



Nyutho (The Administrators of the Estate of the Late Benson Nyutho Mwangi) v Alkason Transporters Limited & another (Civil Case 296 of 2010) [2024] KEHC 3171 (KLR) (Civ) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3171 (KLR)

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

CIVIL

CIVIL CASE 296 OF 2010

AN ONGERI, J

APRIL 2, 2024

BETWEEN

MARTIN MWANGI NYUTHO (THE ADMINISTRATORS OF THE ESTATE OF THE LATE BENSON NYUTHO MWANGI) PLAINTIFF

AND

ALKASON TRANSPORTERS LIMITED 1ST DEFENDANT

MOSES NJEHIA 2ND DEFENDANT

JUDGMENT

1. The plaintiff in his plaint dated 11/6/2010 amended on 25/9/2019 is seeking special damage of ksh.95,150= general damages under both the Law Reform and Fatal Accident's Act together with costs and interest from the two defendants.
2. The suit is filed by Martin Mwangi Nyutho (the Administrator of the estate of the late Benson Nyutho Mwangi(deceased))
3. The plaintiff averred in the amended plaint at all material times the First Defendant was the registered owner of motor vehicle KAX 784 M and the Second Defendant was the registered owner of KBB 232F.
4. That on or about the 7th day of December 2008, Benson Nyutho Mwangi (Deceased) was a lawful passenger in motor vehicle KBB 232F along Mombasa road Nairobi when the First Defendant's authorized driver agent and or servant so negligently drove, managed and or controlled motor vehicle registration number KAX 784M that he caused it to collide with motor vehicle KBB 232F that was also negligently driven or controlled by the Second Defendant's authorized driver agent and/or servant and



subsequently violently hit the Plaintiff occasioning him severe bodily injuries. And the Defendants are vicariously liable for the acts of their agents or servants.

5. That the particulars of negligence were as follows;
 - a. Driving at a speed, which was excessive in the circumstances.
 - b. Ramming into Motor Vehicle KBB 232F into the River.
 - c. Driving dangerously without cautioning other road users.
 - d. Failing to stop, swerve, brake slow down or in any other way manage the said vehicle to avoid hitting motor vehicle KBB 232F.
 - e. Losing control of the vehicle and or failing to control the vehicle to avoid the accident.
 - f. Driving carelessly, recklessly and/or dangerously.
 - g. Failing to heed presence of other road users.
 - h. Failing to have regard to the safety of other road users.
 - i. Causing the accident.
6. The plaintiff further averred that the particulars of negligence of the second defendant's driver, servant, employee and/or agent;
 - a. Driving at a speed that was excessive in the circumstances.
 - b. Failing to stop, slow down, swerve, break or in any other manner control the said motor vehicle to avoid the accident.
 - c. Failing to keep any and/or any proper look out and/or have any sufficient regard for other road users and the Plaintiff in particular.
 - d. Failing to have regard to safety of other road users.
 - e. Causing the accident.
7. The Plaintiffs further averred that he would rely on the doctrine of res ipsa Loquitor.
8. That as a result of the matter aforesaid the deceased suffered fatal injuries and his estate and dependants have suffered loss and damage.
9. The particulars of special damages were pleaded as follows;
 - Obtaining police abstract and death certificate 150.00
 - Obtaining grant of letter of administration 25,000.00
 - Funeral catering expense 40,000.00
 - Mortuary fee 10,000.00
 - Newspaper 20,000.00
 - Total 95,150.00
10. The deceased is survived by dependants and the time of the accident the deceased was 26 years of age and earning an average of Kshs.150,000/= per month and had a very bright future ahead of him.



11. The dependants were named as follows;
 - Benson Nyutho Mwangi -Father-63 Years
 - Marion Wanjiru Icharia -Mother-53 Years
 - Hilda Njugu-Inimwangi -Sister- 24 Years
12. The test suit settled the issue of liability. The case proceeded only in respect of assessment of damages.
13. The plaintiff called only one witness (PW 1) Hilda Mwangi who said she is a sister to the deceased.
14. PW 1 adopted her witness statement dated 25/9/2019 as her evidence in chief.
15. PW 1 stated in the written statement that her brother, Benson Nyutho Mwangi (Deceased) was a lawful passenger in Motor Vehicle Registration Number KBB 232F along Mombasa Road, Nairobi when the 1st Defendant's authorized driver, agent and/or servant so negligently drove, managed and or controlled Motor Vehicle Registration Number KAX 784M that he caused it to collide with Motor Vehicle Registration Number KBB 232F that was also negligently driven or controlled by the 2nd Defendant's authorized driver agent and/or servant and subsequently, violently hit the Plaintiff occasioning him severe bodily injuries that led to his death.
16. That she came to know about the accident through her late brother's friend who while on his way home saw the accident and upon checking confirmed that her brother was one of the victims.
17. That the matter was then reported at the Industrial Area Police Station and an abstract was issued.
18. That they proceeded to apply for the Limited grant of letters of administration Ad Litem so that we could file the case herein
19. PW1 said her late brother was working with my cousin John Muti in real estate under a company known as Liska Properties and was also doing supplies through his own company called Smart Line solutions at the time of his death.
20. That a search was done on the two motor vehicles involved in the accident to ascertain the owners of the vehicles.
21. As the family of Benson Nyutho Mwangi they have suffered loss and damages and pray that the claim as against the Defendants be allowed with costs and interest as they have proved their case against the Defendants.
22. PW 1 produced a bundle of documents as her exhibits.
23. In cross-examination, she said the deceased was 25 years old when he died. He was living alone at Kileleshwa and he had been working since 2004.
24. PW 1 said the deceased was doing business with one Peter Likokholo Gevedi at Commerce House and he used to give her kshs.30,000 per month for her upkeep.
25. PW 1 said their parents were retired and living at Muranga.
26. PW 1 produced a certificate of registration for the deceased's business called Smartline Solutions registered on 18/2/2008.
27. The deceased was not married at the time he met his death.



28. She said the deceased was making a profit of ksh.150,000 per month. She said that figure is an estimate from the bank statements she produced.
29. The parties filed written submissions as follows; the plaintiff submitted that the issue of liability was determined in a test suit civil case number 166 of 2009 Shadrack Rutherford Ambiche vs Auto Section Kenya Limited & 2 others in the ratio of 60:40 as between the 1st and 2nd Defendants herein.
30. On general damages the plaintiff submitted that the deceased died on the date of the accident and proposed an award of Kshs. 100,000 for pain and suffering. In support the plaintiff relied on Benedeta Wanjiku Kimani (Suing as the administrator of the estate of Samuel Nienga Ngunjiri (deceased) Vs Changwony cheboi & Another Civil case No. 373 of 2018. Justice M.J Anyara Emukule at page 4 had this to say;

“In common law Jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs. 10,000 to Kshs. 100,000 currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to 60 years currently, that life itself was until cut short by the accident worth something to the estate.....”
31. On loss of expectation of life the plaintiff submitted that the deceased was 26 years old at the time of his death and enjoyed good health and lived a good life. He had completed a music production course at the music Technology Academy sometime in 2004 and as the obituary indicates he had earned a stage name (D.J Smiles). Guided by the case of Wilson Mwangi Kabiro (Suing as the Administrator of the Estate of Stephen Irungu Mwangi vs Chales Nyamumbo Mageto HCC NO. 200 OF 2011 [2015] eKLR. they proposed that a figure of Kshs. 100,000 would be sufficient under this head.
32. On loss of dependency the plaintiff submitted that the deceased's income at his time of death earned an estimated Monthly Income of Kshs. 150,000. The deceased was an entrepreneur carrying on business jointly with peter Likokholo Gevedi under the name Smartline Solutions. Further a bank statement for the company in question attest that within six months the company in issue had managed to make 2,426,151.85. It is evident from the bank statement therein that the 2 proprietors carrying on business under the said business name would make at least 200,000 per month and subjecting the same to taxes, an estimated figure of 150,000/= would be the Deceased net profit per month. The plaintiff proposed $150,000 \times 12 \times 33 \times \frac{2}{3} = 39,600,000$ under this head.
33. On special damages the plaintiff submitted that they particularized how much they incurred as a result of the accident amounting to Kshs. 75,150.
34. The 1st defendant proposed an award of Kshs. 50,000 for pain and suffering and in support cited Sukari Industries Limited vs. Clyde Machimbo Juma [2016] eKLR where the deceased died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering.
35. On loss of expectation of life the 1st defendant submitted there was no evidence to prove that the deceased was working or earning as a part time DJ. The statement of account for smartline solutions held with equity bank limited were for the period after his demise and do not show proof of any payment from employment or earnings from the business. In this head the 1st defendant proposed an award of Kshs. 70,000 and in support cited Godana Gupo Halake & another vs. Patrick Ndeli Ndoli & Another [2017] eKLR where the court awarded Ksh.70,000 for loss of expectation of life where the deceased was aged 26 years.



36. On loss of dependency the 1st defendant proposed a multiplicand of Kshs. 5,479 being the minimum wage for unskilled workers in 2008 as provided by the National minimum Wages Index. The 1st defendant proposed a multiplier of 20 years and dependency ration of 1/3 as at the time of death the deceased was unmarried with no children. In summary the 1st defendant proposed $5,479 \times 12 \times 20 \times 1/3 =$ Kshs. 394,488 under this head.
37. On special damages the 1st defendant submitted that the plaintiff did not place before this court receipts to prove the loss incurred as pleaded and thus failed to discharge the legal burden of proof placed under this head.
38. I find that the issue of liability was settled in the test suit.
39. The sole issue for determination in this suit is what quantum of damages is payable.
40. The deceased was 25 years old. He was a business man earning an average of 150,000 per month.
41. On loss of dependency the 1st defendant proposed a multiplicand of Kshs. 5,479 being the minimum wage for unskilled workers in 2008 as provided by the National minimum Wages Index. The 1st defendant proposed a multiplier of 20 years and dependency ration of 1/3 as at the time of death the deceased was unmarried with no children. In summary the 1st defendant proposed $5,479 \times 12 \times 20 \times 1/3 =$ Kshs. 394,488 under this head.
42. On loss of dependency the plaintiff submitted that the deceased's income at his time of death earned an estimated Monthly Income of Kshs. 150,000. The deceased was an entrepreneur carrying on business jointly with peter Likokholo Gevedi under the name Smartline Solutions. Further a bank statement for the company in question attest that within six months the company in issue had managed to make 2,426,151.85. It is evident from the bank statement therein that the 2 proprietors carrying on business under the said business name would make at least 200,000 per month and subjecting the same to taxes, an estimated figure of 150,000/= would be the Deceased net profit per month. The plaintiff proposed $150,000 \times 12 \times 33 \times 2/3 = 39,600,000$ under this head.
43. The deceased was not married and there is evidence that he was supporting his sister and his parents who are now retired.
44. He would have worked to the age of 60 years.
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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

- 46. I have considered the submissions filed herein and I find that the income of the deceased is ascertainable.
- 47. I have considered the vagaries of life and I apply a multiplicand of ksh.50,000 and a multiplier of 35 years.
- 48. With regard to the dependency ratio, I am satisfied that the survivors of the deceased were largely dependant on the deceased. I apply a dependency ratio of 1/3.

$$50,000 \times 12 \times 35 \times 1/3 = 7,000,000$$

- 49. The damages are awarded as follows;

- General damages for pain & suffering ksh. 10,000
- Loss of expectation of life ksh. 100,000
- Loss of future income/dependency ksh.7,000,000
- Special damages ksh. 20,000
- Total ksh.7,130,000

- 50. The test suit apportioned liability at 60:40% against the 1st and the 2nd defendants.

- 51. The award is apportioned as follows;

- Liability 60:40% against the 1st and the 2nd defendants
- 1st defendant 4,278,000
- 2nd defendant 2,852,000
- Total 7,130,000

Judgment is entered accordingly in favor of the plaintiff against the 1st and 2nd defendants in ratio stated above with costs and interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND DAY OF APRIL, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff
..... for the 1st Defendant
..... for the 2nd Defendant

