



PAULINE WAMBUI KIRUMA &

PATRICK JAMES MBURU KIHONGE

(Suing as the Administrator of the Estate of

CHARLES KIRUMA.....PLAINTIFF

VERSUS

ESTHER WAMBUI NJUGUNA .....DEFENDANT

### **JUDGMENT**

The Plaintiffs **Pauline Wambui Kiruma** and **Patrick James Kiruma** brought this suit as the administrator of the Estate of **Charles Kiruma** (deceased). They filed suit against the Defendant for damages under The Fatal Accident Act and the Law Reform Act, they also seek special damages, costs and interest.

On the 31<sup>st</sup> of March, 2009 the parties recorded a consent on liability at 85- 15% in favour of the Plaintiff.

Before court for determination is the assessment of damages. The Plaintiffs called 2 witnesses.

I will consider the assessment of damages under the following headings.

- (1) Pain and suffering
- (2) Loss of expectation of life
- (3) Damages under the Fatal Accident Act.
- (4) Special damages &
- (5) Costs

a. Pain & suffering

The death certificate produced in court did not assist in determining whether the deceased died immediately after the accident or after sometime, the witnesses did not assist either. However, it is clear that he died on the same day. In the circumstances I have no basis to award the sum of **Kshs.100, 000/=** as proposed by the Plaintiff. I am persuaded by the authorities cited by the defence and more particularly:-

I. **Dinah James Abusi vs. Meshack Singei Kimutai** HCCC No. 137 of 1997 (NKU) (Judgment delivered on 22/4/05). Faced with similar circumstances the court awarded **Kshs.10, 000/=** for pain &

suffering.

11. **Dainty vs. Haji** C.A No. 59 of 2004 (Judgment delivered on 30/7/04) in similar circumstances the court awarded **Kshs.10, 000/=**.

Taking into account the age of the 2 authorities above I am inclined to award **Kshs.20,000/=** for pain and suffering.

b. Loss of Expectation of Life.

The Plaintiffs have proposed a figure of **Kshs.100,000/=** under this head whereas the Defendant has proposed **Kshs.50,000/=**. Having considered the various authorities cited by both counsels I award the sum of **Kshs.100,000/=** under this head.

c. Damages under the Fatal Accident Act.

The evidence before the court is that the deceased was 40 years of age. He was married with 3 children. He lived in the up market area of Kahawa Sukuri. He had a business in Kikomba and operated between Nairobi and Dar e salaam. **P.W.1** assessed the deceased income at **Kshs. 350,000/=** a month. **P.W. 1** prepared and produced in evidence what he called “**Report and**

**Accounts**”. However when taken to task he admitted that statement of Accounts are normally for partnership, sole proprietor or companies not individuals. The deceased did not run any such business and neither did he keep a business account. No other form books of accounting for the deceased business were produced in evidence. The only pointer the deceased income to some extent were his Bank Statements, produced as Plaintiffs’ exhibit 3. However, the bank Statements did not show daily, weekly or even monthly banking, other than the deceased pension of **Kshs.2,719.70/=** that was credited by his former employer monthly. I have keenly observed that the deposits were erratic such that one cannot assess monthly Income from the same; secondly the court was informed that the deceased operated one account as his business and personal account, in my view it is not possible to separate capital , income , profit or even drawings. **P.W.1** struggled to justify his assessment of **Kshs.350, 000/=** as the deceased Income per month. I was not persuaded by his evidence. It is notable that the accounts were prepared 6 months after the death of the deceased and for purposes of this suit.

**P.W.2** one of the Plaintiffs, is the widow of the deceased, she proposed an Income of **Kshs.150, 000/=** as the deceased monthly income. She based the same on the deceased expenditure per month which she listed as being;- purchase of food at **Kshs.30,000/=** payment of electricity at **Kshs.3,000/=** water at **Kshs.800/=** and School fess for 3 children at **Kshs.45,000/=** a term. The total sum per months of this expenditure comes to **Kshs.48, 800/=** No documentary evidence was produced in support of this evidence.

**P.W.1** did not appear to me to be a credible witness. His evidence is totally unreliable. It is clear to me that the accounts were made with this claim in mind.

**P.W.2** on her part failed to adduce any evidence that would support her claim for **Kshs.150, 000/=**. For the reasons stated above I will disregard the evidence of **P.W.1** in total, I will assess the income of the deceased based on the averments of **PW2** as the expenditure appears reasonable for a family of 4. I will therefore assess the deceased income at **Kshs.40, 000/=** a month, as I consider the same reasonable and reasonable in the circumstances. Both the counsels agree on the dependency ratio of 2/3rds and as such I will apply the same in assessing this head.

On the issue of the multiplier applicable the Plaintiff cited the following case :-

1. **Constance Kanyorota Ngugi vs. Coast Bus Company Ltd and Another** HCCC No. 3344 of

1994 (Judgment delivered on 4/10/2000) where the deceased was 51 years. The court used a multiplier of 14.

2. **Rebecca Mwangi vs. Eastern Bus Service Ltd & another HCCC No. 2750 of 1998** (Judgment delivered on 31<sup>st</sup> July, 2000) the deceased was 36, the court used a multiplier of 19.

The Defendant cited the following cases:-

1. **Jane Wangui & 2 Others vs. Alice Atandi**

**Mugamangi & another** HCCC No. 136 of 2003. The deceased was 37 years. The Court used a multiplier of 13.

2. **Charity Mapenzi vs. National Water**

**Conservation Pipeline Corporation. HCCC No.**

**4000 of 2002 (MSA)** The deceased was 41. The court used a multiplier of 10.

Persuaded by the above authorities I am inclined to use a multiplier of 10.

**Kshs. 40,000x 10 x 12x 2/3 = 1,600,000/=**

d. Special damages

The Plaintiffs have claimed a sum of **Kshs.500, 00/=** However the Plaintiff did not only fail to specifically plead the particulars of special damages but did not prove the said **Kshs.500,000/=** In the circumstances I decline to grant any award under this head.

I therefore enter Judgment as follows:-

(i) General damages for pain & suffering

Kshs. 20,000/=

(ii) Loss of Expectation of Life Kshs. 100,000/=

(iii) Loss of dependency Kshs.1,600,000/=

(iv) Special damaged -

Kshs.1,720,000/=

Less 15% contribution Kshs. 258,000/=

Total **Kshs.1,462,500/=**

(v) I also award costs and interest.

Dated and delivered at Nairobi this 29<sup>th</sup> day of October, 2009.

**ALI- ARONI**

**JUDGE**