



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 29 OF 1997**

**MONICAH DONALD ::: PLAINTIFF**

**VERSUS**

**MBURU WAMUGU ::: DEFENDANT**

Coram: J. W. Mwera J.  
Muteti Advocate for Plaintiff  
Advocate for Defendant  
C.C. Muli

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**J U D G E M E N T**

The plaintiff sued on behalf of the later Kyalo Mule whom it was pleaded died in an accident on 12.9.95 along GITARU-KIAMBERE road while he was a passenger in motor vehicle KZA 885. That the defendant or his agent drove that motor vehicle so negligently that he allowed it to collide with motor vehicle KTT 519 and Kyalo died. It was averred that the defendant's motor vehicle was driven at an excessive speed in the circumstances and without due care and attention to other road users. That the driver of KZA 885 did not keep a proper look-out otherwise he would have noticed motor vehicle KTT 519 on the road and thus swerved, slowed down or in any other way avoided the accident of 12.9.95.

That as a result of death of Kyalo his estate suffered loss as did his dependants. The suit was brought under Law Reform and Fatal Accidents Acts. The plaintiff prayed for damages, costs and interest.

A defence filed on 22.7.97 admitted the occurrence of the accident but denied that it was due to the negligence of the defendant or his driver. That the negligence was on the part of the owner/agent of motor vehicle KTT 519 who was driving it at an excessive speed and thus he did not see or notice the defendants motor vehicle on the road. That the owner/agent of KTT 519 abruptly changed lanes – into that of the defendant, causing the accident etc.

The record bears issues and filed by the plaintiff's side. There is no reply to the said defence.

On 2.5.2001 Mr. Muteti for the plaintiff told the court that the defence lawyers M/s Kimani & Michuki Advocates, Nairobi were served with the hearing notice for that day. An affidavit of service was filed to that effect. They were not present and the trial proceeded ex parte.

The plaintiff (P.W.1), the mother of the deceased Kyalo, told the court that he died on 12.9.95 (Exh.P1). So she took out a grant to administer his estate (Exh.P2) and accordingly filed the suit on 19.2.97. P.W.1 had been with her deceased son when the accident took place but he travelled in the defendant's motor vehicle, going to Kiambere. She took another motor vehicle to the same place, Kiambere. When the accident took place, P.W.1 went to the scene. She found that the motor vehicle in which the deceased had

been travelling had collided with a charcoal – carrying lorry. Kyalo died in that collision. That the accident was reported to Kiambere Police Station and they issued P.W.1 with an abstract (Exh.P3). Later she buried Kyalo.

That Kyalo traded in clothes at various market places in their area and earned between Sh. 5000/= and Sh. 10,000/= per day. The plaintiff, a businessman herself, said that she knew this and Kyalo used to give her Sh.800/- per week that is Sh.3,200/= per month for her own use. That Kyalo had a wife plus 4 children to support and for this P.W.1 produced a chief's letter (Exh.P4) in place of birth certificates. That all suffered with Kyalo's death. At this point several damages were amended to Sh. 1025/- as per receipts that were seemingly not produced in evidence.

Samuel Nzau (P.W.2) was travelling on the day and road above stated but in motor vehicle KAC 331A. The motor vehicle of the defendant KZA 885 in which Kyalo was past them going at a high speed. Some 150 metres ahead it collided with motor vehicle KTT 519 coming from the opposite side. It was on a straight part of the road. P.w.2's motor vehicle got to the scene, it was at about 8 P.M., and they removed Kyalo from the motor vehicle. He had died; that P.W.2 used to do the same business like Kyalo. That it had not rained and the defendant's motor vehicle had its lights on and so did the KTT 519. P.W.2 went back to his motor vehicle and they left.

The plaintiff's side submitted that the defendant take full liability here and the court agrees. It has not been controverted that the defendant or his agent drove at a high speed at about 8 P.M. on a straight road and allowed motor vehicle KZA 885 to collide with motor vehicle KTT 519, as a result of which Kyalo died.

A sum of Sh.100,000/= was proposed for loss of expectation of life (citing the case of JOHN NJOROGE VS. IRERI HCCC 5255/89 Nairobi to guide the court) while Sh.15,000/= for pain and suffering would do.

Under the Fatal Accidents Act a multiplier of 25 was considered proper in that Kyalo died aged 30 years. With a multiplicand of 3,400/= for loss of dependency it gave a sum of Sh. 680,000/= to the plaintiff. The court heard the plaintiff say that the deceased used to give her Sh.800/= per week that is 3,200/= per month. It wonders how Sh. 3,400/= came about. And the case of PAULINE KULOBA VS. MWIKAMBA NRI HCCC 2774/92 was cited on account of the multiplier and dependency ratio of two thirds.

It was proposed that Sh.15,000/= issue as reasonable funeral expenses. However this was not pleaded and right away, it cannot issue.

The following award is considered under the two Acts.

Under the Law Reform Act:

Loss of Expectation of Life	Sh. 70,000/=
Pain and Suffering	<u>Sh. 20,000/=</u>
	<u>Sh. 90,000/=</u>

Under the Fatal Accidents Act this court had some difficulty bearing in mind that an award here must be based on hard "pounds and pence" as proved. Income must be proved and application of some of it for the benefit of a dependant must also be proved. Here P.W.1 and 2 told the court that the deceased traded in clothes. P.W.1 said that he made Sh.5,000/= up to Sh.10,000/= per day, rather a large sum indeed, but no evidence was adduced. Not even the licences to trade which P.W.1 claimed the deceased had. In such circumstances this court is inclined to say that the deceased earned some income to support his wife and children and mother the plaintiff. In a rural area may this stand at Sh. 3,000/= per month with Sh.500/= going to the plaintiff per month. Kyalo died at age 30 and so a multiplier of 20 will do.

May it be remembered that evidence that Kyalo was married was not adduced or not sufficiently adduced at all. The chief's latter proved unreliable before this court.

Under the Fatal Accidents Act the award given is Sh. 120,000/=

(500 x 20 x 12).

The gross award to the plaintiff will stand at Sh. 210,000/= but because the one under the Law Reform Act should be taken in consideration when the same applicant features under the Fatal Accidents Act, the net award is Sh.120,000/=. (The consideration is by way of deduction - see Kemp and Kemp on The Quantum of Damages).

In sum the plaintiff gets Sh. 120,000/= (One Hundred Twenty Thousand Shillings) plus costs and interest at the lower court rates.

Judgement accordingly.

Delivered on 26th September 2001.

***J. W. MWERA***

**JUDGE**