



Muchiri (Suing as the Legal Administrator of the Estate of Alphonse Kiplagat Kipruto - Deceased) v Gikuni & another (Civil Case E007 of 2021) [2025] KEHC 2190 (KLR) (Civ) (21 January 2025) (Judgment)

Neutral citation: [2025] KEHC 2190 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE E007 OF 2021
GL NZIOKA, J
JANUARY 21, 2025

BETWEEN

RUTH WAMBUI MUCHIRI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF ALPHONSE KIPLAGAT KIPRUTO - DECEASED) PLAINTIFF

AND

ELIZABETH WANJIRU GIKUNI 1ST DEFENDANT

SULEIMAN MUTAHI WAMBUI 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 11th May 2021, the plaintiff sued the defendant seeking for the following orders: -
 - a. Damages under the *Fatal Accidents Act* of Kshs. 47,600,000
 - b. Damages under the *Law Reform Act* of Kshs. 1100,000
 - c. Special damages of Kshs. 4,250 as pleaded.
 - d. Costs of the suit
 - e. Interest at court rates on (a), (b), (c) and (d) above
2. The plaintiff's case is that on or about 1st March 2019, her husband Alphonse Kiplagat Kipruto (herein "the deceased"), was driving a motor vehicle registration No. KBR 098C along Naivasha Nakuru road, while the 1st defendant was driving a motor vehicle registration No. KCR 337A along the same road.
3. That as a result of the negligence of the 1st defendant both motor vehicle collided causing the death of the deceased. It is the plaintiff's case that, the 1st defendant drove his motor vehicle at an excessive



- speed, failed to keep a proper look out for other road users or slow down, swerve or in any other manner manage his motor vehicle and/or ignored traffic rules.
4. The plaintiff avers that, the deceased left behind a wife and four (4) children as pleaded at paragraph 11 of the plaint and who depended on him. Further that, at the time of his death, the deceased was 43 years old and a freelance auditor earning a net income of Kshs 350,000 per month on average.
 5. That his family were residing in a four bedroomed house paying rent of Kshs 60,000 and in addition he used to pay school fees for his children as pleaded at paragraph 16 of the plaint. That pursuant to the demise of the deceased, the family has been unable to pay rent, school fees and have been forced to relocate to a cheaper house at Ongata Rongai and children changed schools.
 6. That the 2nd defendant is the 2nd owner of the vehicle driven by the 1st defendant and that despite demand being made to the defendants to admit liability, they have neglected to do so hence the suit herein.
 7. However, the defendant denied liability for the accident and consequences thereof vide a statement of defence dated 25th January 2022. The defendants denied the averments that the 2nd defendant is the registered owner of motor vehicle registration No. KCR 337A and/or that he is vicariously liable in this matter.
 8. The defendants also denied the occurrence of the accident and/or involvement of the two subject motor vehicles. The particulars of the negligence attributed to the 1st defendant were denied.
 9. However, the defendants pleaded that, in the alternative if the accident occurred, which it denied, then it was solely and/or substantially or materially contributed to by the deceased. The defendant avers that the deceased was negligent as he drove his motor vehicle at an excess speed, failed to keep proper look out for the defendant's vehicle, was overtaking third party motor vehicle when it was unsafe to do so and failed to slow down, swerve, or in any other manner control the accident.
 10. The defendant denied the averments that, the plaintiff has suffered loss as pleaded in the plaint, in particular, under the *Law Reform Act* and the Fatal Accident Act, and more specifically loss of dependency, pain and suffering and the special damages claimed. Finally, the defendant argues that, the content of paragraph 10 of the plaint on the loss of dependency amount to submissions and should be struck out.
 11. However, in response to the statement of defence, the plaintiff filed a reply to the defence dated 17th February 2022 and reiterated the content of the plaint save to add that the records at NTSA reveal that the 2nd defendant is the registered owner of motor vehicle registration No. KCR 337A and that according to the police abstract the accident took place. The particulars of negligence attributed to the deceased were denied.
 12. The case proceeded to full hearing. The plaintiff's case was supported by the evidence of (PW1) Ruth Wambui, the deceased's wife who testified and produced Letters of limited grant which authorized her to file the suit. She adopted her witness statement dated; 11th May 2021 together with documents of the even date and additional documents filed on the 27th February 2023, date in support of the her.
 13. In cross-examination she conceded that she had not availed a marriage certificate although it was available. Further, that the tenancy agreement produced showed rent payable was Kshs 40,000 per month in the year 2009 and that a letter 16th November 2020, signed by Naomi indicates rent payable as Kshs 60,000. She conceded that, there are no receipts to prove the payment of rent. She further conceded that she did not witness the accident.



14. PW1 reiterated that the deceased was an auditor and that she has availed documents from KASNEB to prove that the deceased had finished CPA courses. However she conceded that she has not produced documents to prove that the deceased was a professional or practising auditor but maintained that, he was earning Kshs 350,000 per month although she had no documents to prove the same. PW1 also confirmed that the statement from Co-operative Bank for the month of January had no credit entry.
15. In re-examination she stated that, she has birth certificates of the children to prove the parents. Further she has a letter from the chief to prove that she is the widow of the deceased. That the deceased had three bank accounts, held at Equity Bank, Co-operative Bank and Trans-National Bank and that she came up with the amount in the plaint based on what he did for his clients.
16. That, the family has resided in their residential house for ten (10) years and that she has provided receipts to prove rent payment. Further, in the year 2015 the family was paying rent of Kshs 55,000 and therefore by 2019 the same had increased.
17. The plaintiff's case was further supported by the evidence of (PW2) No. 96714 PC Josphat Makau who testified that, a fatal accident occurred on 1st March 2019 near Naivasha Fly over involving two (2) motor vehicles registration No. KBR 098C driven by the deceased and motor vehicle registration No. KCR 377A driven by the 1st defendant. He produced the police abstract filed at Naivasha police station
18. During cross-examination he stated that he could not tell if the deceased died on the spot or while on treatment. That, he did not have the police file and could not tell in which direction the deceased was driving from or to. Further the investigating officer in the matter was transferred but the police abstract indicates that the matter is pending investigations.
19. PW3 Dr. Chek Sheila testified on behalf of the plaintiff to the effect that, a post mortem was conducted on the body of the deceased by Dr. Mercy Mwigweri who is away on study leave. The witness produced a post mortem report on behalf of that doctor. In cross-examination she stated that she could not ascertain whether the deceased died on the spot or at what point and that there was no file that accompanied the body body.
20. On the other part the defendant closed its case without calling any witnesses.
21. The parties filed their final submissions. The plaintiff in submissions dated 21st November 2023, argued that she proved her case on a balance of probability. That, the accident occurred as pleaded in the plaint and relied on the doctrine of Res ipsa loquitur.
22. The plaintiff relied on the case of; Susan Kanini Mwangangi & another vs Patrick Mbithi Kavita [2019] eKLR, where the High Court quoted the case of; Embu Public Road Services Ltd vs Riimi [1968] EA 22 where the East African Court of Appeal stated that the doctrine of Res ipsa loquitur is one where a plaintiff by proving that an accident occurred in circumstance which it should not have occurred leads to an inference that the accident occurred only due to the negligence of the defendant and thus the plaintiff discharges the original burden of showing negligence.
23. The plaintiff further submitted that, the facts of the accident were not controverted as the defendant failed to call any witness and neither did they file any documents to support their claim. That, a defence is not evidence and relied on the case of, Shaneebal Limited vs County Government of Machakos [2018] eKLR where the High Court held that pleadings are not evidence and if a party does not adduce evidence, pleadings remain allegations and mean that the evidence by the plaintiff remains uncontroverted.



24. On the damages payable under the *Law Reform Act*, the plaintiff submitted a conventional award of Kshs 100,000 for loss of expectation of life and Kshs. 10,000 for pain and suffering would be reasonable.
25. The plaintiff cited the case of; West Kenya Sugar Co. Limited vs Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR where the High Court quoted with approval the case of; Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR where it was stated that Kshs. 100,000 was the conventional award for loss of life expectation while an award for pain and suffering ranges from Kshs. 10,000 to Kshs. 100,000 with damages being higher if pain and suffering was prolonged before death.
26. On damages for loss of dependency under the Fatal Accident Act, the plaintiff submitted that the deceased was survived by herself as a wife and her children and proposed a dependency ratio of 2/3.
27. Further that, the deceased was a freelance auditor earning an average of Kshs. 350,000 proved by production of bank statements, school report cards, fees structures, tenancy agreement and rent payment receipts. That, in the case of Jacob Ayiga & Another vs Simeon Obayo (Suing as the administrator of the Estate of Thomas Ndaya Obayo) (2005) eKLR, the Court of Appeal rejected the contention that a person's profession and earning can only be proved by way of documentary evidence, and held that the evidence of the respondent and the widow together with production of school reports was sufficient to amount to strict proof of damages.
28. Additionally, the plaintiff urged the court to adopt seventeen (17) years as the multiplier submitting that the deceased was forty-three (43) years old at the time of his death, that he was in good health and maintained a healthy lifestyle. The plaintiff urged the court to award her Kshs. 47,600,000 for loss of dependency calculated as follows:

$$2/3 \times 350,000 \times 12 \times 17 = \text{Kshs. } 47,600,000$$
29. The plaintiff submitted that the special damages of Kshs. 4,250 was not challenged and urged the court to affirm the same. On costs of the suit, the plaintiff cited section 27 of the *Civil Procedure Act* (Cap 21) Laws of Kenya that costs follow the event and submitted that, she had proved her case on a balance of probability and prayed she be awarded costs plus interest from the time of filing till payment in full.
30. However, the defendants in response submissions dated 3rd November 2023, argued that the plaintiff had failed to discharge her burden of proof to lay a basis for finding liability against them. That, the plaintiff was not with the deceased at the time of the accident while the police record indicated the accident was pending investigation.
31. The defendants relied on the case of; Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another [2014] eKLR where the Court of Appeal stated that even if a defendant has not denied a claim by filing a defence or even enter appearance, the trial court has a duty to examine the evidence and satisfy itself the claim and been proved and if the evidence does not meet the standard of proof, the claim must be dismissed.
32. However, the defendant submitted that if the court was inclined to apportion liability the same be apportioned in the ratio of; 50:50 between the parties taking into account that, the accident was a head-on collision and was pending investigation. They cited the case of, Michael Hubert Kloss & another vs David Seroney & 5 others [2009] eKLR where the Court of Appeal held that both drivers shared blame equally for failing to swerve away from each other before colliding if they were exercising due care and attention.



33. On damages under the *Law Reform Act*, the defendants conceded that an award of Kshs. 10,000 for pain and suffering was sufficient considering that the deceased died soon after the accident. Further, on damages for loss of expectation of life they submitted that an award of Kshs. 80,000 would be sufficient noting the deceased died instantly.
34. On damages for loss of dependency under the Fatal Accident Act, the defendants disputed the plaintiff evidence that the deceased was an auditor and argued that the plaintiff did not provide any documentation to show that the deceased had completed his studies and was awarded the final Accountancy Certificate. Neither was a copy of a practising certificate produced to show the deceased was a registered and licensed auditor.
35. Further, there was no proof the deceased earned Kshs. 350,000. That the bank statements were not clear nor did they indicate that he earned Kshs. 350,000 monthly but conversely, they showed that the deceased had an overdraft. Additionally, the statements on rent and school fees payable for the children were paid on a quarterly basis and not monthly.
36. The defendants argued that, the plaintiff having failed to prove how much the deceased earned, the court must resort to the Regulation of Wages (General)(Amendment) Order 2018 which provides the minimum wage of a cashier at Kshs. 31,000.
37. The defendants cited the case of; Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Losie Gathoni Mugo (deceased) vs Hellena Wanjiru Rukanga [202] eKLR where the Court of Appeal in determining the net monthly income of the deceased who carried out a timber and furniture business considered the minimum wage of a carpenter as the starting point.
38. The defendants argued that owing to the vagaries and vicissitudes of life it was unlikely that the deceased would have worked to the mandatory retirement age of 60 years and submitted a multiplier of 10 years as being appropriate. As such the defendants proposed an award of Kshs. 2,480,000 for loss of dependency calculate as follows: -
$$2/3 \times 10 \times 31,000 \times 12 = 2,480,000$$
39. The defendants further submitted that, the plaintiff had failed to prove special damages save for Kshs. 550 for the motor vehicle search. As regards costs and interest, the defendants urged the court exercises its discretion judiciously and left it to the court.
40. On the 31st day of October 2023, the parties highlighted their respective submissions and concluded on 16th January 2024.
41. At the conclusion of the case, I have considered the evidence adduced and I find that, there is no direct evidence as to how the accident occurred. PW1, PW2 and PW3 were not at the scene and there is no eye witness to the accident and neither is there a sketch plan of the scene to indicate probable point of impact. The evidence that would have helped the court was that of the investigating officer. He did not testify. PW2 who testified had no knowledge of how the accident occurred. He could not even tell where the deceased was travelling from. He conceded that, the matter was still under investigation and that, the 1st defendant had not been charged in relation with the accident.
42. It is trite law that he who alleges proves as per the provision of section 107 of the *Evidence Act* is clear, that, he who alleges must prove the facts alleged. Consequently it was incumbent upon the plaintiff to prove the particulars of negligence attributed to the 1st defendant. Furthermore the pleadings in the plaint indicates that the vehicles were involved in a head on collision but it is not clear from the



evidence adduced which of the drivers involved veered, if at all, towards the other or the point of impact as already stated herein.

43. I note that the plaintiff relied on the doctrine of Res Ipsa Loquitur however that doctrine only applies where events speak for themselves and there being no evidence of how the accident occurred the doctrine cannot apply.
44. In the given circumstances I find that it is only just and fair that the liability between the parties be apportioned at 50:50 in favour of the plaintiff and against the defendant.
45. As regard quantum, I find that, the parties have agreed on Kshs 10,000 for pain and suffering. The plaintiff seeks for Kshs 100,000 for loss of expectation of life, the defendant suggests a sum of Kshs 80,000 however the conventional figure across the board is Kshs 100,000 and I award the same. The last limb is the loss of dependency, to award the same the plaintiff must prove the earning of the deceased, his age and dependants.
46. In the instant matter I find that, it is not in dispute that the deceased was forty- three (43) years. If he were to work upto 60 years he would have had a further seventeen (17) years. The plaintiff submits that, the court adopts the seventeen (17) years. On the other part the defendant suggests a multiplier of ten (10) years. However, a person cannot be denied a solid 7 years of life based on what is stated to be vagaries and vicissitudes of life.
47. However, the seventeen (17) years proposed by the plaintiff does not take into account the reality of life described properly as vagaries and vicissitudes of life. To be reasonable a multiplier of fifteen (15) years is reasonable and I adopt the same. There is no dispute as the dependency ratio of 2/3.
48. However, the main dispute lies on proof of the income of the deceased before death. As already stated, the burden of proof lies on the plaintiff to prove the deceased's income. An analysis of the documents produced by the plaintiff support payments of; rent and school fees thus proof of expenditure than income.
49. The court notes from the bank statements produced and stated as salary/remittance four (4) receipts of cash deposit but unfortunately the entries in this documents are not explained.
50. Similarly analysis of the deceased's bank statement held at Co-operative Bank of Kenya, account No. 01116XXXXXX900 described as Co-operative salary/remittance account for the period 1st January 2017 to 1st April 2021, reveal three (3) credit entries of Kshs 10,000, one (1) credit entry of Kshs 20,000, two (2) credit entries of Kshs 50,000 and Kshs 100,000 respectively. One (1) credit entry of Kshs 110,000, 150,000 and 200,000. There is no credit entry of Kshs 350,000.
51. In the same vein data on account No. 0010XXXXXX947 does not prove any or consistent income of Kshs 350,000 per month. The rest of the documents produced are illegible and of little assistant to the court. I further note that the documents filed alongside the plaint on 8th November 2021, are also illegible.
52. The court also notes that, the plaintiff filed further documents dated 27th February 2023, a perusal thereof reveal they are assessments results from KASNEB and receipts to prove payment of school fees to various schools. Again with due respect, these documents do not prove the plaintiff's income.
53. In fact, as argued by the defendant these documents do not prove that the deceased was a certified Auditor and/or prove he had a practicing certificate.
54. The defendant argues that the Regulation of Wages (General Amendment) Order 2018 be applied and the sum of Kshs 31,000, be adopted.



55. However, there is evidence that, the deceased had qualifications from KASNEB and if the documents produced showing his expenditure is anything to go by, the argument of him being a cashier earning Kshs. 31,000 per months may not be tenable.
56. Furthermore, the fact that the deceased was not having a practicing certificate does not mean he had no professional qualification and may be akin to an un-admitted lawyer.
57. The plaintiff having failed to prove the deceased's income and the court having held that the minimum wage is inappropriate I award given a global figure of Kshs 5,000,000 as damages under the Fatal Accident Act plus Kshs. 110,000, together with special damages pleaded less 50% contributory negligence. The sum awarded shall attract interest from date of this judgment. Each party to meet its own cost.
58. It is so ordered.

DATED, DELIVERED, SIGNED ON THIS 21ST DAY OF JANUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Magoma for the plaintiff

Ms Wanjiku for defendant

Mr. Komen court assistant

