



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT 393 OF 1996**

ZIPPORAH WANJIRU KAMAU.....PLAINTIFF

VERSUS

JAMES G. WATHIGO.....1ST DEFENDANT

JOHN NJIMBA WATHIGO.....2ND DEFENDANT

JUDGMENT

The plaintiff Zipporah Wanjiru Kamau, has filed this suit on behalf of the estate of Ruel Kamau Gikonyo – deceased (*hereinafter referred to as the deceased*) against the defendants James G. Wathigo and John Njimba Wathigo seeking to be paid damages, both special and general on account of the death of the deceased which resulted from a road traffic accident involving motor vehicle registration number KAE 633M, (*hereinafter referred to as the said motor vehicle*) owned by the 1st defendant but driven by the 2nd defendant wherein the deceased was travelling as a fare paying passenger. The plaintiff averred that the said accident, which occurred along Thika- Nairobi road was caused by the negligence of the 2nd defendant who drove the said motor vehicle in such a careless and reckless manner that the same overturned resulting in the deceased sustaining injuries which proved to be fatal. The plaintiff holds the 1st defendant vicariously liable for the acts of the 2nd defendant. As a result of the said accident the plaintiff averred that, she, as the widow of the deceased and the children of the deceased suffered loss and damage. The plaintiff is therefore seeking to be paid damages under the **Law Reform Act and the Fatal Accidents Act** on behalf of the deceased estate. The defendants filed a defence. They denied that the deceased was a passenger in the said motor vehicle and put the plaintiff to strict proof thereof. They further denied that the said accident was caused due to their negligence and put the plaintiff to strict proof thereof. They consequently denied that they were liable to the plaintiff in damages, either special or general. The defendants urged the court to dismiss the plaintiff's suit with costs. Issues having been agreed, this case was duly fixed for hearing before this court.

At the hearing of the case, liability was compromised by the consent of the parties. The parties agreed to apportion liability at the ratio of 80:20 in favour of the plaintiff and as against the defendant; The plaintiff was therefore to bear 20% liability whilst the defendant was to bear 80% liability. Evidence was thus taken to determine the quantum of damages that is to be paid to the estate of the deceased. In this regard, the plaintiff is the only person who testified. She stated that she was a widow of the deceased. According to her testimony, the deceased died on the 28th of September 1995 as he was traveling in the said motor vehicle along Thika-Nairobi road. The deceased prior to his death was running a Medical clinic at Kibendera Trading Centre, Murang'a called Tegemea Medical Clinic which he had opened after he had retired as a clinical officer employed by the Ministry of Health upon attaining the age of fifty years. At the time of his retirement the deceased was earning a salary of Kshs 6,265/= (letter of the Ministry of Health produced as Plaintiffs Exhibit No. 1). The plaintiff further testified that the deceased left behind four children – namely Wangoi Kamau who was born in 1977, Loice Mumbi Kamau born in 1979, Geoffrey Gikonyo Kamau born in 1981 and Wachira Kamau born in 1985. The birth certificate of Wangoi, Wachira and Mumbi were produced in evidence as Plaintiffs Exhibits number 2(a) (b) & (c). She

testified that at the time of his death, the deceased used to reside with the children two of whom were in secondary school whilst the other two were in primary school. The plaintiff used to reside at their farm at Solai undertaking some farming activity to augment the family income. In total, the monthly expenditure of the family was Kshs 10,000/=.

She testified that the deceased paid the school fees of the children who went to school. She further testified that she obtained letters of administration which granted her authority to administer the deceased's estate (certificate of confirmation of grant produced as plaintiff's exhibit No. 3). After the burial of the deceased, the plaintiff went to Thika police station where she was issued with a police abstract report of the accident. She paid Kshs 100/= to obtain the said abstract report (police abstract report and receipt produced as plaintiff's exhibit No. 4(a) and 4(b)). She also obtained the death certificate (produced as plaintiff's exhibit No. 5). She testified that she used Kshs 10,000/= as funeral expenses. The other expenses incurred during the funeral were offset by her relatives. She prays that the court awards her appropriate damages to enable her provide for her children. She further testified that at the moment she was residing at their Solai farm which measures eight acres. She conceded that all her children were now aged over eighteen years and apart from the last born Wachira, all the other children were engaged in some economic activity where they were earning a living. She testified that currently she did not earn any income. She testified that although she would have wished her last born to be educated upto University level, in her current circumstances, she lacked financial resources to fulfil her wish. She confirmed that the deceased was fifty-two years of age at the time of his death.

As stated earlier at the beginning of this judgment, the issue of liability was compromised between the parties. The only issue left for the determination of this court is what damages, if any, should be paid to the estate of the deceased. Having carefully read the pleadings filed and considered the evidence adduced by the plaintiff and the submissions made by counsel for the plaintiff and the defendant, certain issues are not in dispute. For instance, the fact that the deceased's body was transported from Thika to Solai where he was buried. The plaintiff testified that she used Kshs 10,000/= as funeral expenses. This claim was not challenged by the defendants. I will therefore award her claim of Kshs 10,000/= as funeral expenses. Further it was not disputed that she paid Kshs 100/= to obtain the police abstract report from Thika police station. I will award her the Kshs 100/=. In total, I will award the plaintiff the sum of Kshs 10,100/= as special damages.

On quantum, under the **Fatal Accident's Act** the following considerations are taken into account in assessing the quantum payable to the estate of the deceased under this head; The deceased was aged fifty two years at the time of his death. He had retired from the civil service upon attaining the age of fifty years. His last salary before retirement was Kshs 6,265/=. He worked as a clinical officer with the Ministry of Health before his retirement. For two years before his death, he was running a medical clinic at Kibendera Trading Centre, Murang'a District. The clinic was called Tegemeo Medical Clinic. No evidence was however adduced to establish how much the deceased earned in his medical practice. The plaintiff testified that the monthly expenses of the family added up to Kshs 10,000/=. That could be so, but it does not prove that the deceased earned the said sum of Kshs 10,000/= from his clinic. Part of the said expenditure could have been realised from the produce of the farm at Solai. It is unfortunate that the plaintiff did not deem it necessary to adduce evidence to establish the income of the deceased when he was running the clinic at Kibendera, Murang'a District. As it were, there is no material upon which this court can rely on to reach a finding as to what monthly income the deceased earned from his medical practice. In the circumstances of this case, I will consider the last salary that the deceased earned before he retired from the Ministry of Health as the basis of assessing the quantum that is to be paid to the estate of the deceased. That amount is Kshs 6,265/= (See Plaintiffs Exhibit No. 1).

As to the multiplier, in the circumstances of this case, and also considering that the deceased was conducting a business which he utilised the skills he acquired on account of medical learning and experience, I would apply a multiplier of ten (10) years. Both the plaintiff and the defendants have submitted that the dependency ratio to be applied should be 2/3. I will adopt the agreed dependency ratio.

In the premises therefore, the deceased's estate is awarded loss of dependency under the Fatal Accidents Act as follows:-

Kshs 6265/= x 10 years x 12 months x 2/3 = Kshs 501,200/=

I will not make any award under the Law Reform Act in view of the Court of Appeal decision of **Kemfro Africa Ltd t/a “Meru Express Services (1976) & Anor – vs- Lubia & Anor (No 2) [1987] KLR 30** where it was held that a court has to take into account the award made under the **Law Reform Act** when making an award under the Fatal Accidents Act. The result of such taking into account is that the amount awarded under the Law Reform Act will have to be deducted from the amount awarded under the **Fatal Accidents Act** in the final award to be made to the plaintiff.

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

(i) On Liability

Liability is apportioned at the ratio of 80:20 in favour of the plaintiff and as against the defendant.

(ii) On quantum

(a) General damages Kshs 501,200/=

(b) Special damages Kshs 10,100/=

Sub total 511,300/=

less 20% contribution 102,260/=

Total 409,040/=

(iii) Costs of the suit.

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

DATED at NAKURU this 3rd day of October 2005.

L. KIMARU

JUDGE