



Ndambiri (Suing as the legal representative of the Estate of Mary Anne Wanjiru Ndambiri) v Tastic Supplies Ltd & another (Civil Case E002 of 2021) [2024] KEHC 12014 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL CASE E002 OF 2021
RM MWONGO, J
OCTOBER 8, 2024**

BETWEEN

BETH ANGELA WAKONYO NDAMBIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARY ANNE WANJIRU NDAMBIRI) PLAINTIFF

AND

**TASTIC SUPPLIES LTD 1ST DEFENDANT
PATRICK KINEGENI GITARI 2ND DEFENDANT**

JUDGMENT

Background And Testimony

1. This is a personal injuries case. The facts according to the Plaintiff's Amended plaint, on 6th September, 2021 claim, are that on or about 23rd December, 2020 at around 12.50 am the deceased, the late MaryAnne Wanjiru Ndambiri was lawfully driving motor vehicle registration number KBV 501D at Murubara area along Mwea – Embu road. The 2nd Defendant, being the driver of motor vehicle registration number KCG 429G Mitsubishi Fuso lorry so negligently drove, managed and or controlled the said motor vehicle that he caused it to collide with motor vehicle registration number KBV 501D. as a result of which the deceased lost her life.
2. Her claim is for damages as follows:
 - a) General damages under the *Fatal Accidents Act* and the *Law Reform Act* Laws of Kenya.
 - b) Special damages amounting to Kshs. 645,543/=.
 - c) Costs.



- d) Interest on (a), (b) and (c).
3. At the hearing PW 1- John Chege Ng'ang'a stated that he was an engineer and witnessed the accident happen. He testified that on 23rd December, 2020 he was driving motor vehicle registration number KBC 701V behind motor vehicle registration number KBV 501D. They were moving at a speed of about 80 Kmh, heading in the direction of Embu. It was at night when the accident occurred. He stated that the accident was caused by the negligence of the 2nd Defendant in the manner he drove motor vehicle Registration Number KCG 429G a Mitsubishi Fuso Lorry, which swerved into their lane.
 4. He testified that the accident occurred on the right side of the road as one faces Wang'uru from Embu direction. This clearly means that it occurred on the side of the deceased herein i.e on the left side as one faces Embu from Wang'uru direction. In cross examination, he said that he stopped on the roadside and told the police what he saw, but did not write a statement.
 5. Shown the police abstract, he admitted that his name was not indicated as a witness. However, he asserted that the police found him at the scene and he explained what he saw
 6. PW2 Beth Angela Wakonya the mother of the deceased adopted her statement dated 18th June, 2021 as her evidence in chief. She stated that she did not witness the accident. She met PW1 at the burial and he told her that he had witnessed the accident. The burial had over 1000 people in attendance as it had been advertised in the local newspapers. It happened on 27th December, 2020. She got the pay slip of her daughter from her documents. It had not been certified by her employer, the NIS.
 7. The defence also had two witnesses. DW1 Patrick Kenegeni Gitari adopted his statement dated 8th February, 2022 as his evidence in chief. He stated that he had been a driver for 20 years. He drove motor vehicle Registration Number KCG 429G on the material day. He confirmed that he was charged in Traffic Case no. 127/2021, and had initially pleaded not guilty, before he changed his plea to guilty on the understanding that he would only be fined and not lose his job. He stated that the 1st defendant was not charged.
 8. In cross-examination, he said that vehicle KBV 501D was driving fast and in a zig-zag manner in his lane. He stated that he accident occurred on the right side of the road when driving to Nairobi from Embu. Taken through the proceedings of the Traffic case, he admitted that the facts indicate that he veered off the road; that the accident resulted in the death of the deceased; that there was nothing showing the other vehicle was driving recklessly.
 9. DW-2 Paul Mutua Joseph testified that he was employed by the 1st Defendant as a turn boy. He worked in the vehicle driven by DW1. He stated that their company sells fresh produce such as bananas and ngwaci from Meru to Nairobi.
 10. He testified that on the material day, the accident occurred on the left side of the road as you face or are headed to the Nairobi direction. He said they are both still employed by DW1.

Plaintiff's Submissions

11. The Plaintiff submitted that through her testimony and the documents produced in Court, she proved her case. She pointed out that the 2nd Defendant was charged before the Magistrates Court at Wang'uru in Traffic Case Number E127 of 2021 for causing the death of the deceased by dangerous driving. He was convicted of that offence and fined Kshs.20.000/=and in default to serve four months in jail.
12. She submitted that the Defendant's testimony was a mere denial. The 1st Defendant though represented by an Advocate did not testify or call any witness.



13. The 2nd Defendant testified and called one witness who contradicted his testimony as to the side of the road where the accident occurred. Yet they are said to have been in the same motor vehicle at the time.
14. It was submitted that DW 2 told the Court that he was still a turn boy while the 2nd Defendant was the driver of Motor Vehicle Registration Number KCG 429G as at the time of testifying. This clearly contradicted what the 2nd Defendant had told the Traffic Court through his advocate in mitigation. At page 5 of the proceedings in the traffic case produced as PExh11, he had said that he was unemployed because the said motor vehicle had been written off.
15. The Plaintiff submitted that the 2nd Defendant and his witness were not credible witnesses and the Honourable Court should not believe their evidence. They submit that the Plaintiff proved that the 2nd Defendant was wholly to blame for the accident and that the 1st Defendant is vicariously liable as the owner of the said lorry and the employer of the 2nd Defendant.
16. On special damages the plaintiff submitted a bundle of receipts as PExb 5 which proved the special damages. The plaintiff asks the Court to enter judgment in the sum of Kshs. 645,543/= as proved and prayed in the Amended plaint
17. On general damages: the plaintiff submits that a death certificate was produced to prove that the deceased herein died at the prime age of 35 years. She enjoyed good health and a happy life. It was submitted that a sum of Kshs. 100,000/= would be fair and reasonable compensation for loss of expectation of life.
18. On loss of dependency, it was submitted that the deceased was aged 35 years and was earning a monthly salary amounting to Kshs.187,400/=. A letter and a certified copy of her pay slip were filed in Court on 8th December 2023 from her employer as demanded by the Defendants to prove her earnings. This was in addition to a copy of the pay slip filed at the time of filing the suit. The deceased had three dependants who were her mother and her two children aged 11 and 5 years respectively.
19. It was submitted that at the time of her death, the plaintiff had 25 years more to work before reaching the retirement age. There were prospects of promotion too. This being the case, a multiplier of 23 years would be reasonable. A multiplicand of 2/3 is also reasonable in the circumstances of this case. The plaintiff submits that the deceased's estate is entitled to be awarded a sum of Kshs. 34,481, 600/= made up as follows: $187,400 \times 12 \times 23 \times 2/3 = 34,481,600/=$

Defendants' Submissions

20. On their part, the defence submitted that PW-1 was an eye witness who testified that he was at the scene of the accident when it happened. During cross examination, he could not explain why he was at the scene of the accident at around 0050 hours which was a few minutes before 1:00am at night at a time when the COVID-19 curfew was in place.
21. It was submitted that PW-2 did not witness the accident. Thus, her testimony as to the negligence of the 2nd Defendant is a mere statement and lacks basis.
22. The defendant submits that DW-1 testified that he was driving M/V KCG 429G from Meru Town towards Nairobi transporting fresh produce in the company of Paul Mutua Joseph DW-2. He testified that the accident occurred on the right side as you face Nairobi road towards Embu direction. He also stated that he took a plea of not guilty but was advised by the 1st defendant company's advocates and he changed his plea to guilty. DW-2 Paul Mutua Joseph testified that on the fateful day the accident occurred on the left side of the road as you face Nairobi direction.



23. The defence pointed out that the police abstract filed by the Plaintiff did not blame the Defendants' driver for the accident and the Plaintiff did not call the police officer to shed more light as to how the accident occurred and to produce sketch maps of the scene.
24. The defendant submitted that DW-1 and DW-2 are the two witnesses who can be relied upon and they both blamed the deceased for driving recklessly at a very high speed and encroaching into their lane.
25. Citing the case of Simon Kimani v Julius Robi (2018) eKLR, the defence pointed out that the High Court in Migori, dismissed an appeal from the plaintiffs for reasons that the plaintiff failed to adduce evidence showing how the defendant was to blame for causing the accident. The lower court's decision dismissing the matter for want of liability, was upheld on appeal.
26. The defendants submit that the Plaintiff has not proved her case on a balance of probability and urge this honourable court to dismiss the Plaintiffs case. They, however, urges that should the court find that the Defendant was negligent in any way, it should consider the above cases and the testimonies of the parties and apportion liability equally between the parties
27. They rely on Hessein Omar Farah v Lento Agencies [2006] eKLR where the Court of Appeal held that "where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame", a position that was maintained by the High Court in Matunda Fruit Bus Services Ltd v Moses Wangila & another [2018] and Eliud Papoi Papa v Jignesh kimar Rameshibai Patel & another [2017] eKLR.
28. The defendant submitted on three prongs as to the actual quantum of damages to be awarded.
29. On General damages for pain and suffering; the defendant submitted that this issue was decided in the case of Sukari Industries Limited v Clyde Machimbo Juma, Homa Bay HCCA NO.68 of 2015 [2016] eKLR, where the deceased passed on immediately after the accident. On this authority, the defence proposed that Kshs.20,000 is sufficient compensation under this head.
30. On Loss of expectation of life: the defence proposed that the conventional award of Kshs. 100,000/- would suffice herein, as in the case of Kimunya Abednego quoted above and the case of Taita Taveta University College v Rugut & Maritim (Suing on their own behalf and as the administrators of the estate of the late Cosmas Kipserem Kipkoech (Civil Appeal E009 of 2021) [2022] KEHC12772 (KLR) (31 August 2022) where the court awarded Kshs.100,000/- as loss of expectation of life.
31. On Loss of dependency: the defence pointed out that during cross examination the Plaintiff confirmed that the pay slip filed in court was not certified as a true copy and that she allegedly got it from the deceased's documents. After close of the Plaintiffs case, the plaintiff filed a letter allegedly from NIS. That letter was however not produced as an exhibit before court hence cannot be relied on. Instead the Plaintiff should have sought leave of this court to open the Plaintiffs case and have the documents produced as exhibits. They urge the court not to rely on the NIS letter and attached payslip.
32. Further, during cross examination PW-2 confirmed that the alleged pay slip was not from the employer but from the deceased's documents. As such it was submitted that the alleged payslip is not evidence of the deceased's earning as it was not certified and was not produced by the maker, and that there is no proof before the court that the deceased was earning an income.
33. On this, the defence relies on [*Gerald Mbale Mwea v Kariko Kibara & Another \(1997\) KLR \(Civil Appeal No.112 of 1995\)*](#).



34. With regard to Special Damages it was urged by the defence that the Plaintiff's claims for Kshs. 645,543 as special damages being Kshs. 639,178 for funeral expenses and Kshs.6,365 for obtaining letters of administration were over stretched.
35. The defence pointed out that for funeral expenses the Plaintiff had confirmed that the burial was during the time when COVID 19 restrictions were still in place on 27th December, 2020 yet the receipts filed in court showed that the funeral catered for 1,000 guests and three tents with 900 seats in total, which was a clear violation of the Government's Covid 19 Directives.
36. It was submitted that that Kshs. 50,000 for funeral expenses is reasonable in the circumstances. Further that for the expenses for the application for limited grant only one receipt for Kshs. 2,885 was availed to prove the same. As such, Special damages therefore amount to Kshs.52,885.
37. In conclusion the defence proposal for damages was: Pain and suffering: Kshs.20,000/=; Loss of expectation of life Kshs.100,000/=; Special Damages Kshs.50,885/= all totalling Kshs.172,885/=; from which contributory negligence would be deducted

Issues for Determination

38. The issues arising for determination are as follows:
 1. Whether the defendants were liable for causing the accident.
 2. Whether the plaintiff is entitled to general damages, and if so, how much.

Analysis and Determination

Liability for the accident

39. The facts of the case have been set out above.
40. The occurrence of the accident is not disputed. The claim is that on or about 23rd December, 2020 at around 12.50 am the deceased, MaryAnne Wanjiru Ndambiri was lawfully driving motor vehicle registration number KBV 501D at Murubara area along Mwea – Embu road; that it collided with the 1st defendant's Mitsubishi Fuso lorry registration number KCG 429G lorry driven by the 2nd defendant; and that the defendants were at fault.
41. PW1, who said he was an eyewitness, testified that the accident was caused by the negligence of the 2nd Defendant in the manner in which the lorry Registration Number KCG 429G was driven. He testified that the accident occurred on the right side of the road as one faces Wang'uru from Embu direction.
42. DW1 the driver of the lorry Registration Number KCG 429G, stated that his vehicle veered off the road before the accident occurred, as the plaintiff's vehicle was encroaching on his lane. He braked and tried to swerve but the plaintiff's vehicle rammed into his vehicle. In cross examination, he was pressed to confirm that he was charged in traffic case No. 127/2021; that he pleaded not guilty, but finally pleaded guilty; and that he was fined Kshs 20,000/- or four months imprisonment in default.
43. DW 2 Paul Mutua Joseph, the turnboy in the lorry, testified that on the fateful day the accident occurred on the left side of the road as you face the Nairobi direction.
44. From the record of traffic court proceedings in Wang'uru Magistrate's Court Traffic Case No E127 of 2021 placed before the court and on which DW2 was cross examined, the Plaintiff was able to prove that the 2nd Defendant was charged and convicted in Traffic Case Number E127 of 2021 for causing



the death of the deceased herein by dangerous driving. He was convicted of that offence and fined Kshs.20.000/=and in default to serve four months in jail.

45. The particulars of the charge in the Traffic Court were that, inter alia: the defendant, as driver of Mitsubishi Fuso lorry registration No KCG429G drove:

“...on the said road recklessly at a speed and in a manner which was dangerous to the public having regard to the circumstances of the case, including the nature, condition, and use of the road in that you failed to keep your proper traffic lane whereby you hit motor vehicle Reg No KBV 501D make Subaru Impreza which was being driven from the opposite side by one Mary Anne Wanjiru Ndambiri who died on the spot ”

46. From the above evidence taken in totality, the plaintiff was able to prove that the defendants were wholly liable for causing the accident. I so find and hold.

Entitlement and Quantum of damages

47. The plaintiff is entitled to damages under both the *Law Reform Act* and *Fatal Accidents Act*.

Damages under the *Law Reform Act*

Pain and suffering

48. The Plaintiff did not make any submissions under this head.
49. The defendants submitted that the issue of damages under this head was decided in the case of Sukari Industries Limited vs Clyde Machimbo Juma, Homa Bay HCCA NO.68 of 2015 [2016] eKLR, where the deceased passed on immediately after the accident, and based on the above authority, Kshs.20,000 was awarded.
50. The death certificate indicates that the deceased died along Mwea- Embu road where the accident occurred.
51. In the case of *Kioko Peter v Beatrice Keli Mbuvi (Suing as the legal representative of the Estate of Amos Mutunga (deceased) Civil Appeal 136 of 2019* [2022] eKLR the appellate court reduced the trial court's award of Kshs.20,000/= to Kshs.10,000/=for general damages for pain and suffering where the deceased died on the same day.
52. That being a recent case, an award of Kshs 10,000 for pain and suffering is reasonable.

Loss of expectation of life

53. The plaintiff urges the Court to award Kshs 100,000 for loss of expectation of life. The defendants, similarly submitted that an award of Kshs.100,000/= is sufficient under this head.
54. In Antony Njoroge Ng'ang'a (Legal representative of the Estate of the late Fred Nganga Njoroge aka Fred Ng'ang'a Njoroge) v James Kinyanjui Mwangi & 2 Others [2022] eKLR the Court awarded Kshs. 100.000/=under this head and went ahead to quote the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, that stated that the conventional award for loss of expectation of life is Kshs.100,000/=.
55. The defendants relied on the case of Taita Taveta University College v Rugut & Maritim (Suing on their own behalf and as the administrators of the estate of the late Cosmas Kipserem Kipkoech) (Civil Appeal E009 of 2021) [2022] KEHC12772(KLR)(31 August 2022) the court awarded Kshs.100,000/- as loss of expectation of life.



56. An award of Kshs 100,000 is reasonable.

Damages under the Fatal Accidents Act

57. Section 4(1) of the Fatal Accidents Act provides as follows:

“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”

Loss of Dependency

58. The plaintiff pleaded that the deceased was aged 35 years and was earning a monthly salary amounting to Kshs.187,400/=. A copy of her pay slip was filed at the time of filing the suit. It was not certified as a true copy by the employer. The Personnel Number indicated on it is PF No 00000442 in the name of Maryanne Wanjiru Ndambiri.
59. It was argued that the said payslip was not stamped as a certified true document by the employer hence could not be relied upon. The plaintiff in her pleadings stated that the deceased worked for NIS and produced the said payslip. Her mother admitted that she found it among her daughter papers. The defendant urged that I should not take the payslip into account.
60. It is not unusual for a person to maintain their own payslips which may be found among one's papers. This might include ID cards, PIN certificates, insurance policies, share certificates or copies thereof etc. Documents of this nature found by a grieving mother or relative should be treated as such. I reject the idea that a person's payslip found amongst their papers, pleaded and exhibited, should be discredited because they are not stamped and certified by the employer, particularly if not challenged at an early stage of the proceedings or at the Pre-trial.
61. In light of the foregoing, I would take the payslip into account unless shown to be inauthentic. I so hold.
62. In any event, a letter from her employer the National Intelligence Service (NIS) and a certified copy of her pay slip were later filed in Court on 8th December, 2023 as demanded by the Defendants as proof of her earnings.
63. The deceased had three dependants who were her mother and her two children aged 11 and 5 years respectively despite the defendants' submission that during cross examination the Plaintiff confirmed that the pay slip filed in court was not certified as a true copy, and they urge the court not to rely on the document as it was not produced as exhibit in court.
64. Further I note that the plaintiff pleaded in her plaint that the deceased was an NIS officer. She produced her pay slip as evidence of her employment. Further, in her death certificate, it was indicated that she was a civil servant. The defendants had not objected to or challenged the payslip



65. I have carefully considered the certified payslip and the one originally filed. The PF Nos on both are the same and so are all the other details. I have no reason to doubt that the deceased worked with the NIS nor that she earned the amount stated in her original uncertified payslip.
66. The plaintiff submits that the estate of the deceased is entitled to be awarded a sum of Kshs. 34,481,600/=. The defendant submits that there is no proof before this court that the deceased was earning an income.
67. The courts have consistently held that loss of dependency is a question of fact, to be determined on a case by case basis.
68. In *Moses Maina Waweru v Esther Wanjiru Githae* (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR it was held that the criteria to be used in determining an award for loss of dependency for a deceased who left behind dependants is: the number of dependants, the age of the dependants and the level of dependency. In my view the award ought to be higher where the dependants are young. The age at which the deceased died is also a relevant factor.
69. The deceased was aged 35 years and was earning a net monthly salary amounting to Kshs. 100,000/=. Her dependants were her two children aged 5 and 11 years respectively, and her mother, PW2. Birth certificates for her children were exhibited as part of the documents of the Plaintiff.
70. The plaintiff submitted that: the deceased had 25 years more to work before reaching the retirement age; that she had prospects of promotion; that this being the case, a multiplier of 25 years would be reasonable; and that a multiplicand of 2/3 is also reasonable in the circumstances of this case.
71. I think the reasonable multiplier would be 18 years given the vagaries of life, and I apply that figure. The net salary indicated on the deceased's payslip as filed is Kshs 100,049.85. The deceased's estate is thus entitled to be awarded a sum calculated as follows: $100,049.85 \times 12 \times 18 \times 2/3 = 14,407,178.40/ =$ for loss of dependency.

Special damages

72. The Plaintiff claims for Kshs. 645,543 as special damages being Kshs. 639,178 for funeral expenses and Kshs. 6,365 for obtaining letters of administration. The defendants object to the plaintiffs claim and urged the court to award special damages of Kshs. 52,885/-.
73. In the case of *Jacob Ayiga Maruja & Another v Simeon Obayo* [2005] eKLR the court held that:

“We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the Kshs 60,000/= we have awarded herein apply strictly to the circumstances of this case.”
74. The plaintiff testified that the deceased's funeral was attended by over 1000 people as it had been advertised in the local dailies. Given, as pointed out by the defence that this was during Covid restrictions, I would reduce the amount by one half, hence the amount for catering of Kshs.125,000/= is reasonable.
75. The receipts availed, that were legible and payable as special damages are as follows:



- a. Kibugi Funeral home receipts 8,200/=
- b. Letter for Administration.....6,365/=
- c. Flower receipts3,000/=
- d. Catering receipt (less half) 250,000/2.....125,000/=
- e. Media advertisement - Daily Nation 35,871 x 2=.....71,742/=
- f. Coffin77,000/=
- Total.....291,307/=

73. As already noted, I found the Defendants fully liable.

Disposition

74. In the result the plaintiff is entitled to damages as follows:

- a. Loss of expectation of life.....100,000.00
- b. Pain and suffering.....10,000.00
- c. Loss of dependency.....14,407,178.40
- d. Special Damages.....291,307.00
- Total 14,808,485.40

75. The plaintiff shall be entitled to interest on damages awarded at court rates, and to the costs of the suit.

76. Orders accordingly.

DATED AT KERUGOYA THIS 8TH DAY OF OCTOBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Njagi - holding brief for Kathungu for Plaintiff

Njoki - for Defendant

