



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**CIVIL SUIT NO. 69 OF 2010**

**JANE KARIMI & LOIS WAWIRA KINYUA**

**(suing as administrator of the estate of BONIFACE KINYUA**

**MUGANE- Deceased).....PLAINTIFF**

**VERSUS**

**DAVID WAIGWA.....1<sup>ST</sup> DEFENDANT**

**EUSTACE NDURU MURIITHI.....2<sup>ND</sup> DEFENDANT**

**DANIEL MUE KILUNDO.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiffs herein have instituted this suit in their capacity as the administrators and legal representatives of the estate of **Boniface Kinyua Mugane** (deceased) pursuant to the provisions of the *Law Reform Act*, Cap 26 and the *Fatal Accidents Act*, Cap 32, on their behalf and on behalf of the dependants and the estate of the deceased.
2. The plaintiffs pleaded that the 1<sup>st</sup> defendant was at all material times the beneficial owner of motor vehicle registration number KAC 092R (hereinafter referred to as “the said vehicle”) while the 2<sup>nd</sup> defendant was the registered owner thereof.
3. It was pleaded that on or about 11<sup>th</sup> April, 2007 at around 6.30 am the deceased was travelling as a passenger in motor vehicle reg. number KAT 926F along Nairobi Mombasa Road when the 3<sup>rd</sup> defendant so negligently, recklessly and/or carelessly drove, managed and/or controlled the said vehicle that it collided with motor vehicle reg. number KAT 926F as a result of which the deceased sustained fatal injuries. The plaintiffs proceeded to set out the particulars of negligence, Statutory Particulars and special damages.
4. It was pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were held vicariously liable for the negligence of the 3<sup>rd</sup> defendant who was their driver, servant, agent and/or employee. As a result of the foregoing, the plaintiffs pleaded that they had suffered general and special damages for which they claimed compensation under the said statutes as the deceased was deprived of normal expectation of life, underwent great suffering and his dependants and estate were put to great loss and damage.
5. Interlocutory judgement having been entered, what proceeded was ex parte hearing as regards the quantum of damages, otherwise known informally as formal proof, since in those circumstances, the entry of interlocutory judgement settles the issue of liability which no longer falls for determination.
6. In support of their case, the plaintiffs called **Jane Karimi**, who testified as PW1. According to her, she was a teacher in Kajiado County and the deceased was her husband. Prior to instituting this suit, she had taken out letters of administration a copy of which she produced as exhibit.
7. It was her evidence that on 11<sup>th</sup> April, 2007 at 6.00 am she was at work when her husband left for work in Nairobi where he was working as an auditor at Muchungi & Associates. It was her evidence that the deceased was a passenger in motor vehicle Reg No. KAT 946F which was being driven by a friend. At 11.00 am she was called by a neighbour who informed her that they had an accident before Mlolongo at Kenchic. By that time, she had a 3 months old baby and was therefore unable to go. She however later visited the deceased at Kenyatta National Hospital at 5pm where she found him admitted complaining of severe stomach-ache.

8. On 12<sup>th</sup> April, 2007 when she went to visit the deceased, the doctor informed her that the deceased was due for discharge and was discharged at midday on 13<sup>th</sup> August, 2007 and PW1 took him home in Kitengela. Though he had not fully recovered, the pain had gone down. However, the stomach pain started in the evening and he was taken to Makadara Hospital, Athi River where he was given Medicare and ointment. However, at 1am on 14<sup>th</sup> April, 2007, the deceased was in great pain and was taken back to Kenyatta National Hospital where the doctor said that he was to be taken to theatre for emergency operation. In the meantime, PW1 went to feed his baby and returned to the hospital later in the day when she found him still in the hospital bed. She was informed that the deceased was due to be taken to the theatre. However, at 7pm she was called and informed that the deceased had passed on. She accordingly produced the death certificate as exhibit.

9. It was PAW1's evidence that she incurred expenditure at Kenyatta Hospital in form of hospital bills and produced the bundle of receipts in support thereof.

10. It was her testimony that the registration number of the vehicle that was involved in the accident was KAC 092R and she produced a police abstract report as exhibit.

11. According to PW1, she had two children with the deceased, Moses Mutugi aged 3½ years and Christine Wakio aged 3 months old and produced their birth certificates as exhibits. She also produced the chief's letter confirming that they were the deceased's dependants. It was her testimony that prior to the death of the deceased he worked as an auditor at Muchungi Associates where he was earning Kshs 50,000.00 and produced salary voucher from the said firm as exhibit. It was her evidence that the deceased, who was aged 34 years old at that time was the sole breadwinner. Following the deceased's death, she incurred further expenses for purchase of his burial clothes in the sum of Kshs 2,000/= and produced the receipt for the same as well as expenses for dry-cleaning. Further expenses were incurred in respect of newspaper adverts, hearse and transport and she produced the receipt for Kshs 18,000/=. She also spent Kshs 14,500/= towards photographs and videos and produced a receipt for the same as well as the costs for applying for grant of letters of administration.

12. It was her evidence that her advocate served demand letters and statutory notice to the insurers of the vehicle involved in the accident.

13. She therefore sought compensation.

14. In the submissions filed on behalf of the plaintiff, it was submitted that the accident occurred on 11<sup>th</sup> April 2007 at around 6.30 a.m as indicated on the police abstract produced herein and that the deceased died four days later on 14<sup>th</sup> April 2007. All along, the deceased complained of severe pain and anguish. The Plaintiff produced treatment receipts from Kenyatta National Hospital and death certificate in proof of the foregoing. In view of this, it was the plaintiff's opinion that a sum of Kshs. 300,000/= is reasonable under this head, and they urge the court to so award.

15. According to the plaintiffs, at the time of his death, the Deceased was aged 34 years as evident from the Death Certificate. He was in good health, had a young family and in a stable career where he was likely to have prospered. It was therefore submitted that an award of Kshs. 150,000/= is reasonable in damages for loss of expectation of life and reliance was placed on the decision in **J W K & Another vs. George Omondi & 2 Others [2016] eKLR.**

16. Regarding award for loss of dependency, it was submitted that the Plaintiff testified that she was the widow of the deceased. They had been blessed with two children, **Moses Mutugi Kinyua** aged 3½ years at the time of the death of the deceased and **Christine Wakio Kinyua** who was 4 months old at the time of the deceased death. The Plaintiff produced birth certificates for the said children and a letter from the chief in proof of their relation to the deceased. At the time of his death, the deceased was working as an auditor, earning Kshs. 50,000/= per month, and the Plaintiff produced a salary voucher from his employer to this effect. The Plaintiff testified that the Deceased was the sole bread winner for the family as she was not working at the time. Since the deceased was responsible for all the family expenditure it was submitted that a ratio of ¾ would be commensurate, if not less, to the deceased's expenditure on family need.

17. It was submitted that considering the deceased age of 34 years old at the time of his death, he would have worked beyond the retirement age of 60 years, given that he was not in government employment and could have opened his own firm, being an accountant by profession. Nonetheless, given the vicissitudes of life, it was submitted that the Deceased would have worked up to the age of 60 years hence a multiplier of 26 years was reasonable. Taking the multiplicand to be Kshs. 50,000/=: the multiplier 26 years and the ratio ¾, damages for loss of dependency amount to Kshs. 11,700,000/=: worked out as follows: (50,000 x 12 x 26 x ¾) = Kshs. 11,700,000/=:

18. Regarding special damages, it was submitted that the Plaintiff, in the Plaint dated 16<sup>th</sup> April 2010, claimed special damages of Kshs. 86,420/=. She produced receipt in proof of each of the individual claims, and totalling the sum of Kshs. 86,420/=: in the circumstances, the Court was urged to award the same as prayed.

### **Determination**

19. I have considered the foregoing. In **Makala Mailu Mumende vs. Nyali Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13**, it was held by the Court of Appeal that since Judgement in default of appearance presupposes that there is a cause of action, where judgement is entered in default liability is admitted and the Court must proceed to assess damages.

20. In this case the deceased passed away after 4 days during which time he was in great pain. In **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004**, the Court of Appeal found that the deceased suffered severe burns in addition to the fracture of the right femur and died the following day. In the circumstances the award of Kshs 300,000.00 for pain and suffering was reasonable. It proceeded to make an award of Kshs 100,000.00 under loss of expectation of life. Considering the pain that the deceased must have undergone before succumbing to death I am similarly of the view that at award of Kshs 300,000.00 is reasonable in the circumstances. In the same case the court expressed itself as hereunder:

“The nominal award of Kshs 100,000.00 for loss of expectation of life is also reasonable. It is unreasonable in the circumstances of Kenya that the monthly income of an electrical engineer running a firm would be a paltry 10,000.00. The appellant said they were paying school in the sum of Kshs 440,000.00 per year and that alone could not possibly have been paid from a monthly income of Kshs 10,000.00. While the court is satisfied that the Kshs 10,000.00 monthly proposed by the trial Judge was much too low, the court equally does not think his engineering firm had a monthly income of Kshs 200,000.00. Taking all the surrounding circumstances into consideration the court thinks a figure of Kshs 50,000.00 income monthly would be a reasonable estimate. The judge then adopted a multiplier of 19 years for a man aged 51 years, but that multiplier ignored the fact that the money was to be paid in lump sum. In the circumstances a multiplier of 10 years would be quite sufficient taking into account the fact that the monthly income has been increased. Accordingly for the loss of dependency the court assesses the total loss at Kshs 50,000 x 12 x 10 making a total of Kshs 6,000,000.00 to be reduced by 1/3.”

21. In this case, the deceased was aged 34 years. While it is true that he could possibly have worked up to 60 years, that is not certain. Moreover, the Court must take into account that payment is to be made in lumpsum. Accordingly, I take 50 years as the multiplier. It is similarly my view that the correct multiplicand ought to be 2/3rds and not ¾ as submitted. Accordingly, loss of dependency is awarded as hereunder:

$$50,000 \times 16 \times 12 \times \frac{2}{3} = 6,400,000.00$$

22. To the said sum add Kshs 300,000.00 pain and suffering, Kshs 100,000.00 loss of expectation of life and Kshs 86,420/= special damages and the total award comes to Kshs 6,886,420.00 which judgement is awarded for the plaintiff against the defendants jointly and severally. As is the rule, general damages will accrue interest at court rates from the date of this judgement till payment in full while special damages will accrue interest from the date of filing suit till payment in full.

23. The costs of this suit are awarded to the plaintiff.

24. Judgement accordingly.

**Read, signed and delivered in open Court at Machakos this 2<sup>nd</sup> day of April, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Mwanzie for the Plaintiff**

**Mr Mathenge for Mr Ng'angá for the 1<sup>st</sup> Defendant**

**CA Geoffrey**