



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI CIVIL DIVISION

CIVIL CASE NO. 32 OF 2007

PROTUS WANGILWA.....1ST PLAINTIFF

EVANS SIMIYU..... 2ND PLAINTIFF

(Both Suing as administrator to the Estate of the late Rajab Norotso Mwandia-Deceased)

- VERSUS -

ERNEST MUNENE T/A KARAMBE PETROL STATION.....DEFENDANT

JUDGMENT

By a plaint dated 15th January, 2007 and filed on 17th January, 2007 the plaintiffs lodged a claim as against the defendant herein on behalf of the Estate of Rajab Norotso Mwandia-Deceased seeking general damages under the Fatal Accident Act and the Law Reform Act, costs of the suit, interest and costs awarded at courts rates and any other or further relief that this court may deem fit to grant.

The suit was dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules. However, following an application by the plaintiffs, the suit was reinstated vide a ruling dated 20th July, 2018. Subsequently, the parties sought to settle the suit out of court but failed to agree on a settlement. The suit was certified ready for hearing on 15th October, 2019 parties having complied with the provisions of Order 11 of the Civil Procedure Rules.

The facts of the case are that the deceased worked for the defendant at his petrol station known as Karambee Petrol Station along Juja Road near Mlango Kubwa as a guard/watchman. The plaintiffs pleaded that on 16th February, 2005 while lawfully working at the defendant's premises, Rajab Norotso Mwandia-Deceased, was fatally shot by thugs who had accessed the guarded premises. The plaintiffs further pleaded that the defendant was negligent and breached his statutory duties, particulars thereof were listed under Paragraph 5 of the plaint. The Plaintiffs pleaded the following particulars of negligence of the defendant:

- a. Failing to erect a wall that was not easy for thugs to jump over and access the premises
- b. Failing to provide escape route in the premises to help his guards and particularly the deceased to escape incase of attack and or invasion by thugs,
- c. Failing to ensure that the guarded premises/petrol station was well lit to enable the deceased see and or notice the approaching thugs,
- d. Failing to assign the petrol at least three (3) guards commensurate to the size of the premises and thus help notice and or discourage invasion and or attack by thugs,
- f. Failing to ensure there was no unnecessary accessible openings to the premises and thus help the guards and in particular the deceased to notice any approaching individual,
- f. Failing generally to provide a secure working environment.

The plaintiffs called one witness, **Evans Simiyu Masibai (PW1)**, the deceased's brother, who relied on his written statement filed on 16th October, 2019. PW1 testified that the present suit was filed on behalf of the Estate of his deceased brother Rajab Norotso Mwandia and

produced a copy of Limited Grant of Administration as P.Exh 1. He further confirmed that the deceased died at the age of 24 years as a result of a gunshot injury he sustained in the course of his employment at the defendant's premises and produced a copy of the death certificate No. xxx issued on 04.07. 2005. It was PW1's testimony that the deceased left behind four (4) beneficiaries; Narotso Ibrahim-Father, Mary Narotso-Mother, Protus Wangila Masafu-brother and himself as evidenced by the Chief's letter dated 03.06.2006 and produced. According to PW1, the deceased earned a monthly salary of Kshs. 5,000 as shown by Form L.D. 104/1 produced as P.Exh. 4.

In cross-examination, PW1 stated that he was not at the scene where the shooting occurred. He reiterated that the deceased supported their elderly parents and that they negotiated with the defendant who maintained that he had insured his employees and that they should follow up the claim with the insurance company.

The plaintiffs filed their submissions dated 14th July, 2021 which raised the following issues for determination ;

- i. Whether the plaintiffs have capacity to institute the present suit on behalf of the Estate of the Late Rajab Narotso Mwandia**
- ii. Who are the proper dependants of the late Rajab Narotso Mwandia**
- iii. Who was blamed for the accident that occurred on 16th February, 2005**
- iv. Whether the deceased estate suffered loss and damages as alleged under paragraph 7 of the plaint.**
- v. Remedies under the Work Injury Benefits Act (Cap 236) Laws of Kenya**
- vi. Remedies under the Law Reform Act, Cap 26**

On the first issue, the plaintiffs submitted that by virtue of the Limited Grant of Letters of Administration Ad Litem issued on 19th May, 2006 to them they have the *locus* to institute the present suit on behalf of the estate of the deceased as provided for under Section 2 of the Law Reform Act and the Fatal Accidents Act. It is the plaintiff's further submissions that the deceased had four beneficiaries as listed by the chief's letter of 3rd June, 2006 and since the issue of dependency was not challenged at the hearing, the four beneficiaries should benefit from the proceeds of the Deceased's estate.

The Plaintiffs asserts that it is uncontroverted that the deceased was employed by the defendant as a security guard or watchman and that he sustained gunshot injuries while on duty at the defendant's premises from which he succumbed. On liability, the plaintiffs have relied on the case of **Makala Mailu Mumende v Nyali Golf & Country Club [1989] eKLR** where the Court of Appeal held that;

“Such being the circumstances, it is essential that employers of security workmen take reasonable care to protect such employees from risks which can reasonably be foreseen. After all, the keen demand for security personnel means there is a role for them to play. It seems to me that all the merits in this case are in favour of compensating the plaintiff for the loss of earning and for pain and suffering.”

Similarly, the plaintiffs have made reference to the holding of Justice Mwera (as he then was) in the case of **SAMMY MWEU MUTUTU VS PHILIP MULILI MULI & ANOTHER [2002]eKLR** who agreed with the MAKALA CASE cited above. The plaintiffs submit that the defendant ought to be held 100% liable for the deceased death for failing to provide a secure working environment.

It is submitted for the plaintiffs that the deceased was 24 years old earning a salary of Kshs. 5,000 per month at the time of death and still had 31 years to retirement thus his estate has suffered loss and damages as a result hence should be compensated. The plaintiffs have cited the case of **RADHAKRISHEN M. KHENMANEY VS MRS LOCHABA MURLIDHAR [1958] EA 268 page 269** where Sir Own Corries Ag. JA cited with approval the principles applied in **PEGGY FRANCES HAYES & OTHERS V CHUNIBHAI J PATEL & ANOTHER CC 173/1956**, in which the Chief Justice observed that;

“The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased, (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants.”

Counsel for the plaintiffs submit that the principles applicable to assessment of damages under the Fatal Accident Act was further espoused in the case of **B O E & ANOTHER (SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE V E E) VS WELLS FARGO COMPANY LIMITED [2016]eKLR** where the court laid down the following principles;

- “a) The court must establish the value of annual dependency which value is the multiplicand.**
- b) The value is derived from the net earnings of the deceased.**
- c) The court is to multiply the multiplicand by a reasonable figure representing the life expectation of the deceased which is referred to as the multiplier.**
- d) The expectation of life and dependency of the dependants and chances of life of the deceased and dependants are also**

relevant factors.

e) The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature. See Alliance One Tobacco (K) Ltd. V. Isaac Jandi Mbane (2015) eKLR.”

It is further submitted on behalf of the plaintiffs that since the deceased estate has not been compensated under the Work Injury Benefit Act, despite being insured by the defendant, this court should consider the same. On the Remedies under the Law Reform Act, the plaintiffs submit that having died on the same day, this court should award the deceased’s estate Kshs. 300,000 on account of pain and suffering. The plaintiffs have made reference to the case of **B O E & Another (SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE V E E) VS WELLS FARGO COMPANY LIMITED (Supra)** where the court awarded the deceased who was shot dead in line of duty Kshs. 300,000 under the head of pain and suffering.

Additionally, the plaintiffs submit that they have suffered great loss after the death of deceased who provided for his parents and brothers. Relying on the case of **B O E & ANOTHER (SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE V E E) VS WELLS FARGO COMPANY LIMITED (SUPRA)**, the plaintiffs submit that an award of Kshs. 150,000 would be sufficient compensation under loss of life.

On loss of dependency, the plaintiffs submit that dependants of the deceased estate are the deceased father, mother and two siblings as highlighted in the chief’s letter of 3rd June, 2016. In conclusion, the plaintiffs pray for damages as against the defendant as follows;

Compensation under the Work Benefit Injury Act

Liability	100%
Pain and Suffering	300,000
Loss of Life	150,000
Loss of dependency	<u>1,240,000</u>
TOTAL	<u>1,690,000</u>

Defendant’s Case:

The defendant in opposition to the plaintiffs’ claim filed his statement of defence on 28th February, 2007 through the firm of Penina Oloo & Co. Advocates. The defendant denied that the plaintiff was attacked by robbers and also denied all the particulars of negligence and breach of contract attributed to him. He maintained that he took all precautions, provided safe and proper system of working and effective protection for the deceased and all the employees so as not to expose them to unnecessary or foreseeable risk of damage or injury. The defendant averred that if indeed the alleged incident occurred the same was wholly caused by and/or contributed to substantially by the deceased’s negligence and particularized what he claimed was the negligence of the plaintiff as follows:

- a. Exposing himself to risk of damage or injury of which he knew or he ought to have known by virtue of the nature of his job.
- b. Failing to wear and/or use protective wear availed to him in the course of his employment.
- c. Failing to take any or any adequate precautions for his own safety
- d. Volenti non fit injuria
- e. Exposing himself to his attackers instead of finding cover and seeking help
- f. Failing to notice and make use of the provided exit and escape from his attackers.

The defendant called two witnesses **DW1(Isaak Muema)**, who worked as an attendant at the defendant’s petrol station, sought to adopt his statement sworn on 20th February, 2012. DW1 confirmed that he was an employee of the defendant and was present when the incident occurred when the deceased, working as a night watchman at the defendant’s premises was shot by robbers. He stated that on the night of 16th and 17th February, 2005 when they had just closed the business and were counting the money, robbers carrying a “Kyondo” invaded the petrol station, brandishing a gun and ordered everyone to lie down after which they took all the monies. According to DW1, the thugs shot in the sky as they were leaving, that he immediately pressed the alarm and after ten minutes back up rescue arrived at the petrol station. That they then realized that the deceased was missing and on searching, they found him near the wall of the petrol station with a gunshot wound which he later succumbed to while being rushed to the hospital. On cross examination, DW1 stated that it seemed the deceased wanted to escape by jumping over the fence.

Ernest Munene, DW2, the defendant testified that he is the owner of Karambee Petrol Station, he also sought to rely on his sworn testimony dated 20th May, 2019. DW2 confirmed that the petrol station was well lit and fenced on three sides leaving the front part open to enable access to vehicles. According to DW2, he had recruited three watchmen all with alarm buttons and a back-up alarm from Securicor

Company. It is the DW2 testimony that he had instructed his employees to comply with thieves' demands and not to resist when faced with a robbery situation. DW2 further denies negotiating with the deceased's family but confirm that he informed them that he was insured.

In his submissions, the defendant urges this court to dismiss this suit as the plaintiffs have failed to adduce evidence linking the defendant to the particulars of negligence pleaded. Counsel for the defendant submits that the deceased met his death due to failure to comply with the defendant's instructions to comply in the event of such an attack but decided to escape. He contends that the rest of the staff who cooperated with the thugs were left untouched and therefore, the defendant cannot be held liable for the deceased's negligence action that cost him his life.

Despite the foregoing, the defendant agrees that only the wife, husband, parent and child of a deceased person are entitled to benefit from his estate. It is his contention that in the present case the claim should fail as there was no dependency proved. Counsel submits that the deceased neither was married nor had children further, the deceased parents failed to adduce evidence demonstrating their identity, existence and that indeed they got support from the deceased.

The defendant has submitted that an award of Kshs. 10,000 is sufficient for pain and suffering since he died on the same night he was shot. Reliance is placed on the case of **SHAMJI HAJI & BROTHERS LTD -VS- ESTHER ANNECZEA OPIYO & ANOTHER suing as the legal administrators of the estate of DAVID OMONDI OWUOR (deceased) (2016)eKLR** in which the deceased was awarded kshs. 10,000/- after he died on the spot in a road traffic accident. Similarly reference has been made to the case of **HYDER NTHENYA MUSIZI & ANOTHER -VS- CHINA WU YI LIMITED & ANOTHER (2017)eKLR** where an award of kshs. 10,000/- was found reasonable for a deceased who died at the scene of the accident.

On loss of expectation of life, the defendant submits that a sum of Kshs. 80,000/- is sufficient compensation. Reliance is placed on the case of **FESTUS ALCOZO & ANOTHER -VS- DICKSON TABU OGUTU [2016] eKLR** where the court awarded Kshs. 80,000/- for loss of expectation for a plaintiff aged 30 years.

Lastly, the defendant submits that a multiplier of 20 years is sufficient and since the deceased was not married a multiplicand of 1/3 should be applied. In support, the defendant has cited the case of **ALEX KOECH & ANOR.-VS- PATRICK K. NGUGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHN MUYA, DECEASED [2018]eKLR** where a multiplier of 20yrs was upheld as appropriate for a deceased person of 24years. In summary, the award proposed by the defendant is summarized as follows:

Pain & suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs. 80,000/
Loss of dependency	Kshs. 400,000/- (5,000x 20x12x1/3)
Total	kshs. 490,000/-

Analysis and Determination:

I have considered the pleadings, submissions and various authorities cited in support thereof. I have also examined both the pleadings and evidence tendered. From the pleadings and evidence, the issues for determination are liability and quantum under the Law Reform Act and the Fatal Accidents Act.

LIABILITY:

On the first issue of liability, i note that it is undisputed that the deceased died following a gun shot wound while working at the defendant's premises. The defendant argue that the plaintiffs have failed to prove any of the particulars of negligence as against him and has attributed the deceased's death to failure to comply with instructions of the robbers. A perusal of the pleadings and the testimony of DW1 does not indicate that the deceased was shot while trying to run away. The deceased being a watchman meant that his duties were outside the petrol station premises and not inside counting money. Therefore, it is possible that the robbers shot him because he was a threat to their mission. There is also no evidence adduced to show that the deceased heard but failed to comply with any of the orders given by the robbers. According to DW2, the petrol station was fenced on three sides with an opening on the front for access and was very well lit. From this description, I find it hard to imagine that the deceased had a chance of escaping the robbers or even avoid being detected.

That said, I acknowledge that the defendant had taken some steps to ensure the safety and security of the three guards/ watchmen by ensuring that the premises was well lit, fenced and providing alarm buttons in case of an emergencies. I am however of the view that head helmets for the watchmen would have gone along way to secure the deceased. Without any protective gear, the deceased was a sitting duck outside a well-lit compound with only one exit, it is for this reason that this court is not satisfied that the deceased was placed in a safe environment. Apart from the entrance at the front, there is no evidence that there were other exit routes which could have assisted the deceased. Consequently, I refuse the defendant's defence that the deceased was negligent and exposed himself to risk and hold the defendant 100% liable for the death of the deceased in the course of his duty.

QUANTUM:

i. Remedies under the Work Injury Benefits Act, Cap 236

The plaintiffs only sought relief under the Fatal Accident Act and the Law Reform Act. The prayer for remedy under the Work Injury Benefits Act, Cap 236 was only raised in the submissions, this court is of the view that pleadings are the bedrock upon which all the

proceedings derive from and that the duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. It is for these reasons that this court declines to delve into the remedies under the Work Injury Benefits Act. I am guided by the decision of the Court of Appeal in the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANO. VS. STEPHEN MUTINDA MULE & 3 OTHERS (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **ADETOUN OLADEJI (NIG) VS. NIGERIA BREWERIES PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

ii. Award under the Law Reform Act;

a. Pain and suffering

The plaintiffs, submit that an award of Kshs. 300,000 for pain and suffering is reasonable while the defendant on the other hand is of the view that an award of Kshs. 10,000 is sufficient for pain and suffering since he died on the same night he was shot. The evidence on record leaves no doubt that the deceased died on the way to the hospital the same night he was shot. The death certificate produced confirms that the deceased died on 16th February, 2005. I find that an award of Kshs. 80,000 under this head is reasonable as the award by the courts under this head ranges between Kshs. 10,000 and Kshs. 100,000. I am in agreement with Justice Majanja in the case of **SUKARI INDUSTRIES V CLYDE MACHIMBO JUME [2016] eKLR** where he state that:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation.”

b) Loss of Expectation of Life

The plaintiffs have asked this court to award Kshs. 150,000 under this head while the defendant on the other hand has submitted that an award of Kshs. 80,000 is sufficient considering his age at the time of death. In the case of **CITI HOPPA BUS LIMITED & ANOTHER V MARIA CLARA ROTA [2021] eKLR** where this court held that the award for loss of expectation of life is not determined by the level of happiness the deceased was expecting to enjoy during his life or on how poor the deceased was. This court further stated that being a nominal award it takes into consideration the fact that a life had been cut short. From the record, the Death Certificate indicate that the deceased was 24 years old at the time of death therefore I find that the deceased’s age was proved. I do award the plaintiff Kshs.100,000 for loss of expectation of life.

iii) Damages under The Fatal Accident Act

a) Loss of Dependency

Evidence before the court confirms that the deceased neither was married nor had children. There is evidence that his parents and two siblings depended on him. It is on this basis that the Plaintiffs proposed a dependency ratio of two-thirds (2/3). The defendant however, submitted that a dependency ratio of one-third would be reasonable. The chief’s letter dated 3rd June, 2006 indicate that he left behind four dependants; his father, mother and two siblings. However, Section 4(1) and Section 8 of the Fatal Accident Act defines who qualifies to be a beneficiary of a deceased estate. Section 4(1) states:-

“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:...

While Section 8 of the Fatal Accidents Act states;

8. Plaintiff to deliver full particulars of the persons for whom damages claimed In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.”

Additionally, in the case of **ELIZABETH GACOKI W/O KIHARA –V- PAUL EKULAN & ANOTHER (1987) eKLR** the court held:-

"The Fatal Accidents Act, Cap 32 Laws of Kenya, does require that the full particulars of the deceased's dependants be set out in the claim, presumably to give some indication as to the extent of their dependency and the duration of the dependency.

The plaintiffs were under a duty not only to supply those particulars but also to prove by evidence on a balance of probabilities the extent of their dependency on the deceased and, also, the duration of that dependency.”

In the present case the particulars of the deceased dependants have been listed at paragraph 7 of the plaint to include;

Narotso Ibrahim	62 years	Father
Nanjala Amina Narotso	57 years	Mother

From the above, it is clear that the only people dependants on the deceased were his parents and the plaintiffs claim of dependency under the Fatal Accidents Act is misplaced and fails as they do not qualify as dependents under the Fatal Accidents Act. Their claim is neither pleaded nor supported by any evidence before the court and since parties are bound by their pleadings, i consequently, dismiss their claim and place the dependency ratio at 1/3.

It is uncontroverted that the deceased worked as a watchman at the defendant’s premises earning a monthly income of Kshs. 5,000. The deceased was 24 years old, in good health and at the prime of his life prior to his death. It was the plaintiffs’ submissions that with a possible retirement of 55 years, a multiplier of 31 years be applied while the defendant opined that a multiplier of 20 years is reasonable. In the case of **DAVID KIMATHI KABURU V GERALD MWABOBIA MURUNGI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES MWENDA MWOBOWIA (DECEASED)(2014)eKLR** the court applied a multiplier of 35 years where the deceased was 21 years old and working in a private company. In the present suit, there is no evidence that the deceased had ill health. However taking into account life’s other vicissitudes, I will apply a multiplier of 32 years. The computation for loss of expectation of life would therefore be as follows:-

$Kshs.5,000 \times 12 \times 31 \times 1/3 = Kshs. 620,000$

In the end, judgment is entered in favour of the plaintiffs as against the defendant as follows;

Liability	100% as against the defendant
Compensation under the Work Benefit Injury Act	NIL
Award under the Law Reform Act;	
Pain and Suffering	Kshs. 80,000
Loss of expectation of Life	Kshs. 100,000
Award under the Fatal Accident Act;	
$Kshs.5,000 \times 12 \times 31 \times 1/3 =$	<u>Kshs. 620,000</u>
Total	<u>Kshs. 800,000</u>

The low amounts awarded under the Law Reform Act sufficiently take into account the further award under the Fatal Accidents Act.

It is established that costs follow the event. In the present case, the plaintiffs have proved their case and are therefore entitled to costs and interest, this was the holding in **ORIX OIL (KENYA) LIMITED V PAUL KABEU & 2 OTHER [2014] eKLR** where the court stated:

“...the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.”

The plaintiffs shall have costs and interest.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2021

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S. CHITEMBWE

JUDGE