicle occasioning him fatal injuries. The Plaintiffs attributed the accident to the poor and/or unsafe mechanical condition in which the said lorry was and/or was due to the reckless and/or negligent manner in which the vehicle was being driven, controlled and/or managed by the 1<sup>st</sup> Defendant. The Plaintiffs set out particulars of the negligence of the 1<sup>st</sup> Defendant.

The Plaintiffs said that the action was brought on behalf of the following:-

1. Ruth Jemutai Kosgei – deceased's wife
2. Jeff Kipkemboi Kosgei – deceased's son

3. Ivy Jepchirchir Kosgei – deceased's daughter

In the Complaint, the Plaintiffs state that at the time of his

death, the deceased was thirty four (34) years of age and enjoyed good health and lived a happy and victorious life. That he was a banker employed by Kenya Commercial Bank Nairobi and his gross salary was Kshs. 55,832/= . That he had prospects of considerable advancement in his career as a banker and his salary was likely to increase progressively from year to year. They added that the widow and children of the deceased were dependent upon him for support and by his death they have lost the said means of support and have suffered loss and damage. Further by reason of the said matters the deceased suffered from the said injuries sustained by him and his life was considerably shortened in consequence whereof his said estates has suffered loss and damage and the deceased motor vehicle was completely damaged and written off.

The Plaintiffs claimed special damages being the pre-accident value less salvage in the sum of Kshs. 505,000/=. They also claimed general damages for loss of dependency under the Fatal Accidents Act and for pain and suffering and loss of expectation of life under the Law Reform Act. They also claimed costs.

The Defendants filed their defence and denied liability. In the alternative, they blamed the deceased for the accident and stated that the Deceased wholly caused and/or substantially contributed to the accident by his negligence in the manner of driving, controlling and/or otherwise managing his motor vehicle registration number KAM 914Y.

The Defendants after filing their Defence took out a Third Party Notice with leave of the Court. They pleaded that the Third Party's motor vehicle registration number KUE 992 caused and/or substantially contributed to the accident by his negligence.

The Third Party became enjoined in the suit and filed his Defence.

The 1<sup>st</sup> plaintiff testified as an Administratrix of the Estate and widow of the deceased. The Plaintiffs called a police officer as a witness to produce the Abstract from Police on the road accident and a brother of the deceased who was traveling in the vehicle of the deceased at the material time and who was himself injured in the accident. They also called a motor vehicle assessor.

Defendants called the 2<sup>nd</sup> Defendant as a witness. The 2<sup>nd</sup> Defendant was a driver of the motor registration number KXJ 287 Isuzu Lorry. The Third Party did not testify or call any witness.

I have considered the testimonies of all the witnesses, the evidence tendered and the submissions by Counsel. I have also perused their respective authorities.

On the question of liability, PW 5 was an eye witness. He was a brother of the deceased and traveling in the deceased's motor vehicle. PW 5 is a corporal in the Kenya Army based at Moi Barracks RTS College in Eldoret. He was seated in the back seat of the vehicle when the head-on collision with the 1<sup>st</sup> Defendant's motor vehicle took place. He testified that they were driving from Iten to Eldoret at about 7.30 p.m. – 8 p.m. when the accident took place. He said that the Isuzu lorry was on their lane as it came towards them. He said that upon impact he was thrown into the rear of the motor vehicle. He was taken to hospital after being assisted by the members of the public. He said that he was later told that his brother had died on the spot. From his evidence, he must have lost consciousness upon impact. The significant evidence is that he saw the Isuzu Lorry coming towards their vehicle on the wrong side of the road directly in their path. His brother could not avoid the impact as there was a rail guard along the road.

In his evidence he said that he was injured on the head, spinal cord and the back. He filed a suit in the Chief Magistrate's Court, namely CMCC. No. 45 of 2005 against the lorry owner. He said that he was successful in the suit and he was paid damages after the Defendants admitted liability.

PW 2, the police officer produced a copy of the Police Abstract on the road accident. He testified that

he was not the Investigating Officer but their record shows that the 2<sup>nd</sup> Defendant, the driver of the lorry was charged with causing death by dangerous driving. Three (3) persons died in the accident, namely:-

1. Joseph Kinyanjui
2. Theophilas Kipyagan
3. Timothy Kosgei

He was charged with three counts of causing death by

dangerous driving. Strangely, PW 2 said that the driver was acquitted under Section 215 of the Criminal Procedure Code. However, when the driver himself testified, he said that he was convicted and fined a sum of Kshs. 100,000/=. PW 2 did not produce the police file. None of the parties produced a copy of the Judgment or proceedings from the Court that determined the traffic case. However, the Defence did not deny that PW 5 was compensated and paid damages in the Chief Magistrate' Court. Their own witness the Driver testified that he was convicted of the traffic charges and fined Shs. 100,000/=.

On the basis of the foregoing, I do find that the 2<sup>nd</sup> Defendant, the driver to the Isuzu Lorry was wholly liable for the accident. The accident took place due to the negligence of the Defendants as pleaded in the Amended Plaintiff. There was no contribution by the deceased or the Third Party.

This brings me to the question of quantum of damages.

With regard to special damages, I have considered the evidence of PW 3, the motor vehicle assessor who stated the pre-accident value of Shs. 550,000/= and the salvage value of Shs. 45,000/= as the vehicle was written off. The evidence was not challenged and in fact no mention of it is made in the Defendant's submissions. It is deemed that there is no dispute on this head of claim. I do hereby find that the Plaintiffs are entitled to special damages in the sum of Kshs. 505,000/=.

The Deceased was aged 34 years. He was a banker and on the threshold of his career. He earned a basic salary of Shs. 53,511/= and house allowance of Shs. 2,321/= making a total of Shs. 55,832/= which was taxed at a rate of Shs. 10,961/= (P.A.Y.E).

After taking into account other statutory payments like N.H.I.F and N.S.S.F etc, I find that his clear net income was Shs. 44,000/= per month. This has been worked out from his pay slip.

I have considered the age of the deceased in setting the multiplier. The Defendants suggests a multiplier of twelve (12) years while the Plaintiff suggest twenty one (21) years. I have considered the authorities given and the principles of law relating to the multiplicand. I have considered that the deceased worked in the private sector and that the new retirement age in the civil service of sixty (60) years was not shown to apply to the banking sector. Doing the best I can, I do hereby award a multiplier of 16 years. The deceased left behind a widow and two children aged seven (7) years and three (3) years. They depended on him. I do find that a dependency rate of 2/3 to be fair and reasonable I would award a sum of Kshs. 5,631,999/= made up as follows:-

$$44,000/= \times 16 \times \frac{2}{3} \times 12 =$$

Shs. 5,631,999 rounded upto

Shs. 5,632,000/=

With regard to pain and suffering the deceased died on the spot but it is not known after how long. I would award a nominal sum of Kshs. 10,000/=. A sum of Shs. 100,000/= is reasonable for loss of expectation of life.

However, on the basis of the decision in **KENFRO AFRICA LIMITED –VS- LUBIA & ANO. CIVIL APPEAL NO. 21 OF 1984 (1982 – 1988) KAR 727.** Damages under the Law Reform Act must be set off against the award under the Fatal Accidents Act of the beneficiary is the same. As a result I do hereby set off the sum of Kshs. 110,000/= from the award of Shs. 5,632,000/= leaving a balance of Shs. 5,522,000/=.

I therefore do enter judgment for the Plaintiff against the Defendants on a 100% basis as hereunder:-

- (a) Special Damages Shs. 505,000/=
- (b) General Damages Shs. 5,522,000/=

**Shs. 6,027,000/=**

The Defendants shall also pay to the Plaintiff interest on the said amount from date of judgment until payment in full and costs of this suit. The Defendants shall pay costs to the Third Party.

I hereby do apportion the Award as follows:-

1. Ruth Jemutai Kosgei, widow

Shs. 3,027,000/=

2. Jeff Kipkemboi Kosgei, minor son

Shs. 1,500,000

3. Ivy Jepchirchir Kosgei, minor daughter

Shs. 1,500,000/=

I direct that each minor's award shall be invested in an interest earning account with the Housing Finance Company of Kenya Limited, Eldoret Branch in the joint names of the Registrar of the High Court and the First Plaintiff on terms that the First Plaintiff may withdraw the periodical interest for the maintenance and advancement of the minors and that the capital interest remaining on the account of each minor be released to them upon attainment of 18 years respectively.

**DATED AND DELIVERED AT ELDORET ON THIS 29<sup>TH</sup> DAY OF JULY, 2009.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:-**

Mr. Limo for Plaintiff

Mr. Mwinamo for the Defendant

Mr. Muhoho for the 3<sup>rd</sup> Party