



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**Civil Suit 210 of 2003**

**PAULINE WANGARE MBURU.....PLAINTIFF**

**VERSUS**

**BENEDICT RAYMOND KUTONDO.....1ST DEFENDANT**

**SCOOBY ENTERPRISES LTD.....2ND DEFENDANT**

**JUDGMENT**

The plaintiff, Pauline Wangare Mburu is the administrator of the estate of Daniel Mburu Kimani – deceased (*hereinafter referred to as the deceased*). She has filed suit against the defendants claiming to be paid damages on account of the death of the deceased which occurred in an accident involving motor vehicles registration number KAH 129V and KAM 466B. The plaintiff pleads that the accident occurred on the 25th of June 2002 at 7.00 pm near Iterio Market along Kisii-Migori road. The plaintiff averred that the deceased was killed when the 1st defendant who was driving motor vehicle registration number KAM 466B owned by the 2nd defendant rammed into motor vehicle registration number KAH 129V wherein the deceased was a passenger. It was the plaintiff's further averment that the 1st defendant rammed into the said motor when it was stationary by the side of the road. The defendants filed a defence. They denied that they were the authors of the said accident. Instead they blamed the driver of motor vehicle registration number KAH 129V. They averred that they intended to file a third party notice to enjoin the driver and the owner of the said motor vehicle to the suit. However by the time the suit was heard, the defendants had not made good their threat to enjoin the said owner of motor vehicle registration number KAH 129V to this suit.

At the hearing of the suit, the plaintiff called four witnesses to testify on behalf of the estate of the deceased. As the 1st witness (PW1), the plaintiff testified that she had obtained letters of administration to administer the estate of the deceased (*Grant of letters of administration produced as plaintiff's exhibit No. 1*). She stated that the deceased, who was her husband, had died in a road accident which occurred on the 25th of June 2002 at Iterio, along Kisii-Migori road (*death certificate produced as plaintiff's exhibit No. 2*). The said accident occurred at 7.00 pm. PW1 found the deceased at Nyangena hospital. He was already dead. The deceased prior to the accident had been travelling in motor vehicle registration number KAH 120V – Nissan Matatu. PW1 saw the said motor vehicle at the police station the following day. It was extensively damaged on the rear and right hand side. She later learnt the motor vehicle was owned by the 2nd defendant.

She made funeral arrangements. She hired motor vehicles to ferry the body of the deceased from Kisii to Njoro, where the deceased was buried. She paid the sums of Kshs 15,000/=, Kshs 63,000/= (twice) and Kshs 8,000/= (receipts produced as plaintiff's exhibits No. 3 (a), (b), (c) & (d)). The accident was reported at Kisii Police Station. Later the plaintiff obtained a police abstract report (*produced as plaintiff's exhibit No. 4*). She testified that the deceased was survived by two children, namely Zakary Kimani who was eight (8) years old and Newton Waraga who was five (5) years old. PW2, Mary Wanjiku Waraga, a sister to PW1, produced the birth certificates of the said children. They were marked

as plaintiff's exhibit No. 7(a) and 7(b). PW1 testified that the deceased had also supported his aged parents, namely Zakary Kimani and Grace Njoki. PW1 testified that she brought the suit on her own behalf and on behalf of the beneficiaries of the deceased's estate.

It was her testimony that at the time of his death the deceased was thirty years old and was running a wholesale business at Kisii known by the trade name *Ingene na Ingene Enterprises*. The licences issued to operate the shop was produced as plaintiff's exhibit No. 5(a) (b) and (c). Business permits were produced as plaintiff's exhibit No. 6(a) (b) and (c). The deceased sold household goods, mattresses, bicycles and blankets among other items. PW1 claimed that the deceased told her that he used to make a profit of Kshs 1,300/= per day. She stated that the deceased paid for the daily upkeep of his family including paying school fees for Zakary Kimani (1st child) at Montessori Academy at Kshs 10,050/= per term. The family's monthly expenses were estimated at between Kshs 10,000/= to Kshs 15,000/=. Although the business was still running, the income from it had reduced because PW1 did not have the connection with suppliers that the deceased had. She testified that she was earning a reduced profit of between Kshs 200 – Kshs 300/= per day. She asked the court to compensate her including the costs of the funeral and that of the suit.

She testified that she used to assist her late husband to run the business. Although she testified that her husband used to operate a wholesale shop, she conceded that the licences issued (*and produced in evidence as plaintiff's exhibit No. 5(a) (b) & (c)*) indicated that the business operated was a retail shop. She however insisted that the retail shop was very big. She admitted that she did not know how much the deceased paid himself from the business. She testified that she was no longer selling the same items as the deceased used to sell but had concentrated on selling household goods. She stated the family used on average Kshs 60,000/= per month to cater for all their expenses including house rent, school fees and clothing. She testified that although the business was still retained by the family, it was no longer successful as it used to be when the deceased was alive. She stated that their life circumstances had changed since the death of the deceased.

PW3 Daniel Murigu Macharia testified that on the 25th of June 2002 he was at Suneka market in Kisii. He boarded a Nissan. It was about 7.00 pm. He saw the deceased inside matatu. He knew the deceased prior to the said date. At Iterio, a passenger alighted from the said Nissan. When the driver stopped the vehicle, another motor vehicle which PW3 identified as a Canter came across the road and hit the Nissan in the middle of its side. According to PW3 the driver of the Canter had taken the corner at a very high speed as a consequence of which he lost control of the said Canter and hit the Nissan matatu. PW3 was seated on the left side. Upon impact of the accident, he lost consciousness. When he regained consciousness he realised that the deceased had been fatally injured. He informed PW1 what had happened. The Nissan matatu that he had been travelling in was registration number KAH 129V.

He reiterated that the Canter hit the Nissan matatu while it was stationary at the bus stage. He was emphatic that he saw the Canter as it approached when the Nissan matatu had parked. He denied that the Nissan had collided with the Canter whilst it was in the middle of the road. He reiterated that when the Canter hit the Nissan, the Nissan was stationary and was not in motion. He testified that the driver of the Canter was driving it at a very high speed. Although he did not write a statement with the police, he was certain that the driver of the Canter was the one who was negligent. After the accident, PW3 was disoriented but was able to gather his wits and report the accident to PW1. He reiterated that he had seen the Canter moments before it collided with the Nissan matatu which was stationary at the bus stage.

PW4 Zakaria Ongeru Oruke, an accountant with Nyasae & Associates, Kisii testified that he was consulted by the deceased in the year 2001 to prepare his accounts. PW4 had prepared the said accounts for the period of December 2001 to June 2002. The accounts of the year 2001 and that of 2002 (upto the month of June) were produced as plaintiff's exhibit No. 8 and 9 respectively. He testified that the net profit for the deceased's business in the year 2001 was Kshs 1,524,216/=. He assessed the net profit for the six months of the year 2002 to be Kshs 883,522/=. He testified that the deceased ran a wholesale cum retail business. He also had a matatu. According to him, the average net profit for the eighteen months was Kshs 133,763/=. He admitted that prior to preparing the accounts for the year 2001, the deceased had not prepared any accounts before. He stated that the deceased had consulted him in December 2001

before he had died. Although the accounts were for the year 2001 and part of the year 2002, PW4 admitted that the said accounts were signed on the 17th of July 2003. He conceded that the said accounts did not provide what tax the deceased was supposed to pay.

He further admitted that the deceased had not been registered with the Kenya Revenue Authority to qualify him to file annual business returns. He further conceded that the deceased was supposed to pay tax. He further admitted that the said statements of accounts did not state the salary that the deceased was paid although it indicated the drawings that were made by the deceased. He stated that although the business was still going on, the matatu was no longer on the road. It was his testimony that the business was in a poor state at the time he prepared the accounts. It was his further testimony that he had not done any other accounts since he prepared the two statements of accounts. He reiterated that the deceased did not earn any salary but survived on the item which was shown as drawings. For the year 2001 the deceased had drawn Kshs 420,000/= whilst in the year 2002 (half a year) he had drawn Kshs 210,000/=. He testified that if the deceased had paid tax for the year 2001, the tax would have been Kshs 381,447/= while the tax for the year 2002 (half a year) would have been Kshs 189,239/=.

After the close of the plaintiff's case, the defendant called one witness. DW1, Wycliffe Mathias Aming'a testified that he worked for the 2nd defendant. He was employed as a turn boy. On the 25th of June 2002, he was a turn boy in motor vehicle registration number KAM 466B which was travelling from Homabay to Kisii. The motor vehicle was a Mitsubishi Canter. At about 7.30 pm the said motor vehicle was involved in an accident. According to DW1, the said motor vehicle collided with a Nissan matatu while negotiating a corner. The Nissan matatu had zigzagged on the road when the collision took place. DW1 testified that the driver of the Canter did not stop the vehicle after the accident but drove it all the way to Kisii. It was his testimony that the accident took place in the middle of the road, at a corner, when both motor vehicles were in motion. The impact on the Canter was on the driver's side of the front cabin. DW1 did not know who was to be blamed for the accident as the accident took place so suddenly. Further the driver of the Canter did not stop the Canter after the accident. DW1 stated that at the time the accident occurred, the driver was driving at a slow speed as he was negotiating a corner. He denied that the Nissan matatu was hit by the Canter whilst it was parked off the road. He denied that the driver was drunk when the accident took place.

He further testified that the driver of the Canter disappeared after the accident. He admitted that the Canter did not stop after the accident but was driven to Kisii town. He reiterated that the Canter was being driven on its lane when the accident occurred. Just before the accident, the Canter was driven towards the middle of the road. After the impact, the Canter again was driven on its correct lane. PW1 reiterated that the accident occurred when the Canter was negotiating a corner although he could not tell [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) Pauline Wangare Mburu v Benedict Raymond Kutondo & another [2005] eKLR 6 the exact place that the accident took place. He admitted that he did not know the speed that the Canter was being driven when the accident occurred, neither could he estimate the speed that the Nissan matatu was travelling at. He admitted that it was the Canter which had hit the Nissan matatu on its side. He reiterated that he did not know who was to blame for the accident.

After the close of the plaintiff's and the defendant's case, the parties agreed by consent to present written submissions to the court both on liability and quantum. Both the plaintiff and defendants duly filed the written submissions. I had read the pleadings filed by the parties in this case. I have carefully considered the evidence that was adduced by the witnesses and the submissions made. The issues for determination by this court are as follows:-

- (i) Whether or not the plaintiff had established on a balance of probabilities that it was the defendants who were to blame for the accident that resulted in the fatal injuries sustained by the deceased.
- (ii) If the answer of (i) will be in favour of the plaintiff, what is the quantum as to damages to be paid to the deceased's estate?

On the first issue, PW3 testified that on the material evening he boarded motor vehicle registration

number KAH 129V at Suneka. The said motor vehicle was a public service motor vehicle. It was travelling to Kisii. When PW3 boarded the said motor vehicle, he saw the deceased whom he knew as a fellow businessman. At a shopping centre called Iterio, a passenger who was in the said motor vehicle sought to alight. It was now about 7.30 pm. The driver of the motor vehicle stopped at the bus stage at the said centre. According to the evidence adduced by PW3 and also DW1 the said bus stage was at a corner. PW3 testified that when the said motor vehicle stopped, he saw a motor vehicle (canter) being driven at a very high speed trying to negotiate the corner. The Canter lost control crossed the road and hit the Nissan motor vehicle (registration number KAH 129V) on its side. PW3 lost consciousness. When he regained his consciousness, he did not see the Canter. He looked for the deceased. He realised that he was dead. He had been killed when the Canter collided with the Nissan matatu. PW3 later travelled to Kisii and informed that plaintiff.

PW3 was emphatic that the canter had collided with the Nissan motor vehicle when the said Nissan was stationary. He denied that the Nissan was in motion. He blamed the driver of the Canter for the accident. According to him the said driver was negligent in that he had driven the said Canter at a very high speed when negotiating a corner which resulted in his losing control as a consequence of which he hit the Nissan which was stationary at the bus stage. The evidence of PW3 is disputed to some extent by the evidence of DW1. DW1 testified that he was seated in the front cabin of the Canter. As the driver was negotiating a corner, he saw a Nissan which was zigzagging in the middle of the road. The driver of the Canter collided with the Nissan but did not stop after the accident. The driver of the said Canter drove the said motor vehicle all the way to Kisii. According to DW1, the accident occurred when the two motor vehicles were in motion. He denied that the Nissan was stationary. DW1 did not however know who was to blame for the accident. After the accident the driver of the Canter disappeared. DW1 testified that the impact on the canter at the time of the accident was on the driver's side of the front cabin. PW1 and PW3 testified that the Nissan was damaged at the rear and on its side.

I have evaluated the evidence that was adduced in this case. It is not disputed that the two motor vehicles, registrations number KAM 466B and KAH 129V did collide. DW1 testified that the two motor vehicles collided when they were in motion. He however admitted that after the accident, the driver of the canter did not stop. The evidence of the circumstances of the accident as narrated by PW3 is more credible. He testified that the driver of the Canter drove the said motor vehicle at a high speed and was unable to negotiate the corner at the shopping centre where the Nissan was parked. I do find that the said driver lost control and hit the Nissan which was parked at the bus stage. The evidence of PW3 is corroborated by the evidence of PW1 who testified that the Nissan was damaged on its rear and on its side. DW1 testified that the point of impact on the car was on the driver's side of the front cabin. This evidence clearly shows that right hand side of the front cabin of the canter hit the rear and the side of the Nissan. From the points of impacts of the two vehicles it is inconceivable that the two motor vehicles collided when they were overtaking each other and or that the two were in motion facing each other.

Having evaluated the evidence I do hold the driver of motor vehicle registration number KAM 466B solely liable for the said accident. The fact that he did not stop and further that he disappeared after the said accident is a further pointer to his culpability. The defendants jointly and severally are therefore liable to the plaintiff in damages for the death of the deceased. As stated earlier in this judgment, the defendants did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability.

On the second issue, evidence has been adduced that the deceased was thirty years at the time of his death. He was businessman. He owned a matatu and ran a wholesale-cum retail shop. The plaintiff in her submissions has urged the court to adopt a multiplier of twenty one years. The defendants on their part have submitted that a multiplier of fifteen years would suffice. I have carefully considered the evidence adduced in this case. The deceased was a healthy and active young man who was an aggressive businessman. There is no indication that he was suffering from any ailment prior to his unfortunate demise. I have also not lost sight of the fact that the life expectation of an average Kenyan has in the recent years been reduced due to the increased incidences of poverty and the impact of HIV/AIDS. Doing

the best that I can in the circumstances of this case, I will apply the multiplier of eighteen (18) years.

PW1 did testify that the business that the deceased ran was profitable. She variously stated that the business earned a profit of Kshs 1,300/= per day and or Kshs 60,000/= per month. PW4, an accountant, who prepared the statements of accounts for the year 2001 and part of the year 2002 (six months) testified that for the period that he prepared the statements the deceased earned an average profit of Kshs 133,763/=. This court however noted that the said statements of accounts were prepared after the death of the deceased. They were signed by the accountant on the 17th of July 2003. This was one year and one month after the death of the deceased. In my opinion the said statements of accounts were prepared with a view of supporting the plaintiff's case in this suit. From all indications, the said statements of accounts are pieces of fiction. They are a product of the active imagination of PW4.

The said statements of accounts contradict the evidence of PW1 who testified that she used to assist the deceased run the wholesale cum retail business. PW1 testified that the deceased told her that the business used to earn a profit of Kshs 1,300/= per day. It is doubtful whether the deceased could have been able to calculate the profit that the business earned per day. From the evidence adduced by PW1, including the licences which were produced in evidence, the said business was categorised a medium retail trade. The deceased had not registered his business with the Kenya Revenue Authority. The deceased did not pay any taxes. My evaluation of the said evidence, is that the deceased was a struggling businessman. He was not earning the amounts that PW4 suggested. I will therefore disregard the evidence of PW4 in totality. I will assess the income that the deceased received from the business to be Kshs 20,000/= per month. Both the plaintiff and the defendants agree in their submissions that the dependency ratio to be applied should be 2/3.

This court therefore awards the plaintiff damages under the Fatal Accidents Act for loss of dependency as hereunder:

Kshs 20,000 x 18 years x 12 months x 2/3 dependency

ratio = Kshs 2,880,000/=

The plaintiff pleaded that she should be awarded Kshs 184,940/= as special damages. She however proved that she is entitled to Kshs 149,000/=. I will therefore award her Kshs 149,000/= as special damages.

I will not make any awards under the Law Reform Act as to do so would amount to the plaintiff benefiting twice from the same cause of action.

In the premises therefore judgment is entered for the plaintiff against the defendants jointly and severally as hereunder:

**(i) On Liability**

The defendants shall bear 100% liability for the said accident.

**(ii) On quantum**

(a) Damages under the Fatal Accidents Act	Kshs 2,880,000.00
(b) Proven special damages	Kshs 149,000.00
	<b>TOTAL 3,029,000.00</b>

(iii) Costs of the suit.

(iv) Interest shall be applied on the special damages from the date of filing suit whilst interest shall be applied on the general damages from the date of this judgment.

**DATED at NAKURU this 13th day of May 2005.**

**L. KIMARU**

**JUDGE**