



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
Civil Suit 252 of 2002

IRENE W. KAGONDU & MARY WANDIA KAGONDU

(Suing as the legal representatives and administrators of the

estate of the late Patrick Mwangi Kagondu) PLAINTIFFS

VERSUS

W. K. TILLEY (MUTHAIGA) LTD.1ST DEFENDANT

WALTER JUMA OPONDI 2ND DEFENDANT

JUDGMENT

Both plaintiffs in this case are the legal representatives of the estate of the late Patrick Mwangi Kagondu (*deceased*). The deceased died on the 9th day of December, 2000, as a result of road traffic accident involving the vehicle the deceased was driving, KAG 031S (*hereinafter referred to Peugeot*) and the vehicle registration No. KAN 988B (*hereinafter referred to as the Canter*). Prior to his death, the deceased was a lawyer by profession and was practicing law under the Firm name of Kagondu and Mukunya Advocates.

The plaintiffs blame the defendants especially the 2nd defendant whom they alleged negligently drove or controlled the Canter thereby causing the collision as a result of which the deceased lost his life. The plaintiffs therefore sought for compensation by way of general damages under the **Fatal Accidents Act, the law Reform Act** and special damages against the defendants jointly and severally.

The plaintiff testified that on the 9th day of December, 2000 she was in Nairobi when she was notified that her husband, the deceased was involved in a road traffic accident along Nairobi Nakuru Road near Free Area. When the plaintiff reached Nakuru, she found her husband had already passed away. The deceased was aged 49 years old at the time of the accident. He was the sole bread winner of the family. He used to pay school fees for the children namely Maryanne Wandia Kagondu, then aged 20 years. Maryanne was attending the Professional School of Studies in Nairobi, and the deceased used to Kshs.160,000/- per year towards her tuition and accommodation.

The second born Eva Kagondu, was aged 18 years. Eva was at Moi University and the deceased also used to pay her fees approximately Kshs.100,000/- per year. Eva has since completed her studies and qualified as a lawyer. She testified in this case and confirmed that the deceased used to pay their school fees. They also led a comfortable life as a family but since their father's death her mother has been struggling to educate them. For instance Eva would have liked to pursue a masters programme. She has instead taken up a job as a legal assistant and uses some of her income to pay school fees for her brothers.

Moses Kagondu was aged 14 years. He was in Busara Forest Academy where the deceased was paying approximately 100,000/- per year for school fees. The last born, Philip Kagondu aged 11 years was at Mustard Seed Primary School and the school fees per year was approximately 100,000/-.

The plaintiff also testified that the deceased started practising law from 1979. He derived his income from the Law Firm, he paid all the utility bills for the family. The deceased used to own two vehicles which he fully maintained. He also used to give the plaintiff Kshs. 40,000/- per month to cater for the family needs. Upon the deceased death, the plaintiff testified that she incurred expenses for the funeral. She purchased a coffin for Kshs. 8,000/-, hired transport to transport the body and mourners during the funeral at Kshs. 32,000/-. She also incurred expenses of Kshs.15,000/- for obtaining the letters of administration on behalf of the estate of the deceased.

The accident was reported at the Police Station and a police abstract form was issued which showed that the accident involving the vehicle registration No. KAG 031S Peugeot 405 Saloon and KAM 988B Mitsubishi Canter was reported. The police abstract form was produced as evidence by PC Eva Kirimi attached at the Traffic Department Nakuru. There was an earlier police abstract issued on 29th August 2001 when the matter was still under investigations. After the inquest, another abstract form was issued which shows that the driver of the Canter was to be blamed for the accident and it was recommended that he be charged with the offence of causing death by dangerous driving.

There was an inquest in respect of this particular accident before the Chief Magistrate's Court at Nakuru. Inquest No. 37 of 2001. The learned Senior Resident Magistrate found that the driver of the vehicle KAM 988B was to blame for the accident and recommended that the driver be charged with the offence of causing death by dangerous driving. The file was produced by Mr. Kisonko the clerk in charge of the Criminal Registry.

The plaintiff also testified that she referred the matter for investigations by a private investigator known as Deter and Detect Limited. Richard Ongori Nyancho carried out the investigations involving this accident. He is employed as an investigator by M/S Deter and Detect Co. Ltd. This company is registered as investigators and appointed by the Commissioner of Insurance to carry out such work. On 23rd August, 2001 they were instructed by the plaintiff to carry out comprehensive investigations regarding an accident that occurred on 9th December, 2000. Richard testified that they visited the Nakuru Police Station where the accident was reported. From the records at the police station he traced some witnesses who recorded statements and according to the investigations and report filed in court, the driver of the canter was to blame for the accident.

The defence did not adduce any evidence they failed to attend court on the date fixed for hearing. After the matter was closed the court directed parties to file and exchange written submission for further hearing. On the date set for the hearing of the submissions it is only counsel for the plaintiffs who complied and filed written submissions. In the submissions, counsel urged the court to award the estate of the deceased Kshs.100,000/- under the **Law Reform Act** and Kshs.14,400,000/- under the Fatal Accident Act as well as special damages. Counsel put for one the decision in the case of **Deity –vs- Haji & another Court of Appeal Case No. 59/2002 EALR [2005] page 43** where it was held that

“In computing damages for lost years the annual loss to the estate [the multiplicand] would be what the deceased would have been likely to have available to save, spent or distribute after meeting the cost of his living at a standard which his job and career prospect at the time of his death would suggest would be likely to achieve Gammel –vs- Wilson [1981] 1 ALL ER 578 adopted.

In determination of the multiplier, i.e. the estimated number of lost working years accepted as reasonable in a particular case, the Courts have not established a general practice which is applied to different age groups of accident victims determined from the peculiar circumstances of each case. Boru –vs- Ondu [1988 – 1992] 1 KAR 299 applied by analogy.”

From the plaintiffs' evidence and her witnesses as well as the documents produced in evidence it has been proved that the deceased died as a result of an accident involving the vehicle he was driving and the defendant's vehicle which at the time driven by the 2nd defendant. There was no evidence by the defendants in rebuttal. Thus the plaintiffs' evidence was not challenged. According to the inquest that was carried out, the court found that the 2nd defendant was to blame for the accident and recommended that he be charged with the offence of causing death by dangerous driving.

Since there was no evidence by the defence, the plaintiffs proved their case on the basis of probability. Similarly on the issue of quantum this court has to rely on the evidence of record. In the case of **Kenya Bus Service Ltd. vs. Kawira EA Law Report [2003] 2 EA 519**, the court of appeal cited with approval the case of **Pritoo vs. West Nile District Administration [1968] EA 428 at 435E-F** where it was held as follows:-_

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard Vs. Sully [1931] 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver”

In the absence of any evidence by the defence I attribute the negligence on the part of the 2nd defendant. The deceased died the same day but in the hospital in the cause of the treatment. I will therefore award him Kshs.70,000/- for pain and suffering and for the lost of expectation of life Kshs.100,000/- being a conventional sum.

As regards of loss of dependency, the deceased was practicing law as an advocate. The evidence before the court shows the he was the sole bread winner of his family. He used to pay approximately Ksh. 400,000/- per year for school fees for his children. The plaintiff said that he used to provide her with Kshs. 40,000/- for utility bills for the family and she estimated that he was probably earning over Ksh.1,000,000/- a year. The deceased also used to maintain two (2) vehicles and to meet the expenses of his own Law Firm. Counsel urged the court to find that he was earning Kshs.120,000/- per month and adopt a multiplier of 15 years.

The deceased was aged 49 years and being in the private practice one can safely assume that he could have practiced up to the age of 65 or 70 years. However taking the vicissitudes of life I would adopt a multiplier of 11 years. *See the case of Martha Muthoni Mbugua –vs- Tabitha Nduta Mbugua & others NRB HCC NO. 1743 of 1982* where the deceased was aged 57 years and court adopted a multiplier of 8 years. Taking all the circumstances into consideration I award the estate of the deceased the following:

For the loss of **dependency**:

Kshs. 80,000 x 11 x 12 = Kshs.10,560,000/-

The deceased was a family man bearing the responsibility of the education and the welfare of his family, I will adopt the dependency ratio of the $\frac{2}{3}$ thus:

Kshs 10,560,000/= x $\frac{2}{3}$ = Kshs 7,040,000/-.

The plaintiff was able to prove that she incurred the following expenses special damages:

Funeral expenses Kshs. 32,000/-

Letters of administration..... Kshs. 15,000/-

Investigations Kshs. 30,000/-

Police abstract Kshs 100/-

Total – Kshs. 77,100/-

I hereby enter judgment for the plaintiff in the following:

(i) General damages for loss of dependency....Kshs. 7,040,000/-

(ii) Loss of expectation of life Kshs. 100,000/-

(iii) Special damages Kshs. 77,100/-

Total Kshs. 7,217,100/-

To be divided among the dependants as follows:

(i) Irene Wairimu Kagondu (Widow) Kshs 2,217,100/-

(ii) Maryanne Wandia Kagondu (*Adult daughter*)... Kshs 1,000,000/-

(iii) Eva Kagondu (*adult daughter*) Kshs 1,000,000/-

(iv) Moses Kagondu (*adult still in school*) Kshs 1,200,000/-

(v) Philip Kagondu (*minor*) Kshs 1,800,000/-

The plaintiffs shall also have the costs of this suit with interest from the date of judgment.

Judgment read and signed on 13th day of June, 2008

M. KOOME

JUDGE