



**Elkington (Suing as personal representatives of the Estate of Charles  
Antony Elkington - Deceased) v Attorney General & another (Civil Case  
298 of 2012) [2024] KEHC 12743 (KLR) (Civ) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12743 (KLR)

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

**CIVIL**

**CIVIL CASE 298 OF 2012**

**JN MULWA, J**

**OCTOBER 24, 2024**

**BETWEEN**

**DAVID ELKINGTON (SUING AS PERSONAL REPRESENTATIVES OF THE  
ESTATE OF CHARLES ANTONY ELKINGTON - DECEASED) ..... PLAINTIFF**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**PC KATHURIMA CHARLES ALIAS TYSON ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By way of an Amended Complaint dated 22<sup>nd</sup> August 2008, the Plaintiff sued the Defendants for damages arising from alleged fatal police shooting of the deceased that caused acute and severe haemorrhage due to head, chest and spinal cord injuries from multiple gun shots that occurred while the deceased was in police custody and sought Judgment for:
  - a. General damages.
  - b. Exemplary damages.
  - c. Damages for loss of future earnings.
  - d. Special damages at Kshs. 35,000.00/=
  - e. Costs of the suit.
  - f. Interest at the court rates.



2. The Plaintiff's case is that on or about 8<sup>th</sup> July 2007 Charles Antony Elkington (hereinafter referred to as the Deceased) was arrested by the 2<sup>nd</sup> defendant who was among other police officers from Pangani Police Station within Nairobi County in the presence of his family at their residence at Eastleigh Nairobi.
3. The plaintiff claimed that said officers were acting in the course and within their scope of employment by the government of Kenya, and were well known to the deceased's family, and while in their custody, the deceased was assaulted by the police officers and others and subsequently shot dead on the same day, the 8<sup>th</sup> July 2007, and dumped at the City mortuary where his body was traced by his sister Shirly Elkington (PW1) after searching for him at Police Stations within Eastleigh, Nairobi.
4. As a result of the fatal shooting, the deceased Estate sued the defendants seeking damages in compensation as stated above.
5. In their Statement of Defence dated 5<sup>th</sup> August 2008, the Defendants denied the allegations contained in the Complaint and further denied the existence of a police officer employed by the Kenyan Police.

The Plaintiff authorised his daughter Shirley Elkington to sign court documents in this case, to testify on his behalf and generally act on his behalf in this matter due to ill health by granting her written authority dated 13<sup>th</sup> June, 2022 and filed in court.

### **The Plaintiff's Case**

6. PW1 Shirly Elkington testified on behalf of her father and on her own behalf, relied on her father's witness statement and her own both dated 26/6/2015, together with a bundle of documents dated 4/12/2009, which were adopted as her evidence in chief.
7. In Cross-examination, PW1 testified that at the time of the incident, the family was living at Eastleigh and that the deceased was her younger brother. She testified that some policemen ambushed them in their house in the presence of her mother, her brother, aunt and cousins and arrested the deceased. It was further evidence that the men were in plain clothes but they knew them for a long time as police officers, as they used to patrol the Eastleigh area for a long time. It was her further evidence that when the police officers entered their house, they asked for a boy named Absal, whom she did not know, and told them that her brother was not a criminal nor was he involved in criminal activities, and despite this it was her evidence that they arrested the brother, and took him with a white car but could not remember the registration number.
8. PW1 continued to testify that soon after the family visited all police stations within the Eastleigh area but did not trace him. Additionally, it was her evidence that between 9<sup>th</sup> and 13<sup>th</sup> July, the family visited Huruma, Muthaiga, Kamukunji and Central police stations searching for him but never found him.
9. PW1 further testified that she was requested by the plaintiff to go to City Mortuary and on 13<sup>th</sup> July 2017 she visited the City Mortuary where she found the body of her brother, and upon enquiry from the mortuary attendants was told that the body was taken to the mortuary on 8<sup>th</sup> July 2017 by some police officers and was later released to the family for burial.
10. PW1 produced the post mortem report dated 17<sup>th</sup> July 2017 which stated that the cause of death was due to haemorrhage due to head, chest and spinal cord injuries due to multiple gunshot wounds.
11. PW1 testified that her late brother was 19 years old and that he was working in a packaging company called Pan African Syndicate Company with a monthly salary of Kshs. 25,000/=, but did not produce evidence of his salary.



12. In conclusion, PWI urged the court to grant the reliefs sought in the Amended Plaintiff.
13. The defendant did not call any evidence, but filed submissions dated 20th May 2024. The plaintiff's submissions are dated 5<sup>th</sup> March 2024.

**Plaintiff's submissions.**

14. The plaintiff submitted that the deceased was intentionally, wrongfully deprived of his fundamental right to life for no reason or at all by the Defendants jointly and severally.

The plaintiff, relying on the totality of evidence tendered before the court, submitted that it has proved on a balance of probabilities that the defendants ought to be held fully liable for the death of the deceased and liable for damages sought in the Amended Plaintiff.

15. Citing the case the case of Patrick Kariuki Muiruri & 3 Others V Attorney General [2019] eKLR where in the court held on the circumstances that:-

There is no doubt that the attack on the deceased by the police using dangerous weapons was callous to the extreme. The attack was apparently unprovoked and led to an unnecessary death of a promising Kenyan and exemplary damages.

16. The Plaintiff further sought to rely on the case of *Tobiko (Suing As The Administrator of the Estate of Allan Amugune Tobiko) V Ministry of Interior & Coordination of National Government & 4 Others (Civil Appeal 26 of 2018)* [2023] eKLR, the Court of Appeal Judge P.O Kiage held that;

“...A police bullet unlawfully snuffed out the deceased's life. It being trite law that liability of the acts/omissions of the police officers attaches to their employer, the respondents stand vicariously liable for the untimely and unlawful and unconstitutional deprivation of the deceased's life.”

The Learned Judge further observed the following at page 19 of its judgment:-

“19. The question that follows is, what remedy is available to the appellant? I accept, endorse and affirm the holding of Majanja, J in *Zeitun Juma Hassan Petitioning On Behalf Of The Estate Of Abdul Ramadhan Biringe(deceased) V Attorney General & 4 Others* [2014] eKLR in which he observed that it was within the court's powers to grant a remedy for violation of a fundamental right and freedom under the bill of rights. He reasoned; "53. The petitioner's plea to the court is to award damages that would compensate the deceased's estate and dependants as a result of the respondents' unconstitutional actions. It is beyond doubt that compensatory damages are one of the reliefs the Court is empowered to grant under section 84 of the former Constitution (See *Wachira Waheire v Attorney General Nairobi HC Misc Appl No 1184 of 2003* [2010] eKLR and *Harun Thungu Wakaba v Attorney General Nairobi HC Misc Appl No 1411 of 2004* [2010] eKLR).54. The petitioner's case is that the death of the deceased has robbed her and her family of their breadwinner. At the material time the deceased was a lorry driver who supported his family wholly. While the principles applicable to the ordinary civil law may be relevant in guiding the court is (sic) awarding damages, under section 84 of the former Constitution, the Court has wide discretion in awarding relief subject to the overall duty of the court to ensure that the deceased's rights are vindicated...”



20. I note that Majanja, J operated under the less robust Section 84 of the former Constitution. I doubt not that under the more robust provisions of the 2010 Constitution, especially Article 22 on enforcement of the bill of rights, courts are enjoined to do more to give meaning to the bill of rights provisions. These are not mere compensation in the sum of Kshs 1, 980,000, general damages for platitudes, nor are they empty postulates, devoid of meaning. It is for courts to make every effort where the case demands it, to vivify the fundamental rights and to grant appropriate remedies, among them compensatory damages. It must be so if right is to prevail over might, the citizen be superior to the public officers who must serve rather than lord it over them and if the life of each individual Kenyan is to matter as it ought. The wielders of power and the bearers of arms must be constrained by law and reasonableness lest citizens should find themselves raising the Shakespearean lament in King Lear, that "as flies to wanton boys [in blue?] are we to the gods [or demigods?]; they kill us for their sport." (Per Gloucester)
  21. Life lost cannot be restored but an award of damages can provide acknowledgement, closure and a measure of solace. The appellant sought Kshs1,980,000 in compensation for lost years while the respondents, to their credit, offered Kshs 600,000. There was also a further claim for general damages under the rubric of lost life. I think that in the circumstances of this case a global figure of Kshs 2,000,000 would be appropriate to cover both heads of claim”.
  22. Inevitably then, I allow the appeal to the extent that the respondents shall pay the appellant Kshs 2,000,000 as general damages.....”
17. The Plaintiff in its further written submissions dated 15<sup>th</sup> April, 2024 submitted that on general damages for pain and suffering as well as loss of expectation of life, the fatal injuries sustained by the deceased were confirmed by the Autopsy report made by the Pathologist Dr. Ndungu J.R. In summary, Dr. Ndung’u concluded that the cause of death of the deceased herein was haemorrhage due to head, chest, and spinal cord injuries due to multiple gunshot wounds which are undisputed.  
  
Further, the deceased died at the age of 19 years. He was of good health and according to the evidence presented, he was working with "Pan African Syndicate Company" earning approximately Kshs. 25,000/= . If not for his unfortunate death caused by the Police officer herein, he would probably have lived another 51 years.
  18. Additionally, as regards exemplary damages, it is not disputed that the deceased underwent torture and inhumane treatment in the hands of the Police officers. The same was experienced right when they arrested the deceased without informing his family who were present the reason for the arrest.
  19. For the foregoing the plaintiff prays for a global award of Kshs. 2,500,000/= under the subheads of general and exemplary damages for the unlawful death of the deceased in the circumstances.
  20. On special damages, the plaintiff sought Kshs. 35,000/= being funeral expenses.
  21. On the award of costs, the Plaintiff submitted that the Honourable Court has an absolute and unfettered discretion to award or not to award the same and sought to be awarded costs of the suit.



## **Defendants Submissions**

22. In its submissions dated 20<sup>th</sup> May, 2024 the defendant stated that the plaintiff did not prove his case to the standard of proof citing the case of Chaterhouse Bank Ltd (under statutory Management) vs. Frank N. Kamau [2016] eKLR and Susan Mumbi v. Kefala Grebedhin, Nairobi Hcc. No. 332 of 1993 for the proposition that, at section 107 of the *Evidence Act* he who alleges must prove and thus urging that the plaintiff failed to convince the court that it had a claim against the defendants.
23. On damages, the defendant submitted that exemplary and general damages for violation of fundamental rights and freedoms should not be granted in the same plaint as the alleged transaction leading to the violations in the suit are of the same fact. Reliance was placed in the case of Benedict Munene Kariuki & 4 Others V AG [2013] eKLR stating that the evidence adduced by the plaintiff did not lead convincing evidence that the defendants were responsible for the deceased's death.
24. The defendant further urged the court to take judicial notice that it is not the police officers alone who use guns in the country and no one particular officer was pointed out as having shot the deceased there being a possibility of a non-police officer using a firearm.
25. On special damages, the defendant submitted that the plaintiff never proved the special damages as direct natural or probable consequence of the act, relying on the case of Swalleh C. Kariuki & Another v. Violet Owiro Okuyu [2021] eKLR.
26. On general damages, the Defendant submitted that no damages ought to be granted as no convincing evidence was adduced that the defendants were responsible for the fatal shooting of the deceased.
27. Ultimately, the defendants submitted that as the question as to who fatally shot the deceased remains unresolved; the defendants ought not to be held liable.

## **Issues for Determination**

- a. Whether the plaintiff has made out a case against the defendants
- b. Whether the plaintiff is entitled to the remedies sought in the Amended Plaint
- c. Costs.

## **Analysis and Determination.**

28. There are undisputed material facts in this case; that the deceased was arrested in his parents house at Eastleigh Nairobi on 8/07/2017 in presence of his family and his body eventually found at the City Mortuary on the 13/07/2007 and that the deceased's body was taken to the mortuary by some unidentified police officers on the date of his undisputed arrest the 8/07/2007 and later buried by his family.
29. The age of the deceased was confirmed by the death certificate as being 19 years. The plaintiffs' capacity to sue for damages on behalf of the deceased's estate is not in contestation as shown by a Grant of Letters Of Administration Ad Litem issued to his father on 16/06/2008 in Probate And Administration Cause No. 1109 of 2008. These documents were produced by consent of both parties as the plaintiffs bundle, and were duly admitted by the court.
30. The only and major issue for determination is who shot dead the deceased on 8<sup>th</sup> July, 2007 the day he was arrested?



The deceased's nature of death is confirmed by an autopsy conducted on his body by Doctors Ndungu JR, Andrew Gachii and Ndegwa on the 17/07/2007 who made the following observations that the cause of death of the deceased was haemorrhage due to head, chest and spinal cord injuries due to multiple gunshot wounds.

The defendants have denied involvement in the deceased death.

31. However the deceased's family by PW1 sister to the deceased led uncontroverted evidence that the deceased was arrested by two police officers at their house at Eastleigh in their presence and shoved in a white vehicle and driven away.
32. There is also evidence that the family and particularly PW1 knew the two police officers as they used to patrol their area Eastleigh, a fact not controverted by the defence. The defendants did not call any evidence whatsoever and therefore the plaintiffs evidence remained largely unchallenged
33. In the case Charterhouse Bank Limited (under statutory management) vs. Frank N. Kamau (supra) the court of Appeal while discussing the issue of uncontroverted evidence for failure to call evidence rendered that:-

“.....the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”
34. The court further stated that while the defendant's failure to testify has fatal consequences the onus is on the defendant to prove his claim on a balance of probabilities. This effect was held earlier in the case of Susan Mumbi Kefala Grenbedhin (supra) that the question of the court presuming adverse evidence does not arise in civil cases, the position in civil cases is that whoever alleges has to prove her case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial.
35. Upon careful consideration, for the totality of evidence the court disagrees with the defence submissions that the plaintiff has not proved its case to the required standard of prove despite the spirited cross-examination by its counsel, Mr. Martin Munene.
36. To that end, the court is convinced beyond any doubt that the two gentlemen who ambushed the plaintiff and his family at their Eastleigh home and carried away the young man (deceased) were known to the family as police officers who over a long time were patrolling their home area. The family knew them as such and even knew one of them by his nickname “Tyson”.
37. The court is further convinced that it is the same police officers without or with others who during the same night shot the Youngman for reasons only known to them and took his body to the city mortuary where it was found after about five days after their frantic search at all the nearby police stations.
38. The court is further convinced that the plaintiff's evidence was credible and believable and is capable to stand in absence of the rebuttal.
39. It is evident to those who may interrogate the defendant's cross-examination of the plaintiff PW1 that she was not moved at all and over and over reaffirmed her evidence that it is police officers who shot dead her brother and dumbered his body at the city mortuary.



40. Whereas the defendant urged the court of ignore newspaper cuttings on the death of the decease, suggesting that the police did shoot dead the deceased, this court is of the opposite view that all circumstantial evidence the newspaper articles included all go to give more evidence to the plaintiff's evidence that indeed it is the police officers from Pangani Police Station Nairobi County who tortured and shot dead the deceased.
41. For the foregoing the court comes to a finding that the plaintiff has proved his case against the defendants and particularly against the 2<sup>nd</sup> defendant that the deceased suffered his untimely death in the hands of the police officers and therefore shall be held liable in damages.

### **Quantum of Damages**

42. At time of his death, the deceased was 19 years old. No evidence of his having been working with a salary were established by the plaintiff. That in itself does not say that the deceased was not doing some useful work nor contributed to his dependant's welfare. He left behind his father and mother.
43. It is trite that a life lost cannot be adequately compensated in damages

#### **a. Special Damages**

44. It is trite that special damages ought not only to be pleaded but also strictly proved. A sum of Kshs. 35,000/= is pleaded constituting funeral expenses. There is sufficient jurisprudence from superior courts that rarely do families of a deceased loved one keep receipts of expenses expended in preparation for burial.

The court therefore shall allow special damages as pleaded.

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#### **b. Damages under the *law Reform Act***

45. Pain and Suffering.

The court shall award a sum of Kshs. 100,000/=

46. Loss of expectation of life. – the court relies on the following decisions to arrive at a sum of Kshs. 200,000/= under this sub-head, relying on the case of Patrick Kariuki Muiruri & 2 Others v. Dr. James Nganda Muiruri herein the court confirmed Kshs. 100,000/= and Kshs. 200,000/= respectfully for a young man of 29 years old in 2019 as awarded by the High Court.

#### **c. Damages under the *Fatal Accidents Act***

47. The deceased was a young man with no proven income. Despite the plaintiff stating that he was employed and had a monthly salary of Kshs. 25,000/=, no prove was tendered to the court.

Courts have had different approaches in assessment of damages for young persons who have no proven incomes and probably depending on their parents/guardians for upkeep. As held in the case of Kenya Power & Lighting Co. Ltd vs. E. K. O. & Another [2018]; Joel Ngugi J (as he then was) both multiplier and Global approaches are proper and each court is at liberty to apply either.

48. The multiplier approach poses a challenge where income is not definite though, as held by the Court of Appeal in the case of Roger Dainty v. Mwangi Omar Haji & Another [2004]eKLR the court would have considered or ascertained the reasonable multiplier or multiplicand in each case or the prospective



income of a deceased, the kind of work the deceased was engaged in and future prospects of working life.

49. In the present case, the plaintiff did not dwell on the work the 9 year old young man was engaged in as no proof was what he stated as having been employed was far from being proved.

50. This court will in the circumstances apply the Global approach in determining damages under the *Fatal Accidents Act*.

In Abraham V. Kwila [2023] eKLR, the deceased was 20 years old and survived by her parents and set to join University. The damages under the *Fatal Accidents Act*, the court (MugambiJ) applied the multiplier approach for the deceased who had not started working as opposed to the global approach which in this courts view was also proper and at the end arrived at a sum of Kshs. 2,519,240/= in damages under the *Fatal Accidents Act*.

51. Likewise in the case of Endege & Another (suing as legal representative of the *Estate of John Madede Endege (deceased) v. Bernard & Another – Civil Appeal No. 4 of 2021* ([2023]eKLR the court for an 18 years old unemployed student held that damages under the *Law Reform Act* are in addition to and not in derogation of awards under the *Fatal Accidents Act*, and therefore what the court ought to do is to take into account that the damages devolve on the same dependants and so must be taken into account in reduction of the damages recoverable under the *Fatal Accidents Act* ultimately.

52. It is also recommended that where it is not possible to ascertain the multiplicand accurately and income the global approach is more appropriate than the multiplier approach.

Consequently, this court in the circumstances of this case will apply the global approach in the assessment of damages under the *Fatal Accidents Act*.

53. The court of Appeal in the case of Tobiko suing as administrator of the estate of Allan Amugus Tobiko v. Ministry of Interior and Coordination of National Government (Supra) the court in 2023 adopted the Global approach method and for a 27 years old man and a graduate in a London University had no salaried income and confirmed an award of Kshs. 2,000,000/= as general damages and Kshs. 2,000,000/= as exemplary damages following a police shooting wherein he lost his life.

54. In Zeitun Juma Hassan (suing on behalf of the Estate of Abdul Ramadhan Biringe (deceased) V AG & 4 others [2014] eKLR.

In similar circumstances, the court adopted the global approach method and awarded the estate of the deceased Kshs. 2,000,000/= in respect on both general damages and lost years.

In the case of *Harun Thungu Wakoba V. the Hon. The Attorney General Misc. Appln. No. 1411 of 2004*, the court for violation of the 20 plaintiffs awarded each of their awards ranging from Kshs. 1,000,000/= to Kshs. 3,000,000/=

Likewise in the case of Arnacherry Limited v. Attorney General [2014] eKLR the Petitioner was awarded compensation of Kshs. 3,000,000/=

55. This court taking guidance from precedent including the above cited authorities will also apply the global approach in arriving at a reasonable and fair compensation in the sum of Kshs. 2,500,000/= in respect of damages under the *Fatal Accidents Act*.



**d. Costs**

56. Costs as provided under Section 27(1) of the *Civil Procedure Act* shall follow the event there being no special circumstances to persuade the court to depart from the general principle on award of costs. The plaintiff is awarded costs of the suit.

**Disposition**

57. The court finds and holds that the plaintiff has proved his case against the 1<sup>st</sup> defendants on a balance of probabilities as hereunder:-

- a. Liability – 100% against the 1<sup>st</sup> defendant.
- b. Damages
  - i. Under *Law Reform Act* Kshs. 300,000/=
  - ii. General damages  
Under the *Fatal Accidents Act* Kshs. 2,500,000/=
  - iii. Special damages Kshs. 35,000/=
  - iv. Interest at Court rates on the damages from the date of this judgment until payment in full.
  - v. Costs of the suit are awarded to the plaintiff payable by the 1<sup>st</sup> defendant.

58 Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**JANET MULWA**  
**JUDGE**

