



REPUBLIC OF KENYA

- 1) Civil Cause
- 2) Tort
- 3) Police battery of male adult aged 25 years old in 1991
- 4) Injuries:-
 - a) Subdural haematoma frontal lobe right side
 - b) Fatal after 30 days.
- 5) Liability:- 100%
Interlocutory judgment
Deputy Registrar 17.2.1993
- 6) Quantum:
 - a) Law Reform Act - Withdrawn
 - b) Fatal accidents Act
 - i) Loss of dependancy
Ksh.3,000/- x 15 x 12 x 2/3 = Ksh.350,000/-
 - c) Punitive damages – stands dismissed
 - d) Special Damages – dismissed.
- 7) Case law
Quantum: a) Miriti v Firoze Construction Ltd
1982 KLR 275, Nyarangi J.
Court case law a) Sheikh Mustaq Hassan v Nathan Mwangi Kamau & Others.
1982-88 I KAR PG946
b) Trouistik Union International & Another v Jane Mbeyu & Another
CA 145/90, Apaloo, Kwach, Cockar, Omollo,
Tunoi JA
Statute law Fatal Accidents Act cap.32
- 8) Advocate
J.W. Nyaga advocate for the plaintiff
E.O. Rioba Advocate for the defendant

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2267 OF 1992**

DAMAR OWUOTH PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL DEFENDANT

JUDGMENT

On the 19th May 1991, the police officers at Jogoo police station took into custody Kenndy Okum (now deceased). The reasons for this is that the deceased was a mental case and required to be escorted to Mathare Hospital for treatment. Between the 20th of May 1991 and the 10th of June 1991 the

whereabouts of the deceased was not disclosed by the police. The deceased family made their own investigations and discovered that the deceased was delivered to Mathare Hospital on the 15.6.91. He was in poor critical condition. On the 18.6.91 the deceased died.

A postmortem report that was done by:-

Dr. A.O. Musewe Consultant Pathologist and also Lecturer Human pathology at the Kenyatta Hospital.

In his report undated but conducted on 18.7.91 it, revealed that the deceased body (now decomposed) had injuries on it consistent to a battery.

Injuries:-

- 1) Right sided subdural haematoma
- 2) Raised intra cranial pressure
- 3) Pulmonary oedema

On his report he stated that the brain was congested with bruises in the scalp in both the temporal region. Subdural haematoma on the frontal both on the right side.

Other system including the internal brain were normal.

Demar Owuoth, the mother of the deceased sued the Attorney General by a plaint dated the 27th day of April 1992 for battery and causing the unlawful death her son.

The defendant entered appearance on the 25th of August 1992 but failed to file defence. By leave of the court (Aluoch, J) on the 4.12.92, the plaintiff was granted judgment against the respondent in default of a defence being filed.

A: LIABILITY

The effect of the said application meant that on the 17th day of February 1993, an Interlocutory Judgment against the defendant was duly entered by the deputy registrar for the High court of Kenya.

This means that liability is final. It is assessed at 100%.

The plaintiff case was set down for hearing on assessment of damages. This has been pending for over ten years before the case was heard. The reasons seems

An adjournment 5.7.93 - Dugdale,J.

Non appearance of parties 15.9.93 - Pall,J.

Non appearance of parties 6.12.93 - Pall,J.

Non appearance of plaintiff 18.4.94 - Aluoch,J.

Dates taken but no hearing) 27 and 28.9.95

or comment on file) 30 and 31 July 1997

) 21 and 22 February 2001

Taken out of call over list 18.1.01. Ang'awa, J.

The parties appeared to hearing on the 17.2.04. The representative of the Attorney General appeared having already filed a memorandum of appearance but no defence. The matter before me was for assessment of damages on quantum.

B) QUANTUM

i) Law Reform Act

Before the hearing commenced, the advocate for the plaintiff withdrew and abandoned the claims under the law Reform Act. I believe she did this due to the fact that the plaintiff held no grant of letters of representation.

I hereby mark the claim as withdrawn and abandoned.

ii) Fatal accidents Act

The deceased mother PW1, stated that her son was the 6th child out of a family of 9 children. That indeed he was working with M/s Mugoya and would bring her money.

She produced a school leaving certificate Ext P1 which described him as a student who was in the second foot ball team, an active table tennis player, Barrington player and was in the Geography Club.

His character was described as erratic but academically he was rated average. He is said to have specialized in Mechanical Engineering.

The advocate for the plaintiff relied on the case law of:-

Miriti v Firoze Construction Ltd. (1982) KLR 275 Nyarangi J 9 (as he then was).

In the above case a young child aged 5 1/2 years old fell into a pool of water that was caused as a result of the defendant digging a hole and leaving the hole as it was until it filled with water. The said child drowned.

The judge awarded Ksh.70,000/- under the Fatal Accidents Act stating that the child would have supported his parents in the future. Section 3 and 4 of the Fatal Accidents Act therefore complied.

The defence submitted on the grounds that the plaintiff did not plead particulars, I believe, of the beneficiary. I say so as when he cross-examined the plaintiff he wished to know whether the plaintiff had minor children?

The evidence according to the plaint and the plaintiff is that the deceased was not a married man. As such he had no wife nor any children.

The plaintiff's children cannot be beneficiaries as they would be sibling to the deceased. According to section 4 of the Fatal Accidents Act those who would claim are the spouse, parents or child of the deceased. It therefore means that the siblings to the deceased do not qualify to be beneficiary.

I would find that the deceased would have been of assistance to his family in the future. He left Machakos Technical School specializing in Mechanical Engineering. Nonetheless it means that he had an erratic behaviour and may have been the reason why his relatives intended he be taken to Mathare. The Mathare Hospital did not assess his mental capacity and I have no evidence before me as to the extent of such capacity. It is nonetheless clear that this may have been erratic as the deceased was able to complete his studies. I note from the above authority the Hon. Judge (as he then was) arrived at a lump sum figure.

In the case of:-

Shiekh Mustaq Hassan

V

Nathan Mwangi Kamau & Others

(1982 – 88) I KAR 946

The court held a multiplier for a 17 year old minor at 16 years for lost years.

In this present case the deceased was 25 years old but I would take into account the erratic behaviour and place a multiplier at 15 years. I believe that Ksh.3,000/- would suffice as a multiplicand basing it on a possible minimum wage. I require to give an award including the dependency ratio. I do so namely, $3000/- \times 15 \times 12 \times 2/3 = \text{Ksh.360,000/-}$.

This amount goes to the mother of the deceased, who is also the plaintiff herein.

iii) Punitive Damages

This is a general damage claim. At the time the suit was filed the plaintiff did have grant of letters of administration for the deceased estate. Under the Fatal Accidents Act this is not required. Under the General Damages claim for the head of punitive damages and the Law Reform Act the claim for damages are filed **after** the grant of **letters** of administration have been obtained.

In the case law of :-

Trouistik Union International & Another

V

Jane Mbeyu & Another

CA 145/90

The respondents/plaintiff had filed a suit without any grant of letters of administration. The court of appeal in a five bench held that the grant of letters of representation must be first obtained in order for a legal representative to file suit.

It thus meant that a claim for punitive action cannot stand as the plaintiff had no locus to file the same and this court has no jurisdiction to determine the issue.

I hereby struck out this claim.

iii) Special Damages

The claim of Ksh.33,310/05 was made. The same was not proved. I hereby dismiss this claim as having not been established. I enter judgment for the plaintiff on the proved claim.

In Summary

1) Police battery of a male adult aged 25 years old in 1991

2) Injuries:

a) Abdural haematoma frontal lobe right side

b) Fatal after 30 days

3) Liability: 100% against the defendant Interlocutory Judgment Deputy Registrar 7.2.93

4) Quantum:

a) Law Reform Act - withdrawn

b) Fatal Accidents Act

i) Loss of dependency

Ksh.3,000/- x 15 x 12 x 2/3 Ksh.350,000/-

c) Punitive damages – struck out

d) Special Damages – dismissed

Total Ksh.350,000/-

I award the cost of this suit to the plaintiff. I award interest on General Damages from the date of filing suit.

Dated this 18th day of February at Nairobi.

M.A. ANG'AWA

JUDGE

Okwach & Co. Advocates for the plaintiff

State Counsel for the Attorney General