



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 45 OF 2011**

**ARTHUR MWAURA KARIUKI (SUING AS THE ADMINISTRATOR OF  
THE ESTATE OF ANN NJAMBI KARIUKI-DECEASED).....PLAINTIFF**

**-VERSUS-**

**PETER MACHARIA KAMAU.....1<sup>ST</sup> DEFENDANT**

**RAY LIGHT TRADERS AND SUPPLIES.....2<sup>ND</sup> DEFENDANT**

**AND**

**SUMRY BUS SERVICE.....THIRD PARTY**

**JUDGEMENT**

1. Arthur Mwaura Kariuki, the plaintiff herein and the administrator of the estate of Ann Njambi Kariuki (“the deceased”) instituted a compensatory suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants by way of the plaint dated 7<sup>th</sup> February, 2011 and amended on 4<sup>th</sup> April, 2011 and sought for general damages under the Law Reform Act, Cap. 26 Laws of Kenya and the Fatal Accidents Act, Cap. 32 Laws of Kenya, costs of the suit and interest thereon.

2. The 1<sup>st</sup> defendant is sued in his capacity as the employee/agent of the 2<sup>nd</sup> defendant and as the driver of motor vehicle registration number KAS 857Y (“the subject vehicle”) at all material times while the 2<sup>nd</sup> defendant is sued in its capacity as the registered owner of the subject vehicle at all material times.

3. The plaintiff pleaded in the amended plaint that sometime on or about the 8<sup>th</sup> day of February, 2008 the deceased was a lawful pedestrian waiting for a motor vehicle at the Globe Cinema roundabout and as she crossed the road, the 1<sup>st</sup> defendant negligently drove the subject vehicle, causing the same to hit and fatally crush the deceased.

4. It was similarly pleaded in the amended plaint that the deceased who was aged 49 years at the time of her death and enjoying good health has left behind the following dependants:

- |                             |     |          |
|-----------------------------|-----|----------|
| i. Arthur Mwaura Kariuki    | Son | 27 years |
| ii. Benjamin Ng’aru Kariuki | Son | 25 years |
| iii. Titus Mwangi Kariuki   | Son | 21 years |

5. Upon service of summons, the 1<sup>st</sup> and 2<sup>nd</sup> defendants entered appearance and filed a joint statement of defence dated 10<sup>th</sup> October, 2011 to deny the plaintiff’s claim.

6. The defendants subsequently issued a third party notice against Sumry Bus Service (“the third party”) on the basis that the third party was at all material times the registered owner of motor vehicle registration number KAS 775T (“the second vehicle”) which vehicle was also involved in the material accident and was either caused or was substantially liable for the same. The defendants were later granted leave of the court to serve the third party notice and the pleadings on record upon the third party.

7. Upon failure by the third party to enter appearance and/or file any pleadings in the instant suit, the court entered an interlocutory judgment against the third party at the request of the defendants.
8. At the hearing, the plaintiff testified and summoned two (2) other witnesses while the defendants called one (1) witness.
9. The plaintiff (PW1) adopted his executed witness statement and testified that the deceased who was his mother died in the material accident and that he obtained a police abstract in relation to the accident, which shows that the 1<sup>st</sup> defendant was the driver of the subject vehicle on the date of the accident.
10. The plaintiff further testified that he has medical evidence from Guru Nanak Hospital where the deceased was rushed to following the accident and where she succumbed to her injuries after being squeezed between the subject vehicle and another motor vehicle.
11. The plaintiff also made reference to a pay slip indicating that the deceased worked as a nurse at all material times before her death.
12. It is the evidence of the plaintiff that the deceased left behind three (3) dependants: himself and his two (2) younger brothers, all of whom were still in school at the time.
13. The plaintiff stated that following the death of the deceased, the education of his siblings was greatly affected and produced his bundle of documents and supplementary bundle of documents as P. Exh 1 and 2.
14. In cross-examination, the plaintiff stated that the police abstract he produced does not indicate who was to blame for the material accident and that he has never been called to testify in any criminal or traffic proceedings in relation to the accident.
15. The plaintiff further stated that he came to learn of the accident upon receiving a phone call from his aunt and that the police abstract shows that the subject vehicle and the second vehicle were involved in the accident.
16. It was the evidence of the plaintiff that at the time of the death of the deceased, he was not depending on her for financial support since he had just landed a job.
17. In re-examination, the plaintiff testified that he sued the 1<sup>st</sup> defendant since he is the one who crushed the deceased.
18. Paul Mwangi (PW2) adopted his witness statement in his examination-in-chief.
19. In cross-examination, the witness testified that on the material date he was working at Globe Cinema when the accident took place. According to him, it is the second vehicle that caused the accident but that the subject vehicle was also involved in the accident.
20. In re-examination, PW2 stated that it is the minibus that crushed the deceased and that the subject vehicle was the one that was behind.
21. Titus Mwangi Kariuki (PW3) and upon adopting his signed witness statement, stated that he visited Guru Nanak Hospital at 9.30pm only to find the deceased; his mother; already dead.
22. The witness further stated that it is the subject vehicle that brought the deceased to the hospital and that together with other family members, he went to Central Police Station to report the matter.
23. In cross-examination, PW3 testified that the subject vehicle was said to have been involved in the accident and that at the time of the accident, he was living with the deceased in Mathare, who was a nurse by profession. This marked the close of the plaintiff's case.
24. For the defence, PC Julius Kimethi testified that he was at all material times stationed at Central Police Station performing traffic duties and that the accident took place at 4.00pm on the material date involving the subject vehicle being driven by the 1<sup>st</sup> defendant and the second vehicle which was not traced, resulting in the death of the deceased.
25. The witness stated that the subject vehicle was detained at the police station pending inspection and that the accident was recorded in the Occurrence Book (OB) No. 223 of 8/2/2008. The witness produced the excerpt of the OB as D. Exh 1.
26. In cross-examination, DW1 testified that the investigating officer of the material accident was PC Maweu, who also booked the report.
27. According to the testimony of the witness, the deceased was travelling as a pedestrian on the material date and that the police abstract does not give any details of the driver of the second vehicle since he escaped from the scene of the accident.
28. It was also the testimony of the witness that the police abstract dated 27<sup>th</sup> February, 2009 produced by the plaintiff is the correct abstract

as relates to the accident, with the witness stating that the matter is still pending under investigation. This marked the close of the defence case.

29. Upon close of the hearing, this court issued directions for the parties to put in written submissions. The plaintiff vide his submissions dated 30<sup>th</sup> March, 2020 argues that all the documents supporting his case were produced as evidence at the trial and the evidence shows that the deceased was crushed to death by the subject vehicle belonging to the 2<sup>nd</sup> defendant and being driven by the 1<sup>st</sup> defendant.

30. The plaintiff further argues that it is noteworthy that the 1<sup>st</sup> defendant who was present at the scene of the accident did not testify at the trial and hence the plaintiff's case remains largely unchallenged.

31. It is the submission of the plaintiff that the evidence produced by the sole defence witness, namely the police abstract, did not indicate the names of the owner of the subject vehicle or the insurance company, but that it described the deceased as being a passenger in the subject vehicle when in truth she was not.

32. It is also the submission of the plaintiff that a copy of the Occurrence Book (OB) which was tendered in evidence indicated that the second motor vehicle could not be traced.

33. The plaintiff contends that the defendants did not produce a certificate of examination and test of vehicle in respect to the subject vehicle and further contends that the pleadings and evidence tendered on his behalf are consistent and hence he has proved liability against the defendants.

34. On quantum, the plaintiff submits that the estate of the deceased is entitled to an award of Kshs.80,000/ on damages for pain and suffering. The plaintiff cited the case of **Richard Macharia Nderitu v Phillemon Rotich Langas [2013] eKLR** where the court awarded the sum of Kshs.50,000/ under this head and the case of **Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR** where the High Court sitting on appeal upheld a similar award made.

35. The plaintiff suggests an award of damages in the sum Kshs.200,000/ under the head of loss of expectation of life and relies on the case of **Cornelia Elaine Wamba v Shreeji Enterprises Ltd & Others [2012] eKLR** in which the court awarded general damages of Kshs.150,000/ under a similar head, together with the case of **Violet Jeptum Rahedi v Albert Kubai Mbogori [2013] eKLR** whereby the court awarded a similar sum in the instance of a deceased person aged 44 years.

36. In respect to damages for loss of dependency, it is the proposal of the plaintiff that this court applies a multiplier of 11 years taking into account the fact that the deceased was 49 years old at her time of her death and further taking into account the stipulated retirement age of 60 years for staff in the public service. The plaintiff suggested a multiplicand of Kshs.24,107/ and a dependency ratio of 2/3 to be tabulated as follows:

$$(Kshs.24,107 \times 12) \times 2/3 \times 11 = Kshs. 2,132,023.08$$

37. On their part, the defendants through their submissions dated 3<sup>th</sup> July, 2020 have argued that not only did the plaintiff and PW3 fail to prove dependency by way of birth certificates, but that they were not at the scene of the accident and hence could not explain the events leading up to the accident. On this basis, the defendants argue that their testimony cannot be relied upon in making a determination on liability.

38. The defendants also submit that the police abstract which was produced by the plaintiff at the trial indicated the matter as pending under investigation and that since the plaintiff did not call the maker of the abstract as a witness, then the same should be expunged from the court record.

39. It is the submission of the defendants that in contrast, they summoned a police officer who produced a police abstract and the OB, both of which cast blame on the driver of the second motor vehicle. In this regard, the defendants urge this court to dismiss the plaintiff's case against the defendants for failing to establish liability on a balance of probabilities.

40. On quantum, it is the proposal of the defendants that the estate of the deceased be awarded a sum of Kshs.10,000/ on damages for pain and suffering, on the reasoning that the deceased died not long after the accident. The defendants cited the case of **Samuel Njoroge Kamunya v Lucy Wambui Kibe-Civil Case No. 749 OF 2001** in which an award of Kshs.10,000/ was made under this head in the instance of a deceased person who died three (3) days after the accident in question.

41. The defendants further proposed damages in the sum of Kshs.100,000/ for loss of expectation of life and cited *inter alia*, the case of **Ann Njoki Njenga v Umoja Flour Mills & another [2006] eKLR** where the court awarded a sum of Kshs.80,000/ under this head to the estate of a deceased person aged 36 years.

42. When it comes to general damages under the head of loss of dependency, it is the suggestion of the defendants that this court applies a multiplier of 11 years, a multiplicand of Kshs.24,107 and a dependency ratio of 1/3 as opposed to the 2/3 proposed by the plaintiff, to be tabulated in the manner hereunder:  $Kshs.24,107 \times 11 \times 12 \times 1/3 = Kshs.1,050,100/$

43. In conclusion, the defendants contend that the awards made under the Law Reform Act ought to be taken into account when awarding damages under the Fatal Accidents Act where the dependants/beneficiaries are the same in both instances.

44. Upon considering the evidence on record, the submissions and authorities relied upon by the parties, I established that the twin issues for determination are liability and quantum.

45. On the *first* limb to do with liability, following my examination of the evidence on record, both oral and documentary, there is no doubt that an accident took place on the material date and at the place pleaded in the plaint, the result of which the deceased lost her life. It is also apparent that the accident involved two (2) motor vehicles, namely the subject vehicle and the second vehicle.

46. On the subject of ownership of the subject motor vehicle, the plaintiff did not tender any documentation such as a copy of records to show that the 2<sup>nd</sup> defendant was at all material times the registered owner of the subject vehicle.

47. Turning to the police abstract which was tendered by the plaintiff without the objection of the defendants, upon considering the same, I note that the 2<sup>nd</sup> defendant was not indicated as being the owner of the subject vehicle or at all.

48. From the foregoing, I am not satisfied that the plaintiff has proved on a balance of probabilities that the 2<sup>nd</sup> defendant was at all material times the registered owner of the subject vehicle or brought any credible evidence to link the 2<sup>nd</sup> defendant to the subject vehicle, considering this fact was denied in the defendants' statement of defence. I therefore find that the plaintiff has not proved his case for negligence as against the 1<sup>st</sup> defendant.

49. Concerning the 2<sup>nd</sup> defendant, the police abstract produced by the plaintiff lists him as the driver of the subject vehicle, the contents of which were not countered by any credible evidence by the defendants. This fact was further reinforced by the evidence of DW1.

50. On the particulars of negligence, the police abstract dated 27<sup>th</sup> February, 2008 indicates that the material accident involved the subject vehicle and the second vehicle and that the case is pending under investigation.

51. I considered the evidence of PW2 who is said to have witnessed the accident. Though I note that the oral testimony of this witness was incoherent, upon studying the contents of his witness statement I observed that the subject vehicle, which was behind what appears to have been the second vehicle which was stationary, moved forward and crushed the deceased in between itself and the second vehicle.

52. Further to the foregoing, upon examining the evidence of DW1, I observed that since the driver of the second vehicle had escaped, the subject vehicle was detained and that the matter was pending under investigation. It remains unclear whether the investigations were concluded and if so, the outcome of the same. Suffice it to say that the standard of proof in civil cases is a balance of probabilities and hence negligence can be established even where no party has been charged or convicted in relation to an accident.

53. I note that none of the parties called the investigating officer to shed light on the circumstances surrounding the accident. In the absence of his evidence, I am left to examine the evidence placed before me. Having done so and in the absence of contrary evidence by the defendants, I find that the plaintiff has established on a balance of probabilities the particulars of negligence as against the 1<sup>st</sup> defendant. I am guided by the following decision by the Court of Appeal in the case of **Embu Public Road Services Ltd v Riimi [1968] EA 22**:

**“where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence.”**

54. On contributory negligence, it is my observation that the 1<sup>st</sup> defendant did not bring any evidence to establish that the deceased in any way contributed to the accident. As concerns the second vehicle, it remains unclear the extent to which, if any, it contributed to the accident.

55. Taking into account the circumstances of the case; the evidence tendered that the second vehicle had disappeared after the accident and could not be traced and the inability to make a distinction between the drivers of the two (2) vehicles; the copy of records annexed to the defendants' application for joinder of the third party which shows the third party as being the registered owner of the second vehicle at all material times and the non-participation of the third party in the proceedings despite being served with the pleadings, I am of the view that the third party ought to be equally held liable. However, since it is the 1<sup>st</sup> defendant that sought to have the third party brought into the suit, I find it fair to hold the 1<sup>st</sup> defendant liable and he can thereafter seek indemnity of 50% from the third party.

56. My reasoning above is supported by various authorities. I will cite the case of **Shadrack Kilonzo Kavoi v Gacheru Peter & 3 others [2020] eKLR** where the court cited *inter alia*, the case of **Lakhamshi vs. Attorney-General [1971 EA 118** in which the court rendered itself thus:

**“A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence...It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them.”**

57. In the premises, I hereby enter 100% liability against 1<sup>st</sup> defendant and dismiss the suit against the 2<sup>nd</sup> defendant with costs.

58. Having settled the first issue, I turn my attention to the *second* issue on quantum and which I shall address under the following heads.

**a. General damages**

**i. Pain and suffering**

59. Here, the plaintiff produced a death certificate and autopsy report to show that the deceased died on the date of the accident. In addition to his evidence and that of PW2 and PW3, the plaintiff further produced medical evidence to show that the deceased was rushed to hospital following the accident and died shortly thereafter. This shows that she experienced some pain and suffering.

60. Upon considering the sums proposed by the parties, I find that the cases cited were decided a few years ago. I therefore considered the case of **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR** where the court awarded a sum of Kshs.30,000/ to the estate of a deceased who died instantly. I also considered the case of **Alice Ombachi & another v Jerusha Kemunto Mokaya & Joshua Ageta Mokaya [Suing As Legal Representatives And Administrators of The Estate of Risper Nyaboke Mokaya (Deceased) [2019] eKLR** in which an award of Kshs.50,000/ was awarded in the instance of a deceased who passed on less than one (1) hour after the accident in question.

61. I will therefore award a reasonable sum of Kshs.50,000/ under this head.

**ii. Loss of expectation of life**

62. The evidence on record shows that the deceased died at the age of 49 years. There is nothing to indicate that she was of ill health.

63. A conventional award of Kshs.100,000/ was made in the case of **Mumias Sugar Company Limited v Henry Olukokolo Ashuma (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another [2018] eKLR** I am convinced that a similar award of Kshs.100,000/ would constitute adequate damages for loss of expectation of life.

**iii. Loss of dependency**

64. On the multiplier, the plaintiff tendered copies of the death certificate and national ID of the deceased to show that at the time of her death, she was aged 49 years. In the absence of any comparable multipliers by the parties, I considered the case of **HBAO & 2 others v Marisoni Traders & Freight Co. Ltd & another [2019] eKLR** where the court applied a multiplier of 11 years similar to the multiplier proposed by the plaintiff. In the premises and taking into account the vagaries of life, I am persuaded that a multiplier of 11 years is reasonable.

65. On the multiplicand, the death certificate indicates the profession of the deceased as that of a nurse. Moreover, the plaintiff tendered a copy of the deceased's pay slip for the month of January, 2008. The same indicates that the deceased was at the time of her death earning a consolidated salary of Kshs.38,530/. Upon statutory deductions, the net salary comes to Kshs.24,107/. This is what would constitute the multiplicand.

66. In respect to the dependency ratio, it is apparent from the record that the plaintiff did not tender birth certificates for him and his siblings. I however note that the plaintiff adduced school documents belonging to him and his siblings, which he deemed as evidence of dependency.

67. I am persuaded by the authority of **Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR** where the court appreciated that the issue of dependency is dependent on the facts and circumstances of a case. In the instant case, there is no credible evidence to show that the plaintiff and his siblings depended solely on the deceased so as to necessitate a ratio of 2/3. In my view, a dependency ratio of 1/3 would suit the circumstances.

68. Consequently, the damages under this head are to be tabulated as follows:

$$\text{Kshs.24,107} \times 11 \times 12 \times 1/3 = \text{Kshs.1,060,708/}$$

69. On the subject of deductions which was raised in the defendants' submissions, the legal position is that the plaintiff is lawfully entitled to seek general damages under the heads of pain and suffering and loss of expectation of life under the Law Reform Act, and general damages for loss of dependency under the Fatal Accidents Act. There is no requirement for damages awarded under the Fatal Accidents Act to be deducted from the total award. In the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] Eklr**, the Court of Appeal expressed itself in part as follows:

**"In my view what section 2(5) of the Law Reform Act means is that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should not be taken into account and not necessarily deducted... There is no requirement in law or otherwise for him to engage**

in a mathematical deduction...”

70. In the end, I hereby enter judgment in favour of the plaintiff as against the 1<sup>st</sup> defendant as follows:

**a. General damages**

<b>i. Pain and suffering</b>	<b>Kshs. 50,000/</b>
<b>ii. Loss of expectation of life</b>	<b>Kshs. 100,000/</b>
<b>iii. Loss of dependency</b>	<b><u>Kshs.1,490,324/</u></b>
<b>Total</b>	<b><u>Kshs.1,640,324/</u></b>

**iv. The award to attract interest at court rates from date of judgment until the date of payment in full.**

**b. Costs of the suit.**

**c. The case against the 2<sup>nd</sup> defendant is dismissed with no order as to costs.**

**Dated, signed and delivered online via Microsoft Teams at Nairobi this 9<sup>th</sup> day of October, 2020.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiffs

.....for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants