



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 136 OF 2003

JANE WANGUI KAMAU.....1ST PLAINTIFF

NELLIUS WANJIRU KAMAU.....2ND PLAINTIFF

NICHOLAS NJUGUNA KAMAU.....3RD PLAINTIFF

VERSUS

ALICE ATANDI MUGAMANGI.....1ST DEFENDANT

EZINA KADENYI MUGAMANGI.....2ND DEFENDANT

JUDGMENT

The Plaintiff, Jane Wangui Kamau filed this suit on her own behalf, on behalf of the Estate of James Kamau Njuguna – the deceased and on behalf of her two children Nelliuss Wanjiru Kamau and Nicholas Njuguna Kamau. The Plaintiff is seeking special and general damages as a result of a road traffic accident which occurred on the 25th of November 2000 involving motor vehicle registration number KAK 626Q and motor vehicle number KLZ 910 along Nakuru – Nairobi road. According to the Plaintiff, the Plaintiff states that motor vehicle registration number KLZ 910 was so negligently driven by John Mugamangi, who is now deceased, that it collided with motor vehicle registration number KAK 626Q which was being driven by John Kamau Njuguna, the husband of the Plaintiff, fatally injuring him. The Plaintiff and her two children were seriously injured.

When the Defendants (*who are the administrators of the estate of the deceased John Mugamangi*) were served with the summons to enter appearance, they duly filed a defence denying the allegation that the deceased was the author of the said accident. The preliminary issues having been settled, this case was fixed for hearing. On the 28th of January 2004, the Advocates for the Plaintiff fixed the hearing of this case for the 8th of July 2004 in the absence of the Advocates for the Defendants. The Defendants' Advocates were duly served with the hearing notice for the said date that this case was fixed for hearing. On the 8th of July 2004 when this case was mentioned at 9.00 a.m., Mr Gai Advocate holding brief for Mr Cherutich, the Advocate for the Defendants indicated to the Court that the Defendants would be ready to proceed with the hearing of the case at 10.00 a.m. He requested that the said file be placed aside so that the hearing of the said case could commence at 10.00 a.m. This Court acceded to the Defendants' Counsel request. Unfortunately, the Defendants' Counsel did not appear at 10.00 a.m. After waiting for the Defendants' Advocates to appear in vain, this Court ordered the Plaintiffs to proceed with their case at 11.30a.m. in the absence of the Defendants' Counsel notwithstanding.

The Plaintiffs called one witness, Jane Wangoi Kamau (hereinafter referred to as PW 1). She testified that she had brought the suit on her own behalf, on behalf of the estate of her late husband, James Kamau Njuguna and on behalf of her two children Nelliuss Wanjiru Kamau and Nicholas Njuguna Kamau. PW 1 stated that she had obtained letters of administration for the estate of James Kamau Njuguna – deceased in **Nairobi High Court Succession Cause No. 2661 of 2002.** The said letters of

administration was produced by the Plaintiff as Exhibit No. 1. PW 1 further testified that she had sued the Defendants as the administrators of the estate of John Mugamangi who died during the accident. It was PW 1's testimony that the Defendants had obtained letters of administration to administer the estate of the said deceased in **Nakuru High Court Succession Cause No. 147 of 2001.** PW 1 testified that she was married to her deceased husband under the Kikuyu customary law. The couple were blessed with two children namely Nellius Wanjiku Kamau and Nicholas Kamau. The birth certificates of the said two children was produced as Exhibit No. 3(a) and 3(b). PW 1 also produced the death certificate of James Kamau Njuguna as Exhibit No. 2.

PW 1 testified that her late husband, herself and her two children were travelling to Nairobi in motor vehicle registration number KAK 626Q. The date was on the 25th of November 2000. At about 8.30 p.m. when they were near a centre called Karai, along Naivasha-Nakuru road, PW 1 saw an oncoming motor vehicle which was overtaking another vehicle. Motor vehicle registration number KAK 626Q was being driven by PW 1's late husband. PW 1 testified that the said oncoming motor vehicle was being driven at a very high speed and on the wrong side of the road. The said motor vehicle was in effect being driven on their side of the road. The said motor vehicle flashed its lights. The deceased husband of the Plaintiff tried to swerve the said motor vehicle towards the left side of the road to avoid a head on collision but unfortunately the oncoming motor vehicle was too near to prevent the collision from occurring.

PW 1 testified that she was injured on the forehead, chest and legs. She did not lose consciousness. The driver of the motor vehicle, PW 1's husband was crushed on the chest by the steering wheel and died on the spot. The two children were injured. Nellius sustained head injuries and the fracture of the right hand. Nicholas sustained injuries on his chest and a cut on his forehead. PW 1 and the two children were rescued from the scene of the accident and taken to Naivasha District Hospital. They were later taken to M P Shah hospital where they were treated and later discharged. The medical discharge summaries prepared by the said hospital were produced as Exhibits No. 4(a) (b) & (c). PW 1 further testified that she was admitted at the said hospital for one night, Nicholas for the same period while Nellius was admitted for a period of one week. It was PW 1's testimony that after she was discharged she still suffered sometimes from chest pains. Nicholas was completely healed. Nellius however complained of pains on the hand especially after writing in school. PW 1 further testified that she had spent the sum of Kshs. 150,000/= while her children and herself were undergoing treatment at M P Shah hospital. She spent a further Kshs. 7,995/= for treatment. The receipt was produced as Exhibit No. 5. Later she paid the sum of Kshs 2,500/= for physiotherapy at Kenyatta National Hospital. The receipts were produced as Exhibit No. 6.

It was PW 1's further testimony that she and her children saw Dr Wokabi who prepared medical reports for the three. Each of them was charged Kshs. 1,500/=. The receipts for the medical reports of the total sum of Kshs. 4,500/= was produced as Exhibit No. 7(a) (b) and (c). PW 1 testified that she spent Kshs 30,000/= as funeral expenses. She produced the receipts for purchasing the coffin, hiring the hearse and for the postmortem report which was prepared by Dr Kirasi Olumbe as Exhibit No. 8. In total, the Plaintiff was claiming Kshs 42,695 as special damages. PW 1 testified that motor vehicle registration number KLZ 910 was being driven by John Mugamangi who died in the accident. PW 1 later went to Naivasha Police Station who issue two police abstracts to confirm that the accident indeed took place. The police abstracts were produced as Exhibits No 9(a) and 9(b). The P3 forms issued by the Police were also filled by the doctor. They were produced as Exhibits No. 10(a), (b) and (c). Dr. Wokabi who examined PW 1 and her two children prepared medical reports which were produced as Exhibit No. 11(a) (b) and (c).

PW 1 further testified that at the time her husband met his untimely death he was thirty seven years of age and was employed by Kenya Power and Lighting Company Limited as a clerk. The deceased was earning Kshs 38,300/= per month, gross salary less Pay As You Earn (PAYE) of Kshs 8,170/=. National Social Security Fund (NSSF) contribution of Kshs 80/=. National Hospital Insurance Fund (NHIF) contributions of Kshs 320/=. Pension Fund deductions of Kshs 1,915/=. Stima Cooperative deductions of Kshs. 6,150/=. Stima Co-operative Insurance of Kshs. 200/= and the local authority service charge of Kshs. 200/=. PW 1 produced the payslips for the months of August and September 1999 as Exhibits No.

12 (a) and (b). PW 1 testified that the deceased supported the family during his lifetime, a support which the family had lost with his death. PW 1 also lost companionship. The Plaintiff prayed for this Court to order the Defendants to pay compensation for the injuries suffered and also compensation for loss of dependency on behalf of the deceased estate. The Plaintiff further prayed for costs of the suit to be awarded to her. The Plaintiff filed submissions quantifying the damages payable to her and her family as a result of the said road traffic accident.

The issue for determination by this Court is whether on a balance of probabilities the Plaintiff has established that the said road traffic accident was caused by the negligence of the driver of motor vehicle registration number KLZ 910. The other issue for determination is what, if any, should the quantum of special and general damages be to be paid to the Plaintiff. The Plaintiff (PW 1) has testified that on the 25th of November 2000 she was travelling to Nairobi with her husband, James Kamau Njuguna, who was driving motor vehicle registration number KAK 626Q. She was also with her two children Nellius Wanjiku Kamau and Nicholas Njuguna Kamau. The said motor vehicle was being driven along Naivasha-Nairobi road. It was the Plaintiff's testimony that when the motor vehicle reached a centre known as Karai, she saw an on coming motor vehicle which was overtaking another motor vehicle. The said oncoming motor vehicle was being driven on the lane that the motor vehicle that she was travelling in was lawfully being driven on. It was her testimony that the motor that she was being driven in was on its right lane. The Plaintiff testified that her husband, who was driving the said motor vehicle realised that the oncoming motor vehicle was going to collide with his motor vehicle. He swerved to the left to try and avoid head on collision but unfortunately due to the fact that the oncoming motor vehicle was too close, the accident could not be prevented. The two motor vehicles collided resulting in the death of both drivers. The husband of the Plaintiff died on the spot.

On the assessment of the evidence of the Plaintiff, which was uncontroverted, it is the finding of this Court that the driver of motor vehicle registration number KLZ 910 was the sole author of the road traffic accident that resulted in the death of the Plaintiff's husband and the injuries sustained by the Plaintiff and her children. The reason why this Court finds the driver of the said motor vehicle liable is because, he overtook a motor vehicle without confirming first that it was safe to do the overtaking.

The said driver was also driving at a very high speed in the circumstances. As a result of the careless driving on the part of the driver of motor vehicle registration number KLZ 910, the said motor vehicle collided with motor vehicle registration number KAK 626Q which was being driven on its right lane. As a result of the said collision the husband of the Plaintiff sustained fatal injuries. The Plaintiff and her two children sustained various injuries. It is therefore the finding of this Court that the driver of motor vehicle registration number KLZ 910 solely caused the said accident. His estate, represented by the Defendants is therefore found to be 100% liable in negligence to the Plaintiff.

On quantum, the Plaintiff filed this suit on her own behalf and behalf of the estate of James Kamau Njuguna and on behalf of her two children, Nellius Wanjiru Kamau and Nicholas Njuguna Kamau. I will first address the assessment of the quantum as to damages to be paid to the Plaintiff and her two children and then conclude with the assessment of the quantum to be paid to the estate of James Kamau Njuguna – the deceased.

According to the discharge summary issued by M P Shah Hospital, the Plaintiff Jane Wangui Kamau sustained injuries as follows:- Bruises on the frontal area of the head, bruises on the left cheek and on the right ear. The Plaintiff was examined by Dr Wokabi who formed an opinion that the Plaintiff had sustained soft tissue injuries which were mainly contusions, lacerations and bruises on the head and both legs. In his opinion the said bruises had healed well and did not leave any scars. The Plaintiff has submitted that she should be awarded Kshs 150,000/= as general damages for pain suffering and loss of amenities. She has relied on the decision of **Mary Wambui Njoroge –versus- John Warui Wanyoike HCCC No. 392 of 1997 (Nrb)** (unreported). I do find that the injuries sustained by the Plaintiff in the said case referred to were more serious than the injuries suffered by the Plaintiff. I am aware that recent decisions on the award to be made for injuries which are basically soft tissue injuries is in the region of Kshs 50,000/=. In view of the said trend, I will assess the general damages for pain suffering and loss of amenities to be paid to the Plaintiff to be Kshs 50,000/=.

According to the discharge summary prepared by the M P Shah Hospital Nairobi, Nicholas Njuguna Kamau sustained a cut wound on the left frontal area of the head measuring five centimetres. The X-ray of the skull showed that his skull was normal. Dr Wokabi who examined him was of the opinion that the said Nicholas Njuguna Kamau sustained head injuries. His scalp and facial contusion caused massive swelling which had since subsided. The laceration on the forehead which measured six centimetres had healed but was prominent and unsightly. Dr Wokabi suggested that for the self image of Nicholas, a surgery would be required to reduce the scar. The said operation would cost approximately Kshs 25,000/=. In his submissions, the Plaintiff suggested that Nicholas should be awarded Kshs 175,000/= as general damages for pain, suffering and loss of amenities. The Plaintiff relied on the decision of **Mary Wambui Njoroge** quoted above. The injuries sustained by Nicholas were basically soft tissue injuries. I will award Nicholas the sum of Kshs 60,000/= for pain, suffering and loss of amenities. In reaching the said assessment of the award, I have considered the fact that Courts have generally awarded the said sum as general damages for soft tissue injuries sustained. I will not award Nicholas the sum of Kshs 25,000/= as special damages as the said amount was not specifically pleaded nor was it specifically proved.

As regards Nellius Wanjiru Kamau, the daughter of the Plaintiff, the discharge summary issued by the M P Shah Hospital showed that Nellius had sustained injury on his head. The frontal area of the head was swollen, there was effusion of both the eyes, there were bruises on the nose and lips. Nellius sustained a condylor fracture of the distal shaft of the humerus with the consequent displacement. According to the medical report prepared by Dr Wokabi, Nellius sustained several injuries. She sustained soft tissue injuries on her head. She had lacerations on her head which had healed leaving a scar, which though prominent, did not require any plastic surgery to rectify. Nellius sustained fractures of the lower one third of the humerus. She underwent an operation to fix the said fracture. Wires were fixed at the said fracture. At the time Nellius was examined by the said Doctor, the fractures had clinically united. It was the opinion of the Doctor that the right elbow had been left with a marked stiffness. Nellius could only flex her elbow upto 90 degrees. After undergoing physiotherapy the stiffness had not improved. It was the opinion of the said Doctor that the flexibility of the said elbow was unlikely to improve and would therefore be permanent. The Doctor was further of the opinion that as the injured elbow was the dominant hand of Nellius, it would affect the performance of her daily chores. He awarded a disability of 20%. The Doctor opined that the injury sustained by Nellius could not be surgically repaired.

In her submission before Court the Plaintiff has relied on the decision of **Dr Wolfgang Farrigia –versus- The Attorney-General Nairobi HCCC No. 472 of 1988** (unreported) where the Plaintiff in that case had been awarded Kshs 400,000/= general damages for pain suffering and loss of amenities. I have considered the said decision and I am of the opinion that the injuries sustained by the Plaintiff in the above referred case were more severe than the injuries sustained by Nellius in this case. I have however noted that the function of the right elbow of Nellius has been affected such that she will not be able to use her hand as dexterous as she used to before the accident. The Doctor assessed the degree of permanent disability to be 20%. Doing the best I can in the circumstances of this case and considering that Nellius' prospect in fully using the said hand has been permanently affected, I award her general damages for pain suffering and loss of amenities for the injuries sustained in the sum of Kshs 350,000/=.

The Plaintiff testified that her husband James Kamau Njuguna died on the spot when the two motor vehicles collided. James Kamau Njuguna (the deceased) was crushed on the chest by the steering wheel when the two vehicles collide. The Plaintiff further testified that she had obtained letters of administration for the deceased estate in **Nairobi HC Succession Cause No. 2661 of 2002**. The letters of administration were produced as Plaintiffs Exhibit No. 1. The Plaintiff claimed that she used Kshs. 30,000/= as funeral expenses. At the time of his death, the deceased was working for the Kenya Power & Lighting Company as a clerk. According to his payslip of September 2000 the deceased earned a gross salary of Kshs 38,300/= per month. After the statutory deductions excluding the deceased contribution to the Co-operative Society Savings Scheme and other voluntary deductions, the deceased earned Kshs 29,330/=. According to the death certificate which was produced as Plaintiff's Exhibit No. 2, the deceased was aged 37 years at the time of his death. The Plaintiff suggests a multiplier of 18 years. It is the Plaintiff's submission that the deceased would have worked to a ripe age of 55 years when he was due to retire from employment.

I have considered the submission made by the Plaintiff and I am of the opinion that with the nature of life in the Kenya of today there is no guarantee that the deceased would have lived to be 55 years of age. The life expectancy of a Kenyan has over the last fifteen years been reduced due to the incidences of poverty, reduced standard of living, road traffic accidents and the vagaries of the AIDS epidemic. Putting these facts in perspective, and considering the fact that the deceased is already dead, I would apply the multiplier of 13 years. In her evidence, the Plaintiff testified that the deceased supported her and the children of the marriage. The Plaintiff suggested that dependency ratio of 2/3 of the Plaintiff's salary be applied. Unfortunately no evidence was adduced to support the alleged fact that the deceased used 2/3 of his salary for the upkeep of his family. According to the two payslips which were produced in evidence the deceased committed a substantial part of his pay in repaying loans that he had borrowed from his co-operative society. It is trite law that a litigant has to prove the dependency ratio to be applied when persuading the Court to award her general damages under the **Fatal Accident Act**.

In the instant case it is clear that the dependency ratio to be applied is much lesser than the 2/3 dependency ratio that the Plaintiffs suggests. From the two payslips produced I would apply the dependency ratio of 2/5. I have not taken into consideration the house allowance that was paid to the deceased as the Plaintiff and her children would still be housed somewhere irrespective of whether the deceased was alive or not. House allowance cannot therefore be computed as an income. It can only be applied for the purposes that it was given, that is, to pay house rent.

In the circumstances of this case, the general damages to be paid to the Plaintiff for loss of dependency is;

Kshs. 29,330 (Net salary) x 2/5 dependency ratio x 13 years x 12 months = Kshs. 1,830,192/=.

The Plaintiff shall therefore be awarded general damages as follows:

(i) The Plaintiff herself Kshs. 50,000/= for pain suffering and loss of amenities for the injuries sustained.

(ii) Nicholas Njuguna KamauKshs 60,000/= for pain suffering and loss of amenities for the injuries sustained.

(iii) Nellius Wanjiru Kamau Kshs 350,000/= for pain suffering and loss of amenities for the injuries sustained.

(iv) For the Estate of James Kamau NjugunaKshs. 1,830,192/= for loss of dependency .

(v) The estate shall be paid the sum of.... Kshs 30,000/= being the funeral expenses.

The total award to be paid shall be **Kshs. 2,320,192/=**. The Plaintiff did not specifically plead for special damages. In the premises therefore no award will be made under this head. No award shall be made under the **Law Reform Act**, an award having been made under the Fatal Accidents Act (See **Kemfro Africa Ltd t/a Meru Express Services, Gathogo Kanini –versus- A M Lubia & Oliver Lubia [1982-88] 1KAR 727**). The Plaintiff shall have the costs of the suit. Interest shall be applied from the date of this judgment.

DATED at NAKURU this 19th day of October, 2004.

L. KIMARU

AG. JUDGE