



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 10 OF 2017**

**TABITHA WAMAITHA MWANGI (Suing as the Personal  
and Legal Representative of the Estate of SIMON WAMBUGU  
MATHU (Deceased).....PLAINTIFF.**

**VERSUS**

**HENRY MUSEMBI.....1<sup>ST</sup> DEFENDANT.**

**SHANDRES BABARNEH.....2<sup>ND</sup> DEFENDANT**

**MODERN PRECAST (K) LTD.....3<sup>RD</sup> DEFENDANT.**

**JUDGMENT**

1. The deceased Simon Wambugu Mathu died in a road traffic accident that occurred on the 16/9/2016 involving motor vehicle Registration No. KCH 424 P, an Isuzu Canter where he was a passenger along the Gilgil – Nakuru road.

This vehicle collided head on with another Reg. No. KBD 971K whose driver perished during the accident.

2. At the material times, the vehicle Reg. No. KCH 424P was registered in the names of Yaya Car Sales Ltd as shown in the Motor vehicle records – Pexhibit 13.

By a sale agreement dated the 23/6/2016 the vehicle was sold to the 3<sup>rd</sup> defendant Modern Precast (K) Ltd – Pexhibit 25 – which thereafter it assumed beneficial ownership, and was being driven by its servant or agent, the 1<sup>st</sup> defendant.

3. By a plaint dated the 25/2/2017, the legal representative of the deceased sued the defendants for compensation in damages for the loss and damage caused to the deceased's estate due to the defendants driver's negligence, whose particulars stated as

- Driving at an excessive speed in the circumstances.
- Failing to maintain any or any proper or effective control of the motor vehicle.
- Failing to break, stop, swerve or otherwise avoid the accident.
- Failing to observe the traffic code or the basic tenets of road use.
- Overtaking when it was not safe to do so, among others.

Particulars pursuant to the **Fatal accidents Act, Cap 32 Laws of Kenya** are stated as well as special damages in the sum of **Shs.95,750/=**.

4. The defendants denied the claim in their joint statement of defence dated the 13/6/2017 while at the same time, in the alternative, attributed negligence to the driver of motor vehicle Reg. No. KBD 971K as well as to the deceased, stating that he was an unauthorized passenger therein and failed to fasten his safety belt while aboard the vehicle.

5. The plaintiff called two witnesses while the defendants closed their case without calling any witnesses. Parties then proceeded to file their written submissions. I have considered the evidence on record as well as the submissions.

## Issues for determination.

- (1) Which of the two vehicles is to blame for the occurrence of the accident.
- (2) Whether the deceased contributed to the occurrence of the accident.
- (3) Quantum of damages.
- (4) Costs.

6. From the evidence on record, the two vehicles were travelling in the opposite direction. The accident occurred at the edge of the road as one faces Gilgil direction from Nakuru. Motor vehicle KCH 424P was being driven from Gilgil direction towards Nakuru, and was trying to overtake a fleet of vehicles when it pulled towards the right side, thereon colliding with the oncoming vehicle Reg. No. KBD 971K on its driver's side. Motor vehicle Reg. No. KCH 424P was damaged on the left side where the deceased, who was on board died on the spot. The driver of KCH 424P escaped from the accident scene. However, the 2<sup>nd</sup> defendant being the owner of the vehicle was charged in Traffic Case no. 484/2017 for failing to keep records of his driver. He pleaded guilty and was fined Shs.7000/= in default to serve one month imprisonment.

7. From the above evidence, there is no doubt that an accident occurred on the date stated involving the two vehicles as stated in the OB No.09/10/16 (PExhibit 1) produced by the investigating officer (PW2) as well as the police abstract – Pexhibit 4.

8. The plaintiff's evidence was not challenged by any evidence. The defendants submit that as the driver of its vehicle was not charged for any offence, it is prove that he was not to blame for the accident. This submission fails to take into account the evidence that the said driver, the 1<sup>st</sup> defendant absconded from the scene, and his employer, the 3<sup>rd</sup> defendant was charged for failure to keep records of his driver/employee. That submission is therefore without basis.

9. PW1 produced the police file, though not the investigating officer, including the investigation diary, the OB, and police abstract – Pexhibit 1-4 respectfully. No objection to their admission was raised by the defence.

10 On whether the deceased was the passenger who died in the accident, it is submitted by the defendants that he was not the person stated to have died.

11. I have considered the entries in the Investigation Diary. I agree that the name of the co-driver of motor vehicle Reg. No. KCH 424P is not stated. This entry was made soon after the accident. The driver had escaped. There would have been nobody to identify the said deceased's person's body immediately thereafter. The Police Abstract dated 30/9/2016 was filled two weeks after the accident. The deceased passenger is stated as Simon Wambugu Mathu. The death certificate – Pexhibit 8 – captures the deceased's details, date of death at Karura, Gilgil, and occupation as Agricultural Officer, and cause of death as Cervical Spine Fracture due to severe head injury due to a road traffic accident. I have also looked at the deceased's employment documents. He was an employee of the Ministry of Agriculture as a Senior Agricultural Officer. It cannot be a coincidence that all the deceased's documents as filed and produced as exhibits refer to the same person Simon Wambugu Mathu.

I therefore find and hold that the deceased, Simon Wambugu Mathu was the passenger in the defendants motor vehicle, and that he suffered fatal injuries.

12. The defendants did not call any evidence to support their statement of defence, or to controvert the plaintiff's evidence.

It is trite law that any pleading that is not supported by evidence remains as mere allegation and of no evidential value.

**Sections 107 and 108 of the Evidence Act** are clear that he who asserts or pleads must support the same by evidence – **Edward Muriga (Through Stanlely Muriiga Vs. Nathaniel D. Schultee Civil Appeal No. 23/1997, and Motex Knitwear Ltd Vs. Gopitex Knit Wear Mills Ltd (Milimani) HCC No. 384 of 2002.**

12. Further in the case **Linus Nganga Kiongo & 3 others Vs. Town Council of Kikuyu (2012) e KLR**, Odunga J citing the two cases above, rendered that

*“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiffs case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances the counter-claim must fail”.*

13. I have made a finding that the deceased was a passenger in the ill-fated vehicle. He was not in control of the same. No evidence was adduced that he had not belted the seat belt, or that he committed any action that may have contributed to the causation of the accident. Further no evidence was adduced that he was not an authorized passenger – **Court of Appeal No. 140/2010 Ben Menngesa Vs. Edith Makungu Lande (2013) e KLR**. It follows that the deceased, having had no control of the vehicle cannot be held liable for the accident.

14. I further come to the finding and hold that the plaintiff has proved his case against the defendants to the required standard, upon a balance of probability, and therefore liable to the consequential damages and loss to the deceased's estate.

## **Quantum of Damages.**

15. Documentary evidence was produced to confirm the deceased's age, employment status and his dependants – death certificate PExhibit 8, and employment letters – Pexhibit 20, 21 & 22.

He was 39 years old at time of death. He was survived by a wife and three children, then minors – Birth certificates and marriage certificate PExhibit 5, 6 (a) – (c).

I have considered oral submissions on the likely quantum of damages under the following sub-heads.

### **16. Under the Law Reform Act.**

#### **(a) Pain and Suffering.**

The deceased died on the spot. I shall award a sum of Shs. 10,000/=

#### **(b) Loss of Expectation of life.**

It was not stated that the deceased was of ill-health. He would have lived a healthy vigorous working life up to the age of 60 years save for servitudes of life.

I shall award a sum of Kshs.150,000/= under this sub-head, reliance on the following cases;

**Cornelia Elaine Wamba Vs. Shreeji Enterprises Ltd & Others (2012) e KLR, and Charles Masoso Barasa & another Vs. Chepkoech Rotich & another (2014) e KLR, Agnes Mutinda Ndolo & another Vs. Mboya Wambua & 2 others (2017)e KLR.**

### **17. Under the Fatal Accidents Act.**

#### **(Loss of Dependency)**

There is no dispute on dependency ratio. The deceased was survived by a wife and three minor children who depended on him. Both agree to 2/3 as the appropriate ratio.

#### **Multiplier.**

The plaintiff has proposed a multiplier of 30 years against a multiplicand of 2/3, and a net salary of **Shs.157,226/=**.

The defendants have put forth a multiplier of 14 years, a multiplicand of 2/3 and an income of **Shs.57,266/=**.

18. The deceased's employer, the County Government of Nakuru, Ministry of Agriculture, Livestock and Fisheries, by its **letter dated 2/2/2017** and others including a Re-alignment of salary structure for civil servants – Pexhibit 18-22 – stated the deceaseds total earnings as Kshs.73,140/= and NET pay, after deducting Statutory deductions as **Kshs. 57,266**.

19. Based on the principles on assessment of damages as set out in the case **Beatrice Wangui Theuri Vs. Ezekiel Bargetuny & another, Nbi HCC NO.1638 of 1985** that the court ought to consider the age of the deceased, the balance of active working life called the multiplicand, multiplied by the annual income with the multiplier and the multiplicand.

The plaintiff has urged that other than the employment, the deceased used to earn from a business named Rohi Agrovet and a bundle of statements – Pexhibit 18, 19, 20, 21 – produced and submitted that he would earn a monthly salary of Shs. 100,000/=. I have seen the certificate of registration of the business – Pexhibit 9 as a sole proprietorship by the deceased. The statements produced Pexhibit 10- were produced but no explanation offered. They are not bank statements. They were thrown to the court.

20. They do not show the earnings or income. It is not stated how the deceased could be earning a salary from this business yet he was a full time employee of the County Government of Nakuru.

I decline to consider the alluded to income from the business of Shs.100,000/= per month as not sufficiently founded and proved.

There is however a possibility that upon retirement at the age of 60, the deceased would have applied his remaining energy to the business for a considerable period of time. This I will take into account in determining the multiplier.

21. Consideration has been taken of the principles in the **Beatrice Wangui Therui Case (supra)**, and the fact that the deceased would have progressed in his career, having been a student for a degree course at Egerton University, at second year of study.

**Based on the above, I find a reasonable multiplier to be 20 years, for the reasons I have stated above, and a multiplicand of 2/3 against a salary of Shs.57,226/=**

Thus loss of dependency would be  $57,266 \times 12 \times 20 \times 2/3 = 9,162,560/=$

See **Agnes Mutinda Ndolo Vs. Another Vs. Mboya Wambua & 2 others (2017) e KLR** where the deceased was aged 39 years and a multiplier of 21 years was adopted.

**21. Special damages.**

A sum of Shs.95,750/= is pleaded as special damages towards funeral expenses.

It is trite that special damages ought to be pleaded and strictly proved. A bundle of receipts were produced – Pexhibit 17 – as expended on various items.

Whether proved or not, funeral expenses, so long as they are reasonable, ought not be subjected to strict proof due to the nature and circumstances they are spend. As stated in the case mourning family is least concerned about keeping receipts for all expenses towards burial of their loved ones. See **Jacob Ayiga Maruja & another Vs. Simeon Obayo (2005) e KLR**, **Peter Ngari Njeru Vs. Alchanger Njue Kithogo (2019) e KLR**

I allow the sum of **Shs.95,750/=**, as reasonable funeral expenses.

**23. In summary, judgment is hereby entered for the plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally as hereunder:**

**a) Liability – 100%**

**Damages for:**

**b) Pain and Suffering – Shs.10,000/=**

**c) Loss of expectation of use – Shs. 150,000/=**

**d) Loss of Dependancy – Shs.9,162,560/=**

**e) Special damages – Shs.95,750/=**

**Total – Shs. 9,418,310/=**

**f) Damages under a, b, c, and d shall accrue interest at court rates from the date of this judgment.**

**g) Special damages shall attract interest from the date of filing this suit.**

**h) The plaintiff is awarded costs of this suit.**

**Delivered, signed and dated electronically at Nairobi this 13<sup>th</sup> day of May 2020.**

**J.N. MULWA**

**HIGH COURT JUDGE.**