



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

**Civil Case 24 of 1993**

**JOSIAH SANGARA BIRUNDU.....PLAINTIFF**

**versus**

**RUTH CHEMUTAI CHELULE.....1<sup>ST</sup> DEFENDANT**

**PETER MWANGI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, describing himself as the personal representative of Billiah Nganduko, filed this suit against the defendants to recover damages under the Fatal Accidents Act as well as the Law Reform Miscellaneous Provisions Act. The damages are claimed pursuant to the death of the deceased Billiah Nganduko who died in a road traffic accident on 16<sup>th</sup> December, 1990 or thereabouts when she was knocked down by motor vehicle registration number KLJ 871. The said vehicle was at the time of the accident registered in the name of the second defendant and driven by the 1<sup>st</sup> defendant.

The plaintiff produced a police abstract, exhibit 2, and a grant of representation – exhibit 1, in respect of the estate of the deceased. He also produced a death certificate, exhibit 6, to show that the deceased died at the age of 50 years. It was the evidence of the plaintiff that the deceased was survived by her six children including the plaintiff who is the eldest son born in 1968. It was the evidence of PW2 that on the material day he was traveling with the deceased when the vehicle came from behind and knocked down the deceased.

The gate to Kericho Tea secondary school. When the vehicle hit his mother, they were both walking off the road. They were in company of another brother of his (PW3).

PW3 confirmed the evidence of PW2 that the vehicle which hit the deceased came from behind. The vehicle, he said, hit her and went and crushed into the signpost of Kericho Tea Secondary School. It was the evidence PW2 and PW3 that the vehicle did not hoot prior to knocking down the deceased. According to a letter dated 22<sup>nd</sup> April, 1994, the deceased worked for the African Highlands Produce Co. Ltd, at a monthly salary of Ksh.764.40 per month (see exhibit 5). Six birth certificates, exhibits 7-12 were produced to show that the persons named in each certificate were the children of the deceased. The certificates were obtained after the filing of the suit and after the hearing of the suit had commenced.

PW6, IP Peter Njoroge produced a sketch and fair plan of the accident scene, exhibit 13 and 14. According to the sketch plan, exhibit 14, there were blood stains at a point marked “L” which is

completely off the road. The vehicle landed on the flower bed completely off the road and on the same side as the bloodstains. According to the evidence of PW6 the point marked "X" which is in the middle of the road was pointed out to him by the driver i.e. the defendant number one. PW2 and PW3 who were eye witnesses do not appear to have been present to confirm if indeed "X" was the point of impact as identified by the 1<sup>st</sup> defendant. It was the evidence of PW2 and PW3 that the vehicle left the road and hit the deceased who was walking off the road.

Considering the fact that both the bloodstains and the defendants' vehicle are on the same side, and off the road, the point of impact could not have been in the middle of the road. Most likely it was off the road. In defence, the 1<sup>st</sup> defendant conceded that she was the driver of the accident vehicle. She was driving the vehicle from Kericho town and on reaching the gate at Kericho Tea High school, she indicated that she would be turning into the school. The road was clear, and as she turned, the deceased who was walking with some children immediately started crossing the road in front of the vehicle. She swerved onto the right but it was too late and she knocked down the deceased. She said that she was doing 20 KPH at the time. It was her further evidence that apart from indicate that she would turn off the road, she hooted. She was charged vide Kericho Traffic Case No 2489 of 1991, with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act but she was acquitted under section 210 of the Criminal Procedure Code, for no case to answer. I have looked at the proceedings in the traffic case, exhibit D1, and the record shows that the prosecution failed to bond witnesses on several occasions and that was the reason why the 1<sup>st</sup> defendant was acquitted as no witnesses were brought to court to testify. That traffic case was never heard and determined on merit.

PW2 and PW3 said that they were walking with the deceased at the time of the accident. The 1<sup>st</sup> defendant conceded that at the time of the accident, the deceased was walking with some children. It is therefore clear that there were eye witnesses who were walking with the deceased and the defendant who has conceded that the deceased was walking with the children, cannot be heard to say in the written submissions that such children were not eye witnesses just because police failed to trace them and bond them to attend court and give evidence in the traffic case. From the position of the accident vehicle on the sketch plan, and the point where there were bloodstains, I am satisfied and I find that the defendant's vehicle hit the deceased, when the said deceased was off the road. Both the deceased and the 1<sup>st</sup> defendant were coming from Kericho Town. If the 1<sup>st</sup> defendant's defence, that the deceased started crossing the road to the secondary school all of a sudden and that the point of impact was in the middle of the road is to be believed then the vehicle could never have ended up where it appears on the sketch plan and the bloodstains could not have been found at the position where they appear on the sketch plan. The fact that this vehicle landed 8.2 metres off the road, supports the evidence of one of the plaintiffs witnesses that the 1<sup>st</sup> defendant lost control of the vehicle which veered off the road, hit the deceased and crashed into the sign post of Kericho Secondary School before stopping in a flower bed. In her defence, the 1<sup>st</sup> defendant said nothing of that evidence of PW3. It must be that she agreed with it.

I have earlier found that when she knocked down the deceased, that was off the road. It must be that she left the road after when lost control of the vehicle due to careless and reckless driving of the same. She is liable to compensate the estate of the deceased for her death.

The defence did not dispute the fact that the deceased was an employee of AHPB with a monthly salary of Kshs. 764.40. She died at the age of 50 years according to the death certificate, exhibit 6. Although in the plaint, it is pleaded that she died at the age of 61 years, a copy of her identity card, exhibit 3, shows that she was born in 1941. She died on 16<sup>th</sup> December, 1990. That was her 49<sup>th</sup> year on earth. I am unable, from the death certificate as well as the identity card, to find that the deceased died at the age of 61 years. From the date of birth shown in the identity card, I am satisfied that the deceased died at the age of 49 years. The retirement age at the AHPB where she worked is not known as no evidence was adduced on that issue. The fact that she could have died of natural causes sooner or later have possibly lived had she not died in this particular road accident. In the unreported case of *Nicholas Wahuho Ngamau –vs- Musa Sirma* NKU HCC No 177 of 1998, (unreported) where the deceased died at the age of 46 a multiplier of 12 years was adopted. In the present case, the deceased died at the age of 49 and I am satisfied and I find that a multiplier of ten years is fair and reasonable.

Six birth certificates were produced to show that the deceased was survived by six children. The certificates, as I have earlier observed were obtained during the hearing of this case. Although the defence counsel doubts that the deceased was survived by six children, the defence called no evidence whatsoever to dispute the plaintiff's case that the deceased was survived by six children. I find that she indeed was survived by six children three of whom gave evidence herein as PW1, and 3. This was a large family. She must have spent most of her monthly earnings towards the maintenance of the family. Out of her monthly salary of Kshs. 764.40, Kshs. 600 must have gone to her dependants and the balance retained by her for her own personal needs. That is the money which her estate has lost. I therefore work out the loss of dependency as:-

$$600 \times 12 \times 10 = 72,000$$

1 1 1

Having died at the age of 49 years, her estate is entitled to damages under the Law Reform (Miscellaneous Provisions) Act for loss of expectation of life. In most cases, the High Court has awarded Kshs 60,000 for loss of expectation of life. The deceased died in the same date of the accident. She must have suffered some degree of pain, however short a period. I award Kshs. 10,000 for pain and suffering. The total award under the Law Reform Act is Kshs.70,000. An award has already been for Kshs.72,000 under the Fatal Accidents Act, for the dependants of the deceased.

The court of appeal in the case of *Maina Kamau –vs- Josephat Muriuki Wang'ondu* C.A. No. 148 of 1989, held that if damages recoverable under the Law Reforms Act devolve on the dependants of a deceased person, the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act to avoid a situation where the dependants of a deceased person, recover damages twice over. The sum of Kshs. 72,000 awarded under the Fatal Accidents Act shall therefore be reduced by the sum of Kshs. 70,000 awarded under the Law Reform Act to reduce the award to KShs. 2,000.

The sum of Kshs. 10,000 pleaded as special damages/funeral expenses, was never proved to have been incurred, and that claim is dismissed.

I therefore enter judgment for the plaintiff against the defendant jointly and severally in the following terms:

- (a) Pain and suffering - Kshs. 10,000
- (b) Loss of expectation of life - Kshs. 60,000
- (c) Damages under Fatal Accidents Act - KShs. 72,000
- Kshs. 142,000
- Less
- (d) Damages under Law Reform Act - KShs. 70,000
- Kshs. 72,000

(Seventy two thousand only)

(e) Costs of the suit

(f) Interest thereon at court rates from the date of judgment till payment in full.

Dated, delivered and signed at Nakuru this 12<sup>th</sup> day of June, 2001.

S.C. ONDEYO

JUDGE

12.6.2001