



Car accident  
collision  
Fatal accident  
Deceased male adult  
46 years or 48 years old  
Claim for costs of  
repairs of deceased  
Motor vehicle KRH 646

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE 247 OF 1997

ISABELLA WAITHERERO G. KANYI ..... PLAINTIFF

VERSUS

KENYA AIRWAYS & ANOTHER ..... DEFENDANTS

**JUDGMENT**

A brief fact of this case is as follows:-

Joseph Giturwa Kanyi was on the 18th day of September 1993 driving along the Outering Kagundo road Nairobi. He was then driving in his motor vehicle registration No. KRH 646 when he met with a most tragic and sad accident. His vehicle was involved in an accident with that of reg. number KZG 218. The said vehicle belonged to the Kenya Airways (herein referred to as the 1st defendant) and driven by Winston Simwa (herein referred to as the 2nd defendant).

As a result of the said accident Joseph died. His wife filed this suit on the 14th of June 1994. He sued both the defendants for negligence and prayed that she be awarded damages for his wrongful death. She filed the suit under the Law Reform Act and under the Fatal Accidents Act. She also prayed that she be awarded Special damages incurred for the repairs of the motor vehicle KRH 646 at a sum of Ksh.267,518/-.

This suit was originally filed in the Magistrates courts at Nairobi by M/s Khamati Minish & Co. Advocates. The two defendants are represented by M/s Waruhiu & Gathuru & CO., Advocates. They entered appearance for the defendants on 10.8,.94 and duly filed a defence.

They denied the allegations of negligence and stated that the deceased had in fact contributed to the said negligence.

A reply was put in by the plaintiff to this defence.

Sometime in 1997 the case was transferred to the High Court of Kenya for hearing. (This is understandable as the claim sort may have been more than the magistrates pecuniary jurisdiction).

At the High court and after due compliance with the pretrial, the parties appeared before Hon. Justice Etyang. This was on the 23.3.99 about a year ago. They entered into the following consent on liability and recorded as follows:-

“By consent judgement for the plaintiff against the defendant entered against the defendant on liability at 80% 20% against the plaintiff.”

The case was to proceed for the assessment of quantum on 24.3.99. None of the parties appeared and the case was stood over generally.

When the hearing came before me on the 23.2.2000 the parties entered further consent on the Special Damages item that concerned the funeral expenses. The plaintiff had pleaded Ksh.86,891/-. The parties agreed at Ksh.50,000/- subject to apportionment.

The case proceed for trial. Isabell - the plaintiff is the wife to the deceased. She held letters of administration to his estate both temporary and confirmed grant. She is thus the lawful representative of his estate (together with one Bernard Kanyi Giturwa). This is because where minor children of an estate is concerned there must be two administrator.

Isabella informed the court on the aspect of formally that her husband was aged 46 years old. This aspect became an issue with the defendants. The deceased was said to have been 48 years at the time of death and not 46 years old.

Isabella informed the court that there was an error in the death certificate. She tried to rectify this by swearing an affidavit to this effect. She said she was issued with a new death certificate.

The advocate for the defence stated that the death certificate indicating the deceased was 48 years was the one used to obtain the grant.

The age of the deceased is important for the plaintiffs case. If she would claim loss of earning there required to be the aspect of how long would the deceased support her and her children? The conventional year of retirement in Kenya is 55 years old. The deceased is aged 48 years would have retired within 7 years whilst if he was aged 46 years would have had another 9 years to work.

Thus the advocate for the defendant prayed I allow 5 years only as a multiplier whilst the advocate for the plaintiff prayed for 10 years.

I hold that the age of the deceased would be computed at 48 years and that a multiplier of 7 years be given.

As to the multiplicand, this is the income earned by the deceased, the plaintiff provided Exh. 2a. This is a letter from the former employer of the deceased. They confirmed that he earned a

basic salary of Ksh.15,8905/-,

House allowance Ksh.4,500/-

Total Ksh.20,395/-.

Besides this he had allowances that brought his salary to Kshs.36,934/-

The plaintiff claimed the multiplicand of Ksh.36,934/- whilst the defendant stated that this should be Ksh.20,395/-.

I would agree with her advocate for the defendant. The multiplicand is the basic pay and house allowance you get. In this case it came to Ksh.20,395/-. The other allowances are privileges and could

have been taken away on increased at the pleasure of the employer.

I would therefore hold under the head of damages for loss of dependency - Total accident act, the sum to be awarded be Ksh.20,395 x 12 x 7 = 1713,180/- which I am required to discount this amount do by 1/3. This is less 571,060/-. This is to cater for a lump sum payment being made or remarriage by the plaintiff.

I come to Ksh.1,142,120/-. Less 20% apportionment on liability gives me Ksh.913,696 + says 920,000/-. Under the Fatal Accidents

Act, I am required to apportion this figure from the amongst the dependents.

The plaintiff proved to court the defendants who are her minor children and her self. She correctly produced birth certificates for these children except for the 1st born child. The birth certificate is said to be misplaced.

I appoint the damages for loss of dependency as follows :

1 Isabella Waitherero Kanyi- widow	Ksh 320,000/-
2. Lydia Wanjiru (No birth certificate or proof)	Nil
3. Bernard Kanyi born 1979	Ksh.150,000/-
4. Charles Crisistom Gichimu born 1986	Ksh.150,000/-
5. John Gachau born 1986	Ksh.150,000/-
6. Loise Wambui Giturwa born 1991	Ksh.150,000

Ksh.920,000/-

The amount due to the children who are minors be invested in an interest earning account with the East African Building Society or a reputation in the joint names of the Registrar of the High court and the plaintiff.

The capital amount be invested for the minor children until they attain the age of 18 years old. The interest only may be withdrawn upon court orders for the advancement of the children.

Under the Law Reform act - I noted that the advocate for the plaintiff prayed I award Ksh.90,000/- as loss of expectation of life. The advocate for the defendant prayed that this be Ksh.70,000/-. The correct sum is Ksh.60,000/-.

I shall nonetheless award ksh.70,000/- as recommended by advocate for the defendant as being reasonable and subject to apportionment. The widow use this for the benefit of the estate.

She is entitled to the future expenses agreed 50,000/- subject to apportionment.

The last aspect of quantum as pleaded in the plaint, not dealt with, is that of the Special damages dealing with the repair of the motor vehicle reg. KRH 646.

The normal claim is done when the plaintiff of a case would have the vehicle assessed by a qualified motor vehicle assessor. The assessor is to indicate in his report whether the vehicle would be economical to repair or not.

If it is uneconomical to do so, the plaintiff would claim the value of the vehicle - less the cost or value

of the salvage. Namely, if the vehicle is sold as a scrap - that amount is deducted from the total value of the vehicle at the time of the accident.

In this case the plaintiff stated she has a sentimental value to the vehicle where she was offered for the salvage value by the Insurance Company was too little. She refused to accept the money. She undertook the repairs herself.

In evidence she called PW2 a motor vehicle assessor (now retired to actually assess the cost of repairs. He did so.

She spent over 200,000/- to do the repairs. Later she sold the vehicle for the equivalent amount due to the hardship and requirement of trying to make ends meet.

In cross examination she admitted that she bought some of the spares before the assessors report came out. She appeared to explain this by saying that she had verbal knowledge of the cost before it was documented.

As the said vehicle has been sold and moneys paid to the plaintiff, I decline to make award on this head.

This has not been adequately proved. If it has the plaintiff has recovered her cost through the sale.

In conclusion

I enter judgement as follows:

#### 1 Liability

By consent agreed at the ratio of 80%:20% in favour of the plaintiff against the defendant and as recorded by Hon. Justice Etyang on the 23.3.99.

#### 2. Injuries

Fatal

#### 3. Quantum.

Under the Law Reform Act

##### a) General damages

1) Loss of expectation of life Kshs.70,000

##### b) Special Damages

Funeral expenses (agreed) Ksh. 50,000/-

Cost of motor vehicle Nil

Loss of user (not proved) Nil\_\_\_\_\_

Ksh.120,000/-

Less 20% Ksh. 24,000/-

Ksh.96,000/-

