



**FANUEL OLEGE (suing on behalf of the estate of  
EPHELLY SHISIA ANDANJE ..... PLAINTIFF**

**VERSUS**

**1. JAMES KARIUKI**

**2. JOSEPH NJOROGE MUCHOMO..... DEFENDANT**

**J U D G E M E N T**

The suit herein was on 13.7.06 fixed for hearing on 30.1.2007 by the Plaintiff who on 10.11.2005 served Messrs Kulecho & Co., the Advocates on record for the Defendants, with a hearing notice as is evidenced by the Affidavit of service sworn on 29.11.05 by one Athanas Arthur Musambai, a licenced court process server.

During the hearing of the suit on 30.1.2007, neither the Defendants nor their advocates attended court. As a result, and because they had been duly served, the hearing proceeded ex parte.

The Plaintiff, Fanuel Olege, gave evidence (as PW2) and called two witnesses namely Dr. Edwin Anjira Likabo (as PW1) and Mathews Harambe (as PW3). The Plaintiff was the personal representative of the estate of the late Ephelly Shisia Andanje who was his wife and who was fatally injured by motor vehicle reg. No. KAN 126A on 10.04.2002 near Mwiya Primary school when, as she lawfully walked along Kakamega Webuye Road, the said motor vehicle hit her and injured her fatally.

The Plaintiff's claim against the Defendants is for special damages amounting to Shs.52,180/= and damages under the fatal accidents Act for dependants of the deceased and under the Law Reform Act, Cap 26. In his Complaint, the plaintiff attributed the fatal injury to his said late wife to negligence on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were the owner and driver of the motor vehicle reg. No. KAN 126A, respectively. He alleged that the 1<sup>st</sup> Defendant was vicariously liable for the 2<sup>nd</sup> Defendant's negligence.

In his evidence, the plaintiff told the court that Ephelly Shisia Andanje was his wife and that she died on 10.4.2002. He produced as exhibit No. P3 a Grant of Letters of Administration Intestate made to him on 10.4.02 in Kakamega H.C. Succ. Cause No. 472 of 2002 in the estate of his said late wife while Dr. Edwin Anyira Likabo (PW1) produced in his evidence a Postmortem Report as exhibit No.P1 signed by him as the doctor who performed the postmortem on the body of the Plaintiff's said wife, which was identified to him by the Plaintiff who subsequently buried it. He told the court in his testimony that the Plaintiff's said wife had died of excessive bleeding and ruptured spleen and had sustained fractures of the ribs and had blood in the chest cavity. He also produced as exhibit No. P2 the death certificate of the Plaintiff's said wife which showed that she was 39 years of age at the time of her death.

It was the Plaintiff's evidence that the deceased had three children, namely Karen, Esther, Barnabas aged 10, 8 and 3 respectively at the time of her death.

The police issued an abstract of the accident to the plaintiff which the latter produced as exhibit No. P4.

It shows that the Plaintiff's late wife was hit and killed by Toyota Hiace reg. No. KAN 126A which was owned by the 1<sup>st</sup> Defendant and was at the material time being driven by the 2<sup>nd</sup> Defendant as the servant or agent of the 1<sup>st</sup> Defendant. The Plaintiff also produced as exhibit No.P5 proceedings and judgement in Kakamega C. M. Traffic Case No. 1246 of 2003 (Republic versus Josephat Njoroge Muchomo) showing that the 2<sup>nd</sup> Defendant was charged with and convicted of the offence of causing death by dangerous driving c/s 146 (1) of the Traffic Act, Cap 403, to wit the death of the Plaintiff's said late wife on 10.4.2002 when he recklessly drove the said motor vehicle at a speed or in a manner which was dangerous to the public at Mwiya along Kakamega-Webuye road. The 2<sup>nd</sup> Defendant was fined Shs.30,000/= and in default 3 years imprisonment.

The Plaintiff testified that his late wife was prior to her death an approved High School teacher (two) at Lirhanda Girls High School and that she used to support the three children and the plaintiff. Her earnings at the time of her death was given by the Plaintiff as Shs.20,319/= and a pay slip to buttress this fact was produced as exhibit P6. It shows that after deductions which included Co-Op. loans and PAYE, the net pay was Shs.11,948. But if the Co-op. loans are discounted as they should be, her net salary was 19384/50 or thereabouts. The Plaintiff also gave evidence that the expenses attendant to treatment of the body of his late wife, Postmortem, death broadcast fees, burial garments, coffin, transport of the body from hospital and food for mourners, including cement for the grave and burial programme and police abstract form totaled to Shs.52,180/=. He produced as exhibit No. P5 a bundle of receipts to support this claim.

It was the plaintiff's further evidence that the death of his wife robbed him of support as she used to take care of family posho mill and the farm. Indeed, he said, on the day she was killed, the plaintiff's wife was coming from the Posho-mill.

It was the Plaintiff's contention that the Defendants were liable and he sought special and general damages as pleaded in the plaint for the dependants and for himself. Like his late wife, the Plaintiff is a high school teacher.

In his evidence, Mathews Harambe (PW3) testified that he was pushing his punctured bicycle home on 10.4.2002 from Kakamega when he was joined in the walk by the Plaintiff's late wife. He told the court that the Plaintiff's wife walked off the road but a matatu came speeding from behind and hit her and stopped 30 metres away but the driver (2<sup>nd</sup> Defendant) reversed it to the spot where the plaintiff's wife lain. PW3 helped take the Plaintiff's wife to Mukumu Hospital in the matatu that hit her and subsequently informed the police of the accident. He could remember that it was a Toyota Hiace KAN 126A that hit the Plaintiff's wife.

The Defendants did not contest the suit and the evidence adduced by the Plaintiff and his witnesses was not controverted. The issues for determination were two and they related to liability and damages. Were the Defendants liable in the accident in which plaintiff's wife was hit and fatally injured by Toyota Hiace KAN 126A? If so, what damages was the plaintiff and dependants entitled to?

The evidence of conviction of the 2<sup>nd</sup> Defendant of the offence of causing death by dangerous driving is prima facie evidence of negligence. Such evidence was not rebutted. PW3, Mathews Harambe, was an eyewitness. He testified that the Plaintiff's wife was off the road and the matatu KAN 126A was being driven dangerously fast as a result of which it went off the road and hit the deceased. There is nothing to suggest that the Plaintiff's wife contributed to the accident. It is my finding that the 2<sup>nd</sup> Defendant who was the driver of KAN 126A was 100% to blame for the accident. It is also my finding on the evidence and material before me that the 2<sup>nd</sup> Defendant was a servant and/or agent of the 1<sup>st</sup> Defendant at the material time and consequently it is my further finding that the 1<sup>st</sup> Defendant was vicariously liable for the negligence of the 2<sup>nd</sup> Defendant. I hold that both the Defendants are jointly and severally liable for the said accident.

I have examined the claim for special damages and I am satisfied that the expenses were attendant to the treatment of the body, broadcasting fees to announce the death, transport, and burial costs. I find the

same reasonable and as they are supported by receipts and therefore proved, I am prepared to grant the same. I therefore award the Plaintiff Shs.52,180/= towards special damages.

As regards damages for loss of expectation of life, these have over the years remained measly and are for the benefit of the estate of the deceased. That they are nominal is because they are predicted on the fact that life is priceless and no amount of money can compensate it. There may also be a moral question that militates against astronomical awards under this head. The awards under this head have tortuously increased from the original figure of Shs.20,000/= to Shs.120,000/= over the years and the courts here in Kenya today generally award Shs.200,000/=. I would award this figure in this case.

Damages for loss of dependency were claimed under the Fatal Accidents Act and Phaniel Olege (PW2) the husband of the deceased, testified that he was the personal representative of the estate of his late wife and that the Grant of Letters of Administration was issued to him on 19.11.2004. He has produced it as an exhibit P3. He told the court that he and the deceased had 3 children, Karen Ayuma, Esther Emali, and Barnabas Andanje aged 10, 8, and 3 respectively. At the time of death, the deceased was a high school teacher at Lirhanda Girls High School. PW2 told the court that the deceased used to support the children financially and thus gave her husband, PW2, support which PW2 lost on her death. In his evidence, PW2 also testified that the deceased took care of the family posho- mill and the farm. He pointed out that she met her death as she was coming from the family posho- mill.

The deceased's death certificate which was produced as exhibit No. P2 showed that the deceased died on 10/4/2002 at the age of 39 years of severe haemorrhage/severe anemia due to road traffic accident.

In **BERNARD LUKUYU ADUBWA v. ROBERT MUGIRE (KAKAMEGA H.C.C.C. NO.96 OF 2003)** this court stated:-

***“To ascertain the loss of dependency, the court is enjoined to ascertain the age and expectation of working life of the deceased and consider the ages and expectations of life of her dependants and the deceased's net income and the proportion of such net income which she would have made available for her dependants. From this figure, a figure representing the annual value of the dependency will be arrived at. The annual value must be capitalized by multiplying by a figure representing so many years purchase. It is accepted that the multiplier must bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the dependants. What must eventually be ascertained so far as it is possible to do is the pecuniary loss of each dependant or person entitled to sue for loss of dependency. The damages must be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. Ultimately, the object is to ascertain the loss to each dependant. In ascertaining the expectation of the deceased's working life and periods of dependants' dependency, regard must be had whether the deceased would have been called upon to support the dependants for the whole period of the deceased's expected working life.”***

In the instant case, the deceased was aged 39 years. It is not difficult to see that all things being equal, the deceased's expectation of further working life would have been in the vicinity of 16 to 20 years if she were to retire at between 55 years and 60 years as a teacher. Her pay slip shows that her net salary was Shs.20,319/= made up of salary (12,500/=), rental (Shs.6000/=) and medical allowance (Shs.1,819/=) from which she paid her loans and taxes. She lived with her husband and did not have to pay house rent. It can be safely assumed that she would have had at her disposal at least Shs.6,000/= for the support of her three children. It is my finding on the material before me that Shs.6,000/= would have been the proportion of the deceased's net income which she would have made available to the children. Her husband had his own income and was not dependent on her.

It would not be unrealistic that the period of dependency of the 2 younger children would have continued for the entire period of the deceased working life while that of the first child, Karen Ayuma, would probably have extended to the next 14 years by which time Karen Ayuma would have been 24 years and therefore left school. Considering all the imponderables, a multiplier of sixteen (16) years would not be unrealistic, or unreasonable.

Accordingly, the dependency being at a monthly rate of Shs.6,000/=, the annual value would be Shs.72,000/= made up by multiplying Shs.6,000/= by 12 months to get the capital sum. Such capital sum must be capitalized by multiplying it with 16 years purchase. The capital sum reached is Shs.1,152,000/=. The lump sum to be apportioned therefore is as follows:-

- (i) Under Fatal Accidents Act .....Shs.1,152,000/=
- (ii) Law Reform Act .....Shs. 200,000/=
- (iii) Special damages .....Shs. 52,180/=
- (iv) Lump Sum .....**Shs.1,404,180/=**

In the result, I accordingly enter judgment in favour of the Plaintiff against the Defendants jointly and severally in the sum of Shs.1,404,180/= made up as aforesaid.

I apportion the lump sum of Shs.1,404,180/= as follows, giving the eldest child 14 years dependency and the other two children 16 years dependency.

### **APPORTIONMENT**

KAREN AYUMA ----- Shs. 427,359.13

ESTER EMALI ----- Shs. 488,410.43

BARNABAS ANDANJE ----- Shs. 488,410.43

TOTAL ----- Shs.1,404,180.00

The sum of Shs.52,180 being the special damages shall carry interest from the date of the filing of the suit and the balance of the lump sum amounting to Shs.1,352,000/= (i.e. Shs.1,404,180/= less Shs.52,180/=) shall carry interest at court rates from the date of this judgment.

The Plaintiff shall have the costs of the suit.

Delivered, dated and signed at Kakamega this 24<sup>th</sup> day of May, 2007

G. B. N. KARIUKI

J U D G E