



- 1) *Running down cause*
- 2) *Driver motor vehicle collision between two three vehicles*
- 3) *Male adult driver aged 34 years old in 1992*
- 4) *Injuries: Fatal*
- 5) *Liability: 100% against the defendant*
- 6) *Quantum:*
 - A) *Law Reform Act, Cap.26 Laws of Kenya*
 - a) *Pain and Suffering Ksh.10, 000/-*
 - b) *Loss of expectation of life Ksh.70,000/*
 - c) *Lost years*
$$\text{Ksh.10,000/-} \times 20 \times 12 \times 2/3 \text{ Ksh1.6 million}$$
 - B) *Fatal Accidents Act*
 - a) *Loss of dependency*
$$10,000/- \times 20 \times 12 \times 2/3 \text{ 1.6 million}$$
 - C) *Special Damages - Nil not proved*
 - D) *Loss of Conso rtium Ksh.100,000/-*
$$\text{---} \underline{\underline{\text{Ksh.1.780,000}}}$$
- 7) *Case Law*
 - a) *Evalyn Hinzano v Mohamed Sheikh Omar Bin*
T/A Malindi Bus Services Co. Ltd
 - b) *James Muhoro Ndungu & Another v Wilson Nzioka Mutiso*
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 - c) *Elijah Ole Kool vs George Ikonya Thuo*
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 - d) *Chege Gitahi v Maboko Distributors Limited*

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

CIVIL CASE NO. 191 OF 2002

JANE WANGARI PLAINTIFF

VERSUS

FELIX OLE NKARU DEFENDANT

JUDGMENT

This is a road traffic accident case involving two to three motor vehicles along the Nairobi/Kiambu road. Wilfred Machiri Wachira (now deceased) was travelling from Nairobi to Kiambu in a Datsun station Saloon Reg. Number KJX 519. He had with him as passengers there school going children (including his own son) and a male adult passenger on the 3.2. 1992 at about 1.00 p.m. A Peugeot 404 pick up suddenly emerged from behind a stationary Nissan matatu motor vehicle. It swerved from the opposite side of the road to come into collision on the lane of its on coming vehicles. A collision occurred. The passengers in the vehicles were rushed to the Kiambu hospital near by. Wilfred Wachira died at the hospital after 2-3 hours.

His widow Jane Wangari Wachira sued Felex Ole Nkalu and another on behalf of himself and the estate of her late husband Wilfred Wachira.

The two defendants filed defence and they further denied the allegations of being negligence in the said accident. Who then is to blame in the said accident?

I) LIABILITY

The parties agreed to admit in evidence the proceedings of the lower court sitting at Kiambu (section 34 of the Evidence Act applies). This means instead of recalling witnesses in the lower court case to come and repeat the evidence in the High Court or vice versa, the proceeding of a subsequent court can be relied on.

In the said magistrates court the evidence transpired that the deceased driver together with a male adult passenger who was working with the deceased in the same building had gone to pick up some children including the deceased's son from school at a round mid-day. They proceeded to Kiambu where the deceased lived with his wife at the Kiambu District hospital (ie the widow PW1 had been employed at the hospital as a copy typist and lived in a government hospital housing quarters.)

As the deceased travelled along the Kiambu road, witnesses said that the defendant was driving a Peugeot 404 pick up. He was at a high speed and was very close to a Nissan matatu vehicle. The said matatu public served vehicle stopped to carry passenger at a bus stage. Its sudden stop caught the defendant unawares. He swerved his vehicle to a void hitting the stationary Nissan matatu and came to the path of vehicles travelling on the opposite side of the lane. The defendant then collided suddenly into the vehicle driver by the late Wilfred Wachira.

Most certainly, the accident collision occurred very quickly resulting to the injuries of the passengers and drivers of the vehicle.

According to the traffic rules a vehicle that is travelling within the city limit should be at a speed of 50 KPH. Outside the city limit a pick up and an omnibus or van of a public service vehicle should travel at 80 KPH. It is alleged that the said vehicle was over speeding. Even if the defendants vehicle was not over

speeding the traffic rules require that there be a proper distant kept between the vehicle. The vehicles behind has a greater duty of care to ensure that there is no collision between vehicles.

In this particulars case there was indeed no distant kept by the defendant No.1. He was driving too lose, too fast and carelessly that when the vehicle in front of him suddenly stopped, to avoid a collision instead of swerving left to the side of the road he swerved to his right and onto the path of on coming vehicles.

In his evidence in the lower court the defendant stated that he suddenly swerved to avoid hitting the vehicle in front of him. He lost control and then collided but could not recall what occurred.

The trial magistrate found the defendant guilty and fined him Ksh8,000/- in default 2 years imprisonment. The cash bail was utilized to pay the fine for the offence of causing death by dangerous driving. The second count was driving a vehicle without a drivers driving license.

In the event a person is charged with a criminal (traffic) offence in one court, this is conclusive evidence that the person is guilty of the said offence where no appeal has been preferred and found otherwise. Nonetheless in a civil suit liability can be determined by the court as to the apportionment and or blame between the parties.

In this case there is clear evidence that the negligence laid with the defendant. It thus was hte defendant who was reckless in his driving and failed to observe the traffic rules.

I hereby find that the defendant are liable for this accident at 100% jointly and severally with the second defendant liable vicariously.

I now look at the issue of quantum.

II: QUANTUM

A) General Damages

Fatal accident Act

i) Multiplicand

The widow of the deceased, hold letters of administration duly confirmed. She informed the court that she was a copy typist working at the Kiambu District Hospital where she had been provided with accommodation. She lived there with her husband and two minor children (then).

Her late husband was a self employed business man who supplied stationary and office equipment. She called PW2 of M/s Massawa & Co. who are accountant, auditors to provide their accountably reconstituted from the evidence of the deceased business. They came up with a figure of a net profit for the year 1991 at Khs.877,658/- say Ksh.60,000/- to Ksh.40,000/- per month. It was suggested that I apply Ksh.40,000/- as a multiplier. This figure was of course contested by the defence when discrepancy in the accounts had been pointed out to the court. That a sum of Ksh.2,000/- only should be available for a multiplicand. The advocate for the plaintiff argued that a person earning that amount of money of Ksh.2,000/- cannot possibly be able to afford driving and owning a motor vehicle. I would agree to the extent that the deceased most certainly may have been making more money than Ksh.2,000/- p.m. That from the evidence on cross examining of the auditors, the deceased had not paid his income tax nor do we use evidence of other statutory taxes being paid. I would in the event compute Ksh.10,000/- as the minimum income earned for the business man taking into consideration time when eventualities may arise as poor business and that income tax is not required for earners earning less than Ksh.10,000/- per month.

b) Multiplier

I have been informed though evidence that deceased was 34 years of age. If he was employed in the public sector he would have retired in another 21 years time. The advocate for the plaintiff suggested 25 years as the deceased was in the private sector. The defence suggest 14 years.

Under the fatal Accidents act what multiplier would be reasonable? The authorities by the defendant suggested 17 years.

Evalyn Hizano v Mohammed Shah

t/a Malindi Bus Services (Machakos)

HCCC 48/97 Nabuye, J. A civil servant aged 36 years was given a multiplier of 17 years and in the case of James Muhoro Ndungu vs Wilson Nzioka Mutiso

Hccc 995/01, Ang'awa, J.

A 32 year old receptionist was awarded 18 years as a multiplier.

I believe that 20 years in this instance is reasonable with a 2/3 dependency ratio:- Thus the sum of Ksh.10,000 x 20 years x 12 x 2/3rd = Ksh.1.6 million.

B) The Law Reform Act

a) Pain and suffering

The plaintiff proved that she holds letters of administration and has locus to bring this suit.

Evidence clearly showed that the deceased was alive when he was rushed to hospital. He was taken for an x-ray department then to the general ward. He seems not to have been adequately treated having been left on a stretcher for a while. Within an hour or two he had died. The widow said that he bled through his nose and mouth and thereafter could not speak. He had then had died of haemorrhages in his lungs that seem to have been torn as a result of fracture ribs in the road traffic accident.

I believe a fair award of Ksh.10,000/- under this head sufficient.

ii) Loss of expectation of life

The deceased had bright future ahead of him together with his family. This has been sent short by the cruel hand of death. I would award Ksh.70,000/- as fair.

iii) Lost years

An award of Ksh.10,000/- x 20 years x 12 x 2/3rd = Ksh.1.6 million would be awarded but this be taken into account of the award given under the Fatal Accidents Act. Further the widow is both an administratrix and dependent and should not claim under both claims.

General Damages

Loss of consortium

The plaintiff herein has lost a companion. She prays for loss of consortium. I would award the sum of Ksh.100,000/- under this head.

C) Special Damages

A claim for the following was made:-

a) Death certificate Ksh.1500/-

There seem to have been no documentary evidence tendered for this. I am not able to understand how ksh.1,500/- can be paid for a death certificate.

b) Mortuary fees Ksh.2,000/-

The evidence tabled before court that this was Ksh.200/- and not Ksh.2,000/-. No evidence to support this claim has been adequately shown.

c) Funeral expenses Ksh.34,500/-

The funeral expenses must be particularized. In this instance no evidence has been shown that the said sum had been incurred.

d) Police abstract fee 100/-

This fee was proved but it was never pleaded in plaint. The same is rejected.

e) Material Loss claim

A sum of Ksh.110,000/- was made. There was no assessors report formally produced to court to indicate that the deceased vehicle was a write off. No pleading reflect the salvage nature obtained. I reject this claim as not specifically proved. I dismiss the special damages claim not proved.

I wish to mention the issue of dependency. The law requires under the Fatal accidents act that I apportion the sum due to the dependents. I have no evidence save by oral evidence that two children belong to the deceased. It would have been prudent to produce the birth certificates to court of these children. To this end I would reject that the award be dealt under the lost years claim where the estate would ensure the children would be catered for.

I accordingly enter judgment as prayed on the proved sum

In Summary

- 1) Driver motor vehicle collision between to – 3 vehicles
- 2) Male adult businessman aged 34 years old in 1992
- 3) Injuries:- Fatal
- 4) Liability: 100% against the defendant
- 5) Quantum:

1) Law Reform Act

a) Pain and suffering Ksh.10,000/-

b) Loss of expectation of life Ksh.70,000/-

c) Lost years

$Ksh.10,000/- \times 20 \times 12 \times 2/3 = Ksh.1.6 \text{ million}$

Subject to discount taken into account

II: Special Damages Nil not proved

III Loss of consortium Ksh.100,000/-

Total Ksh.1.780 million

To be paid to the estate having two administrators.

I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment.

Dated this 24th day of November, 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Gichuki King'ara & Co. Advocates for the plaintiff

Shah & Parekh Advocates for the defendant