



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

**AT KISII**

**CIVIL SUIT 87 OF 2008**

**ROSE ADISA ODARI (*suing as the personal representative of the estate of***

**HENRY MUSOMA (DECEASED) ..... PLAINTIFF**

**VERSUS**

**WILBERFORCE EGESA MAGOBA ..... DEFENDANT**

**JUDGMENT**

The plaintiff's husband, **Henry Ondari Musoma**, hereinafter referred to as "**the deceased**", died in a road traffic accident that occurred on 31<sup>st</sup> March, 2008 along Funyula-Bumala Road. On 16<sup>th</sup> July, 2008 the plaintiff obtained from this court Letters of Administration ***Ad Litem*** to enable her file this suit while awaiting issuance of a full grant.

The plaintiff stated that at all material times the defendant was the registered owner and/or owner in user and in actual possession of motor vehicle registration number KAR 253 D Toyota Corolla which was being driven by himself or his driver, servant and/or agent.

On or about the 31<sup>st</sup> March, 2008, the deceased was lawfully cycling off the verge of Funyula-Bumala road at Funyula Township or thereabout when the defendant, his driver, servant and/or agent so negligently drove, managed and/or controlled the said motor vehicle that he caused or permitted the same to lose control and violently collide with the deceased. Particulars of negligence on the part of the defendant and/or his driver included driving the said motor vehicle at a speed which was excessive in the circumstances, driving without due care and attention and failing to exercise proper control of the said motor vehicle.

Following the said accident, the defendant was charged with causing death by dangerous driving. At the time of this hearing the traffic case was still going on.

The plaintiff brought this suit pursuant to the Provisions of the **Fatal Accidents Act** and the **Law Reform Act** on her own behalf and for the benefit of the estate of the deceased whose dependants are:

- (a) Rose Adisa Odari – widow, the plaintiff.
- (b) Stephen Idareri Odari – 11 years – son

(c) Elizabeth Kareji – 8 years – daughter

(d) Karen Makungu – 2 years – daughter

The deceased was aged 35 years at the time of his death and enjoyed a healthy and vigorous life. He was a construction worker and his weekly income was said to have been Kshs. 3,900/= or thereabout.

The plaintiff claimed special damages as hereunder:

(a) Police Abstract report ..... Kshs. 200.00

(b) Death Certificate ..... Kshs. 150.00

(c) Funeral expenses ..... Kshs. 74,820.00

(d) Letters of Administration Ad Litem .... Kshs. 15,950

**Total..... Kshs. 91,120.00**

The plaintiff further claimed damages for herself for loss of consortium. She was at 24 years old when her husband died.

The defendant filed a statement of defence and denied that the plaintiff has *locus standi* to institute the suit on behalf of the estate of the deceased. The defendant also denied that the said accident ever occurred or that he was the registered owner of motor vehicle registration number KAR 253 D. Alternatively, the defendant averred that the accident was caused or substantially contributed to by the negligence of the deceased cyclist in that he rode the bicycle in a zig zag manner and without any regard for other traffic on the road. The defendant denied all the other averments contained in the plaint save this court's jurisdiction which was admitted. He urged the court to dismiss the suit with costs.

The plaintiff testified and produced **Letters of Administration Ad Litem** issued to her by this court on 16<sup>th</sup> July, 2008. She also produced the Death certificate in respect of the deceased. The same revealed that he was 35 years old at the time of his death.

The plaintiff told the court that after she received information that her husband had died due to the road traffic accident she travelled to Funyula and got information from the police as to how the accident occurred. She said that the deceased was a construction worker and used to earn about Kshs. 4,000/= per week. Her husband was working away from their home and she was the one who was staying with their children at home. The deceased used to send to her a sum of Kshs. 2,500/= to Kshs. 3,000/= on a weekly basis. She was using that money to pay school fees for the children and for her subsistence together with their children.

Regarding the funeral expenses, the plaintiff testified that the body of the deceased was transported from Funyula to Got Kachola in Migori for burial. The cost of transporting the body was Kshs. 30,000/=. A coffin was purchased at a cost of Kshs. 10,000/=. Two bulls were bought at a cost of Kshs. 16,760/= and Kshs. 15,660/=. The plaintiff also produced bus tickets for three people who travelled to Funyula at a total cost of Kshs. 2,400/=. The plaintiff spent a sum of Kshs. 15,950/= in applying for letters of administration **Ad Litem**. A bundle of receipts was produced in support of the expenses as listed herein above. The cost of a police abstract report was said to be Kshs. 200/= and although no receipt was produced in support of that expense I do not doubt that cost. A death certificate was also purchased at a cost of Kshs. 150/=. All the above expenses amounted to Kshs. 91,120/=.

In cross examination the plaintiff stated that although the death certificate showed that the deceased was a farmer his actual occupation was a construction worker. She reiterated that the deceased used to send to her between Kshs. 2,500/= and Kshs. 3,000/= per week but she had no documentary evidence in support thereof. She said that she was not intending to re-marry.

**Police Constable Elijah Mochama, PW2**, who was based at Funyula police post testified and produced a police abstract report in respect of the said accident. He also produced a certified copy of the occurrence book detailing the actions that were taken by the police with regard to the said accident. He said that the deceased was a pillion passenger on a bicycle which was being ridden by one **Stephen Wesonga**. The defendant's motor vehicle registration No. KAR 253 D hit the bicycle from behind at about 8.10 p.m. He further testified that at the time of the accident the defendant appeared drunk when he was arrested by the police. The defendant was charged with causing death by dangerous driving and the case is still on going.

After the accident the deceased was taken to Nangina Mission Hospital and later transferred to Busia District Hospital where he died while undergoing treatment. According to PW2 the defendant was to blame for the occurrence of the said accident.

The plaintiff's evidence was unchallenged.

In civil proceedings the best way of challenging evidence of an opposite party is to adduce such evidence as tends to controvert the adverse evidence, not just filing a defence. A defence is a pleading in which allegations, denials and/or admissions are made, it cannot substitute the place of oral evidence.

The plaintiff testified that the defendant was “**the registered owner and/or owner in user and in actual possession of motor vehicle registration NO. KAR 253 D Toyota Collora which was at all material times being driven by himself, or his driver, servant and/or agent and acting within the course of his employment.**”

She called PW2, a police officer who was based at Funyula police post at the time of the occurrence of the accident. PW2 produced a police abstract report which showed that the defendant was the owner and driver of the said motor vehicle at the time of the accident. He also produced an extract of the police occurrence book for the date of the accident which related to the accident in question. The same showed that the defendant was driving the motor vehicle on the material day. When the defendant was arrested by the police he did not deny that the motor vehicle belonged to him. In my view therefore, the plaintiff proved on a balance of probabilities that motor vehicle registration No. KAR 253 D was owned and driven by the defendant. The plaintiff was not required to prove that issue beyond any reasonable doubt. The standard of proof in civil cases is always on a balance of probabilities. Where a defendant wishes to have the scale of probabilities tilt in his favour he has to bring to court evidence which outweighs that of the plaintiff. He cannot produce nil evidence and contend that the evidence of the plaintiff lacks sufficient weight.

Turning to the manner in which the accident occurred, evidence on record shows that the bicycle on which the deceased was being carried on was hit from behind by the defendant. The bicycle was being ridden on the extreme left side of the road and there is no evidence to suggest that it was being ridden in a zig zag manner. Although the defendant was not subjected to any medical test, PW2 testified that he appeared drunk immediately after the occurrence of the accident. That was recorded in the occurrence book. Police investigations led to the defendant being charged with causing death by dangerous driving. There is no basis of holding that the deceased was to blame for the said accident and neither is there any evidence tending to show that he contributed in any way to the occurrence of the same. I therefore find the defendant fully liable for the occurrence of the said accident.

Turning to the issue of damages, I accept that the plaintiff is the widow of the deceased. There is a letter to that effect from the Assistant Chief of the area where the deceased hailed from. The plaintiff also obtained letters of administration *Ad Litem* in respect of the estate of the deceased before filing this suit. The plaintiff had *Locus Standi* to institute the suit.

General damages are payable under the **Fatal Accidents Act** and the **Law Reform Act**. Under the **Fatal Accidents Act**, the court was asked to award damages for loss of dependency. The plaintiff's advocate as well as the defendant's advocate were in agreement that a dependency ratio of  $\frac{2}{3}$  is reasonable. Dependency is a question of fact which must be proved. There is no fixed dependency ratio.

The  $\frac{2}{3}$  dependency ratio that is open cited is not a rule of law, each case must be decided on its own facts, see **BOR –VS- ONDUU**, 2 KAR 281. But because here parties have agreed on the dependency ratio of  $\frac{2}{3}$  I will accept the same.

Parties did not agree on the multiplier. The plaintiff's advocate urged the court to adopt a multiplier of 25 years whereas the defendant's advocate was of the view that a multiplier of 10 years is reasonable. The defendant's advocate cited **VINCENT KINUTHIA MWANGI –VRS- PAUL MAINA MWANGI**, HCCC No. 1439 of 1989 where the deceased was 21 years and Mwera, J. adopted a multiplier of 10 years. On the other hand the plaintiff's advocate cited, *inter alia*, **THOMAS OBWOCHA –VRS- CHARLES ADAMS OTUNDO**, HCCC No. 54 of 2001 at Kisii, where the deceased was 26 years at the time of his death and the court applied a multiplier of 15 years.

In **PAULINE KULOBA MWADIME –VS- DANCUN M. MWAKAMBA**, HCCC No. 2774 of 1992 at Nairobi, the deceased was aged 35 years and the court applied a multiplier of 20 years.

I am of the view that a multiplier of 20 years is reasonable. Even though the retirement age for people who are in formal employment has been 55 years, the same has recently been increased to 60 years. In any event, there is no fixed age for retirement for people in self employment. In **JACOB AYIGA MARUJA & ANOTHER –VS- SIMION OBAYO**, Civil appeal No. 157 of 2002 at Kisumu, the Court of Appeal stated that there was no law or any other requirement that a self employed carpenter must retire at the age of 55 years. In that case the deceased was 53 years old and the court approved a multiplier of 8 years that had been adopted by the trial court in assessing damages for loss of dependency.

The plaintiff testified that the deceased was earning about Kshs. 4,000/= a week and used to remit to her between Kshs. 2,500/= and Kshs. 3,000/= a week. These figures were not supported by any documentary evidence.

In the above cited Court of Appeal decision the deceased was a carpenter and was said to have been earning Kshs. 5000/= per month but there was no documentary evidence to prove his occupation or his earnings. Commenting on the appellant's submission that the deceased's occupation and income had not been strictly proved, the court held as follows:

**“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”**

From the unchallenged evidence of the plaintiff I accept that the deceased was a construction worker and it is possible that he was earning an average of Kshs.4,000/= per week. In the construction industry a good mason, for example, can easily earn between Kshs. 600/= and Kshs.700/= per day. If he earns Kshs. 650/= per day and works for 6 days in a week that will be Kshs. 3,900/= a week. However, there is no guarantee that a construction worker may continue in employment for a period of one month without any break or loss of employment. There may be days when work is not available. That will reduce his weekly or monthly earnings. For this reason I will adopt a multiplicand of Kshs.3,000/= per week which works out to Kshs. 12,000/= per month. I therefore compute loss of dependency as hereunder:

$$20 \times 12 \times \frac{2}{3} \times 12,000/= \dots 1,920,000/=.$$

But considering that this amount will be paid lump sum and can therefore be reasonably invested to generate some income, it is a normal practice to reduce the same by a reasonable percentage. In this case, I will discount the sum by 15% leaving a net sum of Kshs. 1,632,000/=.

Special damages of Kshs. 91,120/= were pleaded and proved and I allow the same.

Under the **Law Reform Act** damages for loss of expectation of life are awardable. The conventional figure is Kshs. 100,000/= and I award the same. The deceased did not die immediately after the accident. He was first taken to Nangina Mission Hospital and later transferred to Busia District Hospital. He must have endured considerable pain before he died. I will therefore award a sum of Kshs. 30,000/= for pain and suffering.

The plaintiff prayed for damages for loss of consortium. As a result of the untimely death of her husband she became a widow at a fairly early age of 24 years. She urged the court to award her a sum of Kshs. 50,000/= and in my view the sum is reasonable and I allow the same.

In **KEMFRO AFRICA LIMITED t/a “MERU EXPRESS SERVICES (1976)” & ANOTHER – VS- LUBIA & ANOTHER(NO.2)**, [1987) KLR 30, it was held that any pecuniary loss suffered by a dependant must be offset by any pecuniary gain which accrues to him or her so that the estate does not get double benefit out of the same cause of action. The award for loss of expectation of life under the **Law Reform Act** is therefore deductible from the award made under the **Fatal Accidents Act**. I now summarize the awards made as hereunder:

**(a) Under Fatal Accidents Act**

- Loss of dependency ..... Kshs. 1,632,000/=
- Special damages ..... Kshs.91,120/=

**(b) Under the Law Reform Act**

- Loss of expectation of life ..... Kshs. 100,000/=
- Pain and suffering ..... Kshs. 30,000/=

- (c) Loss of consortium ..... Kshs. 50,000/=

**Total Kshs.1,903,120/=**

Less sum payable for loss of

expectation of life ..... Kshs. 100,000/=

**Total Kshs.1,803,120/=**

I award the plaintiff judgment in the sum of

**Kshs. 1,803,120/=** as shown above. The plaintiff will also have costs of the suit and interest at court rates.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JULY, 2009.**

**D. MUSINGA**

**JUDGE.**

**28/7/2009**

Before Musinga, J.

Mobisa – cc

N/A for the Plaintiff

N/A for the Defendant

**Court:** Judgment delivered in open court.

**D. MUSINGA**

**JUDGE.**