



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL SUIT 400 OF 2002**

**CHARITY MAPENZI (suing as the legal & personal**

**Representative of NYATTA MWAKALE).....1ST PLAINTIFF**

**FURAHA KENGA KITSAO (suing as the legal and personal**

**Representative of the late ROBERT KADENGE KALAMA) .....2ND PLAINTIFF**

**VERSUS**

**NATIONAL WATER CONSERVATION & PIPELINE CORPORATION ..... DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**Njonjo for the plaintiff**

**No appearance for the Defendant**

**Court clerk – Sango**

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

The 2 plaintiffs here are the legal representatives of the Vincent Nyatta and Robert Kalama who were employees of the defendant corporation. They died in a road accident on 5.11.2001 while traveling in the defendant's motor vehicle registration No. KAD 418M along Mombasa-Malindi Road.

It was pleaded that the defendant's agent/employee drove the said motor vehicle at an excessive speed in the circumstances, and did not heed the warning from his passengers (the deceased persons) that he should slow down. That that agent did not exercise due care and attention while controlling the said motor vehicle and he lacked effective control of it. That that driver had no regard for the safety of his passengers (the deceased persons) and he did nothing to slow down, brake or in any way avoid the accident. It was pleaded that the consequence of the subject conduct was death and so the plaintiffs sought damages under the Law Reform and Fatal Accidents Acts, costs and interest.

Special damages were itemized for each plaintiff and the dependants listed. A defence was filed on 5/5/2003. It looks like by a chamber summons of 28-7-03 the defendant intended to amend its defence. It did not inform the court if that application was prosecuted or if it was allowed and an amended defence was filed, paid for and served. Also it is not clear what became of the 3rd party notice dated 27-10-03. However all that is buried on the consent judgment on liability said to have been agreed on 30-7- 03. The submissions which came from the plaintiff's only, the defendant did not submit, alluded to that consent

judgement wherein the plaintiffs took 10% while the defendant bore 90% of liability. This will be referred to presently.

At the assessment of damages stage Charity Mapenzi (PW.1 1st plaintiff), of Lango Mbaya Malindi and a teacher told the court that the deceased, Nyatta, was her husband who was employed as a senior inspector water supply with the defendant, earning about Sh.25,000/- p.m. He died in the said road accident and PW.1 took out a grant of letters to administer his estate (Exh. P1 dated 4-11-02). This suit was filed on the same day. PW.1 told the court that she married the deceased on 18-3-97 (Exh. P3) and they had one child. The court was shown the letter dated 8-9-04 from the defendant (Exh. P5) describing the deceased's position at his place of work. That in December 2000 and January 2001 deceased earned some Sh.19,820 p.m. (Exh.2A, B) and that he died at age 36 (Exh.P4). That while Nyatta lived and worked he supported his family financially and when he died he was buried in Taita Taveta District, and PW.1 had to spend Sh.45,000/- on this. So she prayed for the reliefs set out in the plaint.

On her part Furaha Kadenge (PW.2 2nd plaintiff), a small time trader, said that Kalama, her late husband, died in the said road accident. He was employed as an area manager at the defendant's Baricho station earning some Sh.20,204/- p.m. as at October 2001(Exh.P8). That she took out a grant to administer the estate of Kalama (Exh. P6), he died at age 41. (Exh. P7). That the couple had nine (9) children whom the deceased supported financially as a family. PW.2 produced a police abstract of the accident (Exh. P9) along with a card of employment given to Kalama by the defendant (Exh.P.11). She too sought reliefs as pleaded.

On the day(s) both sides were required to submit, only plaintiff's side did so and the court proceeded accordingly. On behalf of the 1st plaintiff (Charity), the court made the following award:

Under the Law Reform Act

i) Loss of Expectation of life: That conventional awards do issue. In this regard the court gives:

Loss of Expectation of life ..... Shs. 80,000/-

Pain and suffering ..... Shs. 20,000/- (Nyatta died in hospital but on the same day)

Total ..... Shs.100,000/-

ii) Lost Years: It was left to the court to compute this on the monthly pay excluding only statutory deductions (NHIF, NSSF). It was urged however (see under the Fatal Accidents Act relief below) to adopt a monthly income of Sh.18,029/- over a multiplier of 20. It was submitted but with no evidence that the deceased who worked for a parastatal would have retired at age 55.

The court considered the two pay slips produced here (Exh.2a, b). While the net pay for December 2000 was Sh.13,180/- that of January 2001 was Sh.13,530/-.

In doing its best this court adopts a monthly income of Sh.13,530/- and a multiplier of 15. The deceased died at age 36 but one must allow for the vicissitudes in life. The award for lost years therefore worked on the above and that particularly the estate suffered to the extend of one third (13,530 x 15 x 12 x 1/3 (one third) The award comes to Sh.811,800/-.

The total award under the Law Reform Act is:

Loss of Expectation of life ..... Shs. 100,000/-

Lost years ..... Shs. 811,800/-

Shs.911,800/-

Under the Fatal Accidents Act this court was not shown evidence to support the claim of Sh.15,100/- under special damages. But PW.1 (Charity) testified that she incurred some expenses including funeral costs etc. This court grants Sh.15,000/- as reasonable under this head.

Coming to loss of dependency and applying the well-known principles and aspects, it is accepted above that the deceased income was Sh.13,530/- p.m. This is what he could partly spend and support his wife and child with. The multiplier again (see above) is 15. Thus the award under the Fatal Accidents Act is worked thus:

Loss of Dependency (13,530 x 15 x 12 x 2/3 (two thirds)) - Shs.1,623,600/-  
Special Damages - Shs. 15,000/-  
Total ..... Shs.1,638,600/-

Under the two Acts the grand award is:

Law Reform Act ..... Shs. 911,800/-  
Fatal Accidents Act ..... Shs.1,638,600/-  
Shs.2,550,400/-

This grant award is however subject to the principle that where one claimant benefits under both Acts as Charity does here, computation shall not be as to allow that claimant to enjoy double benefits but that the award under the Law Reform Act be taken in regard while dealing with the award under Fatal Accidents Act. Put simply, the award under the former Act is deducted from the grand award (see **(Kemp & Kemp on: The Quantum of Damages)**)

Accordingly the award made to the 1st plaintiff is Sh.1,638,600/- and due to accelerated payment 5% is knocked off. The net award is Sh.1,542,420/- (in words – one million five hundred forty-two thousand four hundred twenty) subject to 10% contribution, plus costs and interest on the lower court rates.

Next are the reliefs to the 2nd plaintiff (Furaha) again worked under the same two Acts and principles applicable.

Under the Law Reform Act:

Loss of Expectation of life ..... Sh. 80,000/-  
Pain & Suffering ..... Sh. 20,000/-  
Sh.100,000/-

Regarding the lost years under the same Act, Kalama was 41 years when he died. A multiplier of 20 was suggested on a monthly income of Sh.20,168/-. The pay slip produced here (Exh.8) for October 2001 bore a net salary of Sh.10,410/-. Adopting that as a the monthly income over a multiplier of 10 gives the loss to the deceased's estate as Sh.416,400/-.

(10,410 x 10 x 1/3 (one third)) The total award under this Act is:

Loss of Expectation of life ..... Sh. 100,000/-  
Lost years ..... Sh. 416,400/-  
Sh.516,400/-

Under the Fatal Accidents Act, except for the police abstract, no evidence was produced to support Sh.15,100/- proposed for special damages. However the court grants Sh.15,000/- under this heading as reasonable.

Next is loss of dependency. This is worked out as below giving a total of Sh.832,800/-. (10,410 x 10 x 12 x 2/3) The total award under this Act comes to:

Special Damages .....	Sh. 15,000/-
Loss of Dependency .....	<u>Sh. 832,800/-</u>
	<u>Sh.847,800/-</u>

The grand award is:

Under the Law Reform Act .....	Sh. 516,400/-
Under the Fatal Accidents Act .....	<u>Sh.847,800/-</u>
	<u>Sh.1,364,200/-</u>

Again applying the principle to avoid double benefit by the same claimant under the two Acts (see above) the 2nd plaintiff is given Sh.847,800/- subject to accelerated payment deduction of 5%. The net award thus comes to Sh.791,160/- (in words – Seven Hundred One Thousand One Hundred Sixty) subject to 10% contribution. Costs and interest to be on the lower court scale.

Furaha and her late husband (Kalama) had nine children. At the time this suit was filed four (4) of them were above 18 years of age – in 2002 (Rachel, Sera, Mary and Joseph). As at the time of this judgment five (5) are under age 18 (James, Ann, Emily, Pendo and Mathias). Accordingly a proper scheme of distribution of the award ought to be worked out and submitted to this court for approval. The minors' entitlements to be proposed for investment under the usual schemes, modes, and arrangements. Finally it must be appreciated and noted that even if the cases cited in support of the plaintiffs' claims were not reproduced, the court nonetheless perused them and incorporated the principles set out there in this decision.

Judgement accordingly.

Delivered on 22nd June 2005.

**J.W. MWERA**

**JUDGE**