



Mboya & another (Suing as administrators of the Estate of Peter Onbonyo Mboya) v Ngaruiya & 2 others (Sued as administrators of ad litem of the Estate of John Munywe Kiburuthu) (Civil Case 1287 of 2006) [2024] KEHC 3990 (KLR) (Civ) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 1287 OF 2006

AN ONGERI, J

APRIL 5, 2024

BETWEEN

GLADYS MUMBUA MBOYA 1ST PLAINTIFF

MAUREEN AKINYI ODERO 2ND PLAINTIFF

**SUING AS ADMINISTRATORS OF THE ESTATE OF PETER ONBONYO
MBOYA**

AND

JANE WAIRIMU NGARUIYA 1ST DEFENDANT

EUNICE WAMBUI MUNYWE 2ND DEFENDANT

NDUNGU WA MUNYWE 3RD DEFENDANT

**SUED AS ADMINISTRATORS OF AD LITEM OF THE ESTATE OF JOHN
MUNYWE KIBURUTHU**

JUDGMENT

1. The plaintiffs in this case Gladys Mumbua Mboya And Maureen Akinyi Odera (hereafter referred to as the 1st and 2nd plaintiffs respectively) filed this suit under the [Law Reform Act](#) and the [Fatal Accidents Act](#) on behalf of the estate of Peter Obonyo Mboya (deceased).
2. The suit is filed against Jane Wairimu Ngaruiya, Eunice Wambui Munywe And Ndungu Wa Munywe (sued as the administrative Ad Litem of the estate of John Munywe Kiburuthu(deceased))
3. The plaintiffs averred in the plaint dated 16/11/2006 that on 16/5/2004, the deceased Peter Obonyo Mboya was lawfully riding his motorcycle KAN 778B along Limuru Nairobi highway heading towards



- Nairobi when the defendant who was driving motor vehicle registration no KAN 913D so negligently drove, controlled and/or managed the said motor vehicle registration no. KAN 718B causing the deceased fatal injuries.
4. The defendants filed a defence dated 10/5/2007 denying the plaintiff's claim.
 5. The hearing proceeded from 24/7/2017 until 29/11/2023 when it was concluded.
 6. The 1st plaintiff's testimony as PW 1 she produced her witness statement dated 21/8/2018 as her evidence in chief. In it she stated that she is the widow of the later Peter Obonyo Mboya having been married for over ten years and blessed with 3 children as follows;
 - i. Michelle Arwa Mboya(then 11years),
 - ii. Natasha Nyaboke Mboya (then 9 years) and;
 - iii. Thomas Joseph Mboya(then 5 years old)
 7. On 16/5/2004 as the deceased was lawfully riding his motor cycle he was knocked by John Munyue Kiburuthi who negligently drove motor vehicle registration No. KAN 913D. The aforementioned accident caused the death of Peter Obonyo Mboya (deceased).
 8. At the time of his death the deceased was 40 years and was a prominent advocate of the High Court of Kenya with a thriving law practice by the name of Mboya Advocates from which he derived a net average income of 1.2 Million.
 9. In cross-examination, PW 1 said the deceased was the main bread winner of her family.
 10. She said he was earning an average of 1,200,000 per month.
 11. PW 2, FREDRICK MWENDWA, a certified public accountant produced audited accounts for the year 2000 to 2008.
 12. PW 2 said the average income of the deceased at the time of his death was 1,376,789/=.
 13. The defendants did not call any witnesses since the defendant also subsequently passed away.
 14. The parties filed written submissions as follows; the plaintiff submitted that PW1, Gladys Mumbua Mboya, gave sworn testimony that was largely unchallenged in cross-examination as to the fact that on 16/5/2004, the Deceased was indeed lawfully riding his motorcycle registration number KAN 778B along Limuru-Nairobi Road. The defence called no witness to refute or rebut the plaintiff's evidence.
 15. In addition, the proceedings and Judgment in the Traffic Case, which were tendered into evidence by PW1, prove that the Deceased was indeed lawfully riding his motorcycle. This was corroborated by the testimony of Patrick Thairu Ngugi in the traffic case, who gave an eye witness account on the deceased having the right of way.
 16. The judgement of the Traffic case has not been set aside and the appeal filed against the judgement was eventually marked as abandoned and the file closed on 28/10/2009.
 17. The plaintiff argued that according to Section 47A of the *Evidence Act*, the final Judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after expiry of time limited for an appeal against such judgement or after the date of the decision of any appeal therein, which is latest be taken as conclusive evidence that the person so convicted was guilty of that offence charged.



18. It follows then that the defendant herein was responsible and liable for causing the fatal accident. The deceased died as a result of the accident which was confirmed by PW5 Dr. Jane Wasike Simiyu. She indicated that the deceased died as a result of the multiple and grievous injuries he suffered as a result of the accident.
19. On loss of dependency the plaintiff submitted that the monthly average income the plaintiff called an expert witness PW2 Mr Fredrick Mwendwa who testified as to the deceased income. It was PW2's ultimate position that from the available accounting records one can deduce that the deceased was earning a monthly net income of Kshs. 623,442.
20. The deceased died at the age of 40 years and left 4 dependants. He was the bread winner of the family as they depended on him. The plaintiff proposed a multiplier of 30 years and a multiplicand of 2/3; $623,442 \times 12 \times 30 \times \frac{2}{3} =$ Kshs 149,626,080.
21. On general damages for pain and suffering the plaintiff submitted that Dr. Simiyu in the traffic case testified that the deceased died a most painful death from the injuries he suffered bruises on the left elbow and the left and right knees, laceration of the right leg, compound fracture of the right tibia and fibula, fracture and dislocation of the right hip joint, laceration of the right lung, hemothorax of 1 litre in the pleural space between the lung and chest, fracture of the right ribs, rupture of the liver and laceration on the right kidney.
22. Under this head the plaintiff proposed Kshs. 5,000,000 as adequate and in support cited;
 - a. Fred Ogada Azere & another v Ezekiel Kiarie Nqanqa [2019] eKLR – where an award of Kshs 1 350 000 was granted for a mild head injury, laceration on the right knee and leg, bruises on the right hand, laceration on the left ear and the left eyelid, posterior dislocation of the right hip joint, fracture of the right acetabulum.
 - b. Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR where an award of Kshs 4 000 000 was granted for persistent pain in the right knee, pain in the right side of the chest and the right thigh, fracture of the ribs 3-6, fracture of the right femur.
23. On Loss of expectation of life, the plaintiff proposed a sum of Kshs. 100,000 being the conventional amount awarded by the courts in such circumstances and in support cited Makario Makonve Monyancha v Hellen Nyanqena [2014] eKLR wherein it was held thus:

“I find no reason to interfere with the award on loss of expectation of life under Law Reform Act as the same is always awarded at Kshs. 100, 000/- across the board.”
24. The defendants on their part submitted that the evidence of pW1 is irrelevant in so far as the question of liability is concerned as she did not witness the accident. That further the testimony of the defendant John Munywe deceased was produced which was demonstrative of a driver who was very keen on the road and as a matter of fact the defendant's car was hit by the plaintiff motor cycle from the rear.
25. That the defendant stopped and ensured there were no vehicles and he was moving at moderate speed. It was thus the proposal of the defendant that it is only fair and just that blame should be apportioned equally at 50:50.
26. On general damages the defendant proposed Kshs. 100,000 as sufficient under this head and in support cited Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal



administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR where the court stated that: -

- “ 16. The evidence, led by PW2, was that the deceased was hit by the truck, at about 6.00 PM, and that he was rushed to hospital and unfortunately passed on at 10.00 PM. PW2 testified that the deceased was in a pathetic state, and that he went into shock before he died. I am persuaded, in the circumstances, that the damages of Kshs. 100,000.00, awarded under this head, are suitable, and, therefore, the award ought not to be disturbed.”
27. On general damages for loss of expectation of life the defendant agreed with Kshs 100,000 suggested by the plaintiff. On general damages for lost years the defendant argued that the monthly income of Kshs. 623,422 is based on inedited and unsigned alleged statements of accounts produced by PW2.
28. The defendants argued that without execution such documents have no probative value. The only statement which seems to have evidential value was the one that indicated that the deceased was entitled to Kshs. 1,335,693. The deceased a-died at the age of 40 years and 20 years is the most appropriate multiplier value. That being the case the damages under this head would be $1,335,693 \times 20 \times \frac{2}{3} = 17,809,240$.
29. It is the duty of the plaintiffs to prove their case to the required standard in civil suits which is on a balance of probabilities.
30. The plaintiffs' evidence was not controverted since the defendant did not adduce any evidence.
31. There is uncontroverted evidence that the defendant was charged in traffic case no. 682 of 2004 and fined.
32. The issues for determination in this case are as follows;
- i. Whether the plaintiffs proved their case to the required standard in civil cases.
 - ii. Whether the defendants are liable to pay the plaintiffs the remedies they are seeking.
33. On the issue as to whether the defendant was liable, I find that the 1st plaintiff's evidence was not controverted.
34. There is also evidence that the defendant was charged in traffic case no. 682 of 2004 and was found guilty with the traffic offence of causing death by dangerous driving.
35. The defendant who later died was fined ksh.20,0000 in default to serve 12 months' imprisonment for the offence of causing death by dangerous driving.
36. The conviction in the traffic case was not set aside or appealed against and I find that it is conclusive evidence that the deceased was liable for the accident.
37. I find the defendant (deceased) was 100% liable for the accident.
38. On the issue of quantum, I have considered the rival submissions filed herein.
39. It is not in dispute that at the time of his death the deceased was 40 years and a prominent advocate of the High Court of Kenya with a lucrative legal practice by the name of Mboya Advocates from which he derived a substantive income.
40. PW1, the 1st plaintiff, who is the widow of the deceased said that the deceased was the sole breadwinner of the family and that he was earning an average of Kshs.1,200,000 per month.



41. PW 2, Fredrick Mwendwa, a certified public accountant produced audited accounts for the year 2000 to 2008.
42. PW 2 said the average income of the deceased at the time of his death was 1,376,789/= per month.
43. I find that the average income of the deceased from his legal practice was Kshs.1,375,787 per month. Considering the vagaries of life, I adopt a multiplicand of 400,000 and a multiplier of 20 years.
44. I adopt a dependency ratio of 2/3rds since the deceased left behind 4 dependents. The dependency ratio of 2/3 is appropriate in the circumstances of this case as the deceased must have used 2/3 of his income on his family and 1/3 on himself.
45. In the case of Marko Mwenda v Bernard Mugambi & another Nairobi HCCC No 2343 of 1993 it was held that:

“In adopting a multiplier the court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.”

46. In the current case I find that the average income of the deceased is ascertainable.
47. I award damages as follows;
 1. Pain and suffering ksh. 50,000
 2. Loss of expectancy of life ksh. 100,000
 3. Lost years $500,000 \times 12 \times 20 \times 2/3 =$ ksh.80,150,000
 4. Special damages nil
 5. Total ksh. 80,150,000
48. Judgment be and is hereby entered in favor of the plaintiffs against the defendants jointly and severally in the sum of ksh.80,150,000 plus costs and interest at court rates from the date of this judgment until payment in full.
49. Section 4(1) of the Fatal Accident Act provides as follows;
 - “(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in



the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct.”(Emphasis added)

50. I rely on the case of Sukari Industries Ltd Vs Clyde Machimbo Juma (suing as personal representatives of the Estate of John Juma Machimbo) where the court said as follows;

“The second issue is that when the court makes an award under the *Fatal Accidents Act*, it must, in accordance with section 4(1) apportion the amount awarded to each dependant and where children are involved approve a scheme of investment for the sums due to the children.As a matter of law where the amount is for the benefit of a child or children there must be a continuing trust under section 58 of the *Law of Succession Act* (Chapter 160 of the Laws of Kenya) this the amount must be held by more than one trustee.”

51. The said sum is apportioned as follows;

- (i) Michelle Arwa Mboya.....20%
- (ii) Natasha Nyaboke Mboya.....20%
- iv. Thomas Joseph Mboya.....20%
- v. Gladys Mumbua Mboya.....20%
- vi. The Administrators for the upkeep of the minors..20%

Total 100%

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF APRIL, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

