



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 529 of 1996**

**KAMAU GAKUO ..... PLAINTIFF**

**VERSUS**

**DR. AHLUWALIA. .... DEFENDANT**

**JUDGMENT**

The dispute herein has a chequered history. It started off in the lower court before it was transferred to the High Court for hearing and disposal. The plaint is dated 11<sup>th</sup> November 1992 and filed on 27<sup>th</sup>.

The salient features of the plaint are that on or about 12<sup>th</sup> January 1977 the defendant gave treatment to the late Wanjiru Kamau by extracting one of her teeth. That the said Doctor applied an injection to the cavernous sinus and this caused the deceased to bleed to death. That the said defendant was negligent in giving the injection as above as he knew or ought to have known and foreseen that the said treatment would lead to death from massive bleeding from the areas of the injection.

That the said Doctor failed to exercise any due care and attention and the late deceased was in perfect health but for the tooth which was having a hole and whose treatment and or extraction could not have led to the death. That in consequence of matters stated in paragraphs 3 and 4 of the said plaint, the plaintiff suffered loss and damage in terms of funeral and allied expenses, transport of the body and purchase of the coffin totaling Ksh.12,000/-.

The action is brought on behalf of one Kamau Gakuo, the husband and James Njau Gakuo a son then aged 15 years in 1992, when the suit was filed. That the deceased was in good health aged 38 years of age, earning Ksh.2500/- per month from her farm at Kagaa. Particulars of negligence are given in paragraph 7 of the plaint as failing to apply relevant skills to inject the proper site but, instead injecting the cavernous sinus when such an injection was unnecessary for the treatment required, failing to exercise any diligence or care in performing the treatment on the deceased, failing to take any immediate remedial to rectify the wrong to the deceased and hence caused the death. The plaintiff's claim is for damages both under the fatal accidents act and the law reform for the benefit of the estate of the deceased and defendants.

The defendant was served and entered appearance, dated 22<sup>nd</sup> December 1992 and filed January 1993. A defence dated 31<sup>st</sup> December, 1992 was filed in January 1993. The salient features of the same are as follows: -

- The defendant denied the name of the plaintiff as his title is not clear to the defendant.

- Denied jurisdiction of the court as the cause of action arose in Muranga where the defendant was also residing.
- That the plaintiff has no right to sue as his capacity to sue has not been disclosed.
- That the matter is Res Judicata as a similar case on the same issue had been decided.
- The defendant pleaded the law of limitation of action as the cause of action arose before more than 12 years ago.
- Denied any negligence of his act and denied her having ever acted without due care and attention as alleged.
- Denied particulars of special and general damages and the plaintiff was put to strict proof.
- Denied particulars of negligence attributed to him.
- Denied receipt of the notice to sue.
- As red that the plaintiff be asked to deposit, court expenses for the case, as his physical whereabouts is not known.

Since the filing of the pleadings and the transfer of the suit to the High Court, the plaintiff has been trotting to the corridors of justice whenever need arose in search of justice for his late wife. At one time he had hired the services of counsel who allegedly lost all the documents he had concerning the case and then later dumped him.

By the time the matter came up for hearing the plaintiff only had on him photocopies of the documents the needed to support his case. This fact necessitated several adjournments. To enable him get certified copies or letters confirming that the records were not available. He however eventually managed to testify in the proceedings which proceeded as a formal proof after the defendant failed to respond to service of hearing notices on him.

The plaintiff was the sole witness. The sum total of his evidence is that the deceased was his wife. The said wife had no other health problem except a toothache. He took her to a private clinic in Karatina where she was injected and the tooth extracted but the bleeding did not stop. The next day he was advised to take the deceased to Murang'a District Hospital for treatment. He looked for a vehicle and took her to hospital but she was pronounced dead on arrival. The body stayed in hospital for a long time – 21 days and thereafter, after post mortem, it was released to him for burial. Thereafter these proceedings commenced but have taken long because the file keeps on disappearing every now and then. Also the documents.

In terms of documentary exhibits, the plaintiff testified that originals had been lost either by his former advocates then acting for him or the institutions where these documents were meant to be held. Those that he managed to trace and availed to court are: -

- 1) The grant issued at Thika on 5<sup>th</sup> August 1993. It is issued to Kamau Gakuo in the matter of the estate of Wanjiru Kamau in succession cause number 95 of 1997 at Thika. It is shown to be limited to representation in Principal Magistrates' Court Civil Case 583 of 1992 exhibit I.
- 2) A copy of a letter dated 20<sup>th</sup> November 2007 from the office of the District Medical officer for Health Murang'a District. It is addressed to whom it may concern and the content therein in the said letter exhibit 2, is that the deceased was brought to the hospital dead hence the non-availability of a hospital card, hospital discharge summary, medical report and P3 form.
- 3) Exhibit 3 is a certified copy of the register of death from Muranga District Hospital. Entry Number

23 shows that it is indicted that it was a police case. The name of the deceased is given as Wanjiru Kamau, a female aged 38 years and whose occupation is indicated as a housewife. She hails from location 8 Kagaar and the place of death is indicated as Muranga District Hospital. Page 2 of the certified copy which is a continuation of the entries in the register shows that the cause of death both primary and secondary is bleeding.

4) Exhibit 4 on the other hand is a photocopy of entries extracted from the register of death exhibit 3 by a person whose signature is not legible. The date of death is shown as 12<sup>th</sup> January, 1977. It however bears the hospital stamp.

5) Exhibit 5 on the other hand is a letter from Kiharu police station dated 14<sup>th</sup> July 2000 addressed to whom it may concern. The effect of the content is that the police had tried to trace the copy of post mortem to no avail and sought further particulars.

6) Exhibit 6 is a letter from Murang'a Senior Resident Magistrate's court dated 19<sup>th</sup> August, 1992 addressed to the plaintiff to the effect that records held by them show that the files for 1979 among them the file for inquest no. 64 of 1979 concerning the deceased IDIS Wanjiru Kamau had been disposed off. But entries in their register shows that the file was marked closed and nobody was charged with the cause of that death.

A total of seven issues were filed by the then plaintiff's counsel on record. None were filed by the defence. These are: -

- 1) Whether the order of the Resident Magistrate Thika was justified in granting leave to the plaintiff to file this suit beyond the time of limitation when the cause of action arose on 12<sup>th</sup> January, 1977.
- 2) In view of the pleadings herein, whether the capacity of the plaintiff is established to bring this action.
- 3) Whether the plaintiff has any locus standi to sue in absence of letters of administration or grant of probate prior to the filing of the suit.
- 4) Whether the defendant was negligent in performing his lawful duty as a medical practitioner.
- 5) Whether the cause of death of the deceased occurred due to any negligence of the defendant.
- 6) Whether the plaintiff is entitled to any damages either special or general.
- 7) What order as to costs.

These have been considered in the light of the evidence adduced as well as the documentary evidence produced to court and the court proceeds to make the following findings.

1) Issue number 1 relates to the defence pleadings in paragraph 5 of the plaint, which related to an averment that the cause of action was time barred. This court has perused the record and traced an application by the defence by way of notice of motion dated 28<sup>th</sup> July, 1999 and filed on 11<sup>th</sup> August 1999, by the defendant. It was brought under order XVI (16) rule 6 and section 3A of the Civil Procedure Act. It sought the following orders: -

*1.1 That the plaintiff's suit be dismissed with costs for want of prosecution with the time prescribed by law.*

*1.2 Alternatively and without prejudice to the above, that the plaintiff's suit be dismissed with costs, as the cause of action is time barred and suit is filed after limitation period.*

1.3 *Alternatively and without prejudice to the above the plaintiff's suit be dismissed with costs for want of appointment of a legal representation and obtaining probate or letters of administration. The plaintiff has failed to establish his capacity under which he sued the defendant and how the capacity arised.*

2. The costs of this application be provided for.

The record reveals that the said application was argued inter parties on 30<sup>th</sup> November 1999. E O Okubasu, J as he then was (now JA) gave a brief ruling which read: -

**“This is an application for dismissal of the suit for want of prosecution. Mr. Owino for the plaintiff has opposed the application arguing that the plaintiff was justified by the missing file. He said that leave to file suit out of time was granted.**

**Having considered what Mr. Awino has said I am now satisfied that the plaintiff will prosecute his suit without any further delays. Hence the application for dismissal of the suit is refused but the plaintiff will pay the applicant the costs of this application. Order accordingly delivered at Nairobi this 9<sup>th</sup> day of December, 1999.**

**E O OKUBASU**

**JUDGE**

The sole purpose of setting out the said application and its resultant ruling in full is to demonstrate that issues of the cause of action having been time barred as at the time the applicant came to Court and the issue of locus standi though raised earlier on in the defence were not dealt with as interlocutions issues and so they have to be ruled upon. No mention of them was made by the learned judge in that ruling and no reason was given as to why they were not so mentioned. The assumption of this court is that since the ruling was on the main prayer there was no need to deal with the alternatives.

On record also there is entry by the Deputy Register of 28<sup>th</sup> February 2000 whereby the parties consented to setting down the matter for hearing and disposal. It is indicated under item 2 that the defendant does not intend to produce any documents. It is also indicated item four that the plaintiff intended to produce grant of letters of administration, death certificate and other documents. Issue of the cause of action being time barred was not raised. The assumption is that this was no longer a preliminary issue.

Further, it was up to the defendant to purse it. It is not the business of the court to prosecute it. In his absence on his behalf. The court will stand ground by the mention in issue number 1, that leave to file suit out of time had been granted by the Resident Magistrate Thika. Being a court order it stands and is valid for all intends and purposes until set aside. For the reasons given above, the court, finds that the plaintiff's suit is procedurally in court and will be ruled upon on its own merits. Issue 2 and 3 dealing with plaintiff's capacity and locus standi to sue. These have answered by the production of the grant exhibit I. Issue No. 4 and 5 relate to the negligence attributed to the defendant which negligence was denied by the defendant in his defence. The plaintiff was put to strict proof in respect of the same.

In response to that pleading, the plaintiff, stated that, the decease's wife had no other sickness other than a toothache. That he took her to the defendant's clinic for extraction of the said tooth. After extraction of the said tooth, bleeding continued. The next day he was advised to take her to Murang'a District Hospital for treatment but she was pronounced dead on arrival. Entries at the hospital shown by production of exhibits show or reveal that indeed the said deceased reached hospital. It was treated as a police case and the cause of death is noted in the register as bleeding. It is on record from exhibit 2 and 5 that police took post mortem form and the same was misplaced. That, notwithstanding, the court, is satisfied, that PW I's evidence on cause of death of the deceased has been confirmed by exhibit 3, which also serves the same purpose as a post mortem form.

In the absence of adduction of evidence on the same, the defence denials of negligence cannot hold as they remain allegations. They have, therefore, been misplaced. If the deceased was in good health save for a toothache, which toothache led to the deceased being taken to the defendant's clinic for extraction, and after extraction there was excessive bleeding resulting in the death of the deceased, there is no doubt that the plaintiff's evidence has linked the deceased's death to the extraction of the tooth. This is further fortified by the fact that the defendant has not denied in his defence that he is not the one who carried out the exercise of extracting of the deceased's tooth. The court, therefore, makes a finding that failure to so deny to be the one who carried out the exercise of the extraction of the tooth provides sufficient link to the cause of death of the deceased as a result of bleeding arising from the extraction of the tooth. The defendant's denial of the negligence has, therefore, been oust and the plaintiff's assertion in his plaint as well as evidence that had it not been for the bleeding, the deceased would not have died remains unchallenged.

Issue number 6 deals with establishment of liability. The evidence of the plaintiff is the sole evidence. The defence has been dismissed for being a mere allegation in the absence of any evidence being adduced to that effect.

The court also has at its disposal copies of documents mentioned herein. The plaintiff explained that originals got lost. In the absence of originals and in view of the reasonable explanation by the plaintiff supported by the copies of the documents themselves, the court is satisfied that the originals are genuinely lost and cannot be traced. That the plaintiff had no hand in the loss of the said documents. This is, therefore, a proper case whereby section 68 of the evidence Act Cap 80 Laws of Kenya can be invoked and validate the copies relied upon by the plaintiff. The court, therefore, makes a finding that the said documents exhibit 1, 2, 3, 4, 5 and 6 have been properly and procedurally admitted in evidence and can be relied upon in the assessment of evidence by this court.

The defendant had also raised the issue of Res Judicata in paragraph 4 of the defence. It was not averred in which case the matter was decided. The court however assumes that the defendant was referring to the inquest referred to in exhibit 6. In order for this to hold the matter must fall within the ingredients set out in section 7 of the civil procedure Act. This reads: -

**“ No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claims litigating under the same title, in a court competent to try subsequent suit or the suit in which such issue has been subsequently raised, and, has been heard, and finally decided by the court.**

Applying these ingredients to the inquest, the court finds that an inquest will not be a proper candidate for the operation of section 7 because the plaintiff and the defendants were not litigating herein but the state inquiring into the death of the deceased.

There is also mention in exhibit 6 that the inquest was marked as closed and nobody was ordered to be charged with a criminal offence. In this court's, opinion, the finding of the inquest court does not absolve the defendant of any blame because: -

- i) This court, is not bound by that decision. It is entitled to evaluate the evidence before it and arrive at its own conclusion on the matter.
- ii) The entire facts of the evidence that was before the inquest court is not before this court in order to determine what reasons the court had in deciding to close the inquest.

This court has, therefore, rightly revisited that evidence and arrived at its own conclusion. The conclusion is that on the evidence on the record, the defendant is to blame for the death of the deceased through his own negligence in the extraction of the tooth leading to bleeding which resulted in the deceased's death. He is, therefore, 100% liable to pay damages.

On quantum the first head of claim is funeral expenses, this was pleaded and testified on but no receipts provided, as they were allegedly lost. Considering the length of time the dispute has taken and considering the plaintiff's explanation that documents were taken to an advocate who misplaced them, the court is satisfied that these receipts indeed got lost. This court will, therefore, be persuaded by the decision of a court of concurrent jurisdiction in the case of **Joyce Nyambura Kabera Versus Sam Steel Ltd**, Nairobi HCCC No. 1320 of 1996, in which the learned judge K H Rawal ruled that: -

**“No evidence had been adduced on funeral expenses but since there was no dispute that these had been incurred went ahead to award a normal figure of 5,000.00.** In this case too, the court, is satisfied that funeral expenses were incurred as death is not disputed and so the court allows Kshs, 12,000.00 under this head.

As for general damages under the law, reform act, for the benefit of the estate of the deceased, this court, takes Judicial Notice of the fact that this head of damages is usually receives a circumstantial figure. See Case law cited in this court own judgment delivered on 23<sup>rd</sup> May 2008, in the case of **Lorna Amino Versus Akamba Public Road Services and another**, Nairobi HCCC No. 194 of 2005, discussed at pages 17-18 of the said judgment. In this court's own opinion a figure of 60,000/- would be adequate compensation under this head.

As for damages under the fatal accidents Act, these fall into two categories, one for pain and suffering before death and that one for loss of dependency. On pain and suffering, the court, would be guided by the same Lorna Amino Case (supra) where at page 20 of the judgement it awarded 35,000/- where the death was almost instantaneous. Herein the deceased died the following day and must have suffered a lot of pain. In this court's, opinion Ksh.45,000.00 would be adequate compensation under this head.

On the second head of loss of dependency the deceased was a housewife. She engaged in farming activities which generated income for her family and by virtue of her death the family lost this support. However, in view of the fact that records on the basis of which monthly income can be assessed have not been presented to the court, the court is of the opinion that this is a proper case where a lump sum award would be adequate compensation.

In the case of **Sheikh Mushtaq Hassan Versus Nathan Mwangi Kamau Transporters** (1982-88) IKAR 946, the court, of appeal made an award of Kshs.380,000.00 as compensation for the death of a youth aged 19 years who had just been admitted to the University to study Architecture.

In the courts own judgment delivered on 21<sup>st</sup> day of September, 2007 in the case of **Dominic Gitau Versus Joyce Muriku Ariithi Nairobi**, C A 799 of 2004 a global award was made as damages for death compensation. The difficulty in this cited own judgment and which formed one of the grounds of appeal was that proof of salary was just by way of a figure or figure on a piece of paper.

The deceased was aged between 25-26 years. The letter proving earnings had been written by a fellow employee was related rejected to the Victim.

At page 7 of the judgment line 4 from the top this court observed: -

**“the complaint is on the quantification of the figure on the loss of dependence or lost years. It is on record and is plain that the trial court took Kshs. 17000.00 as the multiplicand and this is the amount alleged to have been forming the monthly salary. Proof of the same was by a letter from the place of work. I agree with the appellants counsel that the piece of paper should not have been accepted as the whole truth. The lower court should have taken Judicial notice of the fact that in normal employment situations such documents as official ledgers master rolls and payment voucher For a period would have been better proof.....”**

At page 14 line 10 from the bottom the court went on to observe that: -

**“In the absence of production of office ledgers, pay slips, bank statements or cash books showing**

**earnings of the deceased, the figure given qualified to be one conjured up. That aside, it is clear that death occurred and loss occurred for which loss the law demands compensation for the victims from the tort fearer. The deceased was a young lady full of expectations of life, supporting her family Which support was cut short and obuterated. There are no value tags placed on human beings and that is why reasonableness is called into play to make a reasonable award”.**

Following the above observations this court gave a global ward less 20% representing what the deceased would have spent on herself.

Herein, in the absence of books of accounting showing how much the deceased earned from his farming business, how much she spent on herself and how much on her family from her earnings employing the figure given in the plaint as the working figure would be mere conjecture. The court, therefore, finds that as indicated earlier on, this is a proper case for a global award which award has to undergo a percentage reduction to represent what the deceased spent on herself. In this courts opinion a global award of Kshs.850,000.00 would be adequate compensation as damages for loss of dependency. This would suffer 20% reduction to represent what the deceased would have spent on herself. This would work out on  $Ksh.850,000.00 \times 20/100 = 170,000.00$  when reduced from 850,000.00, it leave a balance of Kshs.680,000.00 as the resultant figure for damages under the fatal accidents acts.

In the premise, the court is inclined to enter judgment for the plaintiff against the defendant on the following terms.

- 1) Liability at 100% in favour of the plaintiff and against the defendant.
- 2) Special damages of Ksh.12000/- for funeral expenses with interest at court rates from the date of filing till payment in full.
- 3) General damages
  - (a) Under the law reform Ksh.60,000/-
  - (b) Under the fatal accidents act
    - (i) Pain and suffering before death Kshs.45000/-
    - (ii) Loss of dependency Kshs.680,000.00

Total Kshs.785,000.00 with interest at court rates from the date of judgment till payment in full.

- 4) Costs of the suit.

#### **Apportionment**

**Grand Total – Kshs. 797,000.00.**

1. (a) James Njau Gakuo Kshs.297,000.00
- (b) Kamau Gakuo Kshs.500,000.00

**Total      Kshs.797,000.00**

- 2) Amount apportioned to be paid out to each apportionee, as they are all adults.
- 3) There will be liberty to apply granted to either party benefiting from the award.

**Dated, read and delivered at Nairobi this 11th day of July 2008.**

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**R NAMBUYE**

**JUDGE**