



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL SUIT NO. 1111 OF 1996**

**JANE MUTHONI MUNGAI )**

**SARAH NJERI MUNGAI )**

**Suing through JANE MUTHONI MUNGAI ).....PLAINTIFFS**

**VERSUS**

**TEXCAL HOUSE SERVICE STATION .....DEFENDANT**

**JUDGEMENT**

This suit was filed in 1996. The first Plaintiff was suing on behalf of herself as the administratrix of the estate of Stanley Ndungu Mungai who had died in a car accident in May 1993. The first Plaintiff, the deceased and the second Plaintiff were passengers in motor vehicle registration number KQE 149, which was involved in an accident with another vehicle, registration number KAA 215Y, owned by the Defendant.

From the judgement of the Honourable Lady Justice Angawa, who struck out the Plaint and awarded costs to the Defendant on 7th October, 1998, the Plaintiffs appealed to the Court of Appeal which allowed the appeal and ordered a hearing de novo.

The case was mentioned before different Judges on a number of occasions. On 27th March, 2002, the Honourable Mr. Justice Kuloba stood over the matter generally, with a view to there being a settlement between the Parties, in which event the Court would be moved as necessary.

On 24th March, 2003, the Honourable Mr. Justice Kuloba recorded a consent Order in the following terms:

***“ORDER: By consent, liability is admitted as follows -***

***(1) Defendant is liable up to 80%;***

***(2) Plaintiff is liable upto 20%.***

By further consent, the only issue to be determined is the quantum of general damages; the said quantum of general damages be assessed on the basis of the income tax returns, pay-slips, commission vouchers; age of the deceased at the time of his death is agreed to have been 51 years; two medical reports prepared by Dr. James Jowi dated 22nd October, 1996 in respect of Sarah Mungai and Jane Mungai; and on the Advocates' submissions to be made on a date to be fixed at the Registry. With regard to special damages, it is agreed that the Plaintiff (not Defendant?) shall pay Shs.22,800 being Special Damages.”

Another Order was made by the Honourable Mr. Justice Kuloba on 28th July, 2003, in these terms:

“By consent S.O.G. for Plaintiff’s Advocate to reconsider how to approach the matter regarding loss of earnings.”

On 24th September, 2003 there was a mention of this case before the Duty Judge, the Honourable Mr. Justice Nyamu, who recorded as the position of counsel that::

“What is left is submissions by counsel. We are filing our...submissions in the meantime.”

The learned Judge recorded that submissions were to be heard before the Honourable Justice Kuloba on 2nd October, 2003. He later fixed the date for 22nd October, 2003, but on that date the submissions did not take place. On 29th October, 2003, the matter came up before the Honourable Lady Justice Rawal, who ordered:

“By consent, mention before Duty Judge on 10th November, 2003 with a view to appointing a Judge to continue with the matter.” On 10th November, 2003, the file was allocated to this Court, and hearing took place on 18th November, 2003.

Counsel restated the position as had been recorded before the Honourable Mr. Justice Kuloba on 24th March, 2003 and requested that the Court do proceed and assess damages on the basis of Kuloba J’s Orders and written submissions filed. It should be on record that both parties had already filed written submissions.

The prayer of counsel was that the Court do give judgement on the basis of :

- (a) liability already agreed at 80:20 in favour of the Plaintiffs;
- (b) an award of special damages assessed as agreed in the Consent Order of 24th March, 2003;
- (c) various documents listed and annexed to the written submissions for the Plaintiff;
- (d) the written submissions of counsel for both parties.

The judgement has been formulated taking into account the above elements, and is as follows:

Counsel for the Plaintiffs, in his written submission, proceeds from the Consent Order of 24th March, 2003 and proposes as follows: It is medically ascertained that the first Plaintiff had as a result of the accident in question, suffered soft tissue injury to head and neck; multiple bruises to the left upper limb; multiple bruises to lower back; and the second Plaintiff suffered whiplash injury to the neck, as well as multiple bruises to head and neck.

Counsel has referred to the case ALFREDO PELIZZOLI v. E.N. NYAGA T/a BIASHARA TRANSPORT & THREE OTHERS, HCCC NO. 4278 OF 1990 (NRB) as providing a formula for attaching pecuniary statistics to the above-described injuries. In that case the Plaintiff won Kshs.150,000/- in general damages. Counsel also relies on the case of ROSEMARY NANJARA BAIBA v. BENSON IRUNGU, HCCC NO. 577 OF 1991 (NRB), where the Plaintiff had sustained soft tissue injuries on the back, chest and throat, and the general damages award was Kshs.90,000/-.

In the light of the remarkable similarity between the two cases and the present case, counsel has proposed that each of the first two Plaintiffs be awarded general damages in the sum of Kshs.200,000/-, a figure that makes an allowance for the weakening in the strength of the Kenya Shilling in the last ten to thirteen years.

In respect of the deceased, Mr. Stanley Ndungu Mungai, counsel takes as a starting point the age on record of 51 years, the occupation of the deceased as a salesman, with a monthly income of Kshs.20,000/- and without a set retirement date. Under the head of pain and suffering, counsel submits that as Mr. Mungai died on the day of the accident, a figure of Kshs.10,000/- for pain and suffering would be adequate compensation. Under the head "loss of expectation of life", counsel submits that as Mr. Mungai died at the prime of his life, the amount of Kshs.100,000/- would be a fair compensation.

With regard to loss of dependency, counsel has relied on the authority of PHERICE KIRIMANI v. TIMOTHY NJIRU, HCCC NO. 4485 of 1989 (NRB). The deceased was 45 years old and a businessman. The Court applied a multiplier of 10 years and awarded Kshs.75,000/- for loss of expectation of life and Kshs.320,000/= for loss of dependency.

Counsel notes that the deceased in the present case was married with five children who entirely depended on him for support. He applies a multiplier of 10 years and on this basis computes loss of dependency thus:  $20,000 \times 10 \times \frac{2}{3} \times 12 = \text{Kshs.1,600,000/-}$ .

Counsel for the Defendant, too, begins from the threshold of admitted liability in the ratio of 80/20 per centum in the Plaintiff's favour. Counsel sets out the medical particulars of the injuries suffered by the Plaintiffs and the deceased, and arrives at the following figures:

**(i) For the first Plaintiff the amount proposed is Shs.60,000/- (rather than Kshs.200,000/-);**

**(ii) For the second Plaintiff the amount proposed is Shs.30,000/- (rather than Kshs.200,000/-);**

Counsel for the Defendant made submissions regarding claims in the name of the deceased that require special attention. The applicable laws in such a case are: The Law Reform Act (Cap. 26) and the Fatal Accidents Act (Cap. 32). The correct mode of assessing claims under these enactments has been the subject of much litigation, and the governing principles are now fairly clear. Counsel submitted, on the authority of KEMFRO AFRICA LTD. T/a MERU EXPRESS SERVICE, GATHOGO KANINI v. A.M. LUBIA AND OLIVE LUBIA (1982-88) 1 KAR 727, that the net benefit inherited by the dependant under The Law Reform Act (Cap.26) must be taken into account in respect of damages awarded under the Fatal Accidents Act (Cap. 32), because the loss suffered under the Fatal Accidents Act must be offset by the gain from the estate of the deceased, under the Law Reform Act. The Law Reform Act gives the framework for claiming in respect of

: (i) pain and suffering;

(ii) Loss of expectation of life.

Counsel for the Defendant submitted that there should be no claim in the present case, made under the Law Reform Act (Cap. 26) in respect of:

(i) pain and suffering; and

(ii) loss of expectation of life.

Clearly this submission rests on the argument that the true claimant under these heads should be the personal representatives of the deceased, and for the benefit of the estate. Counsel argues that the widow of the deceased should not be allowed to make this claim, for the technical reason that she has given no evidence of having applied for letters of administration, before she filed suit, and to support this argument counsel has cited the case of ROMAN CARL HINTZ v. MWANGOMBE MWAKIMA (1982 – 88) 1 KAR 482.

I would not agree with the last point made by counsel. In the ROMAN CARL HINTZ case, it is

clearly stated (particularly in the Judgement of Nyarangi, Ag. JA, at p. 494):

“It seems to me having regard to S.2 of the Law Reform Act that a parent or next of kin or a personal representative can act as a representative of a deceased person and file an action for the benefit of an estate of a person deceased without a grant of probate or letters of administration to the estate. There is no express prohibition directed at a personal representative or next of kin. There is no requirement that only an administrator or an executor can represent a deceased person.

“The money recovered on behalf of the estate is put into the estate and would thereafter be subject to the claims of his creditors, if any. If the deceased made no will, the person wishing to deal with the estate has to obtain letters of administration. But that would be after damages recoverable for the benefit of the estate of the deceased person have been litigated, and decided upon. The deceased’s cause of action is a right which is transmitted to the personal representative or next of kin.”

Anchoring myself on this clearly-worded authority from the Court of Appeal, I hold that the Plaintiffs in the present case, as, at the very least, next of kin to the deceased, were well and truly entitled to claim under the Law Reform Act (Cap. 26) in respect of:

- (i) pain and suffering, and
- (ii) loss of expectation of life.

I however agree with the submission of counsel for the Defendant that any award made under the Law Reform Act, must be taken into account in the assessment of damages given under the Fatal Accidents Act (Cap. 32).

Counsel for the Defendant notes the three essential elements applied in assessing damages under the Fatal Accidents Act:

- (i) the multiplicand
- (ii) the multiplier; and
- (iii) the determination of earnings.

He agrees with the 2/3 dependency ratio in respect of marriage, as proposed by counsel for the Plaintiff. He prefers five years, rather than the 10 years proposed by the Plaintiff, as the multiplier. Counsel for the Defendants disputes the figure of monthly earnings, at Kshs.20,000/-, proposed by the Plaintiff and proffers instead Kshs.7,994/-. He insists that the Plaintiff has not deducted sums of money subject to tax, and as a result, the multiplicand is inordinately large.

It is to be noted that counsel for the Defendant, while denying the applicability of the Law Reform Act claims, namely for:

- (i) pain and suffering, and
- (ii) loss of expectation of life,

did not dispute the figures attached to these particular heads by the Plaintiff. In the premises I will dispose of this item in the following manner:

- (a) For pain and suffering I will award the sum of Kshs.10,000/
- (b) For loss of expectation of life I will award Kshs.100,000/-. Under the Fatal Accidents Act, which is

concerned with compensation to the dependants of the deceased for the loss they have suffered owing to loss of dependency, I will adopt:

- (i) the multiplicand of 2/3 dependency; and
- (ii) the multiplier of 10 years.

I do not agree with counsel for the Defendant that a multiplier of 5 years would be fair. At the age of 51 the deceased, who was relatively young, was able-bodied, and with an employment and occupation set-up that was not subject to an early retirement age, was likely to enjoy another ten years of useful working life.

With regard to the earnings of the deceased, the Plaintiff gave a figure of Kshs.20,000/- per month, which the Defendant disagrees with, truncates his payslip figure of Kshs.13,786/- per month, and subjects even this to tax burdens, coming up with a final figure of Kshs.7,994 as the net monthly earning.

I would not agree with this mode of computation. The statutory dues falling on the monthly income of the deceased were personal obligations in respect of which he had made declarations or applications or contracts. These undertakings or commitments should not be treated as matters in rem, in respect of which a person in the position of the Defendant can lessen the full weight of his own legal responsibilities. And having adopted this line of reasoning, I must state also that it is not for the Defendant to subtract from the full employment benefits that were accruing to the deceased, so as to lessen the burden of legal liability falling upon the Defendant. Accordingly, I approve the figure of Kshs.20,000/- as the level of monthly earning of the deceased.

The liability falling upon the Defendant, therefore, in my judgement, is as follows:

- (1) Under the Fatal Accidents Act (Cap. 32)  $Kshs.20,000 \times 10 \times 2/3 \times 12 = Kshs.1,600,000/-$
- (2) Under the Law Reform Act (Cap. 26),  $Kshs.10,000/-$  (pain and suffering) +  $100,000/-$  (expectation of life) =  $Kshs.110,000/-$ .
- (3) As heading (1) must, as a matter of law, take into account the award under heading (2), I would reconcile the sum specified under (1) with that specified under (2), and award just one figure, in the sum of  $Kshs.1,500,000/-$ .
- (4) Should the first Plaintiff be awarded for general damages,  $Kshs.200,000/-$  or  $Kshs.60,000/-$ ? Counsel for both the Plaintiffs and the Defendant are using cases of the early 1990s as their reference, when they propose appropriate figures. The vast difference between their positions appears to result from the fact that the Defendant has not taken into account the factor of inflation, which the Plaintiff has duly taken into account. Even if I accepted the Defendant's position, the figure of  $Kshs.60,000/-$  in 1990 or 1991 would today translate to something more than  $100,000/-$ .

Taking into account this important feature in the dynamics of the finance market, I do award the figure of  $Kshs.120,000/-$  in general damages to the first Plaintiff. This figure, however, is to be reduced by 20% in terms of the Consent Order of 24th March, 2003.

- (5) The applicable reasoning in the case of the first Plaintiff is valid also for the second Plaintiff, for whom the Defendant has proposed a figure of  $Kshs.30,000/-$ . This would not be fair, and for this party I do award the sum of  $Kshs.100,000/-$  as general damages. This figure is to be reduced by 20%, in terms of the Consent Order of 24th March, 2003.

- (6) By the Consent Order of 24th March, 2003, special damages have been agreed at  $Kshs.22,800/-$ .

This case substantially turns in favour of the Plaintiffs who are entitled to general damages as specified, with interest at Court rates from the day of Judgement; special damages as specified, with interest at Court rates with effect from the date of filing the Plaint; costs of this suit, taxed and reduced by 20%, with interest.

**DATED and DELIVERED at Nairobi this 16th day of December, 2003.**

**J.B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J**

**Court clerk, Mutea**

**For the Plaintiffs: Mr. Chacha Odera, Instructed by M/s Oraro & Co. Advocates**

**For the Defendants: Mr. Mbugua, Instructed by M/s Mbugua & Mbugua Advocates**