



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 160 OF 2002

JUSTINE SHIMULI NAMIINDA.....PLAINTIFF

VERSUS

KENNETH KIMNGETICH CHERUIYOT.....1ST DEFENDANT
ELIJAH KIPTTARBEI LAGATT.....2ND DEFENDANT

JUDGMENT

Justine Shimuli Namiinda filed two suits: The first suit was filed in her capacity as the administrator of the estate of Stephen Wekesa Namiinda – deceased. The second suit was filed in her own personal capacity. Both suit arose from a road traffic accident which occurred on the 15th of July 2001. According to the plaint, the plaintiff averred that she was a passenger in motor vehicle registration number KZD 413, Nissan Sunny. The said motor vehicle was being driven by her deceased husband, Stephen Wekesa Namiinda. She averred that as the said motor vehicle was being driven along Kenyatta Avenue, Nakuru, the 1st defendant negligently drove motor vehicle registration number KAM 816B, Toyota Land Cruiser, that it caused the same to collide with motor vehicle registration number KZD 413, as a result of which the deceased sustained fatal injuries. The plaintiff was seriously injured in the said accident. The plaintiff blames the defendants for the said accident. She prayed that the defendants be ordered by this court to pay her damages for the injuries that she sustained and further damages on behalf of the estate of the deceased – Stephen Wekesa Namiinda. The defendants denied they were negligent. They attributed the accident solely to the negligence of the deceased who was driving motor vehicle registration number KZD 413. The defendants urged this court to dismiss the plaintiff’s suit with costs. On 27th of November 2003, this court ordered that the two suits filed by the plaintiff, namely **Nakuru HCCC No. 160 of 2002, Justine Shimuli Namiinda –versus- Kenneth Kipngetich Cheruiyot and Elijah Kiptarbei Lagatt and Nakuru HCCC No. 159 of 2002, Justine Shimuli Namiinda (suing as the personal and legal representative of Stephen Wekesa Namiinda – deceased)** –versus- **Kenneth Kipngetich Cheruiyot & Elijah Kiptorbei Lagatt** be consolidated.

At the hearing of the suit, the plaintiff called three witnesses. The defendant called none. It was the plaintiff’s testimony (PW 1) that on the night of the 14th and 15th of July 2001 at about 12.30 a.m. the deceased was driving motor vehicle registration number KZD 413 Nissan sunny from the railway quarters, to Milimani Estate, Nakuru. PW 1 was seated on the front passenger seat. Two of their children were seated at the rear seats. The two children were Linda Nafula and Tony Wekesa. She testified that the said motor vehicle was being driven at an average speed of about 50-60 km/h. The said motor vehicle was being driven along Kenyatta Avenue. As the motor vehicle

approached Gitwamba Estate, motor vehicle registration number KAM 816B emerged from the side lane – Gusii lane and entered the main road (*Kenyatta Avenue*) without stopping. PW 1 testified that the said motor vehicle collided with their motor vehicle as a result of which she was injured and lost consciousness. PW 1 was later informed that the deceased had died at the scene of the accident. PW 1 was admitted at the hospital for eight days. Upon being discharged she went to the police station and was issued with a police abstract report (*produced as Plaintiff's Exhibit No. 1*). A search was undertaken at the registrar of motor vehicles. The search confirmed that the motor vehicle was owned by one Elijah Kiptarbei Langat (*the 2nd defendant*). The driver of the motor vehicle registration number KAM 816B was charged with the offence of causing death by dangerous driving and was duly convicted on his own plea of guilty and fined in **Nakuru CMC CRC No. 2394 of 2001 Republic –versus- Kenneth Kipngetch Cheruiyot**. The proceedings of the traffic case was produced as Plaintiff's Exhibit No. 3. The plaintiff testified that as a result of the accident she sustained the following injuries;- *her tongue was cut – it had to be stitched; her face was bruised – it had to be stitched; her right hand was fractured in several places; she had a cut on her right leg; her wrist was broken; she fractured one rib*. After being discharged from the hospital she was put on off-duty for three months. The discharge summary was produced as plaintiff exhibit No. 4. She attended physiotherapy (*summary produced as plaintiff's exhibit No. 5*) she was issued with a P3 form which was filled by Dr Gachungo. The plaintiff incurred expenses when seeking treatment. Receipts totalling to a sum Kshs 14,103/= were produced as Plaintiff's Exhibit No. 7. She was seen by Dr Angelo D'Cunha who prepared a medical report of the injuries that the plaintiff had sustained. She paid Kshs 2,000/= for the preparation of the said report (*receipt produced as plaintiff's exhibit No. 9*). PW 1 testified that she had not been completely healed as she was unable to undertake tasks like cooking ugali for many people or driving a motor vehicle. Being a teacher by profession, she could not write on a blackboard for a very long time. The plaintiff blamed the 1st defendant for the accident that caused injuries to her and the death of her husband. She prayed that she be compensated for the injuries that she had sustained.

As regards her husband, the plaintiff testified that when she regained her consciousness she discovered that her husband had died as a result of the accident. The post mortem report was produced as Plaintiff's Exhibit No. 10. The death certificate was produced as Plaintiff's Exhibit No. 11. PW 1 obtained letters of administration to enable her administer the deceased estate (*produced as plaintiff's exhibit No. 12*). The deceased was survived by his wife (*the plaintiff*) and four children, namely Barbra Muyoka Namiinda born in 1983, Winnie Namiinda born in July 1986, Linda Namiinda born in 1989 and Tony Wekesa Namiinda born in 1994. The birth certificates of the children were produced as plaintiff's exhibit No. 13 (a) (b) (c) and (d). All the children were school going including the first born who was a university student (*1st year*). PW 1 testified that her husband used to pay the school fees for the said children. He also bought foodstuff for the family and took care of his aged parents. At the time of his death, PW 1 testified that her deceased husband worked as an engineer with the Kenya Railways. PW 1 produced the payslips for the deceased for the months of April, May and June 2001 (*marked plaintiff's exhibit No. 14(a) (b) (c)*). The said payslips showed that the deceased's gross salary was Kshs 49,867/=. He paid Pay As You Earn (PAYE) of Kshs 11,676/=. His take home pay was Kshs 34,921/10 (April 2001). In May 2001 his take home pay was Kshs 39,440/=. In June 2001 his the take home pay was Kshs 45,954/40/=. The average pay received by the deceased for the three months was Kshs 39,269/20. After the death of the Plaintiff's husband, funeral arrangements were made . Mortuary fees paid (Kshs 4,500/=) (*plaintiff's exhibit No. 15*), funeral announcement were made by Kenya Broadcasting Corporation (KBC). The Plaintiff paid Kshs 3,220/= and Kshs 2,905/=. A death notice was published by the Nation Newspaper. The sums` of – Kshs 5,664/= and Kshs 6,400/= were paid. All the receipts were produced as Plaintiff's Exhibit No. 16 (a) (b) (c) (d). PW 1 further testified that the

deceased had worked for Kenya Railways from 1983 upto the time of his death. A Letter of appointment was produced and marked as Plaintiff's Exhibit No. 17. PW 1 testified that she used Kshs 50,000/= as funeral expenses. She further testified that life had become difficult since the death of her husband as she has had to fend for the children by herself. She prayed that she be paid appropriate damages in compensation for the death of her husband. The plaintiff reiterated that she was in the motor vehicle when the accident occurred and was injured during the accident. She testified that she was injured on her chest and ribs. She conceded that at the time of the trial she was not being attended to by any Doctor for the injuries that she had sustained. She further conceded that the funeral expenses were paid for by the funeral committee. It was her testimony that the deceased was about forty two years when he died during the accident. She testified that she was a teacher by profession and during the lifetime of her husband, the only expenses that she catered for were the vegetables for the family. She admitted that she is being paid death gratuity of Kshs 10,000/- per month for five years by the Kenya Railways, the employer of her late husband. It was her testimony that the plaintiff committed more than half of his salary for the upkeep of the family.

PW2 Timothy Gichina Kiritu, a taxi driver, testified that on the material night he was at his place of work at Gitwamba, Nakuru. Gitwamba is a building at the junction of Kenyatta Avenue and Gusii Road. PW 2 saw motor vehicle registration number KAM 816B being driven at a high speed from Gusii road towards Kenyatta Avenue. Gusii road is a minor road and to join Kenyatta avenue a major road, a driver is supposed to stop and give way to motor vehicles being driven on Kenyatta avenue. PW 2 then saw another motor vehicle being driven along Kenyatta Avenue from the Njoro direction towards Nairobi direction. The motor vehicle registration number KAM 816B then entered the main road without stopping. The said motor vehicle collided with the motor vehicle (*Nissan saloon*) registration number KZD 413. PW 2 testified after the collision he went to the assistance of the injured passengers who were in motor vehicle registration number KZD 413. PW 2 testified that the accident was caused by the driver of motor vehicle registration number KAM 816B because he entered the main road from a minor side road and collided with motor vehicle registration number KZD 413 which was being driven on the main road. PW 2 further testified that the driver of motor vehicle registration number KZD 413 could not have taken any evasive action because he was driving the motor vehicle on its right lane.

PW 3 Dr Angelo D'Cunha testified that he had examined the plaintiff on the 29th of November 2001. He established that the plaintiff had been injured in a road traffic accident and sustained the following injuries; *fracture of the right humerus, radial nerve paralysis, head of the radius was dislocated, fracture of the ulna bone and injury to the right knee joint*. The plaintiff further sustained a dislocation of the acromial clavicular joint and subluxation of the inferior ulna joint. She further sustained a cut under the tongue. He testified that, according to his opinion, the plaintiff would suffer the following residual effect; *osteoarthritis of the right shoulder joint, possible osteoarthritis of the right clavicular joint, movement of the injured joints would be painful and restricted*. The plaintiff had developed osteoarthritis of the right knee joint. PW 3 assessed the degree of permanent disability sustained by the plaintiff due to the injuries that she suffered to be 35%. The medical report was produced as Plaintiff's Exhibit No. 8. PW 3 charged Kshs 5,000/= to attend court. PW 3 admitted that he had not examined the plaintiff again after writing his report in the year 2001.

The parties to the suit then agreed to produce the copy of the records of the Registrar of Motor vehicles as Plaintiff's Exhibit No. 2. The defendants closed their defence without calling any witnesses.

After the conclusion of the case, the parties to this suit agreed by consent to present written submissions in support of their respective client's case.

I have carefully considered the evidence adduced by the plaintiff in this case. I have also read the submissions made by the plaintiff and the defendant. The issue for determination by this court is who between the driver of motor vehicle registration number KZD 413 and motor vehicle registration number KAM 816B caused the accident that resulted in the fatal injuries sustained by the deceased and the injuries sustained by the plaintiff. The other issue for determination is who, as between the two, is liable for in damages to the deceased's estate and the plaintiff? And finally, if the answer to the above is yes, what is the quantum as to damages that is payable to the plaintiff and the deceased's estate? PW 1 testified that on the material night the deceased was driving motor vehicle registration number KZD 413 make Nissan Sunny along Kenyatta Avenue within Nakuru municipality. It was her testimony that the deceased was driving at a moderate speed of about 50-60 km/h. In the said vehicle were the plaintiff (PW 1) and two children who were seated at the back seat. PW 1 was seated on the front seat. PW 1 testified that on reaching Gitwamba hotel, motor vehicle registration number KAM 816B Toyota Land Cruiser emerged from the side road and entered the main road without stopping. The said motor vehicle hit motor vehicle registration number KZD 413 as a result of which the deceased sustained fatal injuries and the plaintiff sustained serious injuries.

The evidence of PW 1 is corroborated by the evidence of PW 2. He testified that as he was at his place of work near Gitwamba Hotel, he saw motor vehicle registration number KAM 816B emerge from Gusii road, a minor side road and attempt to enter the main road, Kenyatta Avenue. It was his evidence that the driver of motor vehicle registration number KAM 816B was supposed to have stopped first to check if there was any traffic on the main road (Kenyatta Avenue) before joining it. Instead the driver of motor vehicle registration number KAM 816B entered into the main road without stopping as a consequence of which he hit motor vehicle registration number KZD 413 which was being driven along Kenyatta. PW 2 was emphatic that it was the driver of motor vehicle registration number KAM 816B who caused the accident. PW 1 produced in evidence the proceedings of **Nakuru CMC Tr. Case No. 2394 of 2001 Republic –vs- Kenneth Kipngetich Cheruiyot** whereby the 1st defendant had pleaded guilty to the charge of causing death by dangerous driving.

After evaluating the evidence, I do find that it was the 1st defendant who was sole author of the said accident. He drove into a main road from a minor road without first stopping and confirming if it was safe to join the said main road. The 1st defendant joined the main road dangerously as a result of which he caused his motor vehicle to collide with motor vehicle registration number KZD 413. The 1st defendant was careless and reckless. He admitted his carelessness when he pleaded guilty to the charge of causing death by dangerous driving. He did not offer any evidence to controvert the evidence adduced by the plaintiff and her witnesses. In the premises therefore I do find that the plaintiff has established, on a balance of probabilities, that it was the 1st defendant who caused the said accident. The defendants, jointly and severally, are therefore found to be fully liable in damages to the plaintiff and to the estate of the deceased.

On quantum, the plaintiff's testimony which was corroborated by the evidence of Dr Angelo D'Cunha was that she sustained the following injuries; *fracture of right humerus with radial nerve palsy, fracture of right ulna with dislocation of the right radius, blunt injury to the right knee, osteoarthritis of the right shoulder joint and laceration of the face and tongue*. According to Dr D'Cunha as a result of the said injuries sustained by the plaintiff, she was left with the following residual effects of the injury; *osteoarthritis at the right shoulder joint and possibly the right acromioclavicular joint, the plaintiff could not lift her arm above the level of her head*. He however was of the opinion that the condition would improve with physiotherapy. There was subluxation of the right inferior radio-ulna articulation. He predicted that the

plaintiff would develop osteoarthritis of the affected joint. He also found out that the movement at the right wrist was restricted and painful. He further diagnosed that the plaintiff had developed osteoarthritis of the right knee joint with painful and restriction of movements at the said joint. Dr D’Cunha assessed the degree of permanent disability to be 35%. The plaintiff has submitted that she should be awarded Kshs 1,500,000/- as general damages for pain, suffering and loss of amenities. She relied on the decisions of **Nairobi HCCC No. 3214 of 1993 Mary M. Muite –vs- Joseph Katunge Muswii (unreported)** and **Nakuru HCCC No. 384 of 2000, Ester Wanjiru Kiarie –vs- Joseph Kiarie Nganga (unreported)**. On their part the defendants have suggested that the plaintiff be awarded Kshs 200,000/= as general damages. They relied on the cases of **Harun Macharia Thuo & Anor –versus- Mrs Winfred Mwai & Anor Nairobi HCCC No. 1762 of 1989 (unreported)** and **Samuel Nyagah Nguruku –vs- John M. Muchemi & Anor Nairobi HCCC No. 5808 of 1993 (unreported)**.

I have considered the submissions made and put into consideration the injuries that were sustained by the plaintiff. I have also considered the authorities relied on by the parties. The authorities submitted by the parties to this suit gives a rough guide to this court on the likely award of damages to be made by this court. The injuries sustained by the plaintiff are not similar to the injuries sustained by the plaintiffs in the cases referred to me. Doing the best that I can in the circumstances of this case and considering the long term effect of the injuries that the plaintiff sustained, including the degree of permanent disability, I will award the plaintiff the sum of Kshs 600,000/= for pain, suffering and loss of amenities.

As regard the deceased, Stephen Wekesa Namiinda, he was aged 42 years at the time of his death. He was working with the Kenya Railways as an engineer. He supported his family comprised of the plaintiff, his widow, and four children namely Barbara Muyoka Namiinda, Winnie Mayuba Namiinda, Linda Nafula Namiinda and Tonny Wekesa Namiinda. At the time of filing suit, and even at the time of hearing this suit, the said children were all still schooling. According to PW 1, the deceased used to cater for all their needs by providing for their daily sustenance, clothing and paying their school fees. The plaintiff chipped in by purchasing vegetables. Otherwise the plaintiff testified that the deceased solely provided for their upkeep.

I have considered the evidence adduced. The plaintiff produced three payslips, showing the salary the deceased earned three months prior to his death. The payslips were produced as plaintiff’s exhibit No. 14(a), 14(b) and 14(c). The deceased did not earn a fixed salary. This was due to the fact that the deceased would be required to undertake extra duties in the course of his employment. I will therefore take the average figure of Kshs 39,269/20 to be the deceased’s monthly salary for the purposes of quantification. The deceased’s letter of appointment (*plaintiff’s exhibit No. 17*) does not indicate when he would have retired. The plaintiff has suggested that the deceased would have retired at the age of 60 years. On their part, the defendants have submitted that the deceased would have retired at the age of 55 years.

I have considered the submissions made. I have also taken judicial notice of the fact that Kenya Railways Corporation is a state corporation. The mandatory retirement age for all the employees of state corporation is 55 years. In the circumstances of this case I do hold that the deceased would have retired at the age of 55 years. The plaintiff has suggested a multiplicand of 14 years whilst the defendants have suggested a multiplicand of 6 years. In the circumstances of this case, and putting into consideration the evidence that was adduced in court, I do hold that the multiplicand applicable shall be 10 years. The plaintiff has suggested that the dependency ratio to be applied should be $\frac{2}{3}$ while the defendants have suggested that the dependency ratio be $\frac{1}{2}$. After evaluating the evidence adduced, I do find that the plaintiff did establish that the deceased took care of her and their children during his life time. Although the

plaintiff contributed to the upkeep of the household, her contribution was minimal. It is trite law that dependency must be proved. In this case, the plaintiff proved, on a balance of probabilities, that the deceased substantially provided for her and the children of the marriage. I do therefore agree with the submission by the plaintiff that the dependency ratio ought to be 2/3.

The general damages to be paid to the deceased's estate under **the Fatal Accidents Act** shall be:

Kshs 39,269/20 x 2/3 x 10 x 12 = Kshs 3,141,535.90

I will not make any award under **the Law Reform Act** due to the fact that to make such an award would be superfluous. The law requires that if such an award is made, then it would be deducted from the award made under **the Fatal Accidents Act** to avoid duplicity of awards. It would therefore be an exercise in futility. The plaintiff pleaded that she should be awarded Kshs 39,840/20 and Kshs 42,889/= as special damages in the two suits respectively. During the hearing, she produced the following receipts;- hospital bill Kshs 14,103/= (*plaintiff's exhibit No. 7*), medical report charges Kshs 2,000/= (*plaintiff's exhibit No. 9*) Kshs 4,500/= mortuary fees (*plaintiff's exhibit No. 15*) KBC funeral announcement Kshs 3,220/= and Kshs 2,905/= Nation newspapers death announcement Kshs 5,664 and 6,400/= (*produced as plaintiff's exhibit No. 16(a), (b), (c) (d)*). The plaintiff testified that she used Kshs 50,000/= as funeral expenses. She did not give any documentary proof that she used the said amount during the funeral. I will however hold that she used Kshs 20,000/= as funeral expenses. This is a conventional figure accepted by the courts. I will also award her the sum of Kshs 5000/= which she used to procure the attendance of the doctor to come to court to testify on her behalf. The proven special damages is therefore Kshs 63,792/=.

I therefore enter judgment for the plaintiff against the defendants jointly and severally as follows:-

(i) General damages for pain suffering and loss of amenities

(by the plaintiff) ... Kshs 600,000.00/=

(ii) General damages under Fatal Accidents Act to be paid To the estate of the deceased

Stephen Wekesa Namiinda ... Kshs 3,141,535.90/=

(iii) Proven special damages ... Kshs 63,792.00/=

TOTAL 3,805,327.90/=

(iv) Costs of the suit

Interest on special damages shall be payable from the date of filing suit whilst interest on the amount awarded as general damages shall payable from the date of this judgment.

DATED at NAKURU this 28th day of February, 2005.

**L. KIMARU
JUDGE**