REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CIVIL SUIT 814 OF 2007

PETER KIBOGORO WANJOHI (Suing as legal Representative of the estate of)

LILIAN WANGUI WANJOHI (DECEASED)…….....PLAINITFF

VERSUS

CHRISTINE WAKUTHI MURIUKI…….....……1ST DEFENDANT

MONICA WANJIRU MIRIUKI…….....…...2ND DEFENDANT

JUDGEMENT

The plaintiff moved to this court, initially vide a plaint dated 21st day of November 2007, and filed on the 6th day of December 2007. This was subsequently a mended on the 11th day of March 2008, and filed on the 12th day of Mach 2008. The salient features of the same are as follows:-

-The action is brought by the plaintiff against the defendants in his capacity as the father and administrator of the estate of the deceased.

-The deceased was a passenger in motor vehicle KMJ 526 which collided with motor vehicle registration number KA U073F driven by one Peter Kariuki Muturi on behalf of whose estate the administrator and or personal representatives are sued.

-The said collision was as a result of the negligence of the said defendant particularized in paragraph 4 of the plaint.

-The deceased was aged 21 years at the said death, the deceased's estate suffered damages and her parents suffered loss of dependency.

-By reason of matters aforesaid, the plaintiff seeks special and general damages costs and interests.

Summons to enter appearance were duly taken out and served. The defendant entered appearance dated 15th day of February 2008 and filed on the same date, followed by a defence dated 26th day of February and filed on the 28th day of February 2008.

-Denied that they were administrators of the estate of one Peter Karuki Muiruri.

-Denied that the deceased was the registered owner of the motor vehicle KAU 073F.

-Denied consent of paragraph 4 of the plaint which attributes negligence on to them and put the plaintiff

to strict proof.

-Vide paragraph 6, they attributed negligence to the owner and driver of motor vehicle KMJ 526.

-Denied particulars of loss pleaded and put the plaintiff to strict proof.

-Lastly prayed for the dismissal of the suit against them.

Two witnesses gave evidence for the plaintiff and none was called by the defence. The sum total of PW1s evidenced is that he is the father of the deceased who had joined the university of Nairobi Kikuyu campus. She was in her first year. On the fateful right he was phoned and informed that the deceased had been involved in an accident as a result of a collision between 2 vehicles. He travelled to Nairobi and confirmed the death and then went back to make arrangement for burial. Removed the body from Chiromo to War memorial hospital from where they removed it for burial at Lanet. He obtained an abstract exhibit 3, after obtaining a death certificate exhibit 1, which documents he used to obtain a limited grant which enabled him to file these proceedings.

Thereafter he used the services of a lawyer and instructed him to carry out a search as regards the ownership of the accident vehicle mentioned in the abstract exhibit 3, and the records exhibit 4 established that the owner of the vehicle was one Peter Kariuki Mulruri who also perished in the accident, but those sued on his behalf are the personal representatives as shown by exhibits.

Turning to the deceased, PW1 said that the deceased had been admitted to do Bachelor of Education at Nairobi University, Kikuyu Campus, as shown by exhibit 6. It is his stand that his daughter was bright and had she lived, she would have successfully completed her studies, accessed employment and then supported them from her earning in exhibit 7. After issuance of the demand notice, demonstrated in exhibit 8, the action was filed.

When cross examined, he stated that they incurred funeral expenses to the tune of 70-80,000.00 but the receipts got lost. He was not at the scene but from the information gathered from the police abstract, the deceased was a passenger in KMJ 526 which was knocked by motor vehicle KAU 073F.

PW2 is the second witness, and the sum total of his evidence is that he attended a party with the deceased among others. The party ended at 1.00 a.m. when PW2 was sent to get a vehicle to ferry them home. He went for a vehicle whose owner he had known for a long time, namely KMJ 526. Each paid 200/= and it was demanded that they drop those going to the campus first, and it is in the process of heading to the campus that the accident happened.

The sum total of PW1s evidence on the causation of the accident is that, their driver was on his right side of the road. The other vehicle that collided with theirs is the one which went off its side of the road in a bid to escape a pot hole and collided with them. Their driver swerved off the road to his side but the on coming vehicle still followed them and collided with them. It is his stand that the accident vehicle was speeding. He absolved their driver from any blame.

According to him the deceased was badly injured and she never uttered a word after the accident. Him PW2 was also injured and was hospitalized for 1 ½ months and he filed suits for damages. It had been decided at the lower court, level and had moved to the high court, vide HCCC A 264/07.

When cross- examined, he maintained that he was indeed a victim in the said accident, maintained that he was in the accident vehicle, denied that the driver ferrying them was also in the party and denied that alcoholic drinks were served. He also had knowledge that the accident vehicle when knocked then belonged to one Peter Kariuki Mulruri. Maintained that it is Peter Kariuki Mulruri who was in the wrong. The pot hole was in the lane of the road from Dagoreti to Kikuyu and that is why Peter avoided it to come into their lane.

The defence tendered no evidence. Both sides filed written submissions. The plaintiff counsel urged

the court, to take note of the following:-

-PW2 who was a survivor of the accident gave candid evidence laying all the blame on to the driver of KAUO73F which swered on to their side to a void a pot hole on its side. It was also speeding and absolved the taxi driver of all the blame.

-The court, is urged to believe PW2s evidence because both vehicles had their lights on and he could see the front clearly.

-The fact that 4 people died confirms that the impact was great.

-The court believes PW2 evidence that their taxi driver was not drunk as he was not at the party with them.

-That since the collision was in the taxi drivers' lane confirms PW1s evidence that KAU 073F was at fault as it came to their side.

-That all the above go to show that it is the defendant who is to blame for the causation of the accident at 100%.

On case law the court, was referred to the case of **JENIPHER ODHIAMBO ALOO AND HELLEN AWINO ODONDO VERSUS ELIZABETH MBUKA ADAMS AND BROLLA ABANJO MOMBASA HCCC NO. 324 OF 2002** decided by D.K. Maraga J on the 29th day of April 2005. The deceased was an adult, he succumbed to injuries suffered in an accident soon after the accident, the accident driver was found guilty of causing death by dangerous driving, on damages. the court, allowed specials covering funeral expenses costs of obtaining a grant, and abstract.

On damages under the law reform Act, the deceased was aged 39 years and the court, allowed 100,000.00, on pain and suffering, It is on record that although it was not known for how long the deceased stayed alive before death, it was clear that he did not die instantly and as such he suffered pain before death and the court awarded 30,000.00.

On loss of dependence a multiplier of 15 years at an age of 39 years. The salary was 28,175/= inclusive of house allowance and the court took a multiplicational of 20,000.00 and this worked out as Kshs. 17,000 x 15 x 12 x 2/3 = 2,020,000.00.

There is also the case of **JANE KWAMBOKA MOGERE VERSUS OURU NYAMORI NYAMWANCHA AND ANTONY WANJALA IRUNGU, KERICHO HCCC NO 33 OF 2001** decided by Kimaru J on the 29th day of April 2005. The deceased died as a result of the injuries suffered. He was aged 30 years and employed as a clerk with Kenya power and lighting. He left a wife and children. Liability was agreed at 100%. The court, allowed special damages of Kshs. 90,480.00, pain and suffering 20,000/= and damages under the law reform kshs. 120,000.00.

The case of **BETSY CHEBET (SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF KENNETH KIPKOECH LANGAT VERSUS PREMIER DAIRY LIMITED AND BENJAMIN KIPRUGUT KOECH KERICHO HCCC NO. 88 OF 2003** decided by Kimaru J on the 29th day of April 2005. The deceased was aged 27 years. Married with one child, employed by the 1st defendant as a sales person, at salary of 3,427/=. At page 6 of the said judgement, the learned judge made observation that the plaintiff produced no proof to show that she spent 30,000/= to feed the mourners, but the court, took judicial notice of the fact that in most African communities mourners are fed during funerals, and on that account the court, allowed a conventional sum of Kshs. 30,000.00 as funeral expenses. The court, went on to allow special damages of Kshs. 38,395.00 and damages under the fatal accident Act at Kshs. 516,320.00.

There is also the case of **PIUS MUNDI NDOSI VERSUS THE HEAD MISTRESS MACHAKOS GIRLS HIGH SCHOOL,** the **chairman Board of governors and Julius Wambua Makau**, Machakos

HCCC NO 458 of 1998, on the 27th day of March 2003 decided by Nambuye J. The deceased was aged 16 years of age, had a good a academic record, and was aspiring to become a lawyer. At page 13 of the said judgement, this court, made the following observations.

"*It is the finding of this court, that suggestions of what the deceased would have earned in future along the lines suggested by counsels was mere conjecture that not withstanding her death is not to go uncompensated. Guidelines have been set by the CA on how to go about the situation displayed herein. I agree with the suggestion of the plaintiffs' counsel that there is nothing to show that the deceased would not have lived upto her expectation and turned out to be a productive person. This is shown by her efforts in competing with her colleagues and being able to keep position 27 out of 127 and also scoring high scores in all her subjects"*. The court. awarded Kshs. 10,000.00 for pain and suffering, 100,000.00 for loss of expectation of life, 1,200,000.00 for lost years.

The defence urged the court, to take note of the following:-

-That PW2 did not witness the accident and as such he is not in a position to place any blame worthiness on any of the two colliding drivers.

-The plaintiff alleged that he spent 70-80,000.00 on funeral expenses but he produced no receipts to confirm the expenditure save for the costs of abstract, as such the claim for funeral expenses should be disallowed.

-Since the deceased died 4 months after joining the university it is mere speculation for the plaintiff to suggest that the deceased would have completed her Education and then accessed employment as a teacher to earn the amount of money suggested.

-The testimony of PW2 demonstrates that a small vehicle had carried 7 people and was thus overloaded and this overloading which is dangerous, must have contributed to the occurrence of the accident.

-Since PW2 testified that the two vehicles collided with each other, the court, is urged to apportioned blame worthiness between the two colliding drivers.

On quontum the defence urged the court, to take note of the fact that the deceased had just completed high school, admitted to university and was hardly 4 months into her first year. She was unmarried, and had not started earning any income. For this reason it is not possible to quantify the damages payable. Neither has the plaintiff shown what financial support he stood to gain from the deceased. For this reason the court, was urged to award Kshs. 5,000.00 for pain and suffering, 70,000/= for loss of expectation of life and Kshs. 300,000/= for lost of dependency.

On case law the court, was referred to the case of **ALBERT ODAWA VERSUS GICHIMU GICHENJI NAKURU HCCC A NO. 15 OF 2003** decided by Koome J on the 9th day of March 2007. The appeal arose from a judgement of Hon. N.O. Ateya on a claim arising from a fatol accident, whereby the Hon Magistrate had awarded Kshs. 100,000.00 for loss of expectation of life, Kshs. 20,000.00 for pain and suffering, loss of dependency Kshs. 1,296,000.00. reasonable funeral expenses Kshs. 10,000.00

At page 5 -6 of the judgement, Koome J made observation that no evidence was adduced from the investigating officer to assist the court, to asses the impact so as to assist the court, apportion liability. In view of the conflicting evidence, the best that the court, could have done was to apportion liability equally between the deceased and the appellant." At page 9 of the judgement, 2nd paragraph, the learned judge after reviewing the evidence on her own, apportioned liability between the deceased and the appellant.

On loss of dependency the learned judge made observations that no basis was given for the choice of Kshs 8,100/= as the multiplicanal and at page 10, 1st paragraph, the learned judge opined that a global sum would be appropriate compensation. On the same page the same judge allowed Kshs. 70,000.00 for loss of expectation of life as the age of the deceased was not given. At the same page 10, the learned

judge disallowed an award of Kshs. 20,000/= for pain and suffering because death was instannous. But sustained the award of Kshs. 10,000.00 as reasonable for funeral expenses.

The case of **GRACE WAIRIMI MWANGI VERSUS JOSEPH MWANGI GITINDU MACHAKOS HCCC NO 1629 OF 1994** decided by Mwera J on the 2nd day of December 1998. The deceased was a form II secondary school student, died as a result of fatal accident injuries, he probably died instantly, the defendant did not seem to contest liability and as such, it was assessed at 100%. The court, awarded Kshs. 5,000.00 for pain and suffering, 70,000/= for loss of expectation of life, special damages Kshs. 3,100.00, funeral expenses Kshs. 10,000/= and loss of dependency Kshs. 70,000.00.

On the courts', assessment of the facts herein as well as submissions of both sides on the evidence, applicable law, and case law it is evident that the court, has been asked to rule on two aspects of the case namely:-

1. On liability

2. On quontum.

On liability, there is no doubt that the case is anchored on negligence as the basis of the fatal injuries, that the deceased subject of these proceedings suffered. The plaintiff placed that blame worthiness on to the defendant, who in turn placed that blame worthiness on to the driver of the vehicle that collided with the defendants' vehicle and the vehicle in which the deceased was traveling. It is however to be noted that the defendant did not take out 3rd party proceedings against this other driver. As observed earlier on, the evidence on the record is one sided as only the plaintiffs side gave oral evidence. The defence called no oral evidence. As per the evidence of the plaintiff's side, blame worthiness was placed on to the defendant and counsel for the plaintiff urges the court, to asses liability at 100% as against the defendant. Whereas the defence through case law and submissions has urged the court, to apportion liability equally between the two drivers of the colliding vehicles.

Due consideration has been made by this court, concerning the rival submissions on assessment of liability and the court, proceeds to make the following findings:-

1. In paragraph 5 of the plaint the plaintiff pleaded the doctrine of Resipsa loquitor. This court, has judicial notice of the fact that this doctrine shifts the burden of proof on to the opposite party to disprove particulars of negligence attributed to them. In the absence of evidence from the defence the burden shifted onto the defence by the plaintiff through this doctrine stands undischarged.

2. Indeed the defence pleaded negligence attributed to the driver of the vehicle which the deceased was traveling in as a passenger but took no steps to cite him as a 3rd party in these proceedings. Neither did they offer any evidence. It is now trite law that pleadings alone is not evidence. In the absence of evidence, the defendant's attribution of negligence on to this other driver has not been established.

3. Indeed PW2 is the only eye witnesses, but his evidence is uncontroverted. He laid blame onto the defence. Indeed the investigations evidence is absent but the court, cannot dismiss PW2 evidence as it was confirmed, he was in the accident vehicle and had even lodged claims of his own arising from the same accident. There is no contrary evidence on the basis of which liability can be apportioned between the two colliding drivers. For the reasons given above the court, has no alternative but to find liability established as against the defendant jointly and severally at 100%.

On quontum the unsidputed facts are as follows:-

-The deceased was a young girl, who had just joined the university to do Bachelors of Education degree; she had not therefore earned any earning from employment. It is on record that the plaintiff and his counsel rely on the admission to university confirmation letter, and the letter from the teachers' service commission on the earning of a secondary school teacher. But as observed by the defence counsel in her submission, it is not possible for this court, to say for sure when the deceased would have completed her

studies, if she would have infact joined the teaching profession, or moved on to some other greener pastures elsewhere. As such it is not possible for this court, to work out her lost earnings using the formula of a multiplier and multiplicand. For this reason this court, would like to draw inspiration from its own reasoning in an own decision delivered on the 21st day of September 2007. In the case of **DOMINIS GITAU VERSUS JOYCE MURUKO ARIITHI.** The salient features of the said decision are as follows:-

"*At page 4 of the judgement, item 4, it is observed by the defence that it was noted that the deceased was aged 25-26 years and she had about 5-7 years to get married and the mother's dependence would have ceased and or diminished as most of her earnings would have gone towards the running of her own house.*

-At page 8 of the judgement, 2nd paragraph, that the mother was aged 42 years and it was not possible to determine when the mother would die so as to determine the number of years the mother would have depended on her deceased daughter.

-At page 9-15 of the judgement the court, revisited case law on the subject. Of a greater importance was the case of ***SHEIKH MUSHTAQ HASSAN VERSUS NATHAN MWANGI KAMAU TRANSPORTES (1982-88) IKAR 946*** *in which the deceased was a young man who had just been admitted to the university of Nairobi to read Architecture.*

-At page 12 of the judgement the court, quoted with approval the observations of Nyarangi JA, as he then was thus:-

"*Damages will be enjoyed by persons who in actual fact may well not have sustained any economic loss whatsoever as a result of the deceaseds' death……In general in Kenya children are expected to prepare and do provide for their parents when the children are in a position to do so and to the extend of their abilities. The children are expected to do that by the established customs of the various African and asians communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africana and asian"*

- At page 12 last paragraph this court, made the following observations:-

"*Applying the foregoing reasoning in the cited case of Sheikh Mushtaq to the facts herein, it is clear that the facts of marriage should not influence the increase or the reduction of the quontum herein because as per Nyarangi JA as he then was, it is death which obliterates financial support and not marriage. Infact children are expected to support their parents till death of themselves or that of their parents. Taking into account the fact that when their own personal expenses demand a bigger share, the help to the parents reduces but it is not diminished or obliterated"*

This court, has adopted that reasoning in the sister file HCCC 812/2007 and will adopt the same here. And also as observed by this court, in the Pius Munde Ndosi case (supra), the deceased herein was excelling in her academic studies. There is therefore nothing on the record to suggest that she could not have completed her studies and gained employment. The court, however agrees that on the facts before it, it is not possible for the court, to determine when she would have accessed the employment and the amount of salary she would have earned. For this the court, the court would like to stand with the reasoning in the said own judgement that in such circumstances a global award would be an appropriate award for assessing loss of dependence damages.

Having laid out the applicable principles, the court, now proceeds to do the assessment of damages as hereunder:-

1. **Special damages**: These relate to costs of abstract and funeral expenses. Indeed no receipts were produced for funeral expenses. But the fact of death and likelihood of money having been expended as funeral expenses cannot be ruled out. Exhibit 2 the grant, 1, the death certificate, and 3 the abstract confirm death. As observed by the learned judges in the cases cited courts' have to be alive to the

realities of life, that indeed it is common to incur funeral expenses and that one can fail to keep receipts for such expenses knowing that the nature of the ceremony is not a happy celebration especially where a most dear one has been lost, like in the circumstances of this case, where the father had not yet come to terms with the loss and broke down in the cause of the testimony given almost 3 years later. However as cautioned by colleagues the court, has to be cautious so that it does not over compensate. The amount PW1 mentioned was 70-80,000.00. The court, has to consider the fact that death occurred in Nairobi. The body was transferred to Nakuru, it spent time in two mortuaries, before burial. In this courts', opinion a sum of 65,000 will be reasonable funeral expenses. The abstract cost of 200/= is allowed bringing the figure to Kshs. 65,200.00

2. General damages

(i). Pain and suffering- indeed it is not clear as to how long the deceased stayed a live before death but she suffered pain and in this courts', opinion Kshs. 10,000.00 under this head is reasonable.

(ii). As for loss of expectation of life though the counsel suggested 120,000.00 since this claim is related to HCCC 812/07. It is prudent to be uniform. The court awards Kshs 150,000.00. under this head.

(iii). As for loss of dependence both were university students and so the amount in HCCC 812/2007 would also suffice in this one, which will suffer a reduction to carter for what the deceased would have spent on herself. In this courts', opinion Kshs. 2,500,000.00 less 30% would be reasonable. This will work out as Kshs. 2,500,000 x 30/100 which comes to Kshs. 750,000.00 and when reduced from the main amount it leaves a balance of Kshs. 1,750,000.00 Which the court awards.

In the premises the court, enters judgement for the plaintiff against the defendant jointly and severally as follows:-

1. Liability at 100%

2. Special damages Kshs. 65,200.00 with interest at court, rates from the date of filing till payment in full.

3. General damages

(a) Pain and suffering before death Kshs. 10,000.00

(b) Loss of expectations of life Kshs. 150,000.00

(c) Loss of dependency Kshs. 1,750,000.

Total Kshs. 1,910,000.00 with interest from the date of filing till payment in full.

4. Cost of the suit with interest.

Apportionment.

1. Peter Kibogoro Wanjohi father 50%

2. Nancy Nyambura Kibogoro 50%

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE