



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

**Civil Case 1484 of 1993**

**LUCY M. NJERI .....**

.....**PLAINTIFF**

**VERSUS**

**FREDRICK MBUTHIA & ANOTHER ..... DEFENDANT**

**JUDGMENT**

1. **BACKGROUND AND PROCEDURE**

1. On the fateful day of 6 April 1990 a motor vehicle traffic accident occurred between motor vehicle Reg. KXX 138 and motor vehicle registration number KYB 425.
2. Joseph Kibui Njuguna, a male adult town aged 29 years old was a passenger in motor vehicle KXX 138. As a result of the said accident he sustained fatal injuries.
3. His widow Lucy Muthoni Njeri filed this suit above although she held letters of grant intestate duly confirmed on 14.5.93 (Shields J) together with another not before court.
4. Her father in law held no letters of grant. He filed suit in the High Court of Kenya at Nyeri in case No.107/93. He sought damages under the Fatal Accidents Act that requires no letters of grant to be filed (but on condition).
5. This court on 21.7.03 directed that the two files be consolidated for hearing. That the issue of representation be addressed.

The parties to this suit are follows:-

1. Lucy Muthoni Njuguna – widow ..... Plaintiff No.1
2. Njuguna Kibui Kamitha (father to deceased) – Plaintiff No.2

Represented by M/sWagaki Murage & Co. Advocates

(Notice of change for plaintiff No.2 having been duly filed 11.6.04))

Versus

1. Fredrick Mbuthia ..... Defendant No.1

Registered owner of the motor vehicle KXX 138

Represented by M/s Archer & Wilcock & Co. Advocates

2. Joseph N. Muni ..... Defendant No.2

Driver of motor vehicle KXX138

3. Kenya matches Ltd ..... 3<sup>rd</sup> Party

Registered owner of KYB 425

Represented by M/s Shah Parekh & Co. Advocates

## II: LIABILITY

7. It seems that there were several cases that concerned the defendants in this accident. Order 37 Civil Procedure Rules on a representative suit was never applied. The defendants nonetheless came up with the agreement on liability as they applied in similar cases on the following terms.

80% liability against the 1<sup>st</sup> and 2<sup>nd</sup> defendant

20% liability against the 3<sup>rd</sup> party.

8. The effect of the above agreement on liability by parties is that the passengers concerned are not held liable for the accident. The liability is presently between the defendants and thus judgment on liability is final but conditional on quantum.

9. In this case, the deceased being a passenger was not questioned by the parties. They then proceeded to formal proof on the claim under the Law Reform Act and the Fatal Accident Act.

## III Quantum

### I: Locus

10. In their submission the issue of locus of the parties was raised by the defendants – 3<sup>rd</sup> parties. This should have been taken first at the earliest opportunity and not at the end of the trial.

11. The 1<sup>st</sup> plaintiff is the widow to the deceased. The 2<sup>nd</sup> plaintiff is the father to the deceased as stated above. What now occurred is the 1<sup>st</sup> plaintiff filed this suit on the 30<sup>th</sup> March 1993 alone. She had prior to this taken out grant of letters administration intestate together with one Fredrick Njenga Igogo who was never part of this suit nor so named and or mentioned. Is this fatal to this suit?

12. It must be pointed out that the plaintiff in giving evidence stated that once her husband died (she married him under customary law) her parents in law were not able to support her. She went back to her parents with a minor child she had with the deceased. The plaintiff No.2 the father in law admitted in evidence that indeed he was not able to support her as he had a considerable burden with other siblings of deceased. He still recognized her as a daughter in law.

13. Further it transpired that the plaintiff had children with other men (she claims these children were accidentally born). I shall deal with this later.

14. Though it is imperative that there be two administrators in filing suit where a minor may make

claims, in this case the plaintiff No.1 had obtained a grant being two administrator/administratrix. This can be cured by the amendment of the plaint to reflect the correct parties as required under the Civil procedure Law. It is therefore not fatal to the case what would not have been acceptable in law is if the letters of grant of administration had only one name – that of the plaintiff without reflecting those of a second administration. The locus of the plaintiff if a grant was taken alone by her would be in question and she would not have had the opportunity to be permitted to have locus in this case. The plaint would have been struck out.

15. The question then arose as to the plaintiff No.2. He himself had no letters of grant at all. The procedure herein is that the plaintiff No.2 claims to be a beneficiary and or dependant of the deceased. Under section 4 of the Fatal Accident Act Parents, spouses and children may claim under the said act to be paid any compensation in tort.

16. What then is required to be further noted is that a person who claims under the Fatal Accidents Act must wait six months for the legal representative administrator/or executor of the estate to take up the estate. If the persons who are required to take up the estate fails to do so then such person must file suit giving a list of all the dependants their relationship and age to the dependants or other party.

17. The deceased died in April 1990. For three years no action to file suit had been taken by the estate - a suit was filed in 1993 the same year that the father in law filed this suit.

18. There was a suggestion that the plaintiff No.2 being the father in law should be reflected in the plaint as a beneficiary and not a party. I find that there are two cases before me. These have been consolidated and is in order. If one had been filed the father-in law would have been a dependent. As there are two files filed and dully consolidated there need not be any amendments.

19. I wish to point out that the Fatal Accident Act and Law Reform Act claims are at times a duplication where this occurs the claim under the Law Reform Act and the Fatal Accidents Act are taken into account in order to ensure there is no double enrichment.

20. I hereby hold that the parties have locus to bring the suit. There was a part raised that because the widow had children out of wedlock she should not now be considered a widow of the deceased. I believe this is discriminatory on the widow. She did not get married but went back to her parents. She had children out of wedlock not belonging to the deceased this does not mean that she has another man to look after her. The purpose of her status is to provide for the minor born to the deceased who should have a way and four to be looked after till she reaches the age of majority.

21. I now turn to the claim under the law Reform Act.

## II: Law Reform Act

### 22a) Pain and suffering

The deceased died as a result of a road traffic accident. The death certificate reflect that this was on 6 April 90 at the Aga Khan hospital. The assumption therefore is that the deceased did not died along the Limuru/road but was alive when he was taken to the Aga Khan hospital. If he was dead then he would have been taken to the City morgue.

22. I would award Ksh.5,000/- under this head of pain and suffering.

23 The sum of Ksh.75,000/- in total under the Law Reform Act goes to the estate.

## III: Fatal Accidents Act

### 24(b) Loss of dependency

24 This is a difficult case as the plaintiff No.1 pleaded that her husband was a worker so self employed in a market earning sh.10,000/- per month and earned Ksh.1,500/- from the business of a matatu.

25. What evidence has been brought to corroborate this is that of plaintiff No.2. He had informed court he had a similar business to that of the deceased. At times the deceased would assist him.

26. The widow was dependent on the deceased. If she was not she would not have been found to go back to her parents.

27. The situation now is that there are indications that the deceased earned an income. There was no documentary evidence provided, nor was there any books kept, receipts fellow work make who saw the deceased work. It is important to note that there must at all times be corroboratory evidence that the deceased worked from his father.

28. The advocates for the defendants stated a minimum wages of Ksh.2,000/- for an income can be given. I am not able to have evidence before the court that the said deceased was indeed in employment and that he infact worked. It would have been of a assistance if witnesses were called stating that they worked with him and or transacted business with him.

29. It is a matter of hearsay to say he had a matatu vehicle business that brought him ksh.1,500/-. I would accordingly reject this claim stating there indeed is nothing to show before this court that the deceased was in employment.

30. If per chance the claim had been proved my possible award would have been as follows under the Fatal Accident Act.

### III Multiplicand

31. The defendants recommended minimum wage in 1990. This was Ksh,2000/- according to them. I would have accepted this as a multiplicand per month.

### II Multiplier

32. This is how long the deceased would have effectively lived to work before he reached retirement. The deceased was aged 29 years old according to the death certificate. In formal sectors he would have worked till the age of 50 to 55years old. I would accept 20 years as a reasonable number of years of a multiplier.

### III Dependency

A dependency ratio of  $2/3^{\text{rd}}$  would have been acceptable.

33. Thus this would amount to  $Ksh.2,000/- \times 20 \times 12 \times 2/3 = Ksh.320,000/-$  . I am required to discount this amount to provide for a lump sum payment. I do so at ksh.20,000/-. I am also required to apportion this sum under the Fatal Accidents Acts amongst the dependants. The minor child's birth certificate was duly issued and exhibited to court.

34. Apportionment (possible award)

34.1 Lucy Muthoni Njeri mother .... Ksh.50,000/-

34.2 Esther Mendi (born 19.2.90) minor Ksh100,000/-

34.3. Njuguna Kihui Karotha father Ksh.50,000/-

Ksh.320,000/-

35. The sum of Ksh.200,000/- for the minor would have been invested with the old mutual in the name of the two administrators and the registrar of the High Court of Kenya till the minor attain 18 years old.

36. As it stands this claim is dismissed.

II: Special Damages

37. This claim was abandoned on 16.5.06. The same is duly dismissed.

38. Judgment is accordingly entered on the proved claim.

39. In summary

39.1. Passenger male adult aged 29 years old in 1990

39.2. Motor vehicle collision between two vehicle

39.3. Injuries

Fatal

39.4. Liability (agreed)

80% against the 1<sup>st</sup> and 2<sup>nd</sup> defendant

20% against the 3<sup>rd</sup> party

39.5. Quantum

I: Law Reform Act

i) Pain and suffering Ksh. 5,000/-

ii) Loss of expectation of life Ksh.70,000/-

II: Fatal Accident

i) Loss of dependancy - Nil

Possible award - Ksh.320,000/-

Subject to discount and apportionment

II: Special Damages

Abandoned - Nil

Total Ksh.75,000/-

80% = Ksh.60,000/-

20% = Ksh.15,000/-

40. I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment.

Dated this 23<sup>rd</sup> Day of May 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

Wagaki Murage & Co. Advocates for the plaintiff

Archer & Wilcock Advocates for the defendant