



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO**

**Civil Suit 33 of 2004**

**MARY WANGUI KIMANI (Suing as Personal Representative of the  
Estate of James Kinuthia Kimani – Deceased).....PLAINTIFF**

**VERSUS**

**GILGIL TELECOMMUNICATION INDUSTRIES LTD.....1<sup>ST</sup>  
DEFENDANT**

**JULIUS KIPLANGAT TOO.....2<sup>ND</sup>  
DEFENDANT**

**JUDGMENT**

The plaintiff, Mary Wangui Kimani filed this suit in her capacity as the personal representative of the estate of James Kinuthia Kimani (*hereinafter referred to as the deceased*). She sued the defendants jointly and severally seeking to be paid damages on account of the fatal injuries that the deceased allegedly sustained when he was hit by a motor vehicle registration No.KAH 079F. The plaintiff averred that the deceased was hit by the said motor vehicle when he was crossing Moi Highway within Kericho Township on 4<sup>th</sup> September 2003. She averred that the said accident was solely caused or substantially contributed by the negligence of the 2<sup>nd</sup> defendant who was the driver of the said motor vehicle.

The plaintiff averred, *inter alia*, that the 2<sup>nd</sup> defendant was negligent in that he drove the said lorry at an excessive speed in the circumstances and also by failing to keep a proper look out or have sufficient regard to other road users. She averred that the 2<sup>nd</sup> defendant drove a defective motor vehicle. She averred that as a result of the death of the deceased, the dependants of the deceased's estate had lost a person whom they depended on. The plaintiff set out the particulars under the Law Reform Act (Cap. 26 Laws of Kenya

the Fatal Accidents Act (Cap.32 of the Laws of Kenya). She also set out the particulars of special damages which included the costs of applying for grant of letters of administration and the funeral expenses. She urged this court to award her special damages and general damages under the Law Reform Act and the Fatal Accidents Act. She further prayed for costs of the suit.

When the defendants were served, they each filed a defence denying that they had caused the said accident. The 2<sup>nd</sup> defendant averred that the deceased was hit by another motor vehicle. He denied that he was negligent or that he was the author of the said accident. In the alternative, he averred that the said accident was solely caused or substantially contributed by the negligence of the deceased. He set out the particulars of negligence on the part of the deceased in his defence. He averred, *inter alia*, that the deceased had crossed the road without giving due regard to the vehicular traffic on the said road. He

averred that the deceased had failed to exercise due care and attention when crossing the said road. He stated that after the said accident, he was charged with the traffic offence of causing death by dangerous driving but was acquitted due to lack of evidence. The 1<sup>st</sup> defendant similarly reiterated the contents of the pleadings filed by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant averred that the said accident was solely caused or substantially contributed by the deceased. The defendants urged this court to dismiss the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff called two witnesses in a bid to prove her case. She testified that she was the mother to the deceased. She produced the limited grant of letters of administration in respect of the deceased's estate as *plaintiff's exhibit No.1*. She testified that the deceased was hit by the 1<sup>st</sup> defendant's motor vehicle which was being driven by the 2<sup>nd</sup> defendant on the 4<sup>th</sup> September 2003 within Kericho Township. She testified that she conducted a search at the Registrar of Motor vehicles and established that the said motor vehicle was registered in the name of the 1<sup>st</sup> defendant (*certificate of search produced as plaintiff's exhibit No.2*).

The plaintiff testified that the deceased at the time of his death was a hawker and used to sell retail goods at Kericho, Sotik, Njoro and Nakuru. She recalled that when she was informed of the death of the deceased. She was present when the post-mortem was performed on the body of the deceased at Kericho District Hospital Mortuary. She produced the post-mortem report as *plaintiff's exhibit No.4*. The death certificate was produced as *plaintiff's exhibit No.5*. The burial permit was produced as *plaintiff's exhibit No.6*. She testified that at the time of his death, the deceased was 25 years old and was unmarried. She testified that the deceased used to earn a monthly income of between Ksh.7,000/= and Ksh.8,000/= out of which he sent her the sum of between Ksh.3,000/= and Ksh.4,000/=. She however, conceded that she did not have any documentary evidence to prove that the deceased earned the said income. She further conceded that she had no proof that the deceased supported her and his father.

The plaintiff conceded that she had other children who were all adults and who were living on their own. She further conceded that at the time of his death, the father of the deceased was still working at the Kericho Municipal Council and only retired in the year 2004. She testified that the family purchased a coffin for Ksh.20,000/= which they used to bury the deceased (*receipt produced as plaintiff's exhibit No.8*). The body of the deceased was transported from Kericho to Njoro for burial (*receipt of Ksh.15,000/= produced as plaintiff's exhibit No.9*). She paid her lawyer the sum of Ksh.10,000/= for the purposes of filing and obtaining the letters of administration. (*Receipt produced as plaintiff's exhibit No.10*). The plaintiff reiterated that she should be paid compensation on behalf of the estate of the deceased.

PW2 PC Dan Omachode testified that he was the police officer in charge of record keeping at the Kericho Traffic Base. He testified that according to the records kept by the police, an accident did occur on the 4<sup>th</sup> September 2002 involving the deceased and motor vehicle registration No.KAH 079F. According to the said records, the deceased, who was a pedestrian, was hit as he was crossing the Kericho-Nakuru road within Kericho Township near Kobil Petrol Station. He testified that the case was investigated by PC Stanley Malongo who died in the year 2005. According to his investigations, the said accident was caused by the 2<sup>nd</sup> defendant who was driving the said motor vehicle at a high speed within an area where speed was limited. He testified that PC Malongo drew a sketch plan of the scene of the accident.

PW2 stated that PC Malongo observed that there were skid marks measuring about 22 metres. He observed that the deceased was knocked down when he was about 0.5 metres from the edge of the road. After concluding his investigations, PC Malongo recommended that the 2<sup>nd</sup> defendant be charged with the offence of causing death by dangerous driving. The police abstract was produced as *plaintiff's exhibit No.7*. According to the records, the 2<sup>nd</sup> defendant was acquitted after trial. He stated that the accident took place at 7.40 p.m. He further testified that the dash board lights of the said motor vehicle were not functioning and therefore the 2<sup>nd</sup> defendant could not have known the speed he was driving the said motor vehicle at the time of the accident. The plaintiff then closed her case.

The defendants called one witness in their defence. The 2<sup>nd</sup> defendant testified as DW1. He recalled that on the 4<sup>th</sup> September 2003 he was driving motor vehicle No.KAH 079F from Sotik Highlands towards the direction of Gilgil. He recalled that it was about 7.30 p.m. when he drove the said motor vehicle into Kericho Township. It was raining. He was driving at an average speed of 30 kph. He testified that as he drove past Mobil Petrol Station, he saw a person dart across the road. He braked sharply in a bid to avoid hitting the said pedestrian. He testified that the motor vehicle which was being driven behind him overtook him and knocked down the pedestrian. He testified that the owner of the said motor vehicle did not stop after hitting the deceased. He recalled that immediately after the accident, he stopped his vehicle and went to the police station and made a report as a Good Samaritan.

The 2<sup>nd</sup> defendant later assisted to have the pedestrian, who is the deceased in this case, taken to hospital. He recalled that when the deceased was taken to hospital, the doctor could not treat him because the deceased was drunk. He denied that his motor vehicle had hit the deceased. He reiterated that the deceased was hit by a hit and run motor vehicle. He conceded that he had been charged with the traffic offence of causing death by dangerous driving. He however testified that he was acquitted of the charge after trial. He conceded that when the motor vehicle was inspected, it was found to have a dent on its front side. He stated that the dents on the front side of the motor vehicle were pre-existing at the time of the accident and were not caused by the collision with the deceased. He further conceded that the dash board lights were not working at the time of the incident.

The 2<sup>nd</sup> defendant however reiterated that he was certain that he was driving at an average speed of 30 kph. He produced the proceedings of the Traffic Case No.1654 of 2003 (Kericho PM's Court) as *defence exhibit No.1*. He conceded that during the material day, one Zablon Githongo Mburu was his passenger. He further conceded that during the trial of the traffic case, the said Zablon Githongo Mburu had testified on his behalf and stated that the motor vehicle that the 2<sup>nd</sup> defendant was driving had hit the deceased. He reiterated that he had not hit the deceased but had reported the accident to the police as a Good Samaritan. He reiterated that he was surprised when he was charged by the police for causing the death of the deceased yet his motor vehicle had not hit the deceased. The defendants then closed their case.

After the close of both the plaintiff's and the defendants' case, the parties agreed by consent to file closing written submissions. Both the plaintiff and the defendants filed closing written submissions.

I have carefully considered the evidence that was adduced by the parties to this suit. I have also read the pleadings and the written submissions filed by the parties to this suit. The issues for determination by this court are two fold;

1. Who caused the accident that resulted in the death of the deceased?
2. Who is liable to pay damages to the estate of the deceased? Is the deceased liable for contributory negligence?
3. What is the quantum as to damages to be paid to the deceased estate?

As regards the first issue, it was the plaintiff's case that the 2<sup>nd</sup> defendant hit the deceased as he was crossing the main Nakuru-Kericho road near the Kobil Petrol Station causing the deceased to sustain injuries which proved to be fatal. The plaintiff blamed the 2<sup>nd</sup> defendant for causing the said accident. On the other hand, the 2<sup>nd</sup> defendant testified that he did not hit the deceased on that material evening. He testified that the deceased was hit by a hit and run motor vehicle which overtook his motor vehicle when he applied emergency brakes and served off the road in a bid to avoid hitting the deceased. The 2<sup>nd</sup> defendant however conceded that he was at the scene when the accident occurred.

I have carefully evaluated the opposing evidence that was adduced by the plaintiff and the 2<sup>nd</sup> defendant. It is clear to this court that it is the 2<sup>nd</sup> defendant who hit the deceased when he was crossing the said road on that particular evening. The 2<sup>nd</sup> defendant testified that it was about 7.30 p.m. when he drove into

Kericho Township. It was raining. Although the 2<sup>nd</sup> defendant testified that he was driving the said motor vehicle at an average speed of 30 kph, it is evident that he was driving the said motor vehicle at a higher speed. The 2<sup>nd</sup> defendant could not have been certain of the speed that he was driving the said motor vehicle because the dash board light was not functioning. He could not therefore read the speedometer.

After the accident, the police visited the scene and drew a sketch plan of the scene. It was observed that there were skid marks of about 22 metres. According to PW2, the said skid marks were indicative of the fact that the 2<sup>nd</sup> defendant was driving the said motor vehicle at an average speed of between 60-90 kph. It is clear that the 2<sup>nd</sup> defendant was driving the said motor vehicle above the speed limit of 50 kph in an urban environment. I read the proceedings of the subordinate court in the traffic case that the 2<sup>nd</sup> defendant was charged. The 2<sup>nd</sup> defendant produced the said proceeding as *defence exhibit No.1*. Although the 2<sup>nd</sup> defendant testified that he had not caused the said accident, a passenger in the said motor vehicle called Zablon Githongo Mburu testified that it was the motor vehicle that the 2<sup>nd</sup> defendant drove that hit the deceased. Further, when the said motor vehicle was inspected after the accident, it was found to have dents on its front side. The said dents were obviously caused by the collision impact when the said motor vehicle hit the deceased. For those reasons, I hold that it is the motor vehicle driven by the 2<sup>nd</sup> defendant that hit the deceased and cause him to sustain the injuries that later proved to be fatal.

Is the 2<sup>nd</sup> defendant solely responsible for causing the said accident? My analysis of the evidence leads me to the conclusion that the deceased contributed to the said accident. The accident took place at 7.30 p.m. It was dark. It was raining. There was no evidence to suggest that there were street lightings at the scene where the accident occurred. It is evident that the deceased did not observe the Kerb rule before he crossed the road. He did not first ascertain that it was safe to cross the said road, before he did. Although the 2<sup>nd</sup> defendant was driving the said motor vehicle at a speed that was above the speed limit within the urban environment of 50 kph, if the deceased had not made a decision to cross the said road in a dark spot, most probably he would still be alive today.

Taking into consideration the totality of the evidence adduced, I do hold that the 2<sup>nd</sup> defendant substantially contributed to the said accident. He drove the said motor vehicle at a speed beyond the limit allowed by the law. He did not take reasonable precaution that there could be pedestrians crossing the road within the said urban setting. The 2<sup>nd</sup> defendant shall therefore bear 70% liability in damages to the estate of the deceased. The estate of the deceased shall shoulder 30% contributory negligence. The 1<sup>st</sup> defendant, being the owner of the said motor vehicle is vicariously liable for the negligence of its employee (*the 2<sup>nd</sup> defendant*). The defendants shall therefore jointly and severally should liability to the estate of the deceased to the extent of 70% liability.

On quantum, the plaintiff pleaded that she should be paid special damages of Ksh.11,025/= being the legal fees for applying for the limited grant of letters of administration intestate. She further pleaded that she should be paid the sum of Ksh.25,000/= as funeral expenses. However, during the hearing of the case, she produced *plaintiff's exhibit No.8, 9 and 10* being receipts of Ksh.20,000/= (*cost of coffin*), Ksh.15,000/= (*being the transport cost from Kericho to Njoro*) and Ksh.10,000/= (*legal fees paid to the firm of Sila Munyao & Company Advocates*). It is trite that special damages must be specifically pleaded and specifically proved for a court of law to award the same. As was held by the Court of Appeal in the case of **Ali vs Nyambu t/a Sisera Store [1990] KLR 534** that special damages, in addition to being pleaded, must be strictly proved. In the present case, the plaintiff has only pleaded and proved the sum of Ksh.20,000/= being the cost of the coffin and Ksh.10,000/= being the legal fees paid to obtain the limited grant of letters of administration intestate. The plaintiff is thus awarded, on behalf of the estate of the deceased, the proven sum of Ksh.30,000/= as special damages.

The plaintiff offered uncontroverted testimony to the effect that the deceased was 25 years at the time of his death. She produced the death certificate as *plaintiff's exhibit No.5* which clearly confirms that the deceased was 25 years at the time of his death. The doctor who performed the post-mortem also confirmed that the deceased was approximately 24 years of age at the time of his death. The post-mortem

report was produced as *plaintiff's exhibit No.4*. For the purposes of assessing the award to be paid to the estate of the deceased, under the **Fatal Accidents Act**, I hold that the deceased was 25 years old at the time of his death. The plaintiff testified that at the time of his death, the deceased was a hawker and used to earn a sum of between Ksh.7,000/= and Ksh.8,000/=. She however did not produce any documentary evidence to establish that indeed the deceased earned such a figure in monthly income. It is the view of this court that the plaintiff literally plucked the said sum from the thin air. In the circumstances of this case, having evaluated the evidence adduced on record and considered the submissions made, I will adopt the sum of Ksh.4,000/= being the minimum wage as the likely sum that the deceased earned per month.

As stated earlier in this judgment, the deceased died when he was 25 years. The plaintiff proposes that the court should apply a multiplier of 25 years in calculating the amount to be paid to the deceased under the **Fatal Accidents Act**. On their part, the defendants have submitted that a multiplier of 20 years should be applied. I have considered the said submissions made by the plaintiff and the defendants. I have also considered the decided cases that they have relied on in support of their submissions. I hold that the multiplier that will be applied in this case shall be 20 years. This is because of fact that there is no guarantee that the deceased could have lived to a ripe old age. I have taken judicial notice of the fact that the life of expectation of an average Kenyan has reduced due to the increased incidences of the HIV/AIDS pandemic and poverty.

The plaintiff testified that the deceased used to maintain her had her husband. She testified that the deceased used to give them a monthly sum of between Ksh.3,000/= and Ksh.4,000/=. There was however no evidence that the deceased supported the plaintiff and her husband. It was clear from her evidence that the father of the deceased was working with the Municipal Council at the time of the death of the deceased. Although it is an expectation of an African that his children would support him in old age irrespective of his source of income, in the present case, the plaintiff failed to establish that the deceased solely supported them. I cannot however rule out that the deceased occasionally gave support to his parents. The defendants have proposed a dependency ratio to be adopted to be 1/3 while the plaintiff has proposed a dependency ration of 2/3. In the circumstances of this case, having evaluated the evidence on record, I do hold that the dependency ratio that would be applied shall be 1/3. The plaintiff conceded that she has other children who are working and are therefore also supporting her and her husband. The plaintiff was unmarried at the time of his death. His dependants were therefore his parents.

I therefore hold that the award to be made to the plaintiff, on behalf of the estate of the deceased under the Fatal Accidents Act is as follows;

$Ksh.4,000/= \times 20 \text{ years} \times 12 \text{ months} \times 1/3 \text{ dependency ration} = Ksh.320,000/=$ .

I will make no award under the **Law Reform Act** in view of the decision of the Court of Appeal decision of **Kemfro Africa Ltd t/a Meru Express Services vs Lubia & Anor. [1987] KLR 30** which prohibits this court from making two awards in damages in respect of the same cause of action.

The upshot of the above is that judgment is entered for the plaintiff against the defendants jointly and severally as hereunder;

(a) On liability,

Liability is apportioned at the ratio of 70:30 in favour of the plaintiff and as against the defendants.

(b) On quantum,

(i) The plaintiff is awarded proven special damages of Ksh.30,000/=.

(ii) The plaintiff is awarded general damages under the **Fatal Accidents Act** of Ksh.320,000/=.

Total.. . . . . Ksh.350,000/=.

Less 30% contribution. . . . .Ksh.245,000/=.

(c) The plaintiff shall have the cost of the suit.

(d) Interest on the special damages shall be paid from the date of filing suit while interest on general damages shall be paid from the date of delivery of this judgment.

**DATED at KERICHO this 7<sup>th</sup> day of June, 2007**

**L. KIMARU**

**JUDGE.**